S. HRG. 109–471

REVIEW OF DEPARTMENT OF DEFENSE DETENTION AND INTERROGATION POLICY AND OPERATIONS IN THE GLOBAL WAR ON TERRORISM

HEARINGS

BEFORE THE

COMMITTEE ON ARMED SERVICES

AND

SUBCOMMITTEE ON PERSONNEL

OF THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

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THE REVIEW OF DEPARTMENT OF DEFENSE DETENTION OPERATIONS AND DETAINEE INTERROGATION TECHNIQUES

THURSDAY, MARCH 10, 2005

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, DC.

The committee met, pursuant to notice, at 9:37 a.m. in room SH–216, Hart Senate Office Building, Senator John Warner (chairman) presiding.

Committee members present: Senators Warner, McCain, Inhofe, Collins, Talent, Dole, Cornyn, Thune, Levin, Kennedy, Lieberman, and Reed.

Committee staff members present: Judith A. Ansley, staff director; and Leah C. Brewer, nominations and hearings clerk.

Majority staff members present: Charles W. Alsup, professional staff member; Regina A. Dubey, research assistant; Gregory T. Kiley, professional staff member; Lynn F. Rusten, professional staff member; Scott W. Stucky, general counsel; Diana G. Tabler, professional staff member; and Richard F. Walsh, counsel.

Minority staff members present: Richard D. DeBobes, Democratic staff director; Gabriella Eisen, research assistant; Bridget W. Higgins, research assistant; Gerald J. Leeling, minority counsel; Peter K. Levine, minority counsel; and William G.P. Monahan, minority counsel.

Staff assistants present: Alison E. Brill, Catherine E. Sendak, and Nicholas W. West.

Committee members' assistants present: Cord Sterling, assistant to Senator Warner; Christopher J. Paul, assistant to Senator McCain; John A. Bonsell, assistant to Senator Inhofe; Mackenzie M. Eaglen, assistant to Senator Collins; Russell J. Thomasson, assistant to Senator Cornyn; Bob Taylor, assistant to Senator Thune; Mieke Y. Eoyang, assistant to Senator Kennedy; Erik Raven, assistant to Senator Byrd; Frederick M. Downey, assistant to Senator Lieberman; Darcia Tokioka, assistant to Senator Akaka; and William K. Sutey, assistant to Senator Bill Nelson.

OPENING STATEMENT OF SENATOR JAMES M. INHOFE

Senator INHOFE [presiding]. The meeting, the hearing, will come to order. I have just been informed that Senator Warner is stuck in traffic. So, Senator Levin, I will act like Senator Warner and start this off. The statement that I will make is not my statement; it is Senator Warner's statement.

The committee meets today to receive testimony on the Department of Defense (DOD) review of the detention operations and detainee interrogation techniques, commonly referred to as the Church Report. We welcome our witness, Vice Admiral Albert T. Church III, United States Navy, currently Director of the Navy Staff.

I note that when Admiral Church started work on this review he was the Inspector General (IG) of the Navy. We thank Admiral Church and all members of his team for the excellent work they have done on this issue.

On May 25, 2004, Secretary of Defense (SECDEF) Rumsfeld formally directed Admiral Church to review all DOD detention procedures and defense interrogation techniques that were being used in the global war on terrorism. I quote from Secretary Rumsfeld's directive: "Specifically, you will ensure that all areas of concern to the Department of Defense regarding detention operations, including interrogation techniques, are being addressed adequately and expeditiously. You will report to me any gaps or seams among those reviews and investigations."

This is the tenth major senior level review of detainee operations and allegations of detainee abuse that has been completed, nine by various elements of the Department and one by an independent panel. Since the abuses at Abu Ghraib were discovered in January 2004, one additional senior level investigation has recently been initiated by the Department to review Federal Bureau of Investigations (FBI) allegations of abuse at the detention facility of Guantanamo Bay (Gitmo) in 2002. These allegations were brought to the attention of the DOD in December of last year.

This committee has been very responsive in its oversight. This is the eighth open hearing that we have conducted on these issues. In addition, we have had a number of classified briefings. The Church Report was initiated to provide a comprehensive evaluation of DOD detention operations and the role interrogation procedures may or may not have played in the abusive treatment of detainees.

Admiral Church has conducted what appears to be a thorough review, analyzing all previous reports and conducting over 8,900 new interviews, including uniformed personnel of all ranks and levels of command and senior policy officials. I now cite two conclusions of the Church Report, and I am quoting now, "Number one, we found no link between approved interrogation techniques and detainee abuse. Number two, we note therefore that our conclusion is consistent with the findings of the independent panel"—that is, the Schlesinger panel—"which in its August 2004 report determined that"—and quoting from that report—'No approved procedures called for or allowed the kind of abuse that in fact occurred.' There is no evidence of that policy of abuse promulgated by senior officials or military authorities."

In my judgment, these findings are consistent with the findings of all previous reports. According to the Church Report, the 70 incidents of substantiated abuse were quoting from the Church Report, "perpetrated by a variety of Active-Duty, Reserve, and National Guard personnel from three different Services, on different dates, and in different locations throughout Afghanistan and Iraq, as well as a small number of cases at Gitmo."

Admiral Church concludes that: "There is not a single overarching reason for abuse, but that the stressful combat situation, particularly at the point of capture," and, as Admiral Church characterized it, "a breakdown of good order and discipline in some units could account for some incidents of abuse."

This does not excuse the abuses that did occur, but I believe it is important to put this discussion in context. As we meet this morning, a large number of trials by court martial have been completed and sentences have been rendered. In a great many of these cases, the military defendants pled guilty. Additional criminal procedures are ongoing. We have shown the world that we are a Nation of laws and that we will not tolerate abusive, inhumane behavior by members of our Armed Forces, we will investigate wrongdoing and hold accountable those responsible for misconduct.

To date over a million U.S. service men and women have served in Iraq and Afghanistan and have served with distinction. As of the date of this report, 36 service personnel have been convicted of criminal misconduct and a few more trials are pending. As Admiral Church noted, "The vast majority of detainees held by U.S. forces during the global war on terrorism have been treated humanely."

The Church Report found that no policy promulgated by the Department either advocates or encourages abusive or inhumane treatment of detainees. The report also found that approved interrogation policies did not lead to illegal or abusive interrogation techniques being used. The Church Report candidly pointed out that, "dissemination of interrogation policy in Iraq and Afghanistan was generally poor and interrogators fell back on their training and experience, often relying on a broad interpretation of Army Field Manual (FM) 34–52."

The Church Report continues, "While these problems of policy dissemination and compliance were certainly cause for concern, we found that they did not lead to the employment of illegal or abusive interrogation techniques." Admiral Church found that "interrogators knew that abusive behavior was prohibited. There are very few allegations of abuse by trained interrogators in established detention centers. Many of the allegations of interrogation-related abuse originated at the point of capture, in the immediate aftermath of the heat of battle."

In the period of time since these allegations of abuse first surfaced, the DOD has been steadfast in examining its procedures and implementing constructive changes as appropriate. The Department of the Army in particular, which has principal responsibility for the conduct of detention and interrogation operations, has updated training procedures and doctrine to ensure the proper treatment of detainees and the effective conduct of interrogators. These steps taken by the DOD and the military Services, as well as the continuing reviews of issues of individual accountability throughout the chain of command, will be the subject of a future hearing by this committee.

The members of the U.S. Armed Forces have been tarnished by these isolated incidents of abuse by a few within their ranks, but they have shown their typical honor and resilience by the manner in which they have responded. We must remember that the vast majority of our brave men and women in uniform are performing

remarkable tasks on a daily basis in austere, stressful environments, and in some cases making the ultimate sacrifice of life and limb to win the war on terror.

We honor their service and that of their families. Our efforts in gathering this information and openly discussing it with the American people and with the world are intended to strengthen our Armed Forces.

I thank our witness and his team for this report and I thank you for coming, and continuing to serve our Nation, Admiral Church.

Senator Levin.

STATEMENT OF SENATOR CARL LEVIN

Senator LEVIN. Thank you, and let me also welcome Admiral Church. Today we hear from Admiral Church on his investigation into detention operations and technologies in Iraq, Afghanistan, and Gitmo. Vice Admiral Church's investigative team has done extensive work, collecting hundreds of statements and reviewing thousands of documents. I would like to thank you, Admiral, and your team for that service.

The Church Report is not and does not purport to be a comprehensive report. It does not fill many of the significant gaps left by earlier investigations regarding the nature and causes of detainee abuse in Iraq, Afghanistan, Gitmo, and elsewhere. One gap in the investigations to date is what was the role of "other government agencies," primarily the Central Intelligence Agency (CIA), in detainee abuse. General Fay's report found that CIA practices, "led to a loss of accountability, abuse, and an unhealthy mystique that further poisoned the atmosphere at Abu Ghraib."

However, General Fay was unable to fully investigate the CIA's role in detainee abuse because the CIA denied his request for documents. Both the Taguba and Fay reports highlight the problem of unaccounted for CIA ghost detainees. The Schlesinger Panel was also aware of this issue, but had limited access to information on the CIA's role in detention operations. Vice Admiral Church's report states his team had limited cooperation from the CIA. The report also makes clear he was not tasked to investigate the existence of or policies in effect for detention facilities controlled by the CIA, rather than by the DOD.

A second major gap in the DOD-led investigations which the Church Report fails to address is the issue of senior leadership responsibility for creating an environment which either contributed to abusive behavior, or which condoned or tolerated, or appeared to condone or tolerate such behavior. The Schlesinger Panel Report found that abuses were widespread and that there was both "institutional and personal responsibility at higher levels." Matters of personal accountability were explicitly outside of the scope of the Schlesinger Panel's tasking from the DOD. So there has been no assessment of accountability of any senior officials, either within or outside of the DOD, for policies that may have contributed to abuses of prisoners.

Numerous other gaps remain unaddressed by Admiral Church's report. For example, the Army IG in his assessment of detention operations, doctrine, and training looked only at Iraq and Afghanistan, not Gitmo. The Formica Report looked into allegations of

abuse by Special Operations Forces only in Iraq, not Afghanistan or elsewhere. As a result, significant abuse allegations have fallen between the cracks.

In addition, previous reports containing conflicting conclusions make it difficult to get a clear picture of the nature and causes of the abuses. These conflicting findings are not addressed in the Church Report. For example, reports are in conflict as to whether detainee abuse was systemic. General Taguba found "systemic and illegal abuse of detainees" by military police at Abu Ghraib. General Fay in his report found "systemic problems and abuses also contributed to the volatile environment in which abuses occurred," and included two dozen findings relating to systemic failures, including doctrine and policy concerns, leadership and command and control issues, resources, and training issues.

On the other hand, the Army IG reporting in July 2004 was "unable to identify system failures that resulted in incidents of abuse." Vice Admiral Church's report notes that, despite that statement of the IG of the Army, that the Army IG at another point "recounted 'numerous system failures' in his detailed findings which contributed to the detainee abuse." I hope that the Admiral will clarify for this committee whether he agrees with General Taguba and General Fay that systemic problems contributed to detainee abuse.

Earlier reports found that policies and guidance at least indirectly contributed to abuses. The Schlesinger Panel Report says that interrogation policies were "inadequate or deficient at three levels: DOD, Central Command (CENTCOM) Combined Joint Task Force (CJTF), and Abu Ghraib Prison." That report, the Schlesinger Report, adds that changes in DOD interrogation policies approved by the SECDEF contributed to confusion in the field about what methods were authorized.

Perhaps most significantly, the Schlesinger Panel found that "both institutional and personal responsibility at higher levels," for widespread abuses, not just at lower levels. Similarly, General Fay found that multiple "national policies and DOD directives" were inconsistent with Army doctrine and resulted in interrogation policies that contributed to the confusion at Abu Ghraib.

But the Church Report concludes that approved interrogation techniques were not a "causal factor" of detainee abuse: they were simply "missed opportunities" in the process of developing policies on detainee operations. There is not even a determination that we can find in the Church Report as to whether or not detainee abuse would have been reduced or avoided had those missed opportunities been acted upon.

In addition, the Church Report's assessment that there were simply "missed opportunities" is difficult to reconcile with the facts set forth in the report itself. Simply concluding that there were "missed opportunities" does not adequately explain why Secretary Rumsfeld approved aggressive interrogation techniques for use at Gitmo in December 2002 including stress positions, 20-hour interrogations, nudity, and the use of dogs in interrogations. He approved those in the face of serious concerns about such techniques which had been forwarded by military lawyers from all four Services to the Joint Staff.

Simply saying that there were "missed opportunities" does not explain why the Office of the Secretary of Defense (OSD) failed to promulgate an interrogation policy for Afghanistan consistent with the amended policy approved for Gitmo in April 2003, even though, according to the Vice Chairman of the Joint Chiefs of Staff, General Peter Pace, the Chairman of the Joint Chiefs sent up a recommendation that the same interrogation guidelines apply in both places.

The bland label of "missed opportunities" does not explain the absence of policies governing the conduct of CIA interrogators at DOD facilities, which contributed to abuses at Abu Ghraib and elsewhere. Those are all failures of command at high levels.

It is also difficult to reconcile the notion of "missed opportunities" with policies that have come to light since Admiral Church apparently ended his investigation in September 2004. A few months ago, the Justice Department (DOJ) confirmed the existence of a memo relating to the authority to use specified interrogation techniques, a memo produced by their Office of Legal Counsel (OLC) concurrently with the August 1, 2002, "Torture" memo that was so flawed that the administration disavowed it in mid-2004. Just in the past few months, we have learned of FBI agents' strong objections to aggressive and coercive interrogation techniques at Gitmo, which FBI agents in one e-mail labeled "torture" and in a number of e-mails deemed so disturbing that agents had guidance to "step out of the picture" when the military were carrying out interrogations. The Gitmo commanders defended these methods by saying that the DOD has their "marching orders" from the SECDEF.

Nor does the Church Report explain recent revelations that the administration reportedly authorized the CIA to engage in rendition, the handing over of detainees to foreign countries, including ones with a track record of torture.

This failure of accountability of senior leaders sends the wrong signal to our troops and to the American people. It harms the United States' standing as a Nation of laws and it undermines the high standards of our Armed Forces. It places our brave and honorable military men and women in jeopardy when they become prisoners.

In the end, I conclude that the DOD is not able to assess accountability at senior levels, particularly when investigators are in the chain of command of the officials whose policies and actions they are investigating. Only an independent review can fully and objectively assess both the institutional and personal accountability for the abuse of detainees.

I thank you, Mr. Chairman.

STATEMENT OF SENATOR JOHN WARNER, CHAIRMAN

Chairman WARNER [presiding]. Thank you, Senator.

I apologize for my tardiness. Senator Inhofe, I appreciate your taking my statement.

As Senator Inhofe said on my behalf, this committee will have at least one more hearing on this subject on the issue of accountability. As I listened to your final comments, I say most respectfully to my colleague there has not been a finality in terms of the assessment of accountability of either senior policy people or senior

officers. There remains open, as you are probably aware, the Army review of its senior officers. So more work has to be done by this committee.

We welcome you, Admiral, and thank you very much for undertaking this very prodigious and challenging effort.

STATEMENT OF VADM ALBERT T. CHURCH III, USN, DIRECTOR OF THE NAVY STAFF

Admiral CHURCH. Thank you, Senator Warner, Senator Levin, and thank you to the members of the committee for the opportunity to be here today.

Chairman WARNER. I want you to draw that mike up like a bullhorn and work on it.

Admiral CHURCH. Yes, sir.

Chairman WARNER. There we go, straight on.

Admiral CHURCH. I hope it is on. There we go.

Chairman WARNER. It is on.

Admiral CHURCH. I have a short opening statement, sir, if I may.

Approximately 10 months ago, the Secretary of Defense tasked me with some very specific things that he wanted done. The first of that was to look at all the interrogation techniques that had ever been considered, authorized, employed, or prohibited in any theater at any time. He asked me to specifically look at the issue of migration, had the techniques migrated, where and when. He specifically tasked me to analyze and review DOD support to or participation in the interrogation activities of non-DOD activities.

He asked me to work in direct support of the independent panel chaired by the Honorable James Schlesinger, which we did. I would add that the data that they had in their report came from our group and we supported their findings and reviewed their work as well.

Implicit in that tasking was to determine whether and to what extent the nature and migration of all these interrogation techniques directly or indirectly resulted in detainee abuse that we have all become familiar with. As has been mentioned earlier, he asked me to look at gaps and seams. We did that. We expanded our tasking to look at International Committee of the Red Cross (ICRC) issues, medical issues, and contract interrogators, as an example.

I believe my investigation was thorough and exhaustive. We conducted over 800 interviews, the majority of which resulted in sworn statements. We took interviews or written statements from senior civilian and military leaders in the Pentagon. We reviewed thousands of pages of documents based on data calls from the Pentagon, from the combatant commanders. We did leverage all the other ongoing investigations so as not to re-investigate that which had already been investigated. We looked very carefully at the 70 completed cases of abuse, the criminal cases, to see if there is anything in those that related to interrogation or interrogation techniques.

Finally, I would like to give you, as has been mentioned earlier today, a backdrop to some of my findings. It was clear to us during the investigation that if we are going to win the global war on terror we have to have intelligence, and embodied in that is we need

human intelligence. As has been mentioned also, the overwhelming majority of our service members have served honorably under very difficult and challenging conditions. The vast majority of detainees have been treated humanely and appropriately, and when that was not the case that has been investigated.

My key findings: that clearly there was no policy, written or otherwise, at any level that directed or condoned torture or abuse; there was no link between the authorized interrogation techniques and the abuses that in fact occurred. Nevertheless, we did identify problems with dissemination, development, migration of the interrogation techniques both in Afghanistan and Iraq, and we documented another problem, which is a lack of field-level guidance for the interaction of DOD and other government agency personnel.

Also previously mentioned, with the benefit of hindsight we saw several missed opportunities, two missed opportunities. The lessons of prior unconventional conflicts were never specifically communicated to our troops as a means of lessons learned; and no guidance or interrogation techniques were promulgated for Afghanistan or Iraq either to CENTCOM or by CENTCOM.

I would like to make several quick points on the detainee abuse. Of the 70 closed cases, 6 were deaths, 26 were serious, and 38 were minor abuse cases, as we categorize them. Approximately one-third of these cases occurred at the point of capture, where emotions run very high. The majority of these cases, even those considered interrogation-related, as we find them consisted of simple assaults—punching, kicking, and slapping detainees. We looked for any discernible pattern of abuse and we were unable to find it. It varied by unit, Active Duty, Guard, Active Reserve, Guard, in different theaters. As the independent panel stated: "No approved procedures called for or allowed the kinds of abuses that in fact occurred."

Finally, a quick word about the FBI documents. We were aware of the 14 July 2004 memo that highlighted three instances. That was sent to us by the Army. Two of those incidents had previously been investigated. The Army Criminal Investigation Division (CID) began an investigation on the third one. Last Friday, I had a meeting with the current Naval IG, who is going over the Freedom of Information Act (FOIA) requests, and General Furlow from Southern Command (SOUTHCOM), who is doing an investigation of the specific incidents, and I would be happy to answer questions on the progress of those two ongoing investigations later.

That concludes my comments, sir, and I look forward to your questions.

Chairman WARNER. Thank you very much, Admiral.

We will proceed to have a 6-minute initial questioning by members.

Admiral, let us get directly to the evidence that the American people and indeed the world saw by virtue of these pictures, tragic pictures. I mean, incomprehensible almost to say a person like me, who has had the privilege of a half century of association with the men and women of the Armed Forces.

However, apart from those pictures you have described other types of infractions which do not have a pictorial record. Largely you learned of them through testimony. I think it is important that

we lay before the public the full range of tortures with some specificity. The pictures were explicit, tragic. Were there other types of incidents which you felt resulted in bringing people to trial which we do not have in mind fully as to what occurred?

Admiral CHURCH. The work that we did, Senator, everything that is alleged is being investigated, if that is the question.

Chairman WARNER. I am not suggesting it is not being investigated. But I think we have to have a full understanding of the types of wrongdoings that were perpetrated. The pictures captured certainly what went on in that prison, but there are other incidents, for instance at the point of detention in the heat of battle, and often there is extenuating circumstances in the heat of battle for those who are making that apprehension.

In other words, I want to hear in the record as best we can a description of other things that were the basis for these trials, that we have not seen by virtue of those pictures.

Admiral CHURCH. It is the full range, Senator. We have six deaths of those who were detainees. There are a number of detainee deaths. Most of them were by natural causes. We looked at every single detainee death. There were six of those.

Chairman WARNER. You say by natural causes. The deaths resulted as a result—excuse me—resulted because of blows to the system, I suppose?

Admiral CHURCH. No, sir. Natural causes were—we looked at all the deaths, all the detainee deaths, to ensure that anything that looked problematic was further investigated. There are 6 of the 70 abuse cases that are closed that involved detainee deaths, and I am trying to answer your question on the range of problems. That was the far end.

To the low end, you could probably go to Gitmo, where there were incidents of slapping or what we call minor abuse cases. There were a couple of sexual assaults that were in that 70 at the high end, and there was the range all the way in between.

Chairman WARNER. The ICRC performed and has throughout contemporary history, I mean going back many years, a very valuable service of trying to monitor the detainee situations worldwide. They were active participants in this case, and in a closed session of this hearing this morning which will follow the open session we will ask you to give us further details of their involvement.

But on the whole, do you feel their involvement was constructive and did it provide reasonable early warning to our chains of command that reviewed these reports?

Admiral CHURCH. I do, Senator. I think it was very positive. I think the reactions to the ICRC reports were in general very good, but in a couple cases the reaction was not as swift or comprehensive as it could have been, and Abu Ghraib is one example.

Chairman WARNER. The responsibility of individual leaders. In your report you talk about the deterioration of good order and discipline in some units and the related failure of unit-level leadership to react to warning signs and stressful conditions and how this may have contributed to some incidents of abuse.

To what do you attribute this breakdown of good order and discipline in the United States military? To what levels did these failures of leadership extend in your judgment? What recommenda-

tions do you make to prevent or reduce such breakdowns of good order and discipline in the future, because in a subsequent hearing of this committee—I mean, we will eventually get into exactly what corrective measures the DOD and other agencies and departments to some extent have taken in that breakdown. But they will draw on your report. Much has been done already, but I am sure this report will further refine the steps that have been done.

So let us talk about your professional judgment. You are an officer of extraordinary capabilities and distinction in your own career, and to what do you attribute this breakdown of good order and discipline?

Admiral CHURCH. Let me answer in two parts, Senator. Having come to the conclusion, having looked at the 70 closed cases, that the interrogation techniques were not a causal factor in the abuse that happened, I felt it was important to try to offer an opinion as to, if that was not—and this is my best military judgment, having looked at this for 9 months—what did cause the abuse?

As I noted, a third of these happened at the point of capture, which is where emotions run high. Then after that it became——

Chairman WARNER. Now let us make it clear to those following this hearing. At the point of capture, you mean in the field?

Admiral CHURCH. In the field.

Chairman WARNER. Where there is active combat in many instances either going on or there are combat conditions, an individual is apprehended.

Admiral CHURCH. Yes, sir.

Chairman WARNER. As you said, emotions, and not only that, time is measured in microseconds in trying to make a capture and then get back and protect yourselves. So go ahead.

Admiral CHURCH. That is exactly right, Senator. Of course, that is—once a detainee is captured, the rules change, and people have to be aware of that. That is where a third of this happened.

I said about 20 of the incidents involved—were interrogation-related, and I used a very expansive definition of that. Anything that involved a military interrogator (MI), if an MI was in the area, if it was a military police (MP), even a debriefing at point of capture, I called that interrogation-related, frankly so I would not be challenged on not including that. Very little of this involved interrogation.

So you are left really with looking at each individual case and saying, what happened? The events of Abu Ghraib are a shining example where you ask the question, where was the leadership? Not only the noncommissioned officers (NCOs), but the mid-grade officers, who—I use the analogy of a ship because that is my background. You can get an illegal order and it does not matter; you are still responsible for the safety of that ship. To me, that is where the breakdown was, and the remedies are—we could talk about that for a long time. It is accountability at that level.

Chairman WARNER. Thank you, Admiral.

Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

Admiral, according to your report, in response to a Joint Chiefs of Staff (JCS) request for comments on the request from Gitmo commanders in November 2002 for authorization to use more ag-

gressive interrogation techniques, military service lawyers expressed "serious reservations" about approving the proposed interrogation techniques without further legal and policy review. What was the nature of their serious reservations?

Admiral CHURCH. They felt that the techniques were too aggressive, that they needed additional legal review if they were in fact lawful.

Senator LEVIN. Were those concerns brought to the attention of Secretary Rumsfeld prior to his December 2, 2002, approval of additional aggressive interrogation techniques?

Admiral CHURCH. Nobody was able to succinctly answer that question, because I think it was overcome by events. That was my opinion.

Senator LEVIN. So you were not able to determine whether——

Admiral CHURCH. With absolute certainty, no, sir.

Senator LEVIN. Okay. Now, there was a DOD working group on interrogation techniques which was initiated in January 2003. That working group ultimately recommended interrogation techniques for use against enemy combatants and most of the recommendations were adopted. However, as you note in the body of your report, you show that the working group, in which military lawyers were participating, was stopped from developing its own legal analysis and instead was required to accept the legal analysis contained in a memorandum from the DOJ OLC, a memorandum with which the working group strongly disagreed.

According to your report, that memo, entitled "Military Interrogation of Alien Unlawful Combatants," was prepared by Deputy Assistant Attorney General John Yu for DOD General Counsel Haynes, and that memo had a date of March 14, 2003. This memo was presented, as your report indicates, to the working group as "controlling authority" on all legal issues.

I want to refer to the March 14, 2003, memo from now on. Access of working group members to this memo was apparently restricted, as you noted, and no notes were permitted. You also noted that conclusions of that memo are nearly identical to those of the August 1, 2002, OLC memo which is known as the torture memo, which the administration disavowed in the middle of last year. Among other things it concluded that for physical pain to amount to torture it had to be equivalent to the pain accompanying "organ failure, impairment of bodily functions, or even death."

So basically that working group in the DOD was told they had to follow this March 14 memo from Deputy Assistant Attorney General Yu to Mr. Haynes.

My question is, did you have access to that March memo?

Admiral CHURCH. Yes, sir, we did.

Senator LEVIN. Do you have a copy of it?

Admiral CHURCH. No, sir, we did not get a copy. We went and read it and took notes.

Senator LEVIN. Were you allowed to take a copy of it?

Admiral CHURCH. No, sir, we did not take a copy.

Senator LEVIN. So even in your classified report there is no copy of that memo, is that correct?

Admiral CHURCH. That is correct, sir.

Senator LEVIN. Has that memo been superseded, like the "torture" memo on which it was based? Do you know?

Admiral CHURCH. I would have to get back to you, sir. I cannot say for certain.

[The information referred to follows:]

The March 14, 2003, Office of Legal Counsel (OLC) memorandum, which drew upon the August 2002 OLC memorandum, has not been explicitly superseded. However, the current legal guidance applicable to the Department of Defense is contained in the December 2004 OLC memorandum, which superseded the August 2002 memorandum.

Senator LEVIN. Now, General Pace stated that on May 15, 2003, the Chairman of the Joint Chiefs sent up a memo recommending that the same interrogation guidelines be issued to CENTCOM as existed for Gitmo. This request from the Chairman and recommendation was sent to the Office of the Secretary of Defense (OSD). Do you know whether the OSD responded to the Chairman's May 15, 2003, letter with that recommendation?

Admiral CHURCH. There was no response that I am aware of, sir.

Senator LEVIN. Did you find any evidence explaining why the OSD failed to act on the recommendation?

Admiral CHURCH. Not specifically, sir.

Senator LEVIN. You made reference to the FBI memos. In December of last year the FBI released e-mails under a FOIA request in which FBI agents described the DOD interrogation techniques in use at Gitmo as torture and stated in their e-mails the following, this is one FBI agent talking to another: "When I return to DC, I will bring a copy of the military's interview plan. You won't believe it."

Are you familiar with that memo?

Admiral CHURCH. Yes, sir.

Senator LEVIN. Did you see the plan?

Admiral CHURCH. I believe, if that is the one you are referring to, I believe I did, yes, sir.

Senator LEVIN. That plan was described as containing coercive techniques in the military's interviewing tool kit. Are you familiar with those coercive techniques?

Admiral CHURCH. I think we are referring to the same incident, sir.

Senator LEVIN. Would you agree those were coercive techniques, the way the FBI described them?

Admiral CHURCH. There were a couple of interrogations that I would classify as humane but coercive.

Senator LEVIN. Do you have a copy of those documents that the FBI referred to in your classified report?

Admiral CHURCH. I believe it is in the backup material, sir. If not, we will get it.

[The information referred to follows:]

[redacted] GTMO

Page 1

b6 -1
b7C -1

From: [redacted]
To: [redacted]
Date: Mon, Dec 9, 2002 10:46 AM
Subject: GTMO

b6 -1
b7C -1

b6 -1
b7C -1

[redacted]

It was good to talkwith you the other night . I look forward to reading your response to the outlandish accusations made by the Inspectors and [redacted]

b6 -1
b7C -1

Attached are two documents- 1) a one-page description of a matter concerning interview/interrogation which we spoke to the Commanding general about.
and 2) An outline of the coercive techniques in the military's interviewing tool kit.

i will also send our Interview Plan for Detainee [redacted] When I return to D.C., I will bring a copy of the miloitary's interview Plan....You won't believe it!

b6 -3,4
b7C -3,4
b7D -1
b7E -1

b6 -1
b7C -1

[redacted]

verified by Mr. O'Brien

[redacted]

DETAINEES-3394

4144

The FBI e-mail refers to a specific interrogation plan approved by the Secretary of Defense for use with one "high-value" detainee who had resisted interrogation for many months and was believed to possess actionable intelligence that could be used to prevent attacks against the United States. The plan is described on pages 115–116 of my report.

Senator LEVIN. Did you talk to those FBI agents about what they saw at Guantanamo?

Admiral CHURCH. We talked to folks that were with them. We talked to members of the Criminal Investigative Task Force (NCIS). They were all working collaboratively. So I am very familiar with the incidents that you are talking about.

Senator LEVIN. You have talked to people who actually witnessed it in the FBI?

Admiral CHURCH. Not specifically.

Senator LEVIN. Finally, the Schlesinger Panel found that abuses were widespread and "the abuses were not just the failure of some individuals to follow known standards, and they are more than the failure of a few leaders to enforce proper discipline. There is both institutional and personal responsibility at higher levels."

Do you agree with that finding of the Schlesinger Panel?

Admiral CHURCH. Yes, sir. I do.

Senator LEVIN. Have you identified anyone at higher levels who bears personal responsibility?

Admiral CHURCH. I have to give you a little bit of a longer answer, Senator. I worked very closely with the Schlesinger Panel and as we worked together it evolved that the issues of responsibility needed to be addressed. That was not in my charter, so it was understood that the Schlesinger Panel were going to make those calls.

Senator LEVIN. Thank you.

I thank you, Mr. Chairman.

Chairman WARNER. Thank you, Senator.

Senator Inhofe.

Senator INHOFE. Thank you, Mr. Chairman.

I know, Admiral Church, that the scope of your work goes far beyond Abu Ghraib, but I will confine my questions to just Abu Ghraib. First of all, I want to thank my colleagues who have been very nice to me, in spite of the fact that on May 4, 2004, I was the skunk at the family picnic, and the picnic is still going on and I have not changed my opinion. At that time I felt and I still feel today that the relationship between the quality of interrogation and the quality of intelligence and American lives is there and it is very important.

Let me first of all—it was my understanding then, it is my understanding now, that the detainees that were held in Abu Ghraib, and I would specifically say in Cell Blocks 1A and 1B, were either actively involved in operational planning for attacks against our Coalition Forces or had already participated in attacks against our forces, and they were working on behalf of former Baathists now acting as insurgents or on behalf of terrorist leaders from outside of Iraq, such as Zarquawi. Is that your understanding?

Admiral CHURCH. That is my understanding, sir.

Senator INHOFE. I have several questions and they can just be short answers if you would do that for me, Admiral. First of all, we have outlined the number of investigations and reports that have been coming. Some commentators have dismissed several of the previous reports as whitewash or coverups. Did you come across anything that would cause you to believe or suspect that any of these officials who conducted these investigations were pursuing an agenda other than seeking the truth? Did you find any evidence of that?

Admiral CHURCH. No, sir, I did not.

Senator INHOFE. Regardless of whether you are talking about properly approved techniques or improperly approved techniques,

did you ever find anything that sanctioned practices that showed up in the infamous photos at Abu Ghraib?

Admiral CHURCH. Senator, that was one of the key findings of the report. None of the instances that we saw in particular at Abu Ghraib——

Chairman WARNER. Can you pull that mike up a little bit.

Admiral CHURCH. Yes, sir; I am sorry.

Chairman WARNER. Your voice is just not projecting.

Admiral CHURCH. That was one of the key findings of my investigation, that none of the abuse cases that have been highlighted, that we are all familiar with, bear any resemblance to any policy or interrogation techniques that was ever considered or authorized.

Senator INHOFE. Yes, I know that, but I think it is a key point that is worth repeating.

Is it fair to say that, whatever confusion there might have been, no one could have reasonably believed that what we saw in those photos was in accordance with approved practices?

Admiral CHURCH. There has been a lot of discussion of the word "confusion." Regardless of which copy or which operative standard operating procedure an interrogator was using, none of the abuses we saw would have been condoned.

Senator INHOFE. All right, sir. Did you ever find any evidence to support the allegations that commanders preferred to "look the other way"—and that is a quote out of some of the accusations—rather than investigate abuse if they could get away with it?

Admiral CHURCH. We did not find that.

Senator INHOFE. In the winter and spring of 2003 there was a working group that was led by Air Force General Counsel Mary Walker that reviewed the law on interrogation practices and made a recommendation to the SECDEF on what techniques should be allowed at Gitmo. How many techniques did the working group recommend and how many did the SECDEF approve? Is it not correct that the SECDEF approved for use fewer than the total number of interrogation techniques approved by the working group? In other words, his directive was narrower than what the group concluded the law allowed?

Admiral CHURCH. The working group sent forward 35 interrogation techniques. Based on advice of his General Counsel recommending restraint, the SECDEF approved 24.

Senator INHOFE. All right, sir. Finally, I can recall when, even back in the days I was in the House of Representatives and certainly many years ago when I came to this body, serving on the Intelligence Committee, that human intelligence (HUMINT) went out of vogue for a while. There was an idea that somehow we are abusing people when we are going after HUMINT; it should all be done electronically or in some other means.

In your report you say that intelligence-gathering, particularly HUMINT, has assumed greater importance in the war on terror. I would like to have you explain why it has assumed a greater role in this particular war on terror than in previous uses?

Admiral CHURCH. It is the nature of the enemy, sir. We do not know who they are, where they are. If we are going to learn anything about what might be around the corner, we have to have intelligence, and it is HUMINT that is going to be key.

Senator INHOFE. Can you think of any, any group you might come upon where the potential of human intelligence would be any greater than those who are incarcerated, who were the detainees in the two cell blocks, 1A and 1B of Abu Ghraib?

Admiral CHURCH. That would be one good example, certainly.

Senator INHOFE. It is a fertile field for intelligence-gathering?

Admiral CHURCH. Certainly the detainees at Gitmo would fit that criteria.

Senator INHOFE. I would assume that you would agree with me that there is a direct relationship between the quality of intelligence and American lives, our men and women in uniform?

Admiral CHURCH. We know that for a fact by some of the intelligence that we have gained.

Senator INHOFE. You have done great work and I thank you for your service.

Thank you, Mr. Chairman.

Chairman WARNER. Thank you, Senator.

Senator Lieberman.

Senator LIEBERMAN. Thank you, Mr. Chairman.

Admiral Church, good morning and thank you for your work. I wanted first to put in some perspective the cases that you investigated because, while no case of abuse is tolerable by this country, where as everyone has said and agreed we live by the rule of law even in the most difficult of circumstances of war, times of war on terror, I think it is important as we react, particularly to the pictures of Abu Ghraib that Chairman Warner referred to, about the numbers here.

Am I correct as I saw in one version of the unclassified version of your report that your estimate is that there have been more than 50,000 detainees thus far in the global war on terrorism?

Admiral CHURCH. Yes, sir, at that point in time that was the figure.

Senator LIEBERMAN. So it is probably more now.

Admiral CHURCH. Yes, sir.

Senator LIEBERMAN. But that was at the point in time you wrote, September 30, 2004. That would include Iraq, Afghanistan, Guantanamo, and then other places where detainees may be held?

Admiral CHURCH. That was the best estimate, yes, sir.

Senator LIEBERMAN. As a result of your investigation you identified 70 cases of abuse that were substantive cases of abuse?

Admiral CHURCH. Yes, sir. We reviewed what the NCIS and the Army CIS had, which included reports from the field as well as the criminal misconduct. We reviewed everything that we could get our hands on.

Senator LIEBERMAN. Right. So my point is that 70 cases out of more than 50,000 detainees is about one-tenth of 1 percent of the detainees, and it justifies your conclusion that in the overwhelming majority of cases detainees to the best of our knowledge now have been treated within the standards that we in America would want detainees to be treated.

If you go one level further, your judgment as given to the committee today is that there were 20 of those 70 cases of abuse that you found to be real, were associated with interrogation, then we are at about one 25th of 1 percent of all detainees. I just say this,

not to minimize the offenses, but simply to put them in perspective, that most of the American personnel, service men and women, who are holding detainees and in fact interrogating them to the best of our knowledge are acting within the law. Is that your conclusion?

Admiral CHURCH. That is absolutely correct, Senator.

Senator LIEBERMAN. Let me ask you a factor related to the way you conducted the investigation. I was interested that you did not interview any of the detainees, but you did base a lot of your work on the report of the ICRC, which is certainly in our perspective an advocate or a protector at least of the detainees. Could you explain why you did not talk to any of the detainees?

Admiral CHURCH. First of all, the scope of the investigation really was to try to catalogue and document all the interrogation techniques, so that was where we started. As we expanded, I felt that the ICRC reports, the working papers, would give me a pretty good feel for what the detainees' complaints were. We will get into this in the next session, but from that, from looking at all the ICRC reports, we got a pretty good feel of what the complaints were and what the reactions to those complaints were, were they being followed up. That was the purpose of that particular section.

Senator LIEBERMAN. General Casey the other day suggested, and there is some reference to it in your report, that he recently issued a set of new procedures regarding the handling of detainees and which techniques were available appropriately to those carrying on interrogation or just the holding of the detainees.

Could you elucidate for the committee at this time in some detail about what those additional safeguards are pursuant to General Casey's directive?

Admiral CHURCH. Senator, I will have to get back to you.

[The information referred to follows:]

The content of General Casey's new interrogation directive for U.S. military forces in Iraq is classified. A copy of the directive has been provided to the Senate Armed Services Committee.

Admiral CHURCH. I did read that subsequent to our investigation. I know he has come very much in line with Doctrine FM 34–52 and put in a number of safeguards and also clarified some ambiguities that he felt were left over from previous guidance.

Senator LIEBERMAN. Just for the record, give us a brief description of what Doctrine FM 34–52 is?

Admiral CHURCH. Sorry. That is the basic interrogation doctrine the Services all use. It lists 17 techniques, starting with direct approach. That is what was in effect for a good part of the initial global war on terror until we started expanding it.

Senator LIEBERMAN. I want to go back to the overall view and the perspective through which we look at this. I quote here your unclassified executive summary: "Any discussion of military interrogation must begin with its purpose, which is to gain actionable intelligence in order to safeguard the security of the United States. Interrogation is often an adversarial endeavor. Generally, detainees are not eager to provide information and they resist interrogation to the extent that their personal character or training permits. Confronting detainees are interrogators whose mission is to extract useful information as quickly as possible. MIs are trained to use creative means of deception and to play upon detainees' emotions

and fears when conducting interrogations of enemy prisoners of war, who enjoy the full protections of the Geneva Conventions. Thus, people unfamiliar with military interrogations might view a perfectly legitimate interrogation of an enemy prisoner of war in full compliance with the Geneva Conventions as offensive by its very nature."

Now, obviously some of what we saw at Abu Ghraib and some of what you have described go well beyond that. But it is important to set it in that context.

I wanted to ask you this question in terms of detainee interrogation and the global war on terror. Do the existing procedures that govern interrogation make any distinction between—and I understand this can be a slippery slope—detainees who may have general knowledge of enemy plans and detainees who we have reason to believe may have knowledge of an imminent terrorist operations?

I know that there are circumstances in the so-called ticking time bomb case, where in other countries which attempt to live by the rule of law the standards of what can—of the nature of an interrogation of a detainee, can be quite simply more aggressive if there is a conclusion, reasonably arrived at, that the detainee has knowledge of the allegorical ticking time bomb, and if you break that detainee you can stop the bomb from exploding.

Do our procedures now allow for those kinds of distinctions?

Admiral CHURCH. I will try to answer that, sir. The policy, the doctrine, the approved interrogation techniques, would not change based on what you know the intelligence, the value of the intelligence of the detainee. What might change is the interrogation plan of how you approach that, how you might use techniques in combination to try to get the information you use, and each interrogation plan might be different.

I doubt that you would waste much time on somebody who was of little intelligence value, but you would probably spend a lot of time on somebody who had actionable intelligence that might save lives.

Senator LIEBERMAN. Thank you, Admiral.

My time is up. Thanks, Mr. Chairman.

Chairman WARNER. Thank you, Senator.

Senator McCain.

Senator MCCAIN. Admiral, thank you for your report.

Are all of the interrogation techniques now in keeping with international law and with treaties that the United States of America is signatory to?

Admiral CHURCH. Yes, sir.

Senator MCCAIN. In your mind there is no doubt?

Admiral CHURCH. There is no doubt in my mind.

Senator MCCAIN. Is there in your mind a difference in the status of a Taliban prisoner who was captured in the war in Afghanistan and that of a terrorist who was apprehended in Omaha, Nebraska?

In other words, is the Taliban guy, fighter, eligible for the Geneva Conventions for the Treatment of Prisoners of War, and is the terrorist caught in Omaha eligible?

Admiral CHURCH. The latter is. The first, as you remember from the President's——

Senator MCCAIN. The latter is eligible for Geneva Conventions?

Admiral CHURCH. A terrorist caught in the United States? Well, I am sorry——

Senator MCCAIN. Is he eligible for——

Admiral CHURCH. He is not a prisoner of war, so he would not fall into that category.

Senator MCCAIN. Okay. Is the Taliban prisoner fighting for the then-government of Afghanistan eligible for Geneva Conventions for the Treatment of Prisoners of War?

Admiral CHURCH. As you will remember, the President said that the Taliban had not conducted themselves in a manner that they would be considered parties to the Geneva. So the answer to your question is no, sir.

Senator MCCAIN. So the President of the United States has decided that the Taliban, even though there was a government recognized by some in Kabul, is not eligible?

Admiral CHURCH. He made that determination, yes, sir.

Senator MCCAIN. The North Vietnamese made the same determination about American prisoners?

Admiral CHURCH. Yes, sir.

Senator MCCAIN. But the Geneva Conventions clearly state that those who are fighting for a country and—in other words, in my view those who are fighting for the Afghan government, whether they were Taliban or average citizens, they were fighting in the army of that government of Afghanistan. How do you argue that they are not?

Admiral CHURCH. I am not sure that I am specially qualified to have the legal debate with you, sir, but——

Senator MCCAIN. I am not having a debate with you. I am asking you a question. You of all people should be well versed on what eligibility for treatment under what conditions should be.

Admiral CHURCH. I am, and I understand what the President said. He also said that they would be—all would be treated humanely and consistent with military necessity, in accordance with Geneva. So Geneva underpinned all of this, but——

Senator MCCAIN. So the United States policy now is that we decide when we are in a conflict whether the combatants of that nation are eligible for the Geneva Conventions or not?

Admiral CHURCH. Senator, in Iraq, Geneva Enemy Prisoner of War (EPW) applied. In Afghanistan and detainees in Gitmo, there were different rules.

Senator MCCAIN. So you have somebody who is captured. Different rules for—so you have somebody captured in Baghdad who was fighting for Saddam Hussein and they are sent to Abu Ghraib or another prison facility. Next to them is a combatant who was captured in Afghanistan, in the same cell. There is different treatment for those two prisoners?

Admiral CHURCH. There would be no different treatment at Gitmo, but the difference between the applicability of Geneva would be different.

Senator MCCAIN. Say that again?

Admiral CHURCH. The three different categories were——

Senator MCCAIN. I am going to ask you this example. Saddam Hussein's army versus Taliban army, both in the same prison.

Admiral CHURCH. Different rules apply, and as for al Qaeda they are different.

Senator MCCAIN. Does this not get a little confusing for the people who are in charge of developing specific policies for terrorism of prisoners?

Admiral CHURCH. I did not find that.

Senator MCCAIN. It is no problem?

Admiral CHURCH. I did not find that for the interrogators that was a problem, because they had the basic underpinning that humane treatment was to be observed at all times and they used the same set of techniques for the interrogations.

So by the time it translated down to the interrogation piece that I was looking at, I didn't see much of a distinction.

Senator MCCAIN. You did not see much of a distinction.

Admiral CHURCH. No.

Senator MCCAIN. Do you not think there are specific protections under the Geneva Conventions for the Treatment of Prisoners of War that should not apply to terrorists?

Admiral CHURCH. I think I agree with you, sir.

Senator MCCAIN. My point here is, Admiral, that I do not believe that it is clear the difference in policy towards treatment of those who are eligible for the Geneva Conventions on the Treatment of Prisoners of War versus those that are not. I do not argue that Mohamed Atta is not eligible for the Geneva Conventions protection. What I am saying is, unless you have specific guidelines, then obviously if you treated those both the same you are either not doing quite maybe what you should to the terrorist and maybe not enough to protect, to be in compliance with a treaty that we signed.

I worry, Admiral, very much that if we decide that a certain country's military personnel are not eligible for treatment under a convention that we signed, then what would be—would it not be logical to expect that they would declare, as the North Vietnamese did, that American prisoners are not eligible for protection under the Geneva Conventions?

Admiral CHURCH. Those were the arguments, yes, sir. I understand.

Senator MCCAIN. What is your opinion?

Admiral CHURCH. My opinion is that the President made the right call.

Senator MCCAIN. So everything is fine?

Admiral CHURCH. No, sir. I said I do not believe that the al-Qaeda should have—was eligible or should have been eligible because they did not meet the criteria.

Senator MCCAIN. Nor do I.

Admiral CHURCH. I do not believe that the Taliban by their behavior should have been eligible for EPW treatment.

Senator MCCAIN. Certainly the German SS should not have been eligible.

Admiral CHURCH. They wore a uniform, sir.

Senator MCCAIN. These guys wore a uniform of sorts.

Admiral CHURCH. But their behavior did not meet the criteria for EPW.

Senator MCCAIN. But the SS division's behavior was okay?

Admiral CHURCH. Sir, you asked me for my opinion and it is a good debate. That is my opinion.

Senator MCCAIN. Well, sir, I think it is a little more than a good debate, because I think this Nation may face other conflicts in the future and I am very concerned about what might happen to Americans who are taken prisoner unless we have clear and specific guidelines that we adhere to, including the Geneva Conventions where applicable under international law.

I thank you, Mr. Chairman.

Chairman WARNER. Senator Kennedy.

Senator KENNEDY. Thank you. Thank you very much, Mr. Chairman.

On page 124 of your report, Admiral Church, in the unclassified paragraphs you describe the initial meetings of the Haynes working group and their briefing from the OLC on the applicable law. Your report states that fairly early on in the working group process the OLC draft legal memorandum was presented to the action officers as the controlling authority for all questions of domestic and international law.

This memoranda was basically the Biby torture memorandum, and you said the working group expressed a great deal of disagreement with the OLC analysis. In your report you write that "Members of the working group were only permitted to read the memoranda in Mr. Haynes' or Ms. Walker's office, initially without taking notes."

In addition, you write that your investigators were not allowed to obtain this crucial memoranda either, but only could review it without taking verbatim notes.

This memo has never been provided to the committee, despite our requests. This issue also highlights the involvement of Mr. Haynes.

Now, the memo was—you said the working group expressed a great deal of disagreement with the OLC analysis. They said interrogation techniques should follow the Geneva Conventions, the Conventions Against Torture, and U.S. law. Now, that is not what the Haynes working group finally recommended. So, Admiral, could you tell us how this dispute was resolved? Were the members of the working group overruled?

Admiral CHURCH. Thank you for the question, Senator. I want to state initially that the value I think of my investigation is that I lay all this out. This has never been laid out before, so that we can understand exactly everything that went on in the determination of these techniques.

As I did my research, I came to understand that what the DOJ had said was in fact binding on the DOD. So that was the legal underpinning that this group began working on. They ultimately, working through that, recommended 35 techniques. The Secretary of Defense approved 24, but again there was the underpinning of humane treatment that was in, not only in the memo, but also in the consideration.

But you are correct, sir.

Senator KENNEDY. Well, I am not sure what I am correct about. I said the working group—you said the working group expressed a great deal of disagreement with the OLC analysis, and they said

the interrogation should follow the Geneva. Now, I want to—I was asking how was that issue resolved? Here you have a number of the people that have had responsibility, are trained people, the Judge Advocate General (JAG) I imagine, other lawyers, that express a great deal of disagreement. Those are your words. Eventually this issue was resolved, and I am asking you about how that was resolved and who resolved it. Was that just resolved by Haynes?

Admiral CHURCH. It was resolved by I guess the chairman of the committee, Ms. Walker, basically said: We are not going to go revisit the decisions of Justice; we are going to move on. So they moved on, and they started looking at the techniques. As they looked at the 35 techniques, they assessed those in numerous categories dealing with humane treatment versus how this would be perceived internationally and many other categories.

So the short answer, Senator, is they moved on; they accepted what the legal starting point was.

Senator KENNEDY. I know they have moved on, and I am familiar where the working group published and how they published virtually identical to the Biby memorandum. I am familiar. The point I am trying to find out is, who made the judgment? When you had talked about a great deal of disagreement with the OLC, who was the one that finally made the call on this? Who was the one that finally said when there was disagreement, in your own words, a great deal of disagreement? As we all know that from other memoranda, there was an enormous amount of disagreement.

Someone finally made the call that what they were going to do is in the working group they would actually print exactly the words in the Biby memorandum. I am just asking you who made that call.

Admiral CHURCH. I believe the answer was the Office of the General Counsel.

Senator KENNEDY. That is Mr. Haynes.

Admiral CHURCH. It is, but I would like to add one thing. I looked at that very closely and that is why I came to the conclusion, because I questioned the same thing and the lawyers who made those issues—that the rulings of the DOJ were binding on the DOD, and that's what I called in my investigation. So it was not a bad call.

Senator KENNEDY. Well, I can understand and appreciate your position. Many of us understand that it was the CIA went to Mr. Gonzalez, with the understanding of Mr. Haynes, to request this memoranda from OLC, and that Mr. Gonzalez talked to OLC during the course of the preparation. This has been laid out in a different hearing. That finally they came back, the Biby amendment came back, and this was just fine with the CIA and with the DOD, and it was sent on over. The record shows that there were many in the JAG and otherwise that did not feel that it followed the Geneva Conventions, and you expressed a similar—an opinion about this.

I want to know who in the DOD made the call on it. It is quite clear now that it is Mr. Haynes, who is the General Counsel on it. That is basically what I am trying to have.

My time is up, unless there is something you want to add to that.

Chairman WARNER. Let the witness finish the answer.

Senator KENNEDY. Yes, please.

Admiral CHURCH. No, sir, I think I have answered the question. I did go down this road, as I mentioned, to try to see if that was in fact an appropriate determination and ultimately concluded—and I think it is in the report—that it was. The memo, of course, as we all know, has now been discredited.

Senator KENNEDY. Well, it was in effect for 2½ years.

Admiral CHURCH. You are correct, Senator, it was.

Senator KENNEDY. But it took some time before it was.

Admiral CHURCH. Yes, sir.

Senator KENNEDY. Thank you.

Thank you, Mr. Chairman.

Chairman WARNER. I thank the Senator.

Senator Talent.

Senator TALENT. Thank you, Mr. Chairman.

I want to thank you for your service, Admiral, on what has undoubtedly been a very difficult and trying endeavor. I just want to refer to page 4 of your report, when you—the narrative recites how in the fall of 2002 the belief on the part of our interrogators at Guantanamo was that the techniques they had were inadequate and they asked for permission or further guidance to use other techniques, and the SOUTHCOM commander approved 19 counter-resistance techniques that were divided into categories 1, 2, and 3.

I was curious in reading it because originally the Secretary's decision only allowed one category 3 technique, which was authorization of mild, non-injurious physical contact, such as grabbing, poking in the chest with a finger, and light pushing. That was originally allowed and then subsequently disallowed. The category 2 techniques were subsequently disallowed.

So I am wondering, what were some of the category 2 techniques that were subsequently disallowed?

Admiral CHURCH. I would have to refer quickly to the memo.

Senator TALENT. Sure, would you do it quickly, or one of the other folks there? I am wondering because category 3 techniques—and maybe I do not understand interrogation very well—the grabbing, poking in the chest with the finger, that is not normally what I would think of as torture. That used to happen in settlement negotiations when I was practicing law rather a lot. I have seen worse at conference committees.

Admiral CHURCH. Well, you are correct——

Senator TALENT. I presume category 2 techniques were milder than category 3 techniques?

Admiral CHURCH. That is correct, sir. They were tiered.

Senator TALENT. Yes. So give me an idea of what were the category 2 techniques that were originally approved?

Admiral CHURCH. I am sorry that these are all running together after 9 months. Stress positions——

Senator TALENT. A stress position, like standing at attention for a while?

Admiral CHURCH. Or in a kneeling position. There are various interpretations of that.

Use of hooding. Removal of clothing was actually one. Use of detainees' individual phobias. There were 14 initially in the list.

Senator TALENT. Okay. The reason why the original request went up to SOUTHCOM and then to the Chairman, General Myers, and then to the Secretary of Defense, was because they thought they were not getting enough intelligence because these guys had been trained to resist effectively the techniques. It does not surprise me that they would have been able to resist these techniques.

Category 2 was permitted, but then subsequently that was revoked, so category 2 was not permitted either, right?

Admiral CHURCH. That is correct, sir.

Senator TALENT. Mr. Chairman, Senator Lieberman and Senator Inhofe spoke for me. There was a vehicle improvised explosive device (IED) that went off in Hillah, Mr. Chairman, 2 weeks ago. 150 Iraqi recruits to the police were killed. Five hundred IED attacks a month, 750 Americans lost in Iraq because of that. This is a subject that I have investigated personally and I know you have too, Mr. Chairman, and we have on the committee, and everybody I have talked to who is in the business of fighting IEDs in our military, in our intelligence, in Israeli military and intelligence, in British intelligence, tells me that getting good intelligence is the key to stopping this IED threat.

Speaking for myself, if our guys want to poke somebody in the chest to get the name of a bomb maker so they can save the lives of Americans, I am for it. Mr. Chairman, if the DOD wants to investigate me for that and have 15 investigations and call me inhumane, fine.

I have been over there. I have talked to these guys. This is the single biggest threat we face in the war on terror, and we have to empower our people to deal with it. I know it is important that we stick to our own beliefs. That is important in fighting the war on terror. I am glad you have had these hearings, Mr. Chairman, because it shows that we care in this country.

But at a certain point we have to introduce a note of proportion. I think that is what Senator Lieberman was saying. I do not speak for him. We have the best military in the world. I do not need an investigation to tell me that there was no comprehensive or systematic use of inhumane tactics by the American military, because those guys and gals just would not do it. Everything about the culture and the training in the military and at home works against that.

That is why the terrorists are attacking us, because we are not the kind of society that would do that.

Thanks for holding this hearing and giving me a chance to say that, Mr. Chairman.

I appreciate your service, Admiral.

Admiral CHURCH. Senator, I need to clarify one answer I gave you for the record. You are correct in that the tiers one, two, and three techniques were all rescinded and that gave way to the 24 techniques in the more restrained of the 35 recommended. They were no longer referred—there may have been one or two tier two techniques that became one of the 24. I would have to check. But clearly they moved to more restraint when they issued the second set.

Senator TALENT. Admiral, it is a great country we have, in part because we sweat so much over this stuff. I do not mean to be out

of proportion myself. If you sweat the small stuff, then you can have confidence that you are not doing the big stuff. Maybe that is what Senator McCain was saying. So I admire us for doing that, but, man, I want people to know this is not the sort of thing we do, but what we need to do, we need to have effective interrogation techniques to get this intel. This is the whole game, beating these IEDs, and we will not do it just with force protection measures or electronic countermeasures. We are not going to win this from the sky. We are going to win it on the ground, with real intel, and that includes effective interrogation techniques.

Thank you, Mr. Chairman.

Chairman WARNER. Thank you, Senator. Senator, next week this committee will have a briefing on the very serious situation of the IEDs, and part of that will be the discussion of the issues that you raise.

Senator TALENT. Mr. Chairman, you and I have talked personally about this and I want to compliment you on your leadership in this area. Unfortunately for the purpose of the public, most of what we do in that area, of course, we have to do in closed session.

Chairman WARNER. Yes.

Senator TALENT. So the public does not always see us and the work that you have led this committee on doing here.

Chairman WARNER. But the work is going on.

Senator TALENT. Absolutely, Mr. Chairman.

Chairman WARNER. I thank my colleague.

Senator Reed.

Senator REED. Thank you, Mr. Chairman.

Thank you, Admiral. Admiral, in the course of your investigation did you speak or interview Ambassador Bremer?

Admiral CHURCH. No, sir, I did not.

Senator REED. Why would you not speak with someone who was the senior DOD official who made significant decisions about using Abu Ghraib? He presumably was the interface between our military operations as an employee of the DOD and other agencies like the CIA?

Admiral CHURCH. It is a several-part answer. The first is it was the scope of my investigation. But I did pursue——

Senator REED. Let me follow up if I may. You were specifically told not to——

Chairman WARNER. Senator, let him just finish his reply and then I will give you extra time to develop this.

Senator REED. Thank you, Mr. Chairman.

Chairman WARNER. Finish answering the Senator's question.

Admiral CHURCH. Excuse me, Senator. I was not limited in who I asked questions of. I almost said "interrogated." I generally stayed within the DOD because that was—Ambassador Bremer as I understood it worked for the Department of State (DOS).

Senator REED. Admiral, you are fundamentally wrong.

Chairman WARNER. Wrong.

Admiral CHURCH. Maybe. I am sorry.

Chairman WARNER. Let the record show that this committee was advised that he was taken on by the Secretary of Defense. It may have been some technical salary arrangement, but for all intents and purposes am I not correct?

Senator REED. You are absolutely correct, Mr. Chairman. He was an appointee of the Secretary of Defense, clearly within the chain of command of the civilian authorities and the Secretary of Defense.

Admiral CHURCH. The short answer to your question, sir: I apologize for being in error. There were one or two things I was trying to determine in terms of what Ambassador Bremer knew about potential abuses at Abu Ghraib. You are correct that I did not ask him the direct questions, but I talked to his military assistant. I talked to a number of those who were at the daily meetings, to try to determine if there was any indication, early indication, that he had of abuses that he passed to General Sanchez. That was the specific tasking I was looking at at the time. But I did not interview Ambassador Bremer, that is correct.

Senator REED. Admiral, that seems to be a stunning omission. Here is an individual who is the direct representative of the Secretary of Defense, who was I would assume nominally the commander of General Sanchez, who was virtually the viceroy of Iraq, and to simply stop with his military assistant to see if they might have gleaned something at a meeting or a conversation seems to me woefully inadequate, with all due respect.

Admiral CHURCH. I accept the criticism, sir. I was trying to—again, the charter was to look at how the interrogation techniques were developed and migrated. I did not need to interview Ambassador Bremer to determine that. As I expanded the scope of my investigation, questions arose which I then followed up on. But I did not specifically have a need in my mind to interview him and, frankly, I am not sure what questions I would ask him if I were interviewing him today.

Senator REED. Did you in any way authorize any military officer to violate the law or convention? Did you authorize, allow the CIA—presumably the station chief worked for him—to conduct operations that were contrary to American law? I think those are pretty basic questions.

Admiral CHURCH. Yes, sir.

Senator REED. Which goes to how these techniques migrate.

Admiral CHURCH. I think I have a pretty good track on the techniques, what was used and how they migrated, sir.

Senator REED. Thank you.

Let me turn to Gitmo now. In the course of your investigation did you discover techniques that were either authorized or used—and I recognize some were merely authorized, but never used—that included environmental deprivations like hot rooms, cold rooms, withholding of food, hooding for periods of time, removal of clothing, or isolation? Were these techniques that, were either in an interrogation plan or at times used at Gitmo, in the course of the many months that the facility was operated?

Admiral CHURCH. As I described in the investigation, there were at least one or two instances where we noted those techniques were employed, where we had a clear need for actionable intelligence.

Senator REED. By that—and I do not want to put words in your mouth—these tools were available, all of these perhaps. Let me ask that question: Were these the range of tools available?

[The information referred to follows:]

"Environmental manipulation," defined as "[a]ltering the environment to create moderate discomfort (e.g., adjusting temperature or introducing an unpleasant smell)" was approved on April 16, 2003. The memorandum specified that "[c]onditions would not be such that they would injure the detainee" and that the "[d]etainee would be accompanied by interrogator at all times."

Withholding of food was never authorized. Between December 2, 2002, and January 15, 2003, detainee meals could be switched from hot rations to Meals, Ready-to-Eat (MREs)—the standard meals provided to U.S. troops in the field. This technique was rescinded on January 15, 2003. On April 16, 2003, the technique "Dietary Manipulation" was approved, defined as "[c]hanging the diet of a detainee; no intended deprivation of food or water; no adverse medical or cultural effect . . . e.g., hot rations to MREs."

Hooding of detainees during transportation and questioning was authorized on December 2, 2002, and rescinded on January 15, 2003. It was specified that the hood "should not restrict breathing in any way and the detainee should be under direct observation while hooded."

Removal of clothing was authorized on December 2, 2002, and rescinded on January 15, 2003.

Use of an isolation facility for up to 30 days was approved on December 2, 2002, and rescinded on January 15, 2003. It was again approved on April 16, 2003, defined as "[i]solating the detainee from other detainees while still complying with basic standards of treatment." Extensive safeguards were prescribed by the April 16 memorandum (which, along with the December 2, 2002, memorandum was declassified and released to the public on June 22, 2004).

Admiral CHURCH. I would have to do a side by side, sir, but most of those were not generally available. They were not, as I remember, part of the 24 that had been approved by the Secretary of Defense. There were a couple of interrogations that were specific techniques were authorized beyond those 24.

Senator REED. What techniques were used in those interrogations?

Admiral CHURCH. There was sleep management, hooding, stress positions, as I remember, were a few.

Senator REED. Did you interview General Miller in your investigation?

Admiral CHURCH. Yes, sir.

Senator REED. On May 19, I asked General Miller the following question: "It has been reported that you developed a 72-point matrix for stress and duress, that lays out types of coercion at escalating levels. They include harsher heat or cold, withholding food, hooding for days at a time, naked isolation and cold, dark cells. Is that correct?"

His answer was: "Sir, that is categorically incorrect."

My response: "That never happened?"

"That is categorically incorrect."

How do you rationalize your statement today that, at least in several instances, things like this happened and that categorical denial?

Admiral CHURCH. I think we are mixing two events. I am not familiar with any matrix.

Senator REED. Well, go ahead, sir.

Admiral CHURCH. I am not saying it does not exist, but we asked for every piece of paper that existed and made a couple of trips to Gitmo. So I am not aware of that.

But there were two instances where we know that specific interrogation plans were used against those with actionable intelligence——

Senator REED. Well, if we substituted the word "interrogation plan" for "matrix," how do you reconcile the statements?

Admiral CHURCH. I would say I do not see the same thing. As a matrix, I understand that to be, Senator, some preplanned sliding or slope of techniques, that I have never seen.

Senator REED. So the real categorical denial was it was not a matrix? These techniques were available. As you have indicated, they were used. But it was not a matrix. So General Miller categorically denied that it was called a matrix; is that your interpretation?

Admiral CHURCH. I have never had that specific conversation with him.

Senator REED. It seems to me a terribly misleading response based upon your findings, to suggest that none of this ever happened. That none of this was ever in any type of document, in any type of plan. I will just stop there.

Admiral CHURCH. Senator, I would like to—I hope my investigation clearly lays out everything that happened, both at Gitmo and in the development of techniques. We know that there was the 2 December memo. We know that was rescinded. We know how we got to the 24 techniques approved by the Secretary of Defense, and we know that on a couple of occasions there were exceptions to that that the Secretary of Defense approved and he has openly discussed.

Senator REED. All of these happened before May 19, 2004?

Admiral CHURCH. Yes, sir.

Senator REED. You had a uniformed officer come up here and object to the term "matrix" by saying that it is categorically wrong; of course, we used these things occasionally?

Admiral CHURCH. I am sorry, Senator. I do not have the context of the question or answer.

Senator REED. Let me turn now to another issue. You worked closely with the Schlesinger committee. When Secretary Schlesinger was here with Secretary Brown, I asked the question: "In October 2003 Secretary Rumsfeld, at the request of Mr. Tenet, ordered the military chain of command to deny at least the registration rights under the Geneva Conventions to an individual who I believe is an Iraqi citizen, an Al-Ansalaam. Do you think that is consistent with the application of the Geneva Conventions to Iraq?"

Secretary Brown: "The answer to that is no, it is not inconsistent."

Dr. Schlesinger: "If that happened, this is not consistent."

Now again, as a factual predicate, I got my information from the public media, so there may be facts in dispute. But have you looked into the situation and certainly the military officers that might have transmitted that command down the chain?

Admiral CHURCH. We document that in our investigation in terms of what happened. I think you are referring to what is generally referred to as "Larry" or "XXX." If that is the same individual—I do not remember the name—then we know how that happened. The Secretary of Defense has said that should not have happened that way.

Senator REED. That is nice, it should not have happened. But there were military officers that at least arguably were following orders that contravene the Geneva Conventions.

Admiral CHURCH. The Secretary of Defense did say that, yes, sir, that is right, that he was not assigned an internment security number for many months, and that has been acknowledged.

Senator REED. As a violation of the Geneva Conventions?

Admiral CHURCH. Yes, sir.

Senator REED. What about those officers that carried out that order, Admiral? They were not privates and corporals and sergeants. They started with generals and colonels and all the way down.

Admiral CHURCH. The individual you are talking to, I think the quote that I have seen, kind of fell through the cracks. In the chaos of the ongoing war, they accepted the individual and did not assign him an internment security number and essentially forgot about him for many number of months until people started trying to find out where he was and then they found him.

Senator REED. Who is being held responsible for allowing that to happen?

Admiral CHURCH. I cannot answer your question. We know it happened and we know why it happened, and it was an unfortunate incident, but it happened.

Chairman WARNER. But your charter by the Secretary of Defense did not require you to reach a conclusion. That is my understanding.

Admiral CHURCH. This whole discussion is well beyond the charter of my investigation——

Chairman WARNER. This what?

Admiral CHURCH. This whole discussion is really beyond the charter. I tried to capture as much as I could. We know that the particular individual fell through the cracks, as I said earlier.

Chairman WARNER. Senator, resume, please.

Senator REED. Thank you, Mr. Chairman.

Just a point. Someone who has been singled out for specialized treatment by the Secretary of Defense and the CIA Director, I find it hard to believe he just falls through the cracks. I find it hard to believe that this just was an administrative goof. I think, frankly, that part of your responsibilities were to look closely at the military chain of command certainly as to how they responded to these orders, some of which clearly are contrary to the convention.

Admiral, this to me is a very disappointing report. The limitations both imposed on you from without and self-imposed apparently, particularly with respect to Mr. Bremer, lead to conclusions—and again, this report is not simply laying out the facts. You have drawn some conclusions, and it seems to me the conclusion is this is all just one big misunderstanding, this policy here, we did not fall not into the cracks, et cetera, which I do not think is an adequate response to the problems we have seen.

I think the chairman asked a very fundamental question: What contributes to breakdown of good order and discipline? I would argue at least in part it is when people in authority, not just E–5s and E–6s, find ways to excuse violations of the law, and that is a very toxic ingredient.

There was an ancient Roman that posed the question, who will guard the Guardians, the question we face today: Who will look after those that we have entrusted with our national security and defense and ensure that they follow laws? I think the jury is still out.

Thank you, Admiral.

Admiral CHURCH. Senator Warner, can I make a comment?

Chairman WARNER. Yes, of course. You can have adequate time to respond to the Senator's last observation and any others you wish.

Admiral CHURCH. Thank you, sir. I would like to challenge the premise that this was all one big misunderstanding. We spent 9 months, as I said initially, over 800 interviews, reviewed thousands and thousands of pages of documents, leveraged all the other reports. I took very seriously my charge as an IG. I understand I was picked because I was an IG, because they wanted an independent look at exactly what happened, how it happened, why it happened. I think I have laid that out with some precision.

I am just reacting to the characterization of the report, which I am proud of and the work that the folks did, as a misunderstanding. Clearly some things were done wrong. Clearly some things in hindsight, Senator, would be done differently, and I think I have captured those. I have laid out all the abuse cases, and had the chips fallen differently I would have made that call. They did not, and I was as factual—and I think that is why you ask an IG to do something like this, is because you get—every IG I have known takes that position of independence very seriously. I took it where it led, and the facts are the facts, and I understand that some people will not like the facts or in some cases the conclusions. But it is not all one big misunderstanding, sir.

Senator REED. Admiral, I respectfully disagree. I think failing to pursue all the facts, failing to at least talk to Ambassador Bremer and to follow up on certain things that seem to emerge from our discussion, suggests that this is not the thorough, complete, no-holds-barred report that many of us expected.

Thank you.

Chairman WARNER. I would simply say, Senator, that I share your views with regard to the integral role that Ambassador Bremer had in the overall decisionmaking in this time period, that he had the designation really given by the President at the recommendation of the Secretary of Defense, is my understanding.

However, I would like to—and I think, Admiral, look, I am a tough old bird. You had a difficult job. You did the best you could professionally, drawing on years of experience, and there is obviously going to be, I think, respectful differences of view. But I am glad you have stated for the record and reaffirmed the work that you and your many subordinates—how large was your team?

Admiral CHURCH. We started with 50 when we went into the theater and started doing our initial investigatory work and asking questions for the record, taking sworn statements. Very shortly after that we were down to a dozen or so, and I think there are two of us standing today, Senator.

Chairman WARNER. I want to call your attention to the headlines, and I select the Washington Post. It reads "Abuse review ex-

onerates policy." I think probably that you would reflect that headline as being reasonably accurate. In other words, you said the policy——

Admiral CHURCH. The policy did not——

Chairman WARNER. —was not the cause, the root cause of these egregious breaches and criminal acts.

Admiral CHURCH. Yes, sir.

Chairman WARNER. But the next line could in the minds of individuals cause confusion, and it reads "Low level leaders and confusion blamed." That implies that the upper level received some type of exoneration, it could be inferred by some, and I want to clarify that. In your series of interviews, I presume you interviewed General Karpinski, General Fast, General Sanchez; would that be correct?

Admiral CHURCH. We did not specifically interview General Karpinski, but the other two we did.

Chairman WARNER. You did. Was there a reason for Karpinski, because of her legal situation at this time?

Admiral CHURCH. No, sir. Again, I leveraged a lot of the other reports and, because Generals Taguba, Fay, Kern, Jones had all looked so thoroughly at that, I did not reinvestigate Abu Ghraib, so I felt no need to interview her. But I did have some questions for General Sanchez and some others, but did not interview her.

Chairman WARNER. The Department of the Army, under the immediate direction of the Secretary and subject to review by the Secretary of Defense, are looking at the issues of accountability and participation by those three officers. It was never your charter, clearly, to establish accountability. So I wish to make clear for the record, you were not interviewing for purposes, I presume, of accountability, but as I in my initial question stated, what was the root cause of so many instances where regulations were completely ignored, good standing regulations and procedures, which allowed these acts to take place.

In your interviews with, say, General Fast and General Sanchez, could you comment on what you learned from each of them?

Admiral CHURCH. Both General Fast and General Sanchez in my opinion were——

Chairman WARNER. Do not mix them. Take one at a time.

Admiral CHURCH. General Sanchez, I had specific questions primarily for General Sanchez on how he developed the techniques that he promulgated in September and then repromulgated in October. So that was the line of questioning. I needed to understand from him what he—what was given to him, did it have a legal review, why did you not just rely on Geneva or the doctrine, why did you promulgate separate interrogation techniques in September. So the line of questioning was how did we develop and promulgate and why did you do that.

I was also trying to follow up on what he knew about the events at Abu Ghraib that maybe had not already been covered. I did not uncover anything new that really we did not already know. General Fast——

Chairman WARNER. Let me just summarize then. With General Sanchez, you determined from your interview that the information

he provided you was consistent with the same information he had given others——

Admiral CHURCH. Yes, sir.

Chairman WARNER. —and which information had been published in any of the other nine series of reports; is that correct?

Admiral CHURCH. It was. I gleaned a couple other things regarding pressure on interrogators, but that is a correct statement, Senator, yes, sir.

Chairman WARNER. Did you confirm that General Sanchez was very shorthanded with staff? He was given an enormous responsibility, very shorthanded with staff, was managing a very hot war situation at the same time he was trying to do a lot of administrative things of this nature; is that correct?

Admiral CHURCH. Consistent with the other investigations, I confirmed that, yes, sir.

Chairman WARNER. Thank you.

Now we turn to General Fast.

Admiral CHURCH. I questioned General Fast on——

Chairman WARNER. You might describe for the record what her area of responsibility was. I know, but I think it is important.

Admiral CHURCH. She was, I guess, the C–2 or the J–2, the head of the intelligence function at the CJTF–7.

Chairman WARNER. Which is General Sanchez's command?

Admiral CHURCH. She worked directly for General Sanchez. She was brought in specifically to put into place the intelligence architecture.

My purpose in talking to her was what she knew about the interrogation policies and what she knew about any instances of abuse and when she knew them. I was able to document all that, and she really was not particularly engaged in the interrogation techniques. It turns out that was mostly the JAGs who put that together.

But since you mentioned those two, I will say that, of all the people I interviewed in the course of this investigation, those two individuals were the most responsive and forthcoming of anybody, and both of them at the time were in the process of permanent change of station orders, and I would get 24-hour turnaround on the questions that I needed answered. So that was not your specific question, but I took the opportunity, Senator, to make that point.

Chairman WARNER. No, but I think that is an important observation.

Now, there is considerable question in the minds of many as to the culpability or nonculpability of seniors in this chain of command. You go up from Colonel Pappas, I presume. Did you have an opportunity to talk with him?

Admiral CHURCH. No, sir. I relied on previous investigations.

Chairman WARNER. Let us talk about the chain of command, as you went up the chain of command whom you interviewed. Obviously, Karpinski, you have answered that. Fast, not direct chain of command, staff, but nevertheless reporting to Sanchez. You have covered Sanchez.

Did you talk to General Abizaid?

Admiral CHURCH. I did, sir.

Chairman WARNER. What can you share with regard to his responses?

Admiral CHURCH. General Abizaid, actually I debriefed him on the way out. Primarily what I did with CENTCOM, I reviewed all the documentation that they had relevant to the development of interrogation policies. I did not interview him specifically because I had all my questions answered.

Chairman WARNER. Any other senior level individuals did you interview?

Admiral CHURCH. Yes, sir. Throughout the Pentagon, all the way up to Deputy Secretary of Defense and the Vice Chairman of the Chiefs of Staff.

Chairman WARNER. I think let us go very thoroughly now. You went through the chain of command right up to the DOD?

Admiral CHURCH. Yes, sir.

Chairman WARNER. You interviewed right up through Secretary Wolfowitz, is that correct?

Admiral CHURCH. That is correct, sir.

Chairman WARNER. And the General Counsel?

Admiral CHURCH. The General Counsel, I interviewed the General Counsel.

Chairman WARNER. Secretary Cambone?

Admiral CHURCH. I did, sir.

Chairman WARNER. So really you did cover with, in my judgment, thoroughness the entire chain as it related to your charter.

Admiral CHURCH. That was my attempt, yes, sir.

Chairman WARNER. I have already indicated that there are ongoing assessments of the culpability of several of these individuals whom we have mentioned and you are aware of that?

Admiral CHURCH. I am aware of that, yes, sir.

Chairman WARNER. So any inference that just low-level officers and leaders blamed could be misconstrued because these are still being examined.

Admiral CHURCH. I have seen the list and that is correct, sir.

Chairman WARNER. I just wanted to make that eminently clear. This committee will continue to discharge its responsibility in this matter as further reports are made available to us, and we will perhaps do some of our own independent work in this area. But your report constitutes a very valuable part of this committee's record.

On the question of ghost detainees, you found that there were violations of the Geneva Conventions regarding failures to account for some detainees, called "ghost detainees," and to make their presence at Abu Ghraib known to the ICRC. What were your findings with respect to this issue? Did you find the type of violation at other detention facilities?

Admiral CHURCH. Senator, we did not find that anywhere else. If I did not say it earlier I should have: The CIA cooperated with our investigation and in fact reviewed that section of the report. Between what we had and what they had, we determined that there were about 30 "ghost detainees," although that is not a term of doctrine, that existed, I think the maximum was for a period of 45 days. That has long since been discontinued, but we did document that we think about 30 ghost detainees did occur.

Chairman WARNER. Let us turn to the professional military intelligence in the Department of the Army. You conclude in your report

that only 20 of the substantiated cases of abuse were interrogation-related and that only a few of these incidents actually involve military investigators. Were the methods and techniques used by these interrogators derived from any policy issued by the local command, and in the absence of that policy or the circumstances of changing policy what guided the actions of these interrogators, and did you feel that the professional military interrogators were well trained individuals?

Admiral CHURCH. You are correct, sir, using the expansive definition of "interrogation-related," we found about 20 instances of the 70 abuse cases. Again, the way we classified that, that was even MPs or any member at the point of capture.

None of these directly related to any of the authorized interrogations. Although interrogators were in short supply, as we have known and documented, I found the professional training to be quite good, those that we had.

Chairman WARNER. Therefore you feel that the intelligence segment of the Department of the Army had in the field well-trained individuals?

Admiral CHURCH. Yes, sir. Not in sufficient numbers, but well trained.

Chairman WARNER. Thank you very much.

Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

There has been reference to a very critical memo here that you were able to look at but not take a copy of. That is that March 14 memo prepared by Deputy Assistant General Attorney Yu for Mr. Haynes.

Mr. Chairman, we have a right to that memo. I think the Admiral had a right to have a copy of that memo, but that is up to him to decide. This committee has a right to that memo. I would ask that we on an urgent basis get that memo. It has been referred to numerous times. It was a key part of this whole interrogation decision. It was a memo, a controlling memo, despite the concerns of the lawyers inside of the military. I would ask you, Mr. Chairman, that we make a formal request for a copy of that memo.

Obviously, if they want to give it to us on a classified basis that's one thing. But not to have a copy of that memo is totally unacceptable. I am afraid it is too typical of a very great reluctance on the Department's part to be fully supportive with documentation which has been requested on other occasions by us. But anyway, my specific request, Mr. Chairman, is for that March 14, 2003, memo.

Chairman WARNER. As you know from our long working relationship of 27 years on this committee, I feel that Congress is a coequal branch and as such, unless there is executive privilege attached to certain documents, Congress should have them, and I will look into this with you.

Senator LEVIN. I thank you.

Chairman WARNER. Thank you.

Senator LEVIN. I thank you for that.

Now, Admiral, you indicated as I understand it, that you were not tasked to assess personal responsibility at senior levels, is that correct?

Admiral CHURCH. That is correct, sir.

Senator LEVIN. In your report you say that issues of senior official accountability were addressed by the Schlesinger Panel. But the Schlesinger Panel did not address the issue. As a matter of fact, they were specifically tasked not to. In their tasking from the Secretary on May 12, 2004, they were told that issues of personal accountability were to be resolved through established military justice and administrative procedures. So they were not tasked. In fact, they were quite clearly told to stay away from it. Then this one qualifier was added: "although any information you may develop will be welcome."

So what did you mean when you said the Schlesinger Panel was tasked to assess personal accountability at senior levels, that was not your job?

Admiral CHURCH. Thank you for the opportunity to explain. The Schlesinger Panel charter was pretty open-ended. The Secretary of Defense verbally told them: "You look at anything you need to look at." You are correct, it may not be in writing.

We worked very closely with that panel. As I mentioned earlier, I think, we provided all the data that you see in their report. I reviewed their drafts. We exchanged information. Early on in working together with that panel, I made the observation that I was not tasked to look into responsibility, individual or high-level responsibility. It evolved and an agreement was made that they would do that, and that kept me within my charter to look at interrogation and development of interrogation techniques.

There was nothing formal about that, but there was an understanding that they would do that, and I as I looked at their report, I thought they had. Now, there is a difference between responsibility and accountability, as you well know, Senator. I thought they assessed responsibility fairly clearly.

Senator LEVIN. This is about the only thing they said that we can find, that the abuses were not just a failure of some individuals to follow known standards and they are more than the failure of a few leaders to enforce proper discipline. There is both institutional and personal responsibility at higher levels.

Did they identify anybody at higher levels who bears personal responsibility?

Admiral CHURCH. They did, sir. There are about five instances in the report that I pulled out. One comment, Lieutenant General Sanchez and his deputy failed to ensure proper staff oversight of detention and interrogation operations. The quote that you just had, and interrogation policies with respect to Iraq, where the majority of the abuses occurred, were inadequate or deficient in some respects at three levels: DOD, CENTCOM–JTF–7, and the prison itself.

Chairman WARNER. Could you give us the citation of the material that you are reading?

Admiral CHURCH. Yes, sir.

Senator LEVIN. I quoted that before, so we do have that citation.

Did they identify any personal responsibility? Did they say who it was up in the chain of command that was the cause of the confusion, what was the reason why there were inconsistent rules relative to interrogation, who it was who blocked the lawyers who had objections to the rules that were proposed by the Office of Criminal

Justice (OCJ)? Did they do any assessment of responsibility, name any names, up that chain of command above Sanchez?

Admiral CHURCH. Beyond what I told you, no, sir.

Senator LEVIN. Okay. There was reference here to the definition of "humane treatment" that was supposed to be followed at Gitmo. Did you agree with General Miller's definition of "humane treatment?"

Admiral CHURCH. I do not remember specifically what that was, so I will not give you a specific answer, sir. He may have said something I am not aware of.

Senator LEVIN. So you do not remember having a reaction to his definition of "humane treatment," as to whether it was too narrow?

Admiral CHURCH. No, sir, I do not. Sorry.

Senator LEVIN. One of the tactics which was referred to in the FBI e-mail, was—I am quoting here—that "DOD interrogators impersonated special agents of the FBI when talking to detainees, that this tactic produced no intelligence," they said, "of a threat, that it may have destroyed any chances of prosecuting the detainees." But my point here is the tactic itself, DOD personnel and interrogators impersonating FBI agents.

Did you check into that and see what the basis of that tactic was, the origin of the tactic?

Admiral CHURCH. There is a tactic, impersonating personnel from a third country, for example. That is part of the basic concept of interrogation, which is deceit to try to get the information. You could almost make the case that falls within doctrine.

Senator LEVIN. The FBI objected to that, is that correct?

Admiral CHURCH. Yes, sir, as I remember.

Senator LEVIN. Did you talk to the FBI about why they objected to it?

Admiral CHURCH. We had the FBI memo. As I may have, I hope I mentioned, we looked very clearly at that. We know the couple of instances they are talking about. In the early development of the techniques, a lot of things were being considered. That eventually led to the October memo that SOUTHCOM forwarded up. But we are aware of that, sir.

Senator LEVIN. Did you talk to the FBI people as to why they objected, though?

Admiral CHURCH. Not specifically, no, sir.

Senator LEVIN. It is hard for me to believe that it is, it is DOD doctrine that they impersonate FBI agents. Are you saying it is doctrine that they do that?

Admiral CHURCH. No, sir, I am not saying that. I am saying that doctrine in itself and interrogation in itself are deceptive in that you are trying to get information from a witness who does not want to give you that information. It calls to point the basic elasticity of doctrine. One of the doctrine techniques is "fear-up harsh" and, as many have said before me, much of the expanded interrogation techniques could easily have fit within that definition of doctrine, which is why I make the case in the report that we need to clearly get new doctrine out there that all of our interrogators understand. That is the imperative piece, and doctrine that will allow us to get the actionable intelligence that we need.

Senator LEVIN. Staying within the rules of law?

Admiral CHURCH. Absolutely, sir.

Senator LEVIN. It is that elasticity which I am afraid was stretched beyond the rule of law here and which has gotten us in a lot of trouble as a Nation and our troops in the future in some real threatening situations. That is really what the issue is here.

The reference in the FBI document to the torture techniques that they witnessed, I specifically want to ask you, did you talk to the writers of that memo about what they witnessed and described as torture techniques by DOD personnel?

Admiral CHURCH. No, sir.

Senator LEVIN. Why not?

Admiral CHURCH. Well, I got the information—we actually even had a member of our team who was part of the Criminal Investigative Task Force working with the FBI down there. So we knew about this. We had the information. When we saw the memo, we quickly reacted to see if in fact we had covered everything that was in that memo. There was, as I mentioned, I hope, one incident that we did not think had been followed up.

I would like to add, as you already know, that SOUTHCOM is following up on the allegations and the current Naval IG has already reviewed I believe 16,000 documents to try to trace this back to make sure we do not have any gaps in that information, Senator.

Senator LEVIN. There is a named person whose name is redacted for us, and it seems to me a thorough investigation would talk to the writer of those memos. That is just part of thoroughness to me. You can say you think you covered it in other ways. Maybe you did, but you do not know until you talk to the people who wrote the memos, who saw what they described as torture techniques.

So I think it is just satisfactory to simply leave it at that and I cannot.

Thank you, Admiral.

Chairman WARNER. Thank you, Senator Levin.

We have to immediately get to the vote. They are holding it for us. I want the record to reflect that the charter given by the Secretary of Defense to the Schlesinger commission—and by the way, I in my modest career have never met a finer man than Jim Schlesinger. I was privileged to serve under him as Secretary of the Navy during the Vietnam War era. I have a similar respect for his partner, the other Secretary of Defense, and we will be in consultation with them.

But I read from the charter given by Rumsfeld: "Issues of personal accountability will be resolved through established military justice and administrative procedures, although any information you"—that is Schlesinger and Harold Brown and others—"may develop will be welcome."

I find on page 47 of the Schlesinger report some fairly specific findings pursuant to that charter. For example: "The CJTF–7 deputy commander failed to initiate action to request additional military police for detention operations after it became clear there were insufficient assets in Iraq." There are several others cited here. I will put them in the record in their entirety.

[The information referred to follows:]

The Panel finds the following:

• The CJTF–7 Deputy Commander failed to initiate action to request additional military police for detention operations after it became clear that there were insufficient assets in Iraq.
• The CJTF–7 C–2 Director for Intelligence failed to advise the commander properly on directives and policies needed for the operation of the JIDC, for interrogation techniques and for appropriately monitoring the activities of Other Government Agencies (OGAs) within the Joint Area of Operations.
• The CJTF–7 Staff Judge Advocate failed to initiate an appropriate response to the November 2003 ICRC report on the conditions at Abu Ghraib.

FAILURE OF THE COMBATANT COMMAND TO ADJUST THE PLAN

Once it became clear in July 2003 there was a major insurgency growing in Iraq and the relatively benign environment projected for Iraq was not materializing, senior leaders should have adjusted the plan from what had been assumed to be a stability operation and a benign handoff of detention operations to the Iraqis. If commanders and. staffs at the operational level had been more adaptive in the face of changing conditions, a different approach to detention operations could have been developed by October 2003, as difficulties with the basic plan were readily apparent by that time. Responsible leaders who could have set in motion the development of a more effective alternative course of action extend up the command chain (and staff), to include the Director for Operations, Combined Joint Task Force 7 (CJTF–7); Deputy Commanding General, CJTF–7; Commander CJTF–7; Deputy Commander for Support, CFLCC; Commander, CFLCC; Director for Operations Central Command (CENTCOM); Commander, CENTCOM; Director for Operations, Joint Staff; the Chairman of the Joint Chiefs of Staff; and the Office of the Secretary of Defense. In most cases these were errors of omission, but they were errors that should not go unnoted.

Chairman WARNER. This committee will continue to work with the Secretary of Defense, who has been extremely cooperative throughout our work here in the committee. He was the first witness. He stood up and said in his capacity as the ultimate authority he takes his share of the accountability. I commended him for that and still do. I know of a number of ongoing things initiated by the Secretary and others under the administrative and judicial procedures.

So there is much work yet to be done, but I think it is to the credit of this great Nation that there have been 10 reports on this very distressing chapter in our military history, otherwise a military history that is envied by the whole world, and as I mentioned in my opening statement, over a million men and women in uniform have rotated in and out of the area of responsibility (AOR) of Iraq and then more in Afghanistan, and when you look at the small fraction of those who have been adjudged guilty and are still in the process it shows that these fine persons in uniform and others went there and discharged those difficult and dangerous missions with great integrity and in accordance with the rule of law as the best they could understand it.

I thank you, Admiral. We will resume this hearing in closed session in 222 Russell as soon as three consecutive votes are finished.

[Questions for the record with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR JOHN MCCAIN

INTERROGATION TECHNIQUES

1. Senator MCCAIN. Admiral Church, in December 2003, Senator Lindsey Graham, Senator Maria Cantwell, and I visited the detainee facility in Guantanamo (Gitmo). Subsequent revelations by the Federal Bureau of Investigation (FBI) and others indicate severe issues with detainees such as attempted mass suicides (as many as 25 detainees on one day) occurred just 3 months prior to our visit, yet no mention of the problem was made during our visit. Furthermore, recent revelations

of interrogation techniques where female interrogators smeared menstrual blood, rubbed their bodies against detainees, wore skimpy clothes, made sexually explicit remarks, touched detainees provocatively, etc. were never described during our visit. The FBI thought that these techniques diminished Muslim religious purity and were improper. What do your findings show to demonstrate the reason why these sexually suggestive tactics were by Department of Defense (DOD) interrogators?

Admiral CHURCH. Our investigation found two cases in which separate female Army interrogators touched and spoke to detainees in a sexually suggestive manner during interrogations at Gitmo. In one of the cases, the interrogator smeared red ink (not blood) on a detainee, telling him it was menstrual blood. In both cases, the soldiers evidently devised the sexually suggestive tactics on their own initiative to gain intelligence. Both interrogators were reprimanded for their actions immediately after they took place. There was no policy, written or otherwise, that approved the use of sexually suggestive interrogation tactics.

2. Senator MCCAIN. Admiral Church, what are your thoughts on the problem and what purpose do you feel was accomplished by not informing me of the problem?

Admiral CHURCH. Our investigation did review detainee medical and mental health care issues in general, and specifically at Gitmo. We documented that there had been a spike in self-injurious behavior involving 23 detainees between August 18 and 26, 2003. (Two of the 23 incidents were judged to be bona fide suicide attempts.) As detailed on page 349 of my report, however, the medical staff assessed that some detainees were engaging in such behavior to gain prolonged observation at the more comfortable Detainee Hospital, and therefore implemented mental health protocol changes in early 2004 that emphasized evaluation-in-place for lower-grade self-injurious behavior. This change dramatically reduced such episodes. No detainee has committed suicide at Gitmo, and the most recent attempt that I am aware of took place in January 2004.

Nevertheless, mental health of detainees has been a concern of both the Commander, Joint Task Force (CJTF) Gitmo and the International Committee of the Red Cross (ICRC). For example, during our first visit to Gitmo in May 2004, 66 of the over 550 detainees (roughly 12 percent) were receiving mental health services, with 7 housed in the psychiatry cellblock for continuous observation.

I do not know why you were not informed of the spike in self-injurious behavior or the reprimands for sexually suggestive interrogation tactics during your December 2003 visit. In my view, you should have been informed.

QUESTIONS SUBMITTED BY SENATOR JAMES M. INHOFE

REVIEW OF MULTIPLE REPORTS AND INVESTIGATIONS

3. Senator INHOFE. Admiral Church, thank you and your staff for the extensive work you did in compiling into one report all of the major investigations that have inquired into detention operations and detainee interrogation techniques. Your appearance here today will serve to shed light onto an issue that has been misunderstood by many.

The U.S. Government currently maintains custody of approximately 550 enemy combatants in the global war on terrorism at Gitmo. Many of these enemy combatants are highly trained, dangerous members of al Qaeda, its related terrorist networks, and the former Taliban regime. Our intelligence and law enforcement communities develop leads, comprehensive assessments, and intelligence products based on information the detainees provide. The information includes their leadership structures, recruiting practices, funding mechanisms, relationships, and the cooperation between terrorist groups, as well as training programs, and plans for attacking the United States and other countries. Further, as Coalition Forces in Afghanistan continue to capture al Qaeda, Taliban, and anti-coalition militia fighters, Gitmo detainees remain a valuable resource to identify forces that operate against the freedom.

It is my understanding that detainees held in Iraq, at Abu Ghraib, were either actively involved in operational planning for attacks against our Coalition Forces there or had already participated in attacks against our forces. They were working on behalf of former Baathist now acting as insurgents or on behalf of terrorist leaders from outside of Iraq such as Zawqari.

Based on the extensive knowledge that these detainees possess, it is critical that we gain as much insight as possible into information they have that will assist us in derailing the actions of those who stand against freedom. Our military Services and our government have policies and techniques that we use to gather this infor-

mation. We should ensure that these policies and techniques are employed. As we discover that additional training, clarification, and adjustments are needed in policies and techniques to give better guidance to our young men and women, we should make these changes. As individuals fail to follow these policies and techniques, we should investigate to ensure we understand what has occurred and we must allow the military justice system to deal effectively with them, as they have to this point and I feel confident will continue to do so.

With your report, we have had about 10 major investigations into this matter. Some in the media have denigrated the work of the leaders in charge of the other reports. They have accused them of whitewashing and stonewalling the truth.

Let me review some of the leaders who have headed up these investigations:

1. General Don Ryder, U.S. Army
2. General Geoff Miller, U.S. Army
3. General Antonio Taguba, U.S. Army
4. General Paul Mikolashek, Army Inspector General (IG)
5. Generals Paul Kern, George Fay, and Anthony R. Jones
6. General Charles Jacoby
7. Secretary James Schlesinger, Secretary Harold Brown, the late Rep. Tillie Fowler, and General Charles Horner
8. General Richard P. Formica

Now we have your report, Admiral Church. These officials, military and civilian, represent over 300 years of service to our Nation. You and your staff conducted over 800 interviews, reviewed over 3,000 documents, and talked to everyone you believed had information relevant to your investigation. Some commentators have dismissed several of the previous reports as "whitewash" or as cover-ups. Did you come across anything that would cause you to believe or suspect that any of these officials who conducted these investigations were pursuing an agenda other than seeking the truth?

Admiral CHURCH. Absolutely not.

CONFUSION IN INTERROGATION TECHNIQUES

4. Senator INHOFE. Admiral Church, in reading your report, it is stated that there was confusion in the development of the interrogation practices in Iraq and Afghanistan. Regardless of whether you are talking about properly approved techniques or improperly approved techniques, did you ever find anything that sanctioned the practices that showed up in the infamous Abu Ghraib photos?

Admiral CHURCH. No, I did not.

5. Senator INHOFE. Admiral Church, is it fair to say that whatever confusion there might have been, no one could have reasonably believed that what we saw in those infamous photos was in accordance with approved practices?

Admiral CHURCH. Yes, it is.

INTERROGATION TECHNIQUE RECOMMENDATIONS TO SECRETARY RUMSFELD

6. Senator INHOFE. Admiral Church, in the winter and spring of 2003, there was a working group, led by U.S. Air Force General Counsel Mary Walker, that reviewed the law on interrogation practices and made a recommendation to the Secretary of Defense (SECDEF) on what techniques should be allowed at Gitmo. How many techniques did the working group recommend and how many did the SECDEF approve?

Admiral CHURCH. The working group recommended 35 techniques, which excluded several techniques (such as "water boarding") that it had considered early on but later determined to be unacceptable under U.S. laws or policies. SECDEF approved 24 techniques, most of which were taken directly from or closely resembled those in Field Manual (FM) 34–52, the Army interrogation doctrine manual.

7. Senator INHOFE. Admiral Church, isn't it correct that the SECDEF approved for use fewer than the total number of interrogation techniques approved by the working group? In other words, his directive was narrower than what the group concluded the law allowed?

Admiral CHURCH. Yes, that is correct. SECDEF approved 24 of the 35 techniques recommended by the working group. Most of those 24 techniques were taken directly from or closely resembled those in FM 34–52, the Army interrogation doctrine manual.

QUESTIONS SUBMITTED BY SENATOR EDWARD M. KENNEDY

CLASSIFICATION OF REPORTS

8. Senator KENNEDY. Admiral Church, obviously, we must all be sensitive of the need to keep matters of national security classified. However, I am concerned that you did not provide an unclassified version of your report beyond the executive summary. The executive summary does not explain why the abuses occurred. Is there any reason why you did not provide an unclassified version? I believe it is very important to get this issue into the public arena.

Admiral CHURCH. I did not generate an unclassified version of the full report because much of the subject matter remains classified. The Office of the Secretary of Defense (OSD) is now working to declassify and/or redact the report as required to make the full version available to the public. In addition, the unclassified Executive Summary was intended to make my central findings immediately available to the public. The section of the Executive Summary titled "Underlying Reasons for Abuse" (pages 15–16) provides my best military judgment as to the factors that may explain why abuse occurred. I do not present additional factors in the classified report.

9. Senator KENNEDY. Admiral Church, who classified the report and why? Will you provide an unclassified version of the full report to the public?

Admiral CHURCH. The report is not classified in a "blanket" sense; rather, individual sections and paragraphs are classified as appropriate based directly upon the classification of the sources cited. The OSD is now working to declassify and/or redact the report as required to make the full version available to the public. In addition, the unclassified Executive Summary was intended to make my central findings immediately available to the public.

HUMANE TREATMENT

10. Senator KENNEDY. Admiral Church, you conclude that the Pentagon's radical revision of its rules on interrogation had no effect on our forces in the field, because President Bush had instructed the military to treat detainees "humanely." But the President's directive did not apply to the CIA at all, and it contained a "military necessity" exception that could be used to justify almost any abuse. But the term "humane" is far too general and vague to guide soldiers in the field. To do their duty, soldiers need specific guidance on how to treat detainees and how to conduct interrogations. That's why in the past, soldiers have had to follow the Army FM on Interrogations and Army Regulations on Detention.

It's now clear that after September 11, DOD General Counsel William Haynes and Justice Department (DOJ) lawyers threw the military's existing rules and regulations out the window. In November 2002, DOD General Counsel William Haynes advised Secretary Rumsfeld that it was both legal and humane to use such tactics as forced nudity, waterboarding to simulate drowning, threats to kill detainees' family members, and aggressive military dogs. The next year, the Haynes Working Group twisted the definition of torture beyond recognition, and advised military personnel that they weren't required to comply with the Federal prohibition on torture.

Obviously the vague and undefined Presidential directive to act "humanely" did not prevent such specific and extreme changes in military rule. What were soldiers told when they asked if a particular tactic was inhumane?

Admiral CHURCH. Department of Defense (DOD) personnel are required to comply with U.S. law (including the Uniform Code of Military Justice (UCMJ)), interrogation doctrine (contained in Army Field Manual (FM) 34–52), and command approved interrogation guidance as appropriate, and existing regulations on detention operations. The "military necessity" principle does not permit servicemembers to violate the law or DOD policy. DOD does not permit, tolerate, or condone torture by its personnel under any circumstances. DOD policy is to treat all detainees and conduct interrogations, wherever they may occur, in a manner consistent with this commitment.

We found no evidence whatsoever that the DOD General Counsel ever advised the Secretary of Defense that "waterboarding," threats to kill detainees' family members, or the use of "aggressive" dogs were legal or humane interrogation techniques. In particular, based on the General Counsel's recommendation, Secretary Rumsfeld specifically rejected "waterboarding" and threats of pain or death to detainees or their families (both of which had been proposed as Category III techniques by the command at Guantanamo). In the November 27, 2002 Action Memo (declassified and released to the public on June 22, 2004) in which he recommended the techniques that the Secretary approved on December 2, 2002, the General Counsel stat-

ed that "[w]hile all Category III techniques may be legally available, we believe that, as a matter of policy, blanket approval of Category III techniques is not warranted at this time. Our Armed Forces are trained to a standard of interrogation that reflects a tradition of restraint."

We found no evidence that military personnel were ever advised (nor did they believe) that they were not required to comply with the prohibition against torture of the UCMJ.

11. Senator KENNEDY. Admiral Church, the only official definition of "humane" that I've heard from this administration is the one given to us by Alberto Gonzales in January. He said that he defined "humane treatment" as "a basic level of decent treatment that includes such things as food, shelter, clothing, and medical care." Isn't that guidance inadequate for soldiers and interrogators in the field? It doesn't say anything about physical abuse, or how detainees should be treated during interrogation.

Admiral CHURCH. No, the current guidance for interrogations is adequate with regard to humane treatment. Although there is no single agreed upon definition of "humane treatment" in relevant legal authorities such as the Geneva Conventions and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), it is clear to all that applicable authorities do not permit physical abuse. For example, the Uniformed Code of Military Justice prohibits maltreatment and abuse of detainees.

Further, Army Regulation 190–8, Enemy Prisoners of War, Retained Personnel, Civilian Internees, and, Other Detainees (which applies to all Military Departments), paragraph 1–5, provides for the humane treatment of detainees. Also, Field Manual 27–10, the Law of Land Warfare, paragraph 89, provides that prisoners of war will be treated humanely. Field Manual 34–52, Intelligence Interrogation, Chapter 1, also prohibits the inhumane treatment of detainees.

12. Senator KENNEDY. Admiral Church, do you think that a definition of "humane treatment" that just talks about detainees' living conditions is enough?

Admiral CHURCH. No, and this is not the situation in the Department of Defense. The President articulated in the Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, November 13, 2001, that detainees will be treated humanely, including the following:

- To be treated without any adverse distinction based on race, color, religion, gender, birth, wealth, sex, or any similar criteria;
- Sufficient food, drinking water, shelter, clothing, and medical treatment; and
- Free exercise of religion, consistent with the requirements of detention.

In addition, several DOD regulations and policies, pursuant to applicable law (described on pages 29–34 of my report), prescribed additional detainee protections over and above their living conditions.

13. Senator KENNEDY. Admiral Church, who should be accountable for what happened?

Admiral CHURCH. Senior-level responsibility was addressed by Dr. Schlesinger's Independent Panel to Review DOD Detention Operations. In addition, the Army IG is conducting a number of reviews to assess the individual responsibility of senior Army officers. The purpose of my investigation was to provide data, which could then be used by the appropriate authorities in assessing accountability. I firmly believe that accountability must be determined in accordance with processes established by laws and regulations.

QUESTIONS SUBMITTED BY SENATOR DANIEL K. AKAKA

INVESTIGATION TECHNIQUES

14. Senator AKAKA. Admiral Church, your original tasking from the SECDEF was to investigate detention operations at Gitmo. In that investigation you indicated that there was no evidence of abuse. It has been reported that in that investigation no detainees were interviewed. My question to you is, if you did not interview any detainees at Gitmo, how can you accurately assess the allegations of abuse?

Admiral CHURCH. My original review of detainee operations at Gitmo, completed in May 2004, found no evidence of noncompliance with DOD orders and no evidence or suspicion of serious or systemic problems. It did, however, note several infractions for which interrogators or military police had been disciplined. My team also

reviewed thousands of pages of documents from the ICRC, which I found to be informative and an effective conduit for detainees' concerns. I found that military commanders and criminal investigative authorities were appropriately investigating allegations of abuse relayed by the ICRC.

15. Senator AKAKA. Admiral Church, since Secretary Rumsfeld expanded the scope of your investigation to include operations in Iraq and Afghanistan, did your panel then follow the same procedure?

Admiral CHURCH. Yes, we did.

INTERROGATION TECHNIQUES

16. Senator AKAKA. Admiral Church, you state in your report that there was no official policy sanctioning detainee abuse in Iraq, Afghanistan, or Gitmo. While there may not have been an official policy, in December 2002 and again in April 2003 new interrogation techniques were approved by the SECDEF, and were used at Gitmo. It is my understanding that Major General Geoffrey Miller, former Commander at Gitmo, was then assigned to Iraq and used techniques similar or identical to those used at Gitmo. Would it be fair to say that assigning the former Commander of Gitmo to Abu Ghraib sends a message that the techniques used at Gitmo are approved methods of interrogation?

Admiral CHURCH. No, it would not. As described in my report, the techniques approved for use at Gitmo in April 2003 were indeed incorporated in Lieutenant General Sanchez's September 2003 interrogation policy for Iraq (which preceded Major General Miller's July 2004 assignment as Deputy Commanding General for Detainee Operations). However, General Miller had given the Gitmo techniques to General Sanchez during his September 2003 visit to Iraq with the caveat that the Geneva Conventions applied in Iraq, and that the techniques would have to be assessed in that light. General Sanchez's legal staff vetted the September 2003 interrogation policy for Geneva compliance before its approval. We found no evidence that interrogators in Iraq employed techniques other than those that they believed to fall within either existing doctrine or interrogation policies explicitly approved for use in Iraq. Interrogators also uniformly reported that they understood that the Geneva Conventions applied in Iraq.

17. Senator AKAKA. Admiral Church, earlier reports authorized by the DOD provided very harsh assessments of private civilian contractors at Abu Ghraib. Specifically, it was suggested that at least one civilian contractor be fired for lying to investigators and for allowing military policemen not trained in interrogation techniques to facilitate interrogations that clearly equated to physical abuse. Would you please tell the committee how extensive your investigation was with regard to civilian contractors and what you found about their detainee interrogation practices?

Admiral CHURCH. We interviewed over 20 contract interrogators and intelligence analysts, and examined laws and DOD policies applicable to contract personnel. We found that, with limited exceptions (as in the well-known cases of contractor-perpetrated abuse at Abu Ghraib), contractor compliance with law and DOD interrogation policies was satisfactory. We did not reinvestigate previous investigations' conclusions regarding specific cases of abuse perpetrated by contractors.

18. Senator AKAKA. Admiral Church, we continue to have investigations into detention procedures and detainee interrogation techniques, that look at the same areas, ask the same questions, and provide the same results. While there may be more formal guidance from the DOD now on detention operations, this does not address issues such as the CIA's unacknowledged practice of transferring suspected terrorists to foreign countries for interrogation, or the DOD's transfer of some prisoners to countries such as Pakistan, Morocco, Egypt, Jordan, Syria, Saudi Arabia, and Kuwait. Will we ever get a complete analysis and understanding of detention operations in Iraq, Afghanistan, and Gitmo without conducting an investigation that has full access to all the information from the DOD and the Intelligence community?

Admiral CHURCH. I was granted full access to all DOD personnel and information in the conduct of my investigation, and I am confident that my report represents the full range of data available within DOD as of September 30, 2004. The independent activities of other government agencies were beyond the scope of my investigation.

19. Senator AKAKA. Admiral Church, I would like to follow up on Senator Reed's question to you regarding whether you interviewed Ambassador L. Paul Bremer,

Administrator of the Coalition Provisional Authority (CPA), for your report. I am concerned by your response that you did not question Ambassador Bremer because he was attached to the Department of State. As we know, Ambassador Bremer was the head of the CPA, a division of the DOD, and as Administrator he reported directly to the SECDEF. Given your own misunderstanding of the chain of command in existence in Iraq at the beginning of the conflict until now, do you believe that similar misinterpretations by other military personnel could have contributed to the lack of understanding over authorized interrogation techniques?

Admiral CHURCH. The issue of whom Ambassador Bremer worked for has been the point of much discussion. The May 9, 2003, appointment letter from President Bush to the Honorable L. Paul Bremer directed that he "serve as my presidential Envoy to Iraq, reporting through the SECDEF." It also authorized him to "oversee, direct, and coordinate all United States Government programs and activities in Iraq, except those under the command of Commander, U.S. Central Command."

Consistent with this direction, we found no evidence that Ambassador Bremer was ever involved, or perceived to be involved, in the development or implementation of military interrogation techniques. Furthermore, none of the investigations conducted on detention and interrogation operations in the global war on terrorism found any evidence of involvement by Ambassador Bremer in interrogation policy or practices. Lieutenant General Sanchez, the senior military commander in Iraq at the time, approved the interrogation policies. We found that in cases where interrogators were not aware of the policies approved by General Sanchez, they defaulted to their training, experience, and existing interrogation doctrine (Army FM 34–52).

[Whereupon, at 11:36 a.m., the committee adjourned.]

THE INVESTIGATION INTO FEDERAL BUREAU OF INVESTIGATION ALLEGATIONS OF DETAINEE ABUSE AT THE GUANTANAMO BAY, CUBA, DETENTION FACILITY

WEDNESDAY, JULY 13, 2005

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, DC.

The committee met, pursuant to notice, at 9:40 a.m. in room SD–106, Dirksen Senate Office Building, Senator John Warner (chairman) presiding.

Committee members present: Senators Warner, McCain, Inhofe, Roberts, Sessions, Talent, Chambliss, Cornyn, Levin, Kennedy, Reed, E. Benjamin Nelson, and Clinton.

Committee staff members present: Judith A. Ansley, staff director; and Leah C. Brewer, nominations and hearings clerk.

Majority staff members present: Charles W. Alsup, professional staff member; Regina A. Dubey, professional staff member; Sandra E. Luff, professional staff member; David M. Morriss, counsel; Lynn F. Rusten, professional staff member; Scott W. Stucky, general counsel; Diana G. Tabler, professional staff member; and Richard F. Walsh, counsel.

Minority staff members present: Richard D. DeBobes, Democratic staff director; Bridget W. Higgins, research assistant; Gerald J. Leeling, minority counsel; Peter K. Levine, minority counsel; and William G.P. Monahan, minority counsel.

Staff assistants present: Andrew W. Florell, Catherine E. Sendak, and Nicholas W. West.

Committee members' assistants present: Christopher J. Paul and Paul C. Hutton IV, assistants to Senator McCain; John A. Bonsell and Mark Powers, assistants to Senator Inhofe; Chris Arnold, assistant to Senator Roberts; Arch Galloway II, assistant to Senator Sessions; Clyde A. Taylor IV, assistant to Senator Chambliss; Meredith Moseley, assistant to Senator Graham; Russell J. Thomasson, assistant to Senator Cornyn; Mieke Y. Eoyang, assistant to Senator Kennedy; Elizabeth King, assistant to Senator Reed; William K. Sutey and Dan Shapiro, assistants to Senator Bill Nelson; Eric Pierce, assistant to Senator Ben Nelson; Mark Phillip Jones and Kimberly Jackson, assistants to Senator Dayton; and Andrew Shapiro, assistant to Senator Clinton.

OPENING STATEMENT OF SENATOR JOHN WARNER, CHAIRMAN

Chairman WARNER. The committee meets this morning to receive the testimony of the U.S. Southern Command (SOUTHCOM) investigation into the e-mails that came to light as a consequence of a Freedom of Information Act (FOIA) request in December 2004. The SOUTHCOM Commander, General Craddock, tasked first General Furlow and then subsequently General Schmidt to undertake the investigation, and we will put into the record, gentlemen, the order that you signed out, General Craddock, to have this investigation done at the conclusion of my remarks.

We welcome our witnesses this morning: General Bantz J. Craddock, USA, Commander of the U.S. Southern Command; Lieutenant General Randall M. Schmidt, USAF, Senior Investigating Officer; and Brigadier General John T. Furlow, USA, Investigating Officer. We thank our witnesses and all others who are in attendance here this morning.

In December 2004, pursuant to the allegations of detainee abuse at Guantanamo Bay (Gitmo) which were brought to light pursuant to a FOIA request for the Federal Bureau of Investigations (FBI) e-mails, General Craddock, you took very prompt action and convened this panel to investigate.

This is the 12th major senior-level review of detainee operations and allegations of detainee abuse that has completed by various elements of the Department of Defense (DOD) and indeed an independent panel, the Schlesinger-Brown panel. In my judgment, the Department has performed credibly in investigating allegations of abuse and failure to follow professional standards and the law and regulation in these instances.

The allegations of abuse referred to in the FBI e-mails occurred from the period of August to December 2002, and had come to the leadership of the Joint Task Force (JTF) Gitmo and SOUTHCOM and were in fact under investigation at that time. Appropriate procedural and disciplinary actions have been taken in some of the cases. This morning General Craddock will describe in detail the 28 e-mails which were turned into the Director of the FBI in response to his request to his agents and detail each of them as they were examined.

The report before us this morning by General Craddock and his team indicated in three instances, just three instances, interrogations at Gitmo used techniques that violated Army doctrine and guidance from DOD. Now, this apparently is three out of some 24,000 interrogations that were conducted at Gitmo over the past 3 years.

Now, General, we will also ask you to brief the committee in some detail—and by the way, colleagues, we will have this open hearing, which Senator Levin and I felt was essential, and this will be followed by a closed hearing. But in the course of the open hearing we will ask you, General Craddock, to give us your explanation for in effect reversing the finding of your two colleagues, Generals Schmidt and Furlow, and I quote that finding in the report: "Major General Miller should be held accountable for failing to supervise interrogation of ISN–063"—that is a high-value detainee—"and should be admonished for that failure." That is on page 2 of the

Schmidt-Furlow report. You, General Craddock, as the convening authority and the final reviewer, did not agree with this finding and you will give us your thoughts on that.

I feel very strongly that the Department and other entities which have examined this whole series of incidents at the prison, it clearly indicates that this Nation is a nation of laws and it will not tolerate inappropriate behavior by members of the Armed Forces or anyone else, and this Nation will investigate allegations of wrongdoing and, in accordance with due process, if persons are found who have violated those laws they will be held responsible. This report is another very important step in that direction.

I think that will conclude my opening remarks.

[The information referred to follows:]

Army Regulation 15-6: Final Report

Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility

EXECUTIVE SUMMARY

Detention and interrogation operations at Joint Task Force Guantanamo (JTF-GTMO) cover a three-year period and over 24,000 interrogations. This AR 15-6 investigation found only three interrogation acts in violation of interrogation techniques authorized by Army Field Manual 34-52 and DoD guidance. The AR 15-6 also found that the Commander of JTF-GTMO failed to monitor the interrogation of one high value detainee in late 2002. The AR 15-6 found that the interrogation of this same high value detainee resulted in degrading and abusive treatment but did not rise to the level of being inhumane treatment. Finally, the AR 15-6 found that the communication of a threat to another high value detainee was in violation of SECDEF guidance and the UCMJ. The AR 15-6 found no evidence of torture or inhumane treatment at JTF-GTMO.

INTRODUCTION

In June 2004, the Federal Bureau of Investigation (FBI) began an internal investigation to determine if any of its personnel had observed mistreatment or aggressive behavior towards detainees at Guantanamo Bay, Cuba (GTMO). On 9 Jul 04, the FBI – Inspection Division (INSD), sent an e-mail message to all FBI personnel who had served in any capacity at GTMO. The e-mail stated in relevant part:

"You have been identified as having conducted an assignment at GTMO, Cuba since 9/11/2001. The Inspection Division has been tasked with contacting those employees who have served in any capacity at GTMO and obtain information regarding the treatment of detainees. Employees should immediately respond to the following:

1) Employees who observed aggressive treatment, which was not consistent with Bureau interview policy guidelines, should respond via e-mail for purposes of a follow-up interview.

2) Employees who worked at GTMO and observed no aggressive treatment of detainees should respond via an EC documenting a negative response..."

The above e-mail message was sent by INSD to 493 FBI personnel who had served in GTMO between 9 Sep 01 and 9 Jul 04. INSD received 434 total

responses, and 26 agents stated that they had observed aggressive treatment of detainees at GTMO.

In response to FBI agent allegations of aggressive interrogation techniques at Joint Task Force Guantanamo Bay (JTF-GTMO) Cuba, that were disclosed in Dec 04 as a result of FOIA releases, General (GEN) Bantz J. Craddock, Commander United States Southern Command (USSOUTHCOM), ordered an AR 15-6 investigation and appointed Brigadier General (BG) John T. Furlow, United States Army South Deputy Commander for Support, as the investigating officer. BG Furlow was directed to address the following allegations:

a. That military interrogators improperly used military working dogs during interrogation sessions to threaten detainees, or for some other purpose;

b. That military interrogators improperly used duct tape to cover a detainee's mouth and head;

c. That DoD interrogators improperly impersonated FBI agents and Department of State officers during the interrogation of detainees;

d. That, on several occasions, DoD interrogators improperly played loud music and yelled loudly at detainees;

e. That military personnel improperly interfered with FBI interrogators in the performance of their FBI duties;

f. That military interrogators improperly used sleep deprivation against detainees;

g. That military interrogators improperly chained detainees and placed them in a fetal position on the floor, and denied them food and water for long periods of time;

h. That military interrogators improperly used extremes of heat and cold during their interrogation of detainees.

Subsequent to the initial appointment, GEN Craddock directed BG Furlow to investigate two additional allegations concerning a female military interrogator performing a "lap dance" on a detainee and the use of faux "menstrual blood" during an interrogation. Finally, the appointment letter directed BG Furlow to not limit himself to the listed allegations.

On 28 Feb 05, after two months of investigation, BG Furlow advised GEN Craddock that he needed to interview officers senior in grade to himself. On 28 Feb 05 GEN Craddock appointed Lieutenant General (Lt Gen) Randall M. Schmidt, United States Southern Command Air Forces Commander, Davis-

Monthan AFB, AZ, as the senior investigating officer. This report reflects the combined findings and conclusions of the initial investigative efforts and the combined investigative efforts of both BG Furlow and Lt Gen Schmidt.

After submission of the AR15-6 Report of Investigation on 1 Apr 05, CDR USSOUTHCOM directed on 5 May 2005 that the investigation be reopened to consider memos dated 11 Dec 04 and 24 Dec 04, that had recently been discovered, regarding the subject of the second Special Interrogation Plan. Prior to completion of the follow-up, CDR USSOUTHCOM directed on 2 Jun 05 that the investigation should also address new allegations made by the subject of the first Special Interrogation Plan.

SCOPE OF REVIEW

This investigation was directed and accomplished under the "informal procedures" provisions of Army Regulation 15-6, Procedures for Investigating Officers and Boards of Officers, dated 30 Sep 96, (AR 15-6). This AR 15-6 investigation centered on alleged abuses occurring during interrogation operations. This AR 15-6 found incidents of abuse during detention operations; all of which were appropriately addressed by the command. The investigation team conducted a comprehensive review of thousands of documents and statements pertaining to any allegations of abuse occurring at GTMO, to include the complete medical records of the subjects of the first and second Special Interrogation Plan. The team interviewed 30 FBI agents, conducted interviews of over 100 personnel from 6 Jan 05 to 24 Mar 05 and had access to hundreds of interviews conducted by several recent investigations. These interviews included personnel assigned to GTMO, USSOUTHCOM, and OSD during the tenure of JTFs 160, 170, and GTMO. It included nine DIA personnel, including every Joint Intelligence Group Chief and every Intelligence Control Element Chief. It included 76 DoD personnel, to include every General Officer who commanded Joint Task Force 160, Joint Task Force 170 and Joint Task Force GTMO. DoD personnel interviewed also included personnel who served as interrogators at GTMO and instructors at the US Army Intelligence School and Center. During the course of the investigation, the team visited Birmingham, AL; Chicago, IL; Ft Bragg, NC; Ft Devens, MA; Ft Huachuca, AZ; GTMO (twice); Los Angeles, CA; Miami, FL; and Washington D.C. (five times).

The investigation team attempted to determine if the allegations alleged by the FBI, in fact, occurred. During the course of the follow up investigation the AR15-6 also considered allegations raised specifically by detainees the subject of the first and second Special Interrogation Plans. The investigating team applied a preponderance standard of proof consistent with the guidance contained in AR15-6. The team also applied guidance contained in FM 34-52, CDR USSOUTHCOM, and SECDEF memorandums authorizing special interrogation techniques in deciding if a particular interrogation approach fell properly within an authorized technique. In those cases in which the team concluded that the

allegation had in fact occurred, the team then considered whether the incident was in compliance with interrogation techniques that were approved either at the time of the incident or subsequent to the incident. In those cases where it was determined the allegation occurred and to have not been an authorized technique, the team then reviewed whether disciplinary action had already been taken and the propriety of that action. On 28 Mar 05, GEN Craddock, as the investigation appointing authority, asked Lt Gen Schmidt to determine accountability for those substantiated violations that had no command action taken.

The team did not review the legal validity of the various interrogation techniques outlined in Army Field Manual 34-52, or those approved by the Secretary of Defense.

BACKGROUND

On 7 Mar 05 Vice Admiral A.T. Church, III submitted his final report of detention operations and detainee interrogation techniques in the Global War on Terror to the Secretary of Defense. (hereinafter "Church Report") That report included a thorough background discussion of detainee operations at GTMO. Our investigation independently researched the genesis and adjustments to policy and interrogation techniques from the origination of GTMO to the present. Our independently derived findings regarding the development and adjustments to policy and interrogation techniques are identical to the Church report. Therefore, I have adopted relevant portions of the Church report to show the development of permissible interrogation techniques.

Interrogation operations at GTMO began in January 2002. Initially interrogators relied upon the interrogation techniques contained in FM 34-52. These techniques were ineffective against detainees who had received interrogation resistance training. On 11 Oct 2002, Major General Michael E. Dunlavey, the Commander of Joint Task Force (JTF) 170, the intelligence task force at GTMO, requested that the CDR USSOUTHCOM, GEN James T. Hill, approve 19 counter resistance techniques that were not specifically listed in FM 34-52. The techniques were broken down into Categories I, II, and III, with the third category containing the most aggressive techniques. On 25 Oct 02 CDR USSOUTHCOM forwarded the request to the Chairman of the Joint Chiefs of Staff, General Richard B. Myers. On 2 Dec 02, the Secretary of Defense approved the use of all Category I and II techniques, but only one of the Category III techniques (which authorized mild, non-injurious physical contact such as grabbing, poking in the chest with a finger, and light pushing). In the approval memorandum, the SECDEF approved the techniques for use by CDR USSOUTHCOM, who subsequently verbally delegated the authority to approve and apply these techniques to CDR JTF-GTMO.

On 15 Jan 03, SECDEF rescinded his approval of all Category II techniques and the one Category III technique leaving only Category I techniques in effect. The SECDEF memo permitted use of Category II and III techniques only with SECDEF approval. No approval was requested or granted.

On 16 Apr 03, the Secretary of Defense issued a new policy accepting 24 techniques, most of which were taken directly from or closely resembled those in FM 34-52. The Secretary's guidance remains in effect today. This policy memorandum placed several requirements on CDR USSOUTHCOM. First, it required all detainees to continue to be treated humanely. Second, it required SECDEF notification prior to the implementation of any of the following aggressive Interrogation techniques: Incentive/Removal of Incentive; Pride and Ego Down; Mutt and Jeff; and Isolation. Third, it specifically limited the use of these aggressive techniques to circumstances required by "military necessity." The memorandum did not attempt to define the parameters of "humane treatment" or "military necessity."

The CDR USSOUTHCOM issued a memorandum on 2 Jun 03 providing further guidance on the implementation of the 16 Apr 03 SECDEF approved techniques. This guidance provided that prior to the use of any of the specified aggressive techniques, the JTF Commander would submit the request in writing to CDR USSOUTHCOM for submission to SECDEF. The guidance also stated that "specific implementation guidance with respect to techniques A-Q is provided in Army Field Manual 34-52. Further implementation guidance with respect to techniques R-X will need to be developed by the appropriate authority." GTMO standard operating procedure on interrogations provides guidance for interrogations.

In addition, the CDR USSOUTHCOM guidance provided the following clarification to the SECDEF's 16 Apr 03 memorandum: **(quoting)**

(a) Reference Technique B, the Working Group was most concerned about removal of the Koran from a detainee—something we no longer do. Because providing incentives (e.g., McDonald's Fish Sandwiches or cigarettes) is an integral part of interrogations, you will notify me in writing when the provided incentive would exceed that contemplated by interrogation doctrine contained in Army FM 34-52, or when the interrogators intend to remove an incentive from a detainee;

(b) Reference Techniques I and O, you will notify me in writing when use of these standard interrogation techniques goes beyond the doctrinal application described in Army FM 34-52. When use of the technique is consistent with FM 34-52, you do not need to notify me;

(c) I define "sleep deprivation", referenced in Technique V, as keeping a detainee awake for more that 16 hrs, or allowing a detainee to rest

briefly and then repeatedly awakening him, not to exceed four days in succession;

(d) Reference Technique X, I do not consider the use of maximum-security units as isolation. A detainee placed in a maximum-security unit is segregated, but not truly isolated;

(e) I define the "least intrusive method" as the technique that has the least impact on a detainee's standard of treatment, while evoking the desired response from the detainee during interrogations;

(f) Except in the case of Techniques B, I, O, and X, I have determined that the first 0-6/GG-15 in the chain of command or supervision, is the "appropriate specified senior approval authority," unless approval authority is withheld from that individual by higher authority.

Lastly, I have told the Secretary of Defense his 16 April guidance applies to all interagency elements assigned or attached to JTF GTMO. **(end quote)**

There have been over 24,000 interrogation sessions at GTMO since the beginning of interrogation operations.

FINDINGS

GENERAL DETAINEE POPULATION

Allegation: That DoD interrogators improperly impersonated FBI agents or Department of State officers during the interrogation of detainees.

Finding #1: On several occasions in 2003 various DoD interrogators impersonated agents of the FBI and the Department of State.

Technique: Authorized: FM 34-52 (p. 3-13); Category I technique approved by SECDEF – Deceiving interrogator identity

Discussion: The Chief of the Special Interrogation Team directed two interrogators to pose as US State Department representatives during an interrogation. In addition another interrogator posed as an FBI agent on one occasion. This impersonation came to the attention of the Senior Supervisory Agent (SSA) of the FBI at Guantanamo Bay when several other agents advised him that detainees were complaining during interviews that the FBI had already asked them the same questions. The SSA approached the Joint Interrogation Group (JIG) Chief, with his agents' concerns. According to the SSA, the JIG Chief did not contest the FBI agents' accusations. In fact, the JIG Chief knew of at least one military interrogator who had impersonated an FBI agent. After the

meeting, the JIG Chief agreed to stop the practice of DoD interrogators impersonating FBI agents without prior FBI approval. The SSA made it clear to the investigation team that he did not believe the impersonation interfered with FBI operations and was pleased with the JIG Chief's rapid and thorough response to the situation.

Organizational response: Immediately stopped the practice.

Recommendation #1: The allegation should be closed. The technique, while authorized, was undermining the inter-agency working relationship. No additional corrective action is necessary or appropriate.

Allegation: That a female military interrogator performed a "lap dance" on a detainee during an interrogation. I have expanded this allegation to "That female military interrogators performed acts designed to take advantage of their gender in relation to Muslim males."

Finding #2a: On one occasion between October 2002 and January 2003, a female interrogator put perfume on a detainee by touching the detainee on his arm with her hand;

Technique: Authorized: FM 34-52 (p. 3-11); Category III technique approved by SECDEF – Mild, non-injurious physical touching

Discussion: a. On at least one occasion in late 2002, a female interrogator rubbed perfume on a detainee. The Interrogation Control Element (ICE) Chief stated that he specifically directed the interrogator to go to the PX and purchase rose oil with the intent of rubbing a portion of the perfume on the detainee's arm to distract the detainee. The interrogator admitted to using this approach with a detainee. At the time of the event the detainee responded by attempting to bite the interrogator and lost his balance, fell out of his chair, and chipped his tooth. He received immediate and appropriate medical attention and did not suffer permanent injury.

Organizational response: a. The interrogator was not disciplined for rubbing perfume on a detainee since this was an authorized technique.

Finding #2b: During the month of March 2003, a female interrogator approached a detainee from behind, rubbed against his back, leaned over the detainee touching him on his knee and shoulder and whispered in his ear that his situation was futile, and ran her fingers through his hair.

Technique: Authorized: FM 34-52 technique – Futility – Act used to highlight futility of the detainee's situation.

Discussion: b. On 17 Apr 03, An interrogation supervisor supervised a female interrogator as she interrogated a detainee with her BDU top off[1], and subsequently the interrogator ran her fingers through the detainee's hair. The interrogator also approached the detainee from behind, touched him on his knee and shoulder, leaned over him, and placed her face near the side of his in an effort to create stress and break his concentration during interrogation.

Organizational response: b. The interrogation supervisor was given a written letter of admonishment for failure to document the techniques to be implemented by the interrogator prior to the interrogation. There is no evidence that either activity ever occurred again.

Recommendation #2: Command action was effective and sufficient with respect to the individual interrogators. AR 15-6 recommends that the approval authority for the use of gender coercion as futility technique be withheld to the JTF GTMO-CG.

Allegation: That a female military interrogator wiped "menstrual blood" on a detainee during an interrogation.

Finding #3: In March 2003, a female interrogator told a detainee that red ink on her hand was menstrual blood and then wiped her hand on the detainee's arm.

Technique: Authorized: FM 34-52 technique – Futility – act used to highlight futility of the detainee's situation

Discussion: The female interrogator is no longer in military service and has declined to be interviewed. According to a former ICE Deputy the incident occurred when a detainee spat in the interrogator's face. According to the former ICE Deputy, the interrogator left the interrogation room and was crying outside the booth. She developed a plan to psychologically get back at him. She touched the detainee on his shoulder, showed him the red ink on her hand and said; by the way, I am menstruating. The detainee threw himself on the floor and started banging his head. This technique was not in an approved interrogation plan.

Organizational response: The ICE Deputy verbally reprimanded the interrogator for this incident. No formal disciplinary action was taken. There is no evidence that this happened again.

Recommendation #3: Command action was inadequate with respect to the individual interrogator. The interrogator should have been formally admonished or reprimanded for using a technique that was not approved in advance. Advance approval ensures that retaliatory techniques are not

[1] It was common practice at GTMO to conduct interrogations in a t-shirt with the BDU top removed because of the heat and humidity.

employed on impulse. Considering the lapse in time, recommend this allegation be closed.

Allegation: That DoD interrogators improperly played loud music and yelled loudly at detainees.

Finding #4: On numerous occasions between July 2002 and October 2004, detainees were yelled at or subjected to loud music during interrogation.

Technique: Authorized: FM 34-52 technique – Incentive and Futility – acts used as reward for cooperating or to create futility if not cooperating.

Discussion: Almost every interviewee stated that yelling and the use of loud music were used for interrogations at GTMO. On a few occasions, detainees were left alone in the interrogation booth for an indefinite period of time while loud music played and strobe lights flashed. The vast majority of yelling and music was accomplished with interrogators in the room. The volume of the music was never loud enough to cause any physical injury. Interrogators stated that cultural music would be played as an incentive. Futility technique included the playing of Metallica, Britney Spears, and Rap music.

Organizational response: None.

Recommendation #4: The allegation should be closed. Recommend JTF-GTMO develop specific guidance on the length of time that a detainee may be subjected to futility music. Placement of a detainee in the interrogation booth and subjecting him to loud music and strobe lights should be limited and conducted within clearly prescribed limits.

Allegation: That military interrogators improperly used extremes of heat and cold during their interrogation of detainees.

Finding #5: On several occasions during 2002 and 2003, interrogators would adjust the air conditioner to make the detainee uncomfortable.

Technique: Unauthorized prior to 16 Apr 03: SECDEF did not approve exposure to cold in his 2 Dec 02 list of approved techniques

Technique: Authorized after 16 Apr 03: SECDEF approved technique. This technique was officially permitted under 16 Apr 03 SECDEF Memorandum – Environmental Manipulation

Discussion: Two FBI agents indicated that they were aware of DoD interrogators using temperature adjustment as an interrogation technique. Many interviewees, FBI agents and military interrogators, believed the hot climate at GTMO and the detainee's comfort in a hot climate caused a differing in opinions

regarding the use of the air conditioning units in the interrogation booths. There were several individuals who were interviewed who acknowledged that certain military interrogators would adjust the air conditioning down (cool) in an attempt to make the detainee uncomfortable for the interrogation. Several witnesses indicated that the practice of adjusting the temperature ceased when CDR JTF-GTMO directed that the practice no longer be employed. The current GTMO SOP still permits interrogators to adjust the temperature. In addition, one interrogator supervisor stated that detainees were interrogated at Camp X-Ray, where the "booths" were not air-conditioned, to make the detainees uncomfortable.

Organizational response: No disciplinary action required.

Recommendation #5: The allegation should be closed.

Allegation: That military interrogators improperly used sleep deprivation against detainees.

Finding #6: During 2003 and 2004 some detainees were subjected to cell moves every few hours to disrupt sleep patterns and lower the ability to resist interrogation. Each case differed as to length and frequency of the cell moves.

Technique: Unauthorized prior to 2 Dec 02 and between 15 Jan 03 and 16 Apr 03: Neither sleep disruption or deprivation is an authorized FM 34-52 technique

Technique: Authorized between 2 Dec 02 and 15 Jan 03 and after 16 Apr 03: The exact parameters of this technique remained undefined until 2 Jun 03 when CDR USSOUTHCOM established clear guidance on the use of sleep adjustment. His guidance prohibited the practice of keeping a detainee awake for "more than 16 hours or allowing a detainee to rest briefly and then repeatedly awakening him, not to exceed four days in succession."

Discussion: Only one FBI agent alleged sleep deprivation; his complaint was that an individual was subjected to 16 hours of interrogation followed by four-hour breaks. He says he was told about these sessions by DoD interrogators and they implied that these 16 hour interrogations were repeated on a 20 hour cycle, but he did not know for certain what in fact occurred. The FBI agent was at GTMO from 2 Jun 03 to 17 Jul 03. Under CDR USSOUTHCOM's 2 Jun 03 guidance, 16 hour interrogations were permitted and do not constitute sleep deprivation if done on a 24 hour cycle. During the course of the investigation of the FBI allegation, the AR 15-6 did conduct a review of the interrogation records to see if there was any evidence that corroborated this allegation. While not directly supporting the FBI's allegation, records indicated that some interrogators recommended detainees for the "frequent flyer program." A current GTMO interrogation analyst indicated that this was a program in effect throughout 2003

and until March 2004 to move detainees every few hours from one cell to another to disrupt their sleep. Documentation on one detainee indicated that he was subjected to this practice as recently as March 2004.

Organizational response: None. Current JTF-GTMO Commander terminated the frequent flyer cell movement program upon his arrival in March 04.

Recommendation #6: The allegation should be closed. Recommend USSOUTHCOM clarify policy on sleep deprivation.

Allegation: That military interrogators improperly used duct tape to cover a detainee's mouth and head.

Finding #7: Sometime in October 2002 duct tape was used to "quiet" a detainee.

Technique: Unauthorized

Discussion: In his testimony, the ICE Chief testified that he had a situation in which a detainee was screaming resistance messages and potentially provoking a riot. At the time of the incident there were 10 detainees in the interrogation section and the ICE Chief was concerned about losing control of the situation. He directed the MPs to quiet the detainee down. The MP mentioned that he had duct tape. The ICE Chief says he ultimately approved the use of duct tape to quiet the detainee. The MP then placed a single strand of duct tape around the detainee's mouth. The single strand proved ineffective because the detainee was soon yelling again. This time the MPs wrapped a single strand of duct tape around the mouth and head of the detainee. The detainee removed the duct tape again. Fed up and concerned that the detainee's yelling might cause a riot in the interrogation trailer, The ICE Chief ordered the MPs to wrap the duct tape twice around the head and mouth and three times under the chin and around the top of the detainee's head. According to an FBI agent, he and another FBI agent were approached by the ICE Chief who was laughing and told the agents that they needed to see something. When the first agent went to the interrogation room he saw that the detainee's head had been wrapped in duct tape over his beard and his hair. An interrogator testified that another interrogator admitted to him that he had duct taped the head of a detainee. According to the first agent, the ICE Chief said the interrogator wrapped the detainee's head with duct tape because the detainee refused to stop "chanting" passages from the Koran.

Organizational response: The JTF-170 JAG testified that she became aware of the incident and personally counseled the ICE Chief. The counseling session consisted of a verbal admonishment.[2] The ICE Chief did not receive any formal

[2] While the ICE Chief testified that he was counseled by the JTF-GTMO Commander this is not possible. The Commander in question did not arrive until the month following the event. The previous Commander has no recollection of the event.

discipline action. We have no evidence that duct tape was ever used again on a detainee.

Recommendation #7: Command action was inadequate with respect to the ICE Chief. He should be formally admonished or reprimanded for directing an inappropriate restraint to be used on a detainee.

Allegation: That military interrogators improperly chained detainees and placed them in a fetal position on the floor

Finding #8: On at least two occasions between February 2002 and February 2003, two detainees were "short shackled" to the eye-bolt on the floor in the interrogation room.

Technique: Unauthorized.

Discussion: Two FBI agents each stated that they witnessed a detainee in an interrogation room that had been "short shackled" to the floor. Short shackling is the process by which the detainee's hand restraints are connected directly to an eyebolt in the floor requiring the detainee to either crouch very low or lay in a fetal position on the floor. The FBI agents indicated that each of the detainees was clothed. Another FBI agent stated she witnessed a detainee short shackled and lying in his own excrement. The AR 15-6 was unable to find any documentation, testimony, or other evidence corroborating the third agent's recollection, to this allegation or her email allegation that one of the detainees had pulled his hair out while short shackled. We also found that 'short shackling' was initially authorized as a force protection measure during the in processing of detainees.[3]

Organizational response: None. JTF-GTMO has implemented SOPs that prohibit short shackling.

Recommendation #8: The allegation should be closed. The AR 15-6 was not able to find any evidence to adequately assign responsibility for these actions. This practice is now specifically prohibited by current GTMO interrogation policy.

Allegation: That military personnel improperly interfered with FBI interrogators in the performance of their FBI duties.

Finding #9: We discovered no evidence to support this allegation.

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[3] During the course of a site visit to GTMO several detention operations personnel indicated that they understood that short shackling was permitted in the early days of GTMO as a force protection measure. They all stated that it was no longer authorized as either a detention measure or during interrogations.

Discussion: This allegation stems from an FBI agent objections to a proposed Special Interrogation Plan. The dispute resulted in a DoD official being rude to the FBI agent. The team did not find any evidence of "interference" with FBI interrogations that extended beyond the dispute over which techniques worked best in interrogation. During the infancy of interrogation operations at GTMO, it was obvious that the different investigative agencies had different interrogation objectives. Law enforcement agencies were primarily interested in interviews that would produce voluntary confessions that would be admissible in U.S. Federal District Courts. Conversely, DoD interrogators were interested in actionable intelligence and thus had greater latitude on the techniques used during the interrogations. These different goals created friction.

Recommendation #9: The allegation should be closed.

Allegation: That military interrogators denied detainees food and water for long periods of time.

Finding #10: We discovered no evidence to support the allegation that the detainees were denied food and water.

Discussion: This allegation stems from the statement of an FBI Agent. She reports two incidents of observing two detainees in "the fetal position and lying on the floor of interview rooms." And that there were was no "evidence of any food or water." The Agent admits in her statement that she made an assumption that the detainees were denied food and water based solely upon their appearance. The Agent was unable to provide any specific information as to the day she made these observations to permit additional proof or assignment of responsibility.

Recommendation #10: The allegation should be closed.

SPECIAL INTERROGATION PLANS

During the course of interrogations certain detainees exhibited refined resistance techniques to interrogations. These detainees were suspected to possess significant current intelligence regarding planned future terrorist attacks against the United States. For these reasons Special Interrogation Plans were proposed and approved for the detainees. A total of two Special Interrogation Plans were carried out. They are referred to herein as the "First Special Interrogation Plan" and the "Second Special Interrogation Plan".

THE FIRST SPECIAL INTERROGATION PLAN

On 23 Nov 02 interrogators initiated the first Special Interrogation Plan. The interrogation plan was designed to counter resistance techniques of the subject

of the first Special Interrogation Plan. The memo authorizing the techniques for this interrogation was signed by SECDEF on 2 Dec 02. These techniques supplemented techniques already permitted under the provisions of FM 34-52.

Allegation: That military interrogators improperly used military working dogs (MWD) during interrogation sessions to threaten detainees, or for some other purpose.

Finding #11a: On one occasion in October 2002 a military working dog was brought into the interrogation room and directed to growl, bark, and show his teeth at the subject of the first Special Interrogation Plan.

Technique: Unauthorized prior to 12 Nov 02.

Discussion: a. October 2002 incident: GTMO records indicate that on 01 Oct 02, the Commander of JTF-170 requested Joint Detention Operations Group (JDOG) support for interrogation operations to interrogate the subject of the first Special Interrogation Plan. The dog was requested to assist in the movement of the subject of the first Special Interrogation Plan between Camp X-ray and the GTMO Naval Brig to "discourage the detainee from attempting to escape." The interrogation plan (IP) indicates that the interrogation would begin on the 2nd or 3rd of October 2002. One FBI agent in his statement recalls the MWD being used on or about 05 Oct 02. He indicated that the events were notable for several reasons. He had recently purchased a German Shepard and wanted to get some "tips" from the dog handlers. The FBI agent noticed that there were two working dog teams (one Navy and one Army) present for the interrogation of the subject of the first Special Interrogation Plan. Finally, the FBI agent recalled that he and his partner left the observation room when the MWD was introduced into the interrogation room. The FBI agent's partner corroborates this statement.

In addition an interrogator indicated that she recalled a MWD being brought into the interrogation room during interrogation of the subject of the first Special Interrogation Plan at Camp X-ray, between 02-10 Oct 02. She stated that the dogs were used only "briefly." She stated that the use of the dog was documented on the IP and approved by the ICE Chief and CDR, JTF-GTMO

Finding #11b: In November 2002 a military working dog was brought into the interrogation room and directed to growl, bark, and show his teeth at the subject of the first Special Interrogation Plan.

Technique: Authorized: SECDEF approved the use of Category I and II techniques for the subject of the first Special Interrogation Plan. Category II technique permits the use of dogs to exploit "individual phobias" during interrogations.

Discussion: b. An interrogator testified that the MWD was in the booth on one occasion for the subject of the first Special Interrogation Plan. He testified that he was approached by another interrogator and discussed the use of a MWD in an interrogation session. Specifically, the first interrogator stated that the second interrogator told him that a MWD was brought into the doorway of the interrogation room and ordered by the dog handler to growl, show teeth and bark at the detainee. In addition a psychologist assigned to the Behavioral Science Consultation Team (BSCT) for JTF-170/JTF-GTMO witnessed the use of a MWD named "Zeus" during a military interrogation of the subject of the first Special Interrogation Plan during the November 2002 time period. In his interview, the ICE Chief acknowledged that an MWD had entered the interrogation room of the subject of the first Special Interrogation Plan under the authority of a "special IP" for the subject of the first Special Interrogation Plan. The unsigned but approved interrogation plan for the subject of the first Special Interrogation Plan is from 12 Nov 02. (Church p. 115) It indicates dogs will only be used in interrogation if approved in writing, in advance. Both JTF-GTMO Commanders who were in charge during the execution of the special interrogation plan deny that they authorized the use of MWDs in the interrogation room.

Organizational response: a. and b. None. Current SOPs expressly prohibit the use of MWDs in the interrogation room. There is no evidence that this has ever happened again.

Recommendation #11: The allegation should be closed. While the ICE Chief was aware of and condoned the first use of the MWD, additional corrective action is not necessary. The event occurred on two occasions and was expressly approved after the first occasion for this detainee. This practice is now specifically prohibited by current GTMO interrogation policy.

Allegation: That a female military interrogator performed a "lap dance" on a detainee during an interrogation. I have expanded this allegation to "That female military interrogators performed acts designed to take advantage of their gender in relation to Muslim males."

Finding #12a: On 21 and 23 Dec 02, MPs held down a detainee while a female interrogator straddled the detainee without placing weight on the detainee;

Technique: Authorized: FM 34-52 technique – Futility – Act used to highlight futility of the detainee's situation.

Finding #12b: On 04 Dec 02, a female interrogator massaged the detainee's back and neck over his clothing;

Technique: Authorized: FM 34-52 technique – Futility – Act used to highlight futility of the detainee's situation.

Finding #12c: On various occasions between October 2002 and January 2003, a female interrogator invaded the private space of a detainee to disrupt his concentration during interrogation;

Technique: Authorized: FM 34-52 technique – Futility – act used to highlight futility of the detainee's situation.

Discussion: Interrogation logs and MFRs for the subject of the first Special Interrogation Plan document that on both 21 and 23 Dec 02, a female interrogator straddled, without putting any weight on the detainee, the subject of the first Special Interrogation Plan while he was being held down by MPs. During these incidents a female interrogator would tell the detainee about the deaths of fellow Al-Qaeda members. During the straddling, the detainee would attempt to raise and bend his legs to prevent the interrogator from straddling him and prayed loudly. Interrogation MFRs also indicate that on 04 Dec 02, a female interrogator began to enter the personal space of the subject of the first Special Interrogation Plan, touch him, and ultimately massage his back while whispering or speaking near his ear. Throughout this event, the subject of the first Special Interrogation Plan prayed, swore at the interrogator that she was going to Hell, and attempted to get away from her. The female interrogator admitted in her interview that she personally prepared portions of the MFRs of the the subject of the first Special Interrogation Plan interrogations. She asserts that she had permission to employ all these techniques. We have found no evidence of a lap dance ever occurring.

Organizational response: No disciplinary action taken. The ICE Chief approved these techniques at the time.

Recommendation #12: The allegation should be closed. No command action is necessary with respect to the individual interrogators. Their supervisor acknowledged that he approved the approaches at the time of the interrogation. AR 15-6 recommends that the approval authority for the use of gender coercion as futility technique be withheld to the JTF GTMO-CG.

Allegation: That DoD interrogators improperly played loud music and yelled loudly at detainees.

Finding #13: On numerous occasions between November 2002 and 15 Jan 03, the subject of the first Special Interrogation Plan was yelled at or subjected to loud music during interrogation.

Technique: Authorized: FM 34-52 technique – Incentive and Futility – acts used as reward for cooperating or to create futility in not cooperating.

Discussion: See above discussion for Finding #4.

Organizational response: No disciplinary action required; technique authorized.

Recommendation #13: The allegation should be closed. Recommend JTF-GTMO develop specific guidance on the length of time that a detainee may be subjected to futility music. Placement of a detainee in the interrogation booth and subjecting him to loud music and strobe lights should be limited and conducted within clearly prescribed limits.

Allegation: That military interrogators improperly used extremes of heat and cold during their interrogation of detainees.

Finding #14: On several occasions between November 2002 and January 2003 interrogators would adjust the air conditioner to make the subject of the first Special Interrogation Plan uncomfortable.

Technique: Unauthorized prior to 16 Apr 03: SECDEF did not approve exposure to cold in his 2 Dec 02 list of approved techniques

Discussion. There are no medical entries indicating the subject of the first Special Interrogation Plan ever experienced medical problems related to low body temperature. The subject of the first Special Interrogation Plan's medical records do indicate that he did have a body temperature between 95 and 97 degrees twice. The subject of the first Special Interrogation Plan's medical records do indicate that from 7-9 Dec 02 he was hospitalized for observation after an episode of bradycardia. He was released within forty-eight hours, after the bradycardia resolved without intervention and he maintained stable hemodynamics.[4] He experienced a second episode of bradycardia in Feb 03.

Organizational response: None

Recommendation #14: The allegation should be closed.

Allegation: That military interrogators improperly used sleep deprivation against detainees.

Finding #15: From 23 Nov 02 to 16 Jan 03, the subject of the first Special Interrogation Plan was interrogated for 18-20 hours per day for 48 of the 54 days, with the opportunity for a minimum of four hours rest per day.

Technique: Authorized: SECDEF approved technique. This technique was officially permitted under 2 Dec 02 SECDEF Memorandum – The use of 20-hour interrogations

[4] Bradycardia is a relatively slow heart; hemodynamics are mechanics of blood circulation.

Discussion: SECDEF approved 20 hour interrogations for every 24-hour cycle for the subject of the first Special Interrogation Plan on 12 Nov 02. Later, CDR USSOUTHCOM formalized the definition of sleep deprivation in his 02 Jun 03 memorandum "promulgating" SECDEF's interrogation techniques of 16 Apr 03. He defined sleep deprivation as keeping a detainee awake for more than 16 hours, or allowing a detainee to rest briefly and then repeatedly awakening him, not to exceed four days in succession.

Organizational response: None. This was an authorized interrogation technique approved by SECDEF.

Recommendation #15: The allegation should be closed. Recommend USSOUTHCOM clarify policy on sleep deprivation.

Additional Allegations, Re: The subject of the first Special Interrogation Plan: In addition to the FBI allegations addressed above, the following additional interrogation techniques (not all inclusive) were used in the interrogation of the subject of the first Special Interrogation Plan. Each act is documented in the interrogation MFRs maintained on the subject of the first Special Interrogation Plan.

Finding #16a: That the subject of the first Special Interrogation Plan was separated from the general population from 8 Aug 02 to 15 Jan 03.

Technique: Unauthorized prior to 12 Nov 02: SECDEF did not approve movement of detainee to an "isolation facility" for interrogation purposes prior to approval of Category II techniques for the subject of the first Special Interrogation Plan on 12 Nov 02.

Technique: Authorized after 12 Nov 02:

Discussion: The subject of the first Special Interrogation Plan was never isolated from human contact. The subject of the first Special Interrogation Plan was however placed in an "isolation facility" where he was separated from the general detainee population from 8 Aug 02 to 15 Jan 03. The subject of the first Special Interrogation Plan routinely had contact with interrogators and MPs while in the "isolation facility." The SECDEF did not define "isolation facility" when he approved the use of an "isolation facility" for up to 30 days with additional isolation beyond 30 days requiring CDR JTF-GTMO approval on 12 Nov 02. Prior to the SECDEF's approval, placement in an "isolation facility" was not an authorized interrogation technique.

Organizational response to Additional Allegations, Re: The subject of the first Special Interrogation Plan: None taken.

Eight Techniques Below: Authorized: FM 34-52 technique – Ego down and Futility.

Finding #16b: On 06 Dec 02, the subject of the first Special Interrogation Plan was forced to wear a woman's bra and had a thong placed on his head during the course of the interrogation.

Finding #16c: On 17 Dec 02, the subject of the first Special Interrogation Plan was told that his mother and sister were whores.

Finding #16d: On 17 Dec 02, the subject of the first Special Interrogation Plan was told that he was a homosexual, had homosexual tendencies, and that other detainees had found out about these tendencies

Finding #16e: On 20 Dec 02, an interrogator tied a leash to the subject of the first Special Interrogation Plan's chains, led him around the room, and forced him to perform a series of dog tricks.

Finding #16f: On 20 Dec 02, an interrogator forced the subject of the first Special Interrogation Plan to dance with a male interrogator.

Finding #16g: On several occasions in Dec 02, the subject of the first Special Interrogation Plan was subject to strip searches.[5] These searches, conducted by the prison guards during interrogation, were done as a control measure on direction of the interrogators.

Finding #16h: On one occasion in Dec 02, the subject of the first Special Interrogation Plan was forced to stand naked for five minutes with females present. This incident occurred during the course of a strip search.

Finding #16i: On three occasions in Nov 02 and Dec 02, the subject of the first Special Interrogation Plan was prevented from praying during interrogation

Finding #16j: Once in Nov 02, the subject of the first Special Interrogation Plan became upset when two Korans were put on a TV, as a control measure during interrogation, and in Dec 02 when an interrogator got up on the desk in front of the subject of the first Special Interrogation Plan and squatted down in front of the subject of the first Special Interrogation Plan in an aggressive manner and unintentionally squatted over the detainee's Koran.

Finding #16k: On seventeen occasions, between 13 Dec 02 and 14 Jan 03, interrogators, during interrogations, poured water over the subject of the first Special Interrogation Plan head.

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[5] The subject of the first Special Interrogation Plan alleges that he was subject to "cavity searches." During the course of interrogation, the subject of the first Special Interrogation Plan was strip searched. The AR 15-6 was unable to determine the scope of these strip searches.

Discussion: the subject of the first Special Interrogation Plan was a high value detainee that ultimately provided extremely valuable intelligence. His ability to resist months of standard interrogation in the summer of 2002 was the genesis for the request to have authority to employ additional counter resistance interrogation techniques. The techniques used against the subject of the first Special Interrogation Plan were done in an effort to establish complete control and create the perception of futility and reduce his resistance to interrogation. For example, this included the use of strip searches, the control of prayer, the forced wearing of a woman's bra, and other techniques noted above. It is clear based upon the completeness of the interrogation logs that the interrogation team believed that they were acting within existing guidance. Despite the fact that the AR 15-6 concluded that every technique employed against the subject of the first Special Interrogation Plan was legally permissible under the existing guidance, the AR 15-6 finds that the creative, aggressive, and persistent interrogation of the subject of the first Special Interrogation Plan resulted in the cumulative effect being degrading and abusive treatment. Particularly troubling is the combined impact of the 160 days of segregation from other detainees, 48 of 54 consecutive days of 18 to 20-hour interrogations, and the creative application of authorized interrogation techniques. Requiring the subject of the first Special Interrogation Plan to be led around by a leash tied to his chains, placing a thong on his head, wearing a bra, insulting his mother and sister, being forced to stand naked in front of a female interrogator for five minutes, and using strip searches as an interrogation technique the AR 15-6 found to be abusive and degrading, particularly when done in the context of the 48 days of intense and long interrogations.[6] While this treatment did not rise to the level of prohibited inhumane treatment the JTF-GTMO CDR was responsible for the interrogation of the subject of the first Special Interrogation Plan and had a responsibility to provide strategic guidance to the interrogation team. He failed to monitor the interrogation and exercise commander discretion by placing limits on the application of otherwise authorized techniques and approaches used in that interrogation. The Commander stated he was unaware of the specific details or impacts of the techniques on the detainee for this important interrogation. His failure to supervise the interrogation of the subject of the first Special Interrogation Plan allowed subordinates to make creative decisions in an environment requiring extremely tight controls[7].

Recommendation #16: The Commander JTF-GTMO should be held accountable for failing to supervise the interrogation of the subject of the first Special Interrogation Plan and should be admonished for that failure.

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[6] The AR 15-6 found no evidence that the subject of the first Special Interrogation Plan was ever physically assaulted. His medical records show no evidence of any physical assaults. A medical examination completed on the subject of the first Special Interrogation Plan on 16 Jan 03 found no medical conditions of note.

[7] The JTF-GTMO Commander's testimony that he was unaware of the creative approaches taken in the interrogation is inconsistent with his 21 Jan 03 letter to CDR USSOUTHCOM in which he asserts that the CJTF approved the interrogation plan in place and it was followed "relentlessly by the command."

Allegation: In addition to the allegations above, the AR 15-6 also considered additional allegations raised specifically by the subject of the first Special Interrogation Plan.

Finding #17: The AR 15-6 was unable to corroborate the subject of the first Special Interrogation Plan's allegations to the point of concluding that they had occurred by a preponderance of the evidence. Specific findings include:

The AR 15-6 did find that the subject of the first Special Interrogation Plan was required to stand for periods of time which he may have interpreted as forced positions.

There is evidence that the subject of the first Special Interrogation Plan regularly had water poured on his head. The interrogation logs indicate that this was done as a control measure only.

There is no evidence that the subject of the first Special Interrogation Plan was subjected to humiliation intentionally directed at his religion. It is however possible that the subject of the first Special Interrogation Plan interpreted many of the interrogation techniques employed to be religious humiliation.

The AR 15-6 found no evidence that the subject of the first Special Interrogation Plan was threatened with homosexual rape. He was told on 17 Dec 02 that he was a homosexual but not threatened in any manner.

There is no evidence, to include entries in his medical records, that either occurred regarding the subject of the first Special Interrogation Plan or any other detainee.

Discussion: In reaching conclusions on the treatment of the subject of the first Special Interrogation Plan the AR 15-6 relied heavily on the interrogations logs. The level of specificity of the logs strongly supports their credibility regarding the interrogation of the subject of the first Special Interrogation Plan and thus they carried considerable weight on the findings.

Recommendation #17: The allegation should be closed

THE SECOND SPECIAL INTERROGATION PLAN

In July 03 interrogators initiated a request for approval of a Special Interrogation Plan for a detainee. This plan was approved by SECDEF on 13 Aug 03. Interrogation logs indicate that the techniques were never implemented because the subject of the second special interrogation plan began to cooperate prior to the approval.

In addition to the interrogation logs, the AR 15-6 also considered allegations of abuse raised by the subject of the second special interrogation, himself. Specifically, after months of cooperation with interrogators, on 11 Dec 04, the subject of the second special interrogation notified his interrogator that he had been "subject to torture" by past interrogators during the months of July to October 2003.[8]

Allegation: That military interrogators improperly used extremes of heat and cold during their interrogation of detainees.

Finding #18: During the summer of 2003, interrogators would adjust the air conditioner to make the subject of the second special interrogation uncomfortable.

Technique: Authorized: SECDEF approved technique. This technique was officially permitted under 16 Apr 03 SECDEF Memorandum – Environmental Manipulation.

Discussion: The interrogation logs of the subject of the second Special Interrogation Plan indicate that on at least two occasions on 10 and 11 Jul 03 the air conditioner was turned off to heat up the room. In addition the subject of the second special interrogation alleges that on repeated occasions from Jul 03 to Oct 03, he was subjected to placement in a room referred to as the "freezer."

Organizational response: No disciplinary action required. Environmental manipulation was expressly permitted in the 16 Apr 03 SECDEF Memorandum. There is no evidence in the medical records of the subject of the second special interrogation being treated for hypothermia or any other condition related to extreme exposure.

Recommendation #18: The allegation should be closed.

Allegation: The subject of the second special interrogation alleges that female military interrogators removed their BDU tops and rubbed themselves against the detainee, fondled his genitalia, and made lewd sexual comments, noises, and gestures.

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[8] He reported these allegations to an interrogator. The interrogator was a member of the interrogation team at the time of the report. The interrogator reported the allegations to her supervisor. Shortly after being advised of the alleged abuse, the supervisor interviewed the subject of the second special interrogation, with the interrogator present, regarding the allegations. Based upon this interview, and notes taken by the interrogator, the supervisor prepared an 11 Dec 04 MFR addressed to JTF – GTMO JIG & ICE. The supervisor forwarded his MFR to the JTF – GTMO JIG. The JIG then forwarded the complaint to the JAG for processing IAW normal GTMO procedures for investigating allegations of abuse. The JAG by email on 22 Dec 04 tasked the JDOG, the JIG, and the JMG with a review of the complaint summarized in the 11 Dec 04 MFR and directed them to provide any relevant information. The internal GTMO investigation was never completed.

Finding #19: The AR 15-6 was unable to corroborate the allegations to the point of concluding that they had occurred by a preponderance of the evidence.

Discussion: The interrogation logs for the subject of the second special interrogation indicate that on a number of occasions female interrogators used their status as females to distract the subject of the second special interrogation during the interrogation but there is nothing to corroborate the allegation of the subject of the second special interrogation.

Organizational response: No disciplinary action taken.

Recommendation #19: The allegation should be closed.

Allegation: The subject of the second Special Interrogation Plan alleges that in late summer of 2003 he was hit by guards and an interrogator "very hard" and "with all their strength" he was hit "all over."

Finding #20: The AR 15-6 was unable to corroborate the allegations to the point of concluding that they had occurred by a preponderance of the evidence.

Discussion: The interrogation logs contain no reference to any physical violence against the subject of the second Special Interrogation Plan. His medical records indicate that in August 2003 the subject of the second special interrogation reported "rib contusions" from an altercation with MPs when moved between camps. During this examination the physician also noted an "edema of the lower lip" and a "small laceration" on his head. There are no other medical entries of any other physical injuries. There are no indications of swelling or contusions to support a conclusion that the subject of the second special interrogation was hit "very hard all over."

Organizational response: No disciplinary action taken. The allegation was not substantiated.

Recommendation #20: The allegation should be closed. There is no evidence to support the subject of the second special interrogation's allegation of physical abuse.

Allegation: A DoD interrogator improperly impersonated a Navy Captain assigned to the White House.

Finding #21: The Special Team Chief impersonated a USN Captain assigned to the White House during interrogation of the subject of the second special interrogation.

Technique: Authorized: This technique is permitted under FM 34-52 – Deception.

Discussion: On 2 Aug 03 the Special Team Chief presented himself to the subject of the second special interrogation dressed as a Captain in the USN and indicated he was from the White House in an effort to convince the subject of the second special interrogation that he needed to cooperate with his interrogators. The Special Team Chief presented a letter to the subject of the second special interrogation, which indicated that because of the subject of the second special interrogation's lack of cooperation, U.S. authorities in conjunction with authorities from the country of origin of the subject of the second Special Interrogation Plan would interrogate the mother of the subject of the second Special Interrogation Plan. The letter further indicated that if his mother was uncooperative she would be detained and transferred to U.S. custody at GTMO for long term detention. While the JTF-GTMO Commander acknowledges that he was aware of the intent by the interrogator to wear Captain's rank and purport to be from the White House, he stated that he was not aware of the intention to convey a threat or the plan to use a fictitious letter.

Organizational response: None taken.

Recommendation #21: The allegation should be closed. No further action necessary.

Allegation: That Military interrogators threatened the subject of the second special interrogation and his family.

Finding #22: The Special Team Chief threatened the subject of the second special interrogation and his family in July, August and September 2003.

Technique: Unauthorized: This technique was rejected by SECDEF on 2 Dec 2002

Discussion: During the interrogation of the subject of the second special interrogation, a masked interrogator was used to interrogate the subject of the second special interrogation [9]. On 17 Jul 03 the masked interrogator told that he had a dream about the subject of the second special interrogation dying. Specifically he told the subject of the second special interrogation that in the dream he "saw four detainees that were chained together at the feet. They dug a hole that was six-feet long, six-feet deep, and four-feet wide. Then he observed the detainees throw a plain, pine casket with the detainee's identification number painted in orange lowered into the ground." The masked interrogator told the detainee that his dream meant that he was never going to leave GTMO unless he started to talk, that he would indeed die here from old age and be buried on "Christian... sovereign American soil." On 20 Jul 03 the masked interrogator, "Mr.

[9] The interrogator was a DoD interrogator who was masked so as to preserve the identity of the interrogator. This was done in case the interrogation team wanted to use that interrogator later in another role.

X", told the subject of the second Special Interrogation Plan that his family was "incarcerated." On 2 Aug 03, the Special Team Chief, while impersonating a USN Captain from the White House, told the subject of the second special interrogation that he had a letter indicating that the subject of the second special interrogation's family had been captured by the United States and that they were in danger.[10] He went on to tell the subject of the second special interrogation that if he wanted to help his family he should tell them everything they wanted to know. The MFR dated 02 Aug 03 indicates that the subject of the second special interrogation had a messenger that day there to "deliver a message to him". The MFR goes on to state:

> "That message was simple: Interrogator's colleagues are sick of hearing the same lies over and over and are seriously considering washing their hands of him. Once they do so, he will disappear and never be heard from again. Interrogator assured detainee again to use his imagination to think of the worst possible scenario he could end up in. He told Detainee that beatings and physical pain are not the worst thing in the world. After all, after being beaten for a while, humans tend to disconnect the mind from the body and make it through. However, there are worse things than physical pain. Interrogator assured Detainee that, eventually, he will talk, because everyone does. But until then, he will very soon disappear down a very dark hole. His very existence will become erased. His electronic files will be deleted from the computer, his paper files will be packed up and filed away, and his existence will be forgotten by all. No one will know what happened to him and, eventually, no one will care."

Finally, interrogator MFRs dated 08 Sep 03 indicate that the subject of the second special interrogation wanted to see "Captain Collins" and that they "understood that detainee had made an important decision and that the interrogator was anxious to hear what Detainee had to say. Detainee stated he understood and will wait for interrogator's [Captain Collins] return and that the subject of the second Special Interrogation Plan "...was not willing to continue to protect others to the detriment of himself and his family."

In investigating the actions above, the AR 15-6 focused on the threat made by the Special Team Chief.[11] When questioned about the threats to the subject of the second special interrogation, the Special Team Chief indicated that prior to the "threat" to detainee the subject of the second special interrogation he cleared the proposal and the letter with the senior judge advocate who approved the technique as a "deception." As written the letter does contain a threat to detain the subject of the second special interrogation's mother but does not contain any threat on her life or that of her family. The SJA indicated in his initial interview

[10] The actual content of the letter simply indicates that his mother will be taken into custody and questioned.
[11] Mr. X's dream story does not rise to the level of a threat. It appears to be a staged prelude to the direct threat made by the Special Team Chief.

that he did not recall the letter. He subsequently elected to exercise his Article 31 rights and declined to answer direct questions about the letter and the threats. The Special Team Chief also indicated that both JIG Chiefs in charge during the promulgation of the Special Interrogation Plan[12] were also aware of the threat letter. The first JIG Chief has retired and was unwilling to cooperate with this investigation. The second JIG Chief indicated under oath that he was unaware of the interrogation events discussed above. He recognizes, that read in conjunction with each other, they indicate a threat. He believes that the Commander of JTF-GTMO was not aware of the threat since the second JIG Chief was not aware of the threat. The second JIG Chief stated that they had weekly meetings with the Commander to discuss interrogations but they would not have covered this level of detail in that meeting. Neither he nor the Commander read interrogation MFRs on a regular basis. Finally, the Commander denies any knowledge of the existence of the threat or the letter. He does not recall ever discussing the issue of threats with the interrogators. He is aware that this is a prohibited practice and would not have permitted it if he had been aware of the plan.

Taken as a whole, it appears that the decision to threaten the subject of the second Special Interrogation Plan was made by the Special Team Chief. He claims that he cleared the plan with the senior judge advocate but not with his supervisors. Considering the actual content of the letter, it is reasonable to conclude that the JAG advised that the letter was a proper deception and therefore additional approval was not required. The Special Team Chief knew that under FM 34-52 deception did not require additional approval.

Despite the fact that the letter may be a proper deception technique under FM 34-52, the interrogation logs clearly indicate that the interrogation went well beyond the "threat to detain" made in the letter, and in fact was a threat to the subject of the second special interrogation and his family that violated the UCMJ, Article 134 Communicating a threat.

Organizational Response: None taken.

Recommendation #22: While the threats do not rise to the level of torture as defined under U.S. law, the facts support a conclusion that the Special Team Chief violated the UCMJ, Article 134, by communicating a threat. Recommend his current commander discipline the Special Team Chief.

[12] The first JIG Chief was in charge during the approval process for the second Special Interrogation Plan and then rotated out of JTF-GTMO. The second JIG Chief was in charge during the execution of the second Special Interrogation Plan

SUMMARY OF FINDINGS

The findings above fall into three categories: Techniques that were authorized throughout the interrogation periods; techniques that were never authorized and finally, techniques that were originally unauthorized, and then subsequently authorized. The summary below only outlines the latter two categories of techniques to address whether the findings violated the UCMJ, international law, U.S. Law, regulations or directives.

Techniques that were never authorized: AR 15-6 determined the following acts were NEVER authorized under any interrogation guidance:

a) On at least two occasions between February 2002 and February 2003, two detainees were "short shackled" to the eye-bolt on the floor in the interrogation room;

b) Sometime in October 2002 duct tape was used to "quiet" a detainee.

c) Military interrogators threatened the subject of the second special interrogation and his family;

Techniques that became authorized after the fact: AR 15-6 determined the following acts were initially not authorized under existing interrogation guidance but later authorized as an approved technique.

a) On several occasions during 2002 and 2003, interrogators would adjust the air conditioner to make the detainees, to include the subject of the first Special Interrogation Plan, uncomfortable. This technique is now permitted under the SECDEF 16 Apr 03 guidance.

b) On several occasions prior to 2 Dec 02 and between 15 Jan 03 and 16 Apr 03 interrogators had detainees moved from one cell to another every few hours to disrupt sleep patterns and lower the ability to resist interrogation. This technique is now permitted under the SECDEF 16 Apr 03 guidance.

c) In October 2002 a Military Working Dog was brought into the interrogation room during the course of interrogation of the subject of the first Special Interrogation Plan and directed to growl, bark, and show his teeth at the detainee. This technique is subsequently approved for the interrogation of the subject of the first Special Interrogation Plan by SECDEF on 12 Nov 02.

d) The subject of the first Special Interrogation Plan was separated from other detainees in an isolation facility away from the general population from 8 Aug 02 to 12 Nov 02. This technique was subsequently approved

for the interrogation of the subject of the first Special Interrogation Plan by SECDEF on 12 Nov 02.

In each of the incidents above the violations can best be characterized as violations of policy. The SECDEF's subsequent approval of each of the techniques clearly establishes the ultimate legitimacy of that technique and thus additional corrective action is not necessary.

Additional Matters: In addition to findings outlined above it is important to document some additional findings:

a) The team found no evidence that any detainee at GTMO was improperly documented or unaccounted for at any time. Every agency interviewee clearly indicated that they never knew of any "ghost detainees" at GTMO;

b) Several past interrogators at GTMO declined to be interviewed. In the case of personnel who are currently in a civilian status we had extremely limited authority to compel the individuals to cooperate with this investigation; of particular note was former SGT Erik Saar who has written a book into "activities" at GTMO. Despite repeated requests he declined to be interviewed;

c) During the course of this investigation, JTF-GTMO CG investigated and took action for personal misconduct of senior DoD personnel on GTMO. These allegations were reviewed and it was determined that they were not relevant to this investigation, and did not rise to a level to suggest a leadership environment with any impact on interrogation or detainee operations.

ADDITIONAL RECOMMENDATIONS

This AR15-6 recommends consideration of the following:

a) ***Recommendation #23*** Recommend a policy-level review and determination of the status and treatment of all detainees, when not classified as EPWs. This review needs to particularly focus on the definitions of humane treatment, military necessity, and proper employment of interrogation techniques. (e.g. boundaries or extremes);

b) ***Recommendation #24*** Recommend study of the DoD authorized interrogation techniques to establish a framework for evaluating their cumulative impact in relation to the obligation to treat detainees humanely;

c) ***Recommendation #25*** Recommend a reevaluation of the DoD and Inter-agency interrogation training consistent with the new realities of the requirements of the global war on terror;

d) ***Recommendation #26*** Recommend a policy-level determination on role of Military Police in "setting the conditions" for intelligence gathering and interrogation of detainees at both the tactical level and strategic level facilities;

e) ***Recommendation #27*** Recommend an Inter-Agency policy review to establish "standards" for interrogations when multiple agencies and interrogation objectives are involved. Particular emphasis should be placed on setting policy for who has priority as the lead agency, the specific boundaries for the authorized techniques in cases with multiple agencies involved, a central "data-base" for all intelligence gathered at a detention facility, and procedures for record keeping to include historical, litigation support, lessons learned, and successful/unsuccessful intelligence gathering techniques.

Chairman WARNER. Senator Levin.

STATEMENT OF SENATOR CARL LEVIN

Senator LEVIN. Thank you, Mr. Chairman, for convening the hearing.

Let me join you in welcoming our witnesses here today to discuss the results of the investigation of Generals Schmidt and Furlow into allegations of abuses at Gitmo, more specifically the allegations contained in specific e-mails from FBI agents at Gitmo witnessing interrogation practices of DOD intelligence personnel. These FBI e-mails, which came to light in December of last year following a FOIA request spoke of DOD interrogators' "torture techniques" and "coercive techniques in the military's interviewing toolkit." One FBI agent at the time expressed alarm over DOD interrogation plans for one Gitmo detainee, saying, "You won't believe it." Subsequent e-mails described abuses that FBI agents had witnessed, including detainees being chained in a fetal position on the floor for 18 to 24 hours at a time, having urinated and defecated on themselves, and being subjected to extreme cold.

The Schmidt-Furlow report confirms that detainees were subjected to "degrading and abusive" treatment in the course of interrogations at Gitmo. The report finds the use of techniques such as "short-shackling" in a fetal position for hours at a time, or using military working dogs to intimidate detainees during interrogation sessions, or a female interrogator rubbing up against a detainee's back and running her fingers through his hair as a form of "gender coercion."

It is clear from the report that detainee mistreatment was not simply the product of a few rogue military police on a night shift. Rather, this mistreatment arose from the use of aggressive interrogation techniques. The purpose of those activities, whether authorized or not, was to obtain intelligence.

The report of Generals Schmidt and Furlow does not resolve a number of critical questions surrounding the military's interrogation of detainees at Gitmo.

From the FBI documents released under the FOIA request, we know that FBI concerns and objections went beyond the specific allegations of abuse. The FBI agents questioned not only the effectiveness but the "propriety" of DOD's aggressive interrogation techniques. The report does not address those concerns. As a result, the Schmidt-Furlow report does not examine the "heated" debate between FBI agents and DOD commanders at Gitmo, which was about propriety and effectiveness. Their report does address whether techniques were authorized or not authorized and found that some were and some were not. But their conclusions on the most egregious techniques remain classified.

So from what we can determine, they do not look, again, at propriety or effectiveness of aggressive interrogation techniques, but rather at the authorization or lack of authorization of the use of those techniques. The FBI was so concerned about coercive DOD interrogation techniques that its agents at Gitmo were told to "stand clear" when military intelligence took over an interrogation. The report does not shed light on those discussions or what, if any, follow-up to those discussions was made. Nor does the report in-

clude documents related to these discussions, such as a May 30, 2003, electronic communication (EC) by FBI agents at Gitmo which, according to another FBI document, summarizes the FBI objections and includes as attachments a number of military documents discussing the authorization to use aggressive techniques. This committee needs to have the FBI documents relating to DOD intelligence techniques used at Gitmo, which FBI agents at the time believed were coercive or abusive. Following an earlier briefing on a related subject, I requested that FBI Director Mueller provide those documents.

In addition, the report itself states that its investigation did not attempt to review the legality of interrogation techniques approved by the Secretary of Defense (SECDEF). The fact that a technique may have been approved does not resolve the question of its legality.

There is a confusing aspect to the report which highlights some of these omissions. The report states that the current guidance for Gitmo approved by the SECDEF fails to define the term "humane treatment" and it recommends that this question be taken up by future policy review. So far so good. But the report nonetheless goes on to state that "there was no evidence of . . . inhumane treatment."

This is seemingly inconsistent with the absence of a definition of "humane treatment." But to compound the confusion, the report states that it did find "degrading and abusive treatment." First saying that there is an absence of a definition of "humane treatment," but then saying that degrading and abusive treatment is not the same as inhumane treatment is, frankly, truly a head-scratcher.

We are left once again also with a lack of accountability for the confirmed mistreatment of detainees. Generals Schmidt and Furlow recommended that Major General Miller be held accountable for "failing to supervise the interrogation of one high-value detainee" and "be admonished for that failure." However, General Craddock, who is with us this morning, the U.S. SOUTHCOM Commander, disapproved that recommendation.

The recommendations of Generals Schmidt and Furlow include the need for a "policy-level review" regarding the "status and treatment of detainees" other than prisoners of war. They also call for a review of interrogation techniques and the role of military police in "setting the conditions" for subsequent interrogations. I wholeheartedly agree with Generals Schmidt and Furlow. Their recommendations, in my judgment, reinforce the need to establish an independent commission to address the issues left unaddressed by this report and a number of other issues which have been identified which have so far not been addressed by various inquiries and investigations. The very creation of such an independent commission will help protect our soldiers should they ever end up in enemy custody, by showing the world that we are determined that our detention and interrogation policies reflect the values that we cherish as Americans.

Again, I welcome the testimony and look forward to it.

Chairman WARNER. Thank you, Senator.

I would like to also bring out that there were some 24,000 interrogations that were examined by this team and only a very few fall into the category of violations to Army doctrine.

Senator LEVIN. Just on that point if I could, Mr. Chairman.

Chairman WARNER. Yes.

Senator LEVIN. My understanding is that 24,000 interrogations were not investigated by this panel, but the e-mails of the FBI were the subject of their inquiry.

Chairman WARNER. We will bring clarity to that in the course of the hearing.

But I think we have to always be mindful of the fact that we are fighting a war and the fact that some very few individuals, whether it was Abu Ghraib or here, did violate Army doctrine and other rules and regulations should in no way reflect adversely upon the bravery and the courage of the men and women of the Armed Forces fighting terrorism the world over.

Senator LEVIN. I think there is a real consensus on that point. I could not agree with you more, Mr. Chairman.

Chairman WARNER. Thank you.

General Craddock, glad to hear from you.

STATEMENT OF GEN BANTZ J. CRADDOCK, USA, COMMANDER, U.S. SOUTHERN COMMAND; ACCOMPANIED BY LT. GEN. RANDALL M. SCHMIDT, USAF, SENIOR INVESTIGATING OFFICER; AND BG JOHN T. FURLOW, USA, INVESTIGATING OFFICER

General CRADDOCK. Thank you. Chairman Warner, Senator Levin, distinguished members of the committee: Thank you for the opportunity to appear before you today to brief you on the results of the Army Regulation (AR) 15–6 investigation that I directed into allegations of detainee abuse at our Gitmo detention facility.

As Commander of United States SOUTHCOM, I am responsible for ensuring that detention and intelligence operations at JTF Gitmo meet the high standards that our Nation expects from its military. I want to make it clear that I have full faith and confidence in the fine work that the servicemembers and the leaders of JTF Gitmo are doing each and every day for our Nation. Their work contributes to our Nation's safety and their adherence to the highest standards of humane treatment of the detainees under their charge is lauded by all who visit the facility.

I would also like to point out that the operations at Gitmo are still providing intelligence that supports the day-to-day operations of our warfighters engaged in the global war on terrorism, are helping our allies and partners in their fight against terrorists, and are keeping dangerous enemy combatants off the battlefield.

Of the more than 70,000 detainees who have been captured in the global war on terror, less than 800 have been sent to Gitmo because of the threat they posed and the intelligence they possessed. Today approximately 520 detainees remain at Gitmo and approximately 235 have been released or transferred to the custody of other countries because they no longer pose a threat or they no longer have intelligence value.

Today we have in our custody at Gitmo terrorist trainers, bomb makers, terrorist recruiters, facilitators and financiers, Osama bin Laden's bodyguards, and would-be suicide bombers. Through them

we have learned the organizational structure of al Qaeda and other terrorist groups, the extent of the terrorist presence in Europe, the United States, and the Middle East, the methods of and location of terrorist recruitment centers, how operatives are trained, and al Qaeda's efforts to acquire weapons of mass destruction.

One enemy combatant has provided insights into al Qaeda pre-operational planning for the 11 September 2001 attacks, to include methods and criteria for recruiting operatives for the attacks and the logistics involved in carrying them out. He described the facilitators he met along the way, the methods of financing the operation, the way he obtained his U.S. visa, and the logistics involved in traveling to the United States and communicating with his handlers along the way.

This particular detainee, Mohammed al-Qahtani, has during his interrogation sworn his loyalty to Osama bin Laden. He was to take part in the September 11 attacks, but the INS blocked his entry into the United States in August of that year at the Orlando International Airport.

He was captured in December 2001 on the Afghanistan-Pakistan border with other al Qaeda members and brought to Gitmo in February 2002. In July 2002 a fingerprint match from the INS verified Qahtani's presence in Orlando prior to the September 11 attacks and increased interest in getting him to reveal what he might know about future attacks planned around the 1-year anniversary of September 11.

In the fall of 2002, Qahtani successfully resisted all interrogation efforts using standard criminal investigation techniques. This led the investigators at Gitmo to request the approval of more aggressive interrogation techniques, which were approved by higher authority. During Qahtani's interrogation from November 2002 through January 2003, the application of these techniques by the JTF interrogators led to breaking Qahtani's resistance and to solid intelligence gains.

These and other intelligence gains come only through persistence, patience, and vigilance—diligence, excuse me, diligence. These traits, along with the highest standards of professional conduct, are the hallmarks of the men and women serving our Nation today as part of JTF Gitmo.

Now let me address the investigation. The allegations in the FBI e-mails came to light as the result of the public release of a series of FBI e-mails that contained these allegations. After a review of these e-mails following their public release in December of last year, I determined that the allegations merited a detailed examination in order to establish the truth and ascertain what, if any, actions needed to be taken.

I ordered the AR 15–6 investigation and appointed Brigadier General John Furlow, the Deputy Commander for my Army component command, as the Investigating Officer. Brigadier General Furlow was directed to address the following allegations that were drawn from the FBI e-mails:

One, that military interrogators improperly used military working dogs during interrogation sessions to threaten detainees or for some other purpose;

Two, that military interrogators improperly used duct tape to cover a detainee's mouth and head;

Three, that DOD interrogators improperly impersonated FBI agents and Department of State officers during the interrogation of detainees;

Four, that on several occasions DOD interrogators improperly played loud music and yelled loudly at detainees;

Five, that military personnel improperly interfered with FBI interrogators in the performance of their FBI duties;

Six, that military interrogators improperly used sleep deprivation against detainees;

Seven, that military interrogators improperly chained detainees and placed them in a fetal position on the floor and denied them food and water for long periods of time; and

Eight, that military interrogators improperly used extremes of heat and cold during their interrogation of detainees.

Subsequent to his initial appointment, I also directed General Furlow to investigate two additional allegations concerning a female military interrogator performing a lap dance on a detainee and the use of red ink as fake menstrual blood during an interrogation. These allegations came from a separate document. I did not limit General Furlow to these allegations. I gave him the flexibility to bring into his investigation any additional allegations of detainee abuse that he might discover during the course of his work.

On 28 February 2005, after 2 months of investigation, General Furlow advised me that he needed to interview officers who were senior in grade to him. As a result I appointed Lieutenant General Mark Schmidt, the Commander of my Air Force component command, as the Senior Investigating Officer. Generals Schmidt and Furlow are here with me today and in a moment they will brief you on the conduct and findings of their investigation. Their report reflects the combined findings and conclusions of the initial investigative efforts and the combined investigative efforts of both of these officers.

General Schmidt submitted his initial report to me on the 1st of April. After review, I directed on the 5th of May that the investigation be reopened to consider two memos from the December 2004 time frame that had been recently discovered regarding a special interrogation plan. While the investigative team was completing this additional task, I further directed on the 2nd of June that General Schmidt address a second set of new allegations made by a detainee that also concerned a special interrogation plan.

General Schmidt completed his investigation on the 9th of June, at which time my staff judge advocate began a thorough legal review of the report. I have completed my personal review of the report and taken my actions with regards to the report's findings and recommendations. I will inform you of my actions after General Schmidt and General Furlow brief you on their investigation and findings.

So I will turn it over to General Schmidt and General Furlow.

Chairman WARNER. General Schmidt.

General SCHMIDT. Thank you, sir. Senator Warner, Senator Levin, distinguished members of the committee: Thank you for the

opportunity to brief you on the results of this AR 15–6 investigation into the FBI allegations of detainee abuse at Gitmo.

On December 29, 2004, General Furlow was appointed. He brought three U.S. Army staff members with him to help do this investigation. Then on February 28 I included my staff judge advocate and two other action officers, and we were the basic eight members that completed this investigation.

I provided to all the members a copy of the report, and I apologize for its length. There are about 21 pages. But if I go through the report I will refer to those pages as I talk about the conduct of the report, what we found, and what our recommendations and findings were. That would be helpful. So I will refer to those pages for the members.

Chairman WARNER. We will put the complete statements and reports of each of the investigating officers in the record.

CDR USSOUTHCOM Directed AR 15-6 Investigation into Detainee-Abuse Allegations at Guantanamo Bay, Cuba

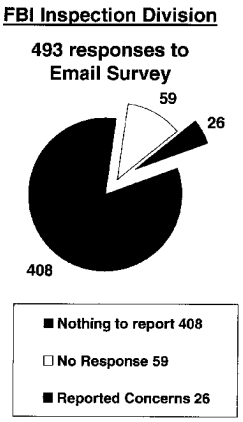
Lt Gen Mark Schmidt
Sr. Investigation Officer
BG John Furlow
Investigation Officer

Purpose

- Investigate FBI allegations of detainee abuse at Guantanamo Bay, Cuba
- Investigate other allegations of abuse discovered during the investigation
- Determine accountability for substantiated violations

Background

- June 2004 FBI began internal inquiry on mistreatment or aggressive behavior towards Guantanamo Bay, Cuba (GTMO) detainees
- July 2004 FBI Inspection Division sent Email Survey to 493 FBI personnel who served in GTMO between 9 Sep 01 and 9 Jul 04
- 29 December 2004 CDR USSOUTHCOM appointed BG Furlow to investigate
- 28 February 2005 Lt Gen Schmidt appointed to complete Investigation



Scope of Review

- Interviews
  - Full chain of command to CDRs JTF-GTMO, JTF-160 and JTF-170
  - GTMO Operations from Jan 02 to present
  - FBI, DIA, CIA, OSD, and US Military
- Reviewed/researched documentation
  - Previous investigation results
  - MFR/Interrogation logs
  - Special Interrogation Plans
  - Standard Operating Procedures
  - Joint Detainee Information Management System
  - FBI reports
  - Manuals
  - Regulations
  - Interrogation Plans
  - Brig logs
- Reviewed allegations by two high-value detainees

Summary of Findings

- 9 FBI allegations
  - 2 unsubstantiated
  - 2 substantiated; not authorized
  - 5 substantiated; authorized
- Interrogation of ISN 063 resulted in abusive and degrading treatment
- 2nd high-value detainee (HVD) was threatened during his interrogation
- No torture occurred; detention and interrogation operations were safe, secure, and humane

AR 15-6 Findings
Unsubstantiated Allegations

*a. Military personnel improperly interfered with FBI interrogators in the performance of their duties.

*b. Military interrogators denied food and water.

* Relates to FBI allegations

Interrogation Techniques
Source: U.S. Army Field Manual 34-52, Intelligence Interrogation

1. Direct.
2. Incentive.
3. Emotional Love.
4. Emotional Hate.
5. Fear Up (Harsh)
6. Fear Up (Mild)
7. Fear-Down
8. Pride and Ego-Up
9. Pride and Ego-down
10. Futility
11. We Know All
12. File and Dossier
13. Establish Your Identity
14. Repetition
15. Rapid Fire
16. Silent
17. Change of Scene

JTF-170 Counter Resistance Techniques
Requested: 11 Oct 02 SECDEF Approved✓: 2 Dec 02
Cat II and III Rescinded 15 Jan 03

- **Category I techniques**
  - ✓ – Yelling at the detainee, but expressly excluding yelling that would cause pain or damage to the detainees hearing
  - ✓ – The use of multiple interrogators
  - ✓ – Deceiving the detainee by having the interrogator present a false identity. The assumption of a false identity would be intended to paint the interrogator as either a citizen of a foreign nation, or as an interrogator from a country with a reputation for harsh treatment of detainees
- **Category II techniques**
  - ✓ – The use of stress positions (like standing), for a maximum of four hours
  - ✓ – The use of false documents or reports
  - ✓ – The use of an isolation facility for up to 30 days, with any extensions beyond the 30 days requiring approval from the JTF-170 Commander
  - ✓ – Interrogation of the detainee in an environment other than the standard interrogation booth
  - ✓ – Deprivation of light and auditory stimuli
  - ✓ – The use of a hood placed over the detainee's head during transportation and questioning (the hood should not restrict breathing in any way and the detainees should be under direct observation when hooded)
  - ✓ – The use of 20-hour interrogations
  - ✓ – The removal of all comfort items (including religious items)
  - ✓ – Switching the detainees diet from hot meals to Meals Ready-to-Eat (American military field rations)
  - ✓ – Removal of clothing
  - ✓ – Forced grooming (shaving of facial hair, etc)
  - ✓ – The use of detainee's individual phobias (such as fear of dogs) to induce stress
- **Category III techniques**
  - – The use of scenarios designed to convince the detainees that death or severely painful consequences are imminent for him and/or his family
  - – Exposure to cold weather or water (with appropriate medical monitoring)
  - – The use of wet towel and dripping water to induce the misperception of suffocation
  - ✓ – The use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing

Approved Interrogation Techniques
SECDEF Memo 16 Apr 03

a. Direct
b. Incentive/removal of incentive
c. Emotion Love
d. Emotional Hate
e. Fear up harsh
f. Fear up mild
g. Reduce fear
h. Pride and ego up
i. Pride and ego down
j. Futility
k. We know all
l. Establish you identity
m. Repetition approach
n. File and dossier
o. Mutt and Jeff
p. Rapid fire
q. Silence
r. Change of scenery up
s. Change of scenery down
t. Dietary manipulation
u. Environmental manipulation
v. Sleep adjustment
w. False flag
x. Isolation

Techniques b, i, o, and x require showing of military necessity and advanced notice to SECDEF

Interrogation Policy and Guidance

- Prior to 2 Dec 02
  - **Humane treatment**
  - FM 34-52
- 2 Dec 02 – 15 Jan 03
  - **Humane treatment**
  - FM 34-52
  - 2 Dec 02 SECDEF counter-resistance techniques
- 15 Jan 03 – 16 Apr 03
  (2 Dec 02 SECDEF memo rescinded Cat II and III)
  - **Humane treatment**
  - FM 34-52
  - 2 Dec 02 SECDEF memo Cat I
- 16 Apr 03 – Present
  - **Humane treatment**
  - 16 Apr 03 SECDEF counter-resistance techniques
  - Implementation guidance derived from FM 34-52, USSOUTHCOM and GTMO

Policy to JTF-GTMO Application Process Example 1 of 2

- FM 34-52
  - Example: Futility – "Interrogator convinces the source that resistance to questioning is futile." (FM 34-52)
- Interrogator (NCO) constructs written interrogation plan; vetted through Team Chief and ICE Supervisor (DIA and/or officer); conducted with translator in consultation with Analysts
- GTMO Application Example:
  - Tell Detainee…
    - About how Al Qaida is falling apart
    - That everyone has been killed or captured
    - What we know about him
  - Gender coercion via domination
    - Straddled
    - Massaged
    - Mild, non-injurious touching

Policy to JTF-GTMO Application Process Example 2 of 2

- FM 34-52
  - Example: Ego Down – "Approach based on attacking the source's sense of personal worth." (FM 34-52)
- Interrogator (NCO) constructs written interrogation plan; vetted through Team Chief and ICE Supervisor (DIA and/or officer); conducted with translator in consultation with Analysts
- GTMO Application Example:
  - Told mother and sister were whores
  - Forced to wear women's lingerie
  - Allegations of homosexuality
  - Forced to dance with male interrogator
  - Strip searches for control measures
  - Forced to perform dog tricks

AR 15-6 Findings Substantiated Allegations

*a. Twice detainees were "short shackled" to the floor of the interrogation room.

*b. An interrogator directed the use of duct tape to quiet a detainee.

AR 15-6 Findings
Substantiated Findings

*a. DoD Interrogators subjected numerous detainees to yelling or loud music during interrogations.

*b. DoD interrogators impersonated being FBI and DoS agents.

*c. Interrogators adjusted air conditioners to make rooms uncomfortable.

*d. Interrogators had detainees moved from cell to cell to disrupt sleep patterns.

e. Female interrogator approached a detainee from behind, rubbed against his back, whispered in his ear, & ran fingers through his hair.

f. Female interrogator put perfume on a detainee's arm.

g. Female interrogator told a detainee that a red marking on her hand was menstrual blood and then wiped her hand on the detainee.

AR 15-6 Findings
High Value Detainee

ISN 063

- Saudi citizen and al Qaeda operative
- Denied entry into US in Aug 01
- Captured in Afghanistan and transferred GTMO Feb 02
- Admitted to being "20th hijacker" on UA Flt 93
- Proved to have intimate knowledge of future plans
- Successfully resisted standard interrogation techniques at GTMO for over 8 months

(Internment Serial Number (ISN) is unique detainee identifier)

AR 15-6 Findings
ISN 063 - Substantiated Findings

a. Twice, MPs held down ISN 063 while a female interrogator straddled the detainee without placing weight on the detainee.

b. Female interrogator on one occasion massaged the back and neck of ISN 063 over his clothing.

c. Female interrogators on numerous occasions invaded the personal space of ISN 063 to disrupt his concentration.

*d. On numerous occasions between Nov 02 and Jan 03 ISN 063 was yelled at or subjected to loud music during interrogation.

AR 15-6 Findings
ISN 063 - Substantiated Findings

e. Told ISN 063 that his mother and sister were whores.

f. Forced ISN 063 to wear a woman's bra and a thong placed on his head during the course of the interrogation.

g. Twice interrogators told him he was a homosexual or had homosexual tendencies and that other detainees knew.

h. Forced ISN 063 to dance with a male interrogator.

i. Interrogators subjected ISN 063 to several strip searches as a control measure.

j. Interrogator tied a leash to ISN 063's hand chains, led him around the room through a series of dog tricks.

AR 15-6 Findings
ISN 063 - Substantiated Findings

*k. Adjusted air conditioners to make rooms uncomfortable.

*l. Twice interrogators brought a military working dog into the interrogation room and directed it to growl, bark, and show teeth.

m. Interrogators subjected ISN 063 to segregation from the general population from 8 Aug 02 to 15 Jan 03 (160 days).

n. Interrogators subjected ISN 063 to 18 to 20-hour interrogations per day (48 of 54 days).

AR 15-6 Discussion
ISN 063

Discussion: Cumulative effect of simultaneous application of numerous authorized techniques had abusive and degrading impact on detainee

- 160 day segregation from detainee general population
- 18 to 20-hour interrogations per day, for 48 of 54 days
- Applied creative, aggressive and persistent techniques

Recommendation: CDR JTF GTMO should be held accountable for failing to supervise the interrogation of ISN 063 and should be admonished for that failure.

AR 15-6 Discussion
Second High Value Detainee

ISN ---

SEE CLASSIFIED SLIDE

AR 15-6 Discussion
Second HVD-Substantiated Findings

*a. DoD interrogator impersonated a Navy Captain assigned to the White House.

*b. Interrogators adjusted air conditioners to make rooms uncomfortable.

c. USN LCDR threatened second HVD and his family.

Recommendation: USN LCDR violated UCMJ, Article 134, by communicating a threat. Recommend discipline by current commander.

Summary of Findings

- 9 FBI allegations
  - 2 unsubstantiated
  - 2 substantiated; not authorized
  - 5 substantiated; authorized
- No torture occurred; detention and interrogation operations were safe, secure, and humane.
- ISN 063 Cumulative effect of simultaneous application of numerous authorized techniques had abusive and degrading impact on detainee
- Second HVD USN LCDR violated the UCMJ, by communicating a threat to HVD.

Questions

Lt Gen Mark Schmidt
Sr. Investigation Officer
BG John Furlow
Investigation Officer

General SCHMIDT. Thank you, Mr. Chairman.

Slide 2, you can see the purpose, as was stated by General Craddock, was to investigate those FBI allegations into the misconduct. Now, I will tell you it was a very focused investigation. It was about the FBI allegations. But we were also asked to look at whatever else we found in the way of discovery that led to detainee abuse. So that was our charter.

We were also asked to determine accountability for substantiated violations, and then in the end I was to recommend action at the

appropriate level for any accountability that could be identified for substantiated violations.

On Slide 2, as General Craddock has said, the e-mails from the FBI generated this investigation. The FBI Inspection Division sent an e-mail survey out to 493 FBI personnel who had been assigned to Gitmo from 9 September 2001 to 9 July 2004. In response to those surveys, 408 FBI agents had nothing to report. There were 59 who came back with no responses and that was determined by the FBI to be a negative reply as well. 26 agents replied that they had some indication or knowledge that they had perceived aggressive treatment or aggressive interrogation techniques that would not be consistent with FBI interrogation techniques and they reported those back to the FBI.

Of those, there were multiple reports of the same type of event and we boiled those down to eight, and we split one because it involved two different categories and we called it nine. So out of the 26 that came back positive, we looked at 9.

Slide 4, please.

The scope of the review. You can see on the slide it was fairly comprehensive, even though this was a focused report. The investigation was directed and accomplished under the informal procedures of the AR 15–6. This AR 15–6 investigation centered on the FBI alleged abuses occurring during interrogation operations. We found incidents of abuse during detention operations, all of which were appropriately addressed by the command.

The investigation team conducted a comprehensive review of thousands of documents and statements pertaining to allegations of abuse occurring at Gitmo, to include the complete medical records of the subjects of the first and second special interrogation plan. The team interviewed 30 FBI agents, conducted interviews of over 100 personnel from 6 January 2005 to 24 March 2005, and had access to hundreds of interviews conducted by several recent investigations. These interviews included personnel assigned to Gitmo, U.S. SOUTHCOM, the Office of the Secretary of Defense during the tenure of JTF's 160, 170, and Gitmo. It included 76 DOD personnel, to include every general officer who commanded the Task Force 160, 170, or the JTF Gitmo. Additionally, we considered abuse allegations made by the two high-value detainees themselves, as General Craddock has said. The investigation team attempted to determine if the allegations alleged by the FBI, in fact, occurred.

During the course of the follow-up investigations, the AR 15–6 team also considered allegations raised specifically by the detainees who were the subject of those plans. The investigating team applied a preponderance standard of proof consistent with guidance contained in AR 15–6. Much of the testimony was obtained from witnesses who had served as much as 3 years earlier and sometimes for 45 days or less. Civilian witnesses were not required to cooperate, nor under subpoena to answer questions.

The team also applied guidance contained in Field Manual (FM) 34–52, Commander of U.S. SOUTHCOM, and SECDEF memorandums authorizing special interrogation techniques if deciding if a particular interrogation approach fell properly within an authorized technique. In those cases in which the team concluded that the

allegation had in fact occurred, the team then considered whether the incident was in compliance with interrogation techniques that were approved either at the time of the incident or subsequent to the incident. In those cases where it was determined the allegation occurred and to not have been an authorized technique, the team then reviewed whether disciplinary action had already been taken and the propriety of that action. On 28 March 2005, General Craddock asked me to determine accountability for those substantiated violations that had no command action taken.

We did not review the legal validity of the various interrogation techniques outlined in the Army FM 34–52 or those approved by the SECDEF.

If you to go Slide 5, please. This is a summary of findings and I will go through the findings item by item in detail in the following slides. You can see in the nine FBI allegations two were unsubstantiated; we found no basis for those allegations. Two were substantiated and in fact were not authorized. Five were substantiated; however, they were determined to be authorized under the current guidance.

Interrogation of a particular ISN–063—and this is one person—in our judgment resulted in abusive and degrading treatment, and that was determined by the cumulative effect of creative, persistent, and lengthy interrogations which resulted in that determination.

The third bullet: There was a threat to the second high-value detainee that was discovered during the investigation.

As the bottom line, though, we found no torture. Detention and interrogation operations were safe, secure, and humane.

Slide 6. To the unsubstantiated allegations: On the left-hand column on your slide you will see an asterisk. Any of the allegations that we discuss in the briefing that have an asterisk relate to the FBI allegations. Those that are not relate to discovery events.

Chairman WARNER. General, we do not have page numbers on our copy.

General SCHMIDT. I am sorry, sir, but at the very bottom of the right there is a faint number, the very bottom of the right-hand part of the slide.

Chairman WARNER. Oh, I see. Well, that is an unusual way to do it. I see it now, all right.

General SCHMIDT. I am sorry, sir.

Chairman WARNER. We are not holding you responsible, but we thank you for bringing it to my attention.

General SCHMIDT. Yes, sir.

I am currently briefing from Slide 6. Reference to A: Investigation revealed that interrogators impersonated FBI agents and we believe that some of the FBI agents characterized this as interference. All testimony indicated the FBI impersonations were isolated and they were stopped upon FBI request. Further, we could find no FBI agent that could cite an actual example of interference with their mission.

Reference to the allegation that was unsubstantiated in B: Regarding the allegation by an agent she observed a detainee to be deprived of food and water. We considered both the statement she made on 12 July 2004 e-mail and her 9 September FBI telephone

interview. We made several efforts to conduct our own interview, but our FBI liaison continually advised us that she was unavailable. During the course of our investigation, we were unable to corroborate any allegations that detainees had been denied food or water.

Also, because of the inconsistencies in that agent's testimony and the lack of any other corroboration, we were unable to substantiate the second allegation.

To Slide 7. It is very important, I think, that we understand what we used as the authorities. FM 34–52 is the baseline providing doctrinal guidance, techniques, and procedures governing employment of interrogators as human intelligence (HUMINT) collection assets. This was all used and was in force at the time Gitmo interrogation operations began in March 2002.

Slide 8. Due to the difficulties, as General Craddock said, of interrogating a single high-value detainee, ISN–063, JTF Gitmo requested on 11 October 2002 additional techniques. As you look at that slide, all of the category 1, category 2, and category 3 techniques were on the list requested by the JTF. On December 2 the SECDEF approved the ones that have the green check marks. You can see it is all of the category 1, category 2, and only one of the category 3. After approximately 45 days, all category 2 and category 3 techniques were rescinded.

Next slide, Slide 9. On April 16, the SECDEF approved these interrogation techniques and this is the sole authority in existence today. The FM 34–52 is used as a guide. As you look at the slide you will notice that B, I, O, and X are highlighted. Those techniques, if they are to be used, require the showing of military necessity and advance notice to the SECDEF. These are in force today.

Slide 10. I put a slide together that just shows that in a more concise way. But I have highlighted a basic premise and guidance that has been inherent in every change of guidance and policy that has come down, and that is the baseline of humane treatment of all detainees.

Chairman WARNER. General, the committee will ask that you provide for the record first, referring to Slide 8, the green check marks all approved by SECDEF. Then in what form did he rescind those? By written communication, I presume?

[The information referred to follows:]

The Secretary of Defense memorandum dated December 2, 2002, which approved the techniques outlined in slide 8 was exhibit #15 of the Army Regulation 15–6 Investigation Report into FBI Allegations of Detainee Abuse dated April 1, 2005, (amended June 9, 2005) which was provided to the committee.

General SCHMIDT. That is affirmative, sir.

Chairman WARNER. Can we have copies of that written communication?

General SCHMIDT. Yes, sir, we will provide those to you.

[The information referred to follows:]

The Secretary of Defense memorandum dated January 15, 2003, which rescinds the December 2, 2002, memorandum was exhibit #16 of the Army Regulation 15–6 Investigation Report into FBI Allegations of Detainee Abuse dated April 1, 2005, (amended June 9, 2005) which was provided to the committee.

Chairman WARNER. Now, was that written communication different than the memo of 16 April 2003? Is that a separate document?

General SCHMIDT. It is a separate document, also written, and we can provide that for the record as well.

Chairman WARNER. All right, thank you.

General SCHMIDT. As I move, humane treatment again being the baseline of any issuance of policy and guidance regarding interrogation.

To move to Slide 11——

Chairman WARNER. Before we leave 9, we will need to have an amplification of your note there that techniques B, I, O, and X require showing of military necessity and advance notice. The full document that is behind that, we will need that also.

General SCHMIDT. Yes, sir, we will do that.

[The information referred to follows:]

The Secretary of Defense memorandum dated April 16, 2003, which outlines the requirement to show military necessity was exhibit #17 of the Army Regulation 15–6 Investigation Report into FBI Allegations of Detainee Abuse dated April 1, 2005, (amended June 9, 2005) which was provided to the committee.

General SCHMIDT. On Slide 11, I thought it would be illustrative to understand how the broad guidance or techniques that were available to the JTF, not directed to use but were available for the JTF Gitmo to use, on this particular detainee, how it moved from a high-order, fairly benign looking technique into an application that you will see later in the briefing that got very specific.

On Slide 11 it says "FM 34–52 has an example of a technique called 'futility.' It's intent is for the interrogator to convince the source that resistance to questioning is futile." That guidance is now an approved technique chosen by the JTF. The process it goes through to be used—there is an interrogator, normally a noncommissioned officer (NCO), who constructs a written interrogation plan that is vetted through a team chief and an intelligence control element supervisor, which could be Defense Intelligence Agency (DIA) or an officer at the O–5 or GT–14 level. Then, the plan is approved and vetted through that level, and then the interrogation is conducted with a translator in consultation possibly with another analyst.

The Gitmo example that I put at the bottom there is for futility, again convincing the source that resistance is futile, tell the detainee about how al Qaeda is falling apart, talk about how everyone has been killed or captured, and tell him what we know about him so that he feels that he has already been exploited at some point and it is futile to withhold information.

However, as it gets down to the interrogation room that may be, it may involve gender coercion via some form of domination. The detainee does not want to hear this and he does not want to hear it from a woman. You will see that being straddled, not touched, massaged, or possibly mild non-injurious touching, such as putting perfume on the arm and that sort of thing, invades a detainees personal space. This is part of how they make the futility element work, with this more aggressive technique.

Chairman WARNER. Now, all of those actions would be done by a female?

General SCHMIDT. That could have been done by a female. In this case it was, and we will talk about that specific interrogation. This is an example how top-down policy was applied at Gitmo.

On the next page there is a second example, also taken from FM 34–52 again. Example was "Ego Down." That is an approach based on attacking the source's sense of personal worth. Again, the same process: from the NCO, vetted through about the O–5, GT–14 level, and then the interrogation is conducted with enlisted personnel.

To bring the ego down, in the Gitmo application example the detainee was told that his mother and sister were whores, he was forced to wear women's lingerie, there were multiple allegations of homosexuality, and he was told that his comrades were aware of that. He was forced to dance with a male interrogator, subject to strip searches for control measures, not for security, and he was forced to perform dog tricks—all this to lower his personal sense of worth.

That is from the higher order technique down to an application. Somewhere in there there has to be a translation and that is where we started looking for accountability, in the translation from the high order example of a technique to the application, and we will go through those, sir, as we go through the briefing.

As we go to Slide 13, we begin to talk about the allegations. Again, on the left-hand side of the briefing if you see an asterisk that relates directly to something that was observed by an FBI agent that did not conform to FBI protocol for interrogation, which they found to be aggressive.

We found two substantiated allegations to be not authorized. The chaining of detainees to the floor, they were short-shackled to the floor in the interrogation room. Chaining detainees in this manner was used as a force protection measure in the early stages of operation. It is now specifically prohibited by Gitmo standard operating procedures.

We also determined that the chaining to the floor, the short-shackling, where the handcuffs are put down at the floor level, was only done briefly, it was done as a force protection measure, and it was never done in the interrogation, "briefly" meaning awaiting interrogation. That has now been stopped. So that was substantiated.

This was not construed to be a stress position and it was not considered to be overly abusive. There was no injury, there was no pain involved in this. It was a force security measure.

On the second one, an interrogator directed the use of duct tape to quiet a detainee. This was not authorized. In this case, a detainee was resisting interrogation by continuous chanting. According to witnesses, one was chanting a resistance mantra, another one was chanting things from the Koran. At the direction of a civilian intelligence control element chief, tape was used to quiet the detainee. This intelligence chief was verbally admonished by the Judge Advocate General (JAG) onsite at Gitmo.

Slide 14. This slide refers to the general population, what we found, and does not necessarily apply to ISN–063. We will treat him independently and another, second high-value detainee. In the general population, the first four, A, B, C, and D on your briefing on Slide 14, were alleged by the FBI. The yelling, the loud music,

we found that to be substantiated, did happen, and it was authorized under the FM 34–52 under the technique of futility.

Under B, impersonation of FBI and Department of State agents was authorized under the Secretary of Defense action memo in December 2002 under category 1, deception.

C, the air conditioners, was not authorized prior to 16 December 2003 under environmental manipulation, but it was authorized under the SECDEF 16 April 2003 memo. Environmental manipulation was approved as an appropriate and humane interrogation technique.

D, disrupt sleep patterns. That was authorized by SECDEF 16 April 2003 memo, sleep adjustment. Now, some of these events happened before 16 April, but if they were judged to be appropriate as a technique in this case at that time we found that they should have been appropriate prior.

E, the female interrogator approached detainee from behind, rubbed his back, whispered in his ear, and ran fingers through his hair; that was authorized by the FM under the futility technique.

F, the female interrogator put perfume on a detainee's arm; also authorized under futility, also authorized under the action memo from the SECDEF under mild, non-injurious physical contact.

The last one, G, under substantiated findings, involved the case of the female interrogator told the detainee that the red marking on her hand was menstrual blood and then wiped her hand on the detainee. This was a not authorized event. It was a spontaneous act of revenge by the interrogator. She had been spit on by the detainee. She left the room. She was angry. She put some marker on her hand, walked back in, put it on him, and said: You know what that is? He goes: No. She told him, and it in fact unsettled him.

She was verbally reprimanded, removed from interrogation duties for an unspecified time—we determined about 30 days—she was retrained, and then she was reinstated.

We listed these female coercive substantiated findings because we needed to dispel the idea that there had been a lap dance committed, and we could find no evidence that that ever occurred. But there was enough of these coercive sort of things with female invasion of space that that could have been interpreted by an FBI agent. So we looked at all of these.

Slide 15, please. Now we get to the isolated case, and this is where most of the findings we have about, that we classify as abusive or degrading treatment are concerned, with ISN–063. You will see on Slide 15 this is not a good person. This is not a person that we have any compassion for and it was difficult to find any pity for this man.

A Saudi citizen and an al Qaeda operative. Denied entry into the U.S., as General Craddock said, and it was just a matter of a sharp agent that kept him from entering the United States at Orlando. He was captured in Afghanistan, he came to Gitmo in February 2002. He admitted to being the 20th hijacker and he expected to fly on United Airlines Flight 93.

He proved to have intimate knowledge of future plans. He successfully resisted standard interrogation techniques at Gitmo for 8 months and he is the genesis for the request by the JTF at Gitmo

for more techniques that might be able to get past his resistance training.

Slide 16, referencing ISN–063, and this is all about this one individual. A, B, and C, as you can see, involved gender coercion, invasion of space, and futility, and that involved the straddling. Twice it happened, while MPs held him down while a female interrogator straddled him without placing weight on the detainee.

Invasion of space, B. The female interrogator on one occasion massaged the back and neck of ISN–063 over his clothing.

C, female interrogators on numerous occasions invaded the personal space of ISN–063 to disrupt his concentration.

Asterisk on D, meaning it was observed by the FBI: On numerous occasions between November 2002 and January 2003, ISN–063 was yelled at or subjected to loud music during the interrogation. That was an authorized technique on ISN–063.

Slide 17. These are all substantiated findings, and up front these all fall under the broad technique of pride and ego down, which is an authorized technique.

E, ISN–063 was told his mother and sister were whores. He was forced to wear a bra and a thong placed on his head during the course of interrogation. Twice interrogators told him he was a homosexual or had homosexual tendencies and that other detainees knew. He was forced to dance with a male interrogator. He was subjected to several strip searches as a control measure, not for security. An interrogator tied a leash to his hand chains, led him around the room, and conducted a series of dog tricks.

Slide 18. The first two have the asterisk, observed or reported through FBI allegations. Air conditioners were adjusted to make the rooms uncomfortable. That was not authorized prior to 16 December. However, it was authorized by the SECDEF 16 April 2003 under environmental manipulation, and it's an approved, appropriate, humane Gitmo technique.

L, twice interrogators brought military working dogs into the Gitmo room and directed to growl, bark, and show teeth at the detainee. Dogs were authorized under the SECDEF action memo, again the additional techniques, 2 December 2002, category 2, individual phobias. Both of those were FBI alleged observed.

M, interrogators subjected ISN–063 to segregation from the general population from 8 August 2002 to 15 January 2003, and that is 160 days. That was authorized by the SECDEF action memo of 2 December 2002, category 2, isolation facility.

Interrogators subjected ISN–063 to 18- to 20-hour interrogations per day. Those occurred 48 out of a 54-day straight period. That was authorized by the SECDEF action memo of 2 December 2002, category 2, 20-hour interrogations. The interrogation days were typically a 7-hour interrogation, a new set of interrogators would come in, 7 hours of interrogation, a new set would come in, 6 hours, and then the detainee was released for 4 hours. He could sleep if he chose to sleep.

Slide 19, and this is the discussion, not a finding, on the ISN–063. While taken individually, each technique and the application of those techniques was authorized and did not rise to the level in our judgment of inhumane treatment, and this AR 15–6 team

found that the cumulative effect of the interrogation was degrading and abusive, again regarding this particular single individual.

Particularly troubling is the combined impact of the 160 days of the segregation from other detainees, 48 of 54 consecutive days of 18 to 20-hour interrogations, and the creative application of authorized interrogation techniques. Requiring the subject of the first special interrogation plan to be led around by a leash tied to chains, placing the thong on his head, wearing a bra, insulting his mother and sister, being forced to stand naked in front of a female interrogator for a period of at least 5 minutes, using strip searches as interrogation techniques, the AR 15–6 team found to be abusive and degrading, particularly done within the context of the 48 days of intense and long interrogations.

I do not, however, consider this treatment to have crossed the threshold of being inhumane. In making that conclusion, I considered the President's mandate to treat the detainees humanely and the requirement to ensure detainees had adequate food, drinking water, clothing, shelter, and medical treatment. In this case the treatment was not determined by me to be inhumane because the interrogators not only ensured that ISN–063 had adequate food, water, clothing, and shelter, but also that the interrogation and the techniques used were done in a highly controlled interrogation environment, with medical personnel continuously monitoring his health and well-being.

On the other hand, despite the controlled environment of the interrogation room, we felt the commander of the JTF still failed to monitor the cumulative application of the creative interrogation techniques applied over a lengthy period of time. In interviews, the commander of the JTF stated he was unaware of almost any of these applications.

Both FM 34–52 and the current SECDEF guidance warn interrogators of the responsibility to monitor the cumulative effects of interrogation. General Miller was aware of the FM's warning and expressly told the FBI agents—and had been expressly told by FBI agents of their concerns about the dangers of counter-resistance interrogations. Despite these facts, in my opinion he failed to monitor and place limits on the application of authorized interrogation techniques—authorized interrogation techniques—and allowed this interrogation to result in potentially unnecessary and degrading abusive treatment.

On Slide 20, we will have to move to a closed hearing to discuss the second high-value detainee. But we will discuss in open session some of the treatment.

Slide 21, the second high-value detainee substantiated findings. The first two have asterisks, again reminding that these were observed by the FBI agents as alleged abuse. The DOD interrogator impersonated a Navy captain assigned to the White House. That impersonation was authorized under the FM 34–52 as a deception approach.

Interrogators adjusted air conditioners to make the rooms uncomfortable—again, not authorized prior to December; however, authorized by the SECDEF 16 April 2003 memo, environmental manipulation as an approved, appropriate humane interrogation technique.

On C, this is one that was found by discovery, and that was that a United States Navy lieutenant commander communicated a threat to the second high-value detainee and his family, and it was determined to be a threat of death. We made a recommendation that the United States Navy lieutenant commander had violated the UCMJ Article 134 by committing a threat and we recommended discipline by his current commander.

We were unable—again, this is not a legal criminal investigation by us; we did not have that authority. But the preponderance of evidence—even in the absence of several key witnesses who declined to be interviewed, we found a preponderance of the evidence showed that this did in fact happen.

Slide 22.

Chairman WARNER. Let me get that clear. Several key witnesses declined to be interviewed?

General SCHMIDT. That is correct, sir.

Chairman WARNER. Can you amplify that? Who were they and what procedures did you take to try and get those interviews, and did you go above your chain or your own level to a higher level to try and get assistance to get those people?

General SCHMIDT. Sir, the higher level would obviously be the combatant commander and that will go to General Craddock and he will address that in his remarks. The people who would not acquiesce to being interviewed in this and we could not interview them because they were civilian, they were retired, or they were reservists. If they were military, we could direct them to participate and cooperate with the investigation.

One was a DIA individual, and I need to make sure I am correct on this. One was a staff judge advocate who said he would plead his rights to not get involved in this, and we did not have the authority to go around that. Another one was a—and the lieutenant commander would also not participate in this interview.

Chairman WARNER. Did any FBI personnel decline to be interviewed?

General SCHMIDT. No, sir.

Senator LEVIN. Excuse me. Was the lieutenant commander on Active Duty or retired?

General SCHMIDT. The lieutenant commander was a reservist and I believe he is no longer even on Reserve status. Is that correct?

He is still in the Reserves. He has invoked his rights and he will have to be interviewed in the investigation that will follow this. Now, I have recommended, again, that this goes to a commander.

Senator LEVIN. Just clarify "invoked his rights"? Be more specific? What rights?

General SCHMIDT. Invoked his rights to not incriminate himself or participate in the interview.

Senator LEVIN. Thank you.

Chairman WARNER. There will be a follow-on criminal investigation, is that correct? Did you bring that out to General Craddock?

General SCHMIDT. I believe so, sir.

Sir, we get to Slide 22, and again I apologize for the long-winded and the level of definition. But again to review, that we had nine FBI allegations, two unsubstantiated, two were substantiated that

were not authorized; and there were five substantiated, however upon investigation we found that under broad authorities they were authorized.

In my judgment—and we looked at this very, very carefully—no torture occurred. Detention and interrogation operations across the board, the general population, and again looking through all the evidence that we could, were safe, secure, and humane.

We did find that, regarding one detainee, ISN–063, I felt that the cumulative effect of simultaneous applications of numerous authorized techniques had abusive and degrading impact on the detainee.

Lastly, the second high-value detainee, the naval commander violated the UCMJ by communicating a threat, and to us it was a death threat, and that can be determined once we have more testimony under oath to that.

Chairman WARNER. Is there any conflict between the two substantiated and not authorized and no torture occurred at all?

General SCHMIDT. I am sorry? Restate the question?

Chairman WARNER. I am just trying to figure out. Two substantiated, not authorized, and then your general conclusion is there was no torture, detainee and interrogation operations were safe and secure.

General SCHMIDT. Sir, we made a distinction between what torture and inhumane treatment would be, given the general guidelines, and then what might be abusive and degrading. Something might be degrading but not necessarily torture, and it may not be inhumane. It may be humiliating, but it may not be torture.

So we can say no torture, no physical pain, injury. There was a safe, secure environment the entire time. However, there was degrading and abusive treatment to this particular individual. That was our charter, was to find that.

On the next slide, sir, that is the end. Again, I apologize for the lengthy——

Chairman WARNER. You do not need any apologies. This is a very important subject and we need to have all the details before us.

General SCHMIDT. Sir, at this time I would like to return the microphone to General Craddock.

General CRADDOCK. Thank you.

Chairman WARNER. General Furlow, is he going to participate in the direct presentation?

General CRADDOCK. No, sir. He is available to answer questions when we get to that stage.

Chairman WARNER. All right.

General CRADDOCK. Under AR 15–6, as the appointing authority for the investigation, my responsibility was to review the report and take action on the findings and recommendations. In taking my action, I accepted or approved all the numbered findings and recommendations included in the written report which was provided to the committee, with the following two exceptions.

I disapproved Recommendation No. 16, that Major General Miller be held accountable for failing to supervise the interrogation of ISN–063 and be admonished for that failure. However, in accordance with current procedures and regulations, I have forwarded this report to the Department of the Army Inspector General for review and action as he deems appropriate.

I modified Recommendation No. 22 to request that the Naval Criminal Investigative Service (NCIS) conduct further investigation into the threat communicated by an interrogator to a particular high-value detainee before forwarding the matter to the current commander of that interrogator for his action as he deems appropriate.

I will now explain the rationale for my decisions. My reason for disapproving Recommendation No. 16 is that the interrogation——

Chairman WARNER. That is relating to General Miller, for those trying to follow this. It is a little difficult.

General CRADDOCK. With regard to Major General Miller, Recommendation No. 16, my reason for disapproving that recommendation is that the interrogation of ISN–063 did not result in any violation of any U.S. law or policy and the degree of supervision provided by Major General Miller does not warrant admonishment under the circumstances. As the commander, even in the early days of his assignment, General Miller was responsible for the conduct of his subordinates. However, as all commanders must do to an extent they determine appropriate, General Miller relied on the judgment and experience of his people to carry out their duties in a manner that was both professional and authorized.

The evidence shows that he was not misguided in his trust, since there was no finding that law or policy was violated. General Miller did supervise the interrogation in that he was aware of the most serious aspects of ISN–063's interrogation: the length of interrogation sessions, the number of days over which it was conducted, and the length of segregation from other detainees.

The evidence does show that General Miller was not aware of certain other aspects of that interrogation. However, since there was no finding that U.S. law or policy was violated, there is nothing for which to hold him accountable concerning the interrogation of ISN–063. Therefore, under the circumstances, I do not believe that those aspects of which he was not aware warrant disciplinary action.

Again, of particular importance to my decision is the fact there was no finding that the interrogation of ISN–063, albeit characterized as creative, aggressive, and persistent, violated U.S. law or policy. Additionally, I think it is important to note that General Miller arrived in Gitmo for the first time when he assumed command on 4 November 2002. He is an artilleryman with no previous command experience and detention and strategic intelligence-gathering operations. Upon arrival, he assumed command of two organizations, JTF 160 and 170, that upon his arrival were merged into JTF Gitmo. The operations at Gitmo had commenced in January 2002 with little infrastructure in place when the first detainees arrived. Upon assuming command of JTF Gitmo, General Miller became responsible for a multitude of tasks that demanded his immediate attention: merging the two task forces into the one task force that would have a common operating system for both the interrogation element and the detention element, managing the construction of new facilities, the manning, equipping, training, and organizing of the force, developing standard operating procedures for and improving the cooperation between inter-agency interrogations, and

also, last but not least, improving the quality of life for the military personnel of JTF Gitmo.

Now, let me go on to the next recommendation, Recommendation 22, which has to deal with the communication of a threat. My reason for modifying Recommendation 22 is that further investigation by the NCIS——

Chairman WARNER. Before we leave Miller now, your decision in effect reverses General Schmidt's finding, but your decision is now to be reviewed by the Inspector General (IG) of the Department of the Army. That should be put in the record at this point.

General CRADDOCK. That is correct, Senator. The requirement I have under Army regulations, the Army requirement actually, is that any allegation of wrongdoing, founded or unfounded, must be communicated to the IG of the Department of the Army for his review and decision as appropriate.

Chairman WARNER. Will he review this de novo, in other words go from the ground up, look at it all?

General CRADDOCK. We send him the report and my forwarding letter for his review.

Chairman WARNER. Then it goes to the Secretary of the Army, I presume?

General CRADDOCK. Mr. Chairman, what he does with it, I do not know his procedures.

Chairman WARNER. All right.

Senator LEVIN. Does he have the power to reverse your reversal of those two recommendations?

General CRADDOCK. I do not know.

Chairman WARNER. I think he does.

Senator LEVIN. General Craddock, your answer is that you do not know if he has that power?

General CRADDOCK. That is correct.

Senator LEVIN. I think we ought to ask our counsel.

Chairman WARNER. We will clarify that.

General CRADDOCK. Now, with regard to the communication of the threat, my reason for modifying Recommendation 22 is that further investigation by NCIS may discover evidence in mitigation and extenuation that should be considered in determining whether disciplinary action is appropriate for the interrogator.

Of the recommendations I approved, Recommendations 23 to 27 are not within my authority to implement. Therefore, I forwarded those to the Deputy Assistant Secretary of Defense for Detainee Affairs for review and action as he deems appropriate.

This concludes my statement, Mr. Chairman. Thank you for the opportunity and we stand ready to answer your questions.

Chairman WARNER. Thank you very much.

First I want to commend you, General Schmidt, working with General Furlow, for what appears to be a very comprehensive and thorough piece of work by you and your team. We had to move swiftly on this. I had the opportunity at length to visit with General Craddock last night and to, in the intervening hours, go through much of the report. But it is a complicated subject.

My first question I will put to General Craddock, but I think in all likelihood you will want to refer it to your two officers. That is,

your assessment of the working relationship between those in the Bureau—there were some 400 or 500 Bureau people?

General SCHMIDT. Sir, there were 493 in the e-mail survey, and obviously there is more since.

Chairman WARNER. Now, my understanding, they came for 30-day intervals, the individuals; is that about right?

General SCHMIDT. I think 30 or 45 days was the standard.

Chairman WARNER. Very brief intervals, they were there. Then there was a complete recycling, one after another. That is in sharp contrast to the military individual or the civilians who were there for at least a year in many instances; am I correct on that?

General CRADDOCK. Initially 6 months and then it turned into a year rotation, yes, Mr. Chairman.

Chairman WARNER. Now, the interrogation at Gitmo it is clear was producing a lot of very important intelligence that helped our operating forces, primarily in Iraq and Afghanistan. That is thoroughly documented, General Craddock?

General CRADDOCK. Mr. Chairman, in a closed session we will provide you information on the intelligence gained, yes, sir.

Chairman WARNER. But my assessment I think in the open can be that it was a very important contribution——

General CRADDOCK. Yes, sir.

Chairman WARNER.—to save lives, be it Americans or coalition forces, fighting.

General CRADDOCK. We believe so.

Chairman WARNER. The findings by and large, with the several exceptions that you have pointed out, indicate that the interrogating procedures were conducted in accordance with directives from the SECDEF, even though from time to time they were changed.

Now, the Bureau people were looking at this same set of facts coming from these detainees and the procedures from the perspective of future criminal operations in the United States; am I correct on that?

General FURLOW. Mr. Chairman, that is correct. The FBI agent went down there with the idea of conducting a prosecutable case in a court of law.

Chairman WARNER. The standards by which they collect evidence for prosecutions, presumably for Federal courts as opposed to State, were quite different than the standards promulgated by the SECDEF; am I correct in that observation?

General FURLOW. Yes, sir, that is correct.

Chairman WARNER. To put it in a simple way, that seems to me could put sand in the gearbox and cause some difficulty in their pursuing their mission and the military pursuing their mission. Am I correct in that, General?

General SCHMIDT. That is correct, sir.

Chairman WARNER. Now, when you conducted your investigation, to what extent did the Bureau have the opportunity to look at your findings preliminary and provide some rebuttal?

General SCHMIDT. Sir, when we started the investigation, they were aware that the entire focus of my investigation, General Furlow's investigation, was centered around their alleged percep-

tion or otherwise of aggressive tactics for interrogation that they would violate their own policy. They gave us access——

Chairman WARNER. So in other words, SECDEF's directives were inconsistent, maybe not in violation, but inconsistent with their policies; is that correct?

General SCHMIDT. The goals were different. The goals for evidence——

Chairman WARNER. Yes, I understand the goals were different.

General SCHMIDT.—and intelligence to be used drove us that way. So there were different rules. The agents on the ground obviously wanted to develop rapport and develop evidence through noncoercive means because it is no longer admissible in a court of law. We needed actionable intelligence on the DOD side. One, time was an element. Two, the coercion piece was not an element that would deter that.

Chairman WARNER. Now clearly that gave rise to some of the agents providing the, was it 28 e-mails, is that the number that raised allegations?

General FURLOW. Sir, there was 26.

Chairman WARNER. Twenty-six e-mails, which gave rise to the need for General Craddock to convene this thing.

Now, to what extent did the writers of those e-mails have an understanding with what the military mission was vice what the Bureau mission was? Presumably they understood what the Bureau mission was and the constraints, as you say, imposed by our doctrine of Federal law and criminal procedure. But did they have any appreciation for what you were trying to do in accordance with SECDEF?

General SCHMIDT. Sir, I will turn this over to General Furlow, but obviously five of the other allegations were unsubstantiated because they did not have an understanding. What they saw and what they understood to be abusive did not correlate.

Chairman WARNER. General Furlow, do you want to make a comment?

General FURLOW. Yes, sir, I will make a comment. I would like to make a comment that the Bureau was very cooperative in working with us on this investigation, and the goals obviously, as you mentioned previously, were different. Now, the initial conversation with some of the writers of the electronic communications were from a standpoint of providing a prosecution. Later on, late 2002, early 2003, there was more of an understanding and communication between the DOD representatives and the Bureau individuals about what each individual's part of the effort at Gitmo was.

Chairman WARNER. Now, my understanding is that the Director of the Bureau has this whole chapter or problem under investigation. Is that correct, General Craddock?

General CRADDOCK. Mr. Chairman, I know that the Department of Justice Inspector General (DOJ IG) requested to visit Gitmo to interview their people there and some of the DOD people. We supported that. They also did some interviewing of detainees. Beyond that, I am not aware of where that investigation is going nor the intent or purpose. But what we were told was it was to validate FBI processes and reporting procedures.

Chairman WARNER. Were there any instances in the performance of your mission pursuant to General Craddock's order in which you felt that the Bureau was not being cooperative? In other words, did each of the persons you wished to interview agree to do it and did perform an interview?

General SCHMIDT. When I came on they were completely cooperative, they were collaborative. The DOJ, they were just beginning their investigation as we were ending ours. General Furlow had constant contact with the FBI agents and they also worked with the FBI to have access to all of those agents who had allegations that they had seen abuse.

General Furlow?

General FURLOW. Yes, sir, we worked hand in hand with the FBI. There were some agents that were just not available based on the fact that they were deployed overseas and on projects and such like that. We were able to visit with the FBI, through the FBI legal, where we were allowed to run the lead with their representatives from the DOJ IG in attendance. We have been in communication with their investigation to ensure that they have the information that we were able to obtain to assist them in their investigation.

Chairman WARNER. Now, the two unsubstantiated e-mails, did you interview both of the writers of those e-mails?

General FURLOW. Sir, the two unsubstantiated allegations, we actually——

Chairman WARNER. In other words, to me—those e-mails were examined by you and you could not find any facts to substantiate the allegations in those two FBI e-mails, is that what that means?

General FURLOW. Yes, sir. In addition to that, what we did is we queried each one of the FBI agents we visited with, with all of the eight or nine allegations that I was initially chartered with.

Chairman WARNER. Correct. But now, the two unsubstantiated, were those people face-to-face interviewed by you or your staff?

General FURLOW. Sir, there was a few—one individual agent was not available who wrote one of the electronic communications. We were not able to get a hold of her. She was not available. But we were able to——

Chairman WARNER. What does "not available" mean? She is locatable somewhere in the world, is she not?

General FURLOW. Yes, sir. She was on a project.

Chairman WARNER. Whatever. I do not want to probe behind what may be classified, but presumably they are detailed to domestic stations here in the continental United States, I suppose, maybe overseas.

General FURLOW. Yes, sir, there is a considerable number of Bureau folks deployed overseas.

Chairman WARNER. I understand that. But I mean, where was this individual physically?

General FURLOW. Could I defer that? I am not sure where the limits and the line is with the FBI information. If I could defer that to the classified side.

Chairman WARNER. Let us put it this way. It is so important that we determine how these reports were put together, given that the facts did not exist in your judgment to support them.

General FURLOW. Yes, sir.

Chairman WARNER. It seems to me that we should have delegated someone to go somewhere and face-to-face interrogate that agent. Was that procedure considered?

General FURLOW. Yes, sir, it was considered, but it was not done. But in the context of those allegations, through review of the methodology, reviewing the logs, interviewing other FBI agents and DOD personnel, we were not able to substantiate those two allegations.

Chairman WARNER. It has been my judgment—and I have some experience dealing with this as an assistant U.S. attorney at one time—you go find the person, wherever that person is, and face-to-face query them. But that was not done for some reason, is that correct?

General FURLOW. With one individual, that is correct, sir.

Chairman WARNER. But that was an important individual, am I not correct?

General FURLOW. Yes, sir.

Chairman WARNER. Is it possible, General Craddock, that there could be a follow-up to fill that gap?

General CRADDOCK. Yes, Mr. Chairman. We can pursue that.

Chairman WARNER. I thank you.

Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman.

General Craddock, you say there are basically three different types of activity here you have distinguished between relative to the Miller recommendation. One was torture, one is inhumane treatment, and the other one is degrading and abusive treatment. I believe maybe General Schmidt made those distinctions.

When it came to the recommendation relative to General Miller, you said that there was no U.S. policy that was violated and that was the reason for your decision. Is degrading or abusive treatment consistent with U.S. policy?

General CRADDOCK. Senator, in the context of the interrogation techniques authorized at the broad level, FM 34–52 and the directives from the Office of the SECDEF, those techniques were very general in nature. Now, what happens is then at JTF Gitmo, the interrogation team looks at, for example, pride and ego down or futility, as was the example used by General Schmidt, and they develop specific applications, if you will, of how to then use under that large interrogation technique specific applications which will cause discomfort to the detainee, which will break concentration, which will take that detainee out of his trained resistance techniques.

They may be, as General Schmidt has said, have a cumulative effect of being abusive or degrading.

Senator LEVIN. You said "may be." Did you disagree with General Schmidt's conclusion that there were degrading and abusive techniques used here?

General CRADDOCK. His conclusion was cumulative effects.

Senator LEVIN. Did you disagree?

General CRADDOCK. I do not know because the report—my investigators did not give me the point at which that would have occurred. Was it a combination of techniques occurring at the same

time or was it a combination of one technique over time, or both? I do not know. That is the reason——

Senator LEVIN. Excuse me. You do not know from their report?

General CRADDOCK. Correct.

Senator LEVIN. You do not agree or disagree with their conclusion that the cumulative effect was degrading and abusive techniques?

General CRADDOCK. It may well be the case, but their report did not prove it conclusively to me.

Senator LEVIN. If it were the case, would you agree that that would violate U.S. policy?

General CRADDOCK. No.

Senator LEVIN. Well then, it makes no difference whether or not their report is clear on that point or not, because even if it is clear on that point, which it is in my judgment, it still in your judgment——

General CRADDOCK. Senator, repeat your question?

Senator LEVIN. Yes.

General CRADDOCK. Would I do what now?

Senator LEVIN. If you agreed with their conclusion that the cumulative effect of these actions was that there was, in their words, "degrading and abusive treatment" of detainees, would you agree that that would violate U.S. policy?

General CRADDOCK. The policy as written, I would disagree that it would not violate.

Senator LEVIN. No, no. There is a double negative.

General CRADDOCK. That is correct——

Senator LEVIN. In your judgment, if the cumulative effect of treatment of detainees resulted in degrading and abusive treatment, would that violate U.S. policy? Can you give us a yes, a no, or you do not know?

General CRADDOCK. For this specific detainee, which is the only one I can address since it is the only one in question——

Senator LEVIN. Well, there are two here.

General CRADDOCK.—with regard to those techniques——

Senator LEVIN. There are two here.

General CRADDOCK. This is the only one, sir, with these techniques that we addressed. Because of the situation—let us take a step back——

Senator LEVIN. I do not want to disagree with you. I just want to find out what your answer is. Do you disagree with their conclusion that, relative to that detainee, the cumulative effect of the behavior of the interrogators was degrading and abusive treatment? Do you disagree with that conclusion?

General CRADDOCK. I do not know.

Senator LEVIN. Okay.

General CRADDOCK. As I stated earlier, because they did not give me the specificity.

Senator LEVIN. Next question, if you agreed with the conclusion, would you then believe that that would violate U.S. policy?

General CRADDOCK. We are dealing in a hypothetical?

Senator LEVIN. Yes.

General CRADDOCK. I do not want to do that. We are dealing in specifics here.

Senator LEVIN. Okay.

General CRADDOCK. I think that is why, sir, as I tried to state—and let me just—that is why I agreed to the recommendation. This needs some further study to determine where points are, as referenced in the report, and where lines may be crossed.

Senator LEVIN. General Schmidt, let me ask you a question. By the way, let me just tell you, General Craddock, I would have hoped that you could have given us a good, clear "yes," that if you concluded, if you concluded, that there was degrading and abusive treatment of a detainee, that that would violate U.S. policy. I would have hoped you would have given us a good, clear "yes" on that. But I will leave it at that.

General CRADDOCK. May I respond?

Senator LEVIN. Sure, if you can leave me a little time.

General CRADDOCK. Senator, we have some definitional standards and we know what torture is and we know what cruelty is. "Inhumane treatment" is undefined, but defined at JTF Gitmo in the absence of anything else that is used, and it appears to be effective. Beyond that, this blurs. An intent—the issue here is to what was the reason it might have been done. It was to produce an effect, to gain information, not for recreation.

Senator LEVIN. I could not agree with you more on that.

General Schmidt, this is for you. A May 10, 2004, e-mail released under a FOIA request describes how FBI concerns about aggressive DOD interrogation techniques were so serious that agents in Gitmo had guidance to stand clear when the techniques were used. The e-mail states that in weekly meetings of officials from the FBI and the DOJ's Criminal Division, "We all agreed DOD tactics were going to be an issue in military commission cases."

Now, my question: Do you have an unredacted copy of the May 10, 2004, e-mail?

General SCHMIDT. Sir, I am familiar with the e-mail. I am not sure if we have an unredacted copy or not.

Senator LEVIN. I would think you should have an unredacted copy of the e-mail. I think you ought to insist on it.

General SCHMIDT. We will take that for the record and we will find out.

[The information referred to follows:]

I do not have an unredacted copy of the 10 May 2004 FBI e-mail discussing instructions to Gitmo interrogators. I have viewed a redacted copy of this same e-mail and feel confident that all of the FBI concerns have been addressed relative to the scope of this investigation.

Senator LEVIN. If you do not, I think you ought to insist upon it.

There was, finally, in this May 10, 2004, document a reference to an earlier electronic communication which was prepared by the FBI's behavioral analysis unit explaining the Bureau way of interrogation versus DOD's methodology. Now, a classified version of that EC—which was referred to in the May 10, 2004, document, a classified version of that EC which is dated on May 30, 2003, has been provided to the Senate by the FBI. The classified May 30, 2003, EC contains a number of redactions, but also makes reference to a number of attachments to the May 30, 2003, EC.

My question: Do you have an unredacted copy of the May 30, 2003, electronic communication and do you have the attachments that are referred to?

General SCHMIDT. Senator, we are not in possession of that. We are aware of that EC. We were made aware of it in the last few days. We were allowed to see and review, but not take possession of, that document by the FBI just 2 days ago.

Senator LEVIN. Its attachments?

General SCHMIDT. General Furlow, did you get to see the attachments?

General FURLOW. Yes, sir.

Senator LEVIN. I would ask the chairman here that we ask that you make available to us in a classified setting, and that the FBI make available to us since you folks have seen them, that document plus its attachments, in a classified setting. So this is really a question I guess I will have to address to our chairman.

Chairman WARNER. We will take it under advisement.

Senator LEVIN. Thank you. My time is up.

Chairman WARNER. But I believe we have to clarify the record. Your questions are very important.

In the course of your examination of the e-mails, did you see all of the unredacted that you so desired?

General SCHMIDT. General Furlow did that part of the investigation.

General FURLOW. Yes, sir. Going back to Senator Levin's comment earlier, sir, we reviewed those yesterday at FBI headquarters. We were able to review them and read them, but we were not allowed to take possession of those documents. We were allowed to take notes, but we do not have those documents in our possession.

Senator LEVIN. Your report was written before you saw those documents?

General FURLOW. Yes, sir.

General SCHMIDT. Sir, our judgment after General Furlow read that, it was determined it was not relevant to the focus of our investigation on abuse.

Senator LEVIN. To this, okay.

General SCHMIDT. This particular focus, sir.

Senator LEVIN. That is fine. If we could have a copy of those documents in our classified session, it would be helpful.

General CRADDOCK. Senator, we do not have the documents.

Chairman WARNER. No, I understand.

Why did you delay until 24 hours before this hearing to look at such an important body of evidentiary material?

General FURLOW. Sir, there was one particular document that came up we were able to obtain a copy. There was a reference to this document dated May 30, 2003, and that was a specific document that I had not seen before. The other referenced documentation that I reviewed yesterday, the attachments and such, were made privileged to us previous to that. What I did is I went through and reviewed those to ensure that we had a completeness.

But the only document that we had not seen previous was the May 30, 2003.

Senator LEVIN. So the attachments had been made available to you?

General FURLOW. Yes, sir.

Senator LEVIN. Okay, good.

Chairman WARNER. I thank you.

Senator McCain.

Senator MCCAIN. General Craddock, as a matter of curiosity, you mentioned one of the reasons why you overruled General Schmidt's recommendation is General Miller was an artilleryman and had absolutely no experience in the handling of prisoners. Why, if this is such a valuable and important operation, would we appoint somebody in charge who had no experience?

General CRADDOCK. Senator, as I recall I said experience in detention operations at the strategic level. I did not make that decision. General Miller is an aggressive commander. He is known to be able to work through problems and bring——

Senator MCCAIN. So we could not find anybody who had background and experience in this kind of work to be in charge?

General CRADDOCK. Sir, I cannot answer that. I was not privy to the selection process.

Senator MCCAIN. The prisoners at Gitmo are those captured in Afghanistan, is that correct?

General CRADDOCK. That is correct.

Senator MCCAIN. What is the status of those prisoners? What is the official status of those prisoners?

General CRADDOCK. As determined by the Combatant Status Review Tribunals, enemy combatants or no longer enemy combatants.

Senator MCCAIN. Either one?

General CRADDOCK. The ones that are declared no longer enemy combatants then will either be returned to country of origin or released. That is an ongoing process, Senator.

Senator MCCAIN. I was asking the status of those who are held prisoner today in Gitmo. What is their official status?

General CRADDOCK. I answered that question, sir.

Senator MCCAIN. Which is?

General CRADDOCK. They are either enemy combatants as determined by the Combatant Status Review Tribunal and validated through an annual review board or no longer enemy combatants and therefore they will be processed for return or release.

Senator MCCAIN. As enemy combatants, what protections and what international agreements that we are signatories to are they entitled to?

General CRADDOCK. Our policy is they will be treated humanely and, where military necessity allows, consistent with the principles of the Geneva Conventions.

Senator MCCAIN. Say that again?

General CRADDOCK. They will be treated humanely and, where military necessity permits, consistent with the principles of Geneva Conventions.

Senator MCCAIN. Where military necessity permits, they are eligible for——

General CRADDOCK. Consistent with military necessity——

Senator MCCAIN.—Geneva Conventions? Who decides where military—what was your word?—military necessity permits?

General CRADDOCK. Consistent with military necessity——

Senator MCCAIN. Who decides what "military necessity" is?

General CRADDOCK. At this point, sir, the JTF commander, JTF Gitmo commander.

Senator MCCAIN. So when we interrogate a prisoner, we say you may be eligible for protections under the Geneva Conventions, but only where military necessity permits?

General CRADDOCK. I did not indicate it was an interrogation issue. The point at which——

Senator MCCAIN. We are talking about interrogation at this hearing, General.

General CRADDOCK. I understand that, Senator. But there is also detainee operations, which is the security aspect of that.

Senator MCCAIN. Let us focus our attention on the interrogation techniques, which are the subject of this hearing.

General CRADDOCK. Okay.

Senator MCCAIN. Who decides whether they have the protection of the Geneva Conventions for the treatment of prisoners of war or not?

General CRADDOCK. That is a presidential decision. The President has said that they do not have the protection of the Geneva Conventions.

Senator MCCAIN. Even though they are classified as enemy combatants?

General CRADDOCK. Sir, the President has said they do not have the protection of the Geneva Conventions.

Senator MCCAIN. These are not al Qaeda. These are people who are captured in combat in Afghanistan; is that right?

General CRADDOCK. Sir, they are Taliban and al Qaeda.

Senator MCCAIN. Okay, and they were part of the Taliban government in Afghanistan, right?

General CRADDOCK. They were Taliban. Whether it was a Taliban government, I won't judge. They were Taliban.

Senator MCCAIN. Okay. So basically they have no protections unless military necessity permits it; is that correct?

General CRADDOCK. They will be treated humanely.

Senator MCCAIN. Well, tell me this. At least for a period of time—is it still permissible to use a wet towel and dripping water to induce the misperception of suffocation?

General CRADDOCK. I am sorry, Senator. I missed the question. I was given a note here.

Senator MCCAIN. I have the JTF–170 counter-resistance techniques, requested 11 October; SECDEF approved 2 December, Category 2 and Category 3 rescinded 15 January. Is it still permissible to use a wet towel and dripping water to induce the misperception of suffocation?

General CRADDOCK. Sir, the only principles—the only interrogation techniques authorized are in the 16 April letter. I do not know if that letter—the date of that letter, if that was the 2 December, tier 1, 2, and 1 of tier 3. Tier 2 in the one individual technique and tier 3 were rescinded on 15 January.

Senator MCCAIN. All of them?

General CRADDOCK. All tier 2 and all of tier 3. Only one was ever authorized, tier 3.

General SCHMIDT. Senator McCain, if I could answer that.

Senator MCCAIN. Yes, go ahead.

General SCHMIDT. On that list, the use of the wet towel and dripping water to induce the misperception of suffocation was one of the techniques requested by the JTF in their laundry list given up. It was never approved. It has never been a technique approved. The SECDEF declined to even consider that.

General CRADDOCK. That was tier 3?

General SCHMIDT. It was a category request, but it was never approved.

Senator MCCAIN. Are dogs still used in interrogations?

General CRADDOCK. Dogs are not used in interrogations.

Senator MCCAIN. They are not?

General CRADDOCK. No, sir.

Senator MCCAIN. They have been?

General CRADDOCK. I believe the report, as indicated, found two occasions where dogs were used.

Senator MCCAIN. General Schmidt, there is a—well, let me just tell you the problem, General Craddock. There are no specific guidelines that I can tell from your response for specific rules for treatment of "enemy combatants" and there needs to be. Maybe that is not in your pay grade, but the clause "where military necessity permits" is as wide open as anything that I have ever heard.

This is what leads to recommendations such as were agreed to by the SECDEF and then had to be rescinded. I also happen to know that the then-acting on Active-Duty JAGs did not agree with these guidelines that were approved by the Secretary of Defense for a short period of time.

General CRADDOCK. Sir, may I clarify?

Senator MCCAIN. We need specific rules and specific guidelines for the treatment of "enemy combatant," as these in Gitmo are. Now, they may be al Qaeda, they may be Taliban, they may be the worst people in the world, and I am sure that some of them are. But there are certain basic rules and international agreements that the United States has agreed to that we will observe.

Go ahead and please respond.

General CRADDOCK. Very quickly, let me clarify. The President's policy: "As a matter of policy the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."

Senator MCCAIN. When you say you adhere to some principles, lots of us adhere to principles and practices that vary rather dramatically. As I say, that is a legalistic statement and one that is ridden with loopholes. It is clear to me that one of the reasons why we are sitting here today was, at least at the working level, that the interrogators did not understand, at least some of them did not understand, that "humane treatment" might be in the eye of the beholder.

General Schmidt, did you draw that conclusion from your investigation?

General SCHMIDT. Sir, the lines were hard to define. Humane treatment, torture, I felt were the clear lines. So did the JTF. Anything else beyond that was fairly vague, so it fell to our judgment.

Again, this was not a criminal investigation. It was one where I was asked to use my judgment. Detainee abuse was the center of the investigation. I felt there were abusive and degrading things done to this particular detainee and that is why I made that judgment.

Senator MCCAIN. General Furlow, the Army FM is very specific, is it not, on the treatment of prisoners?

General FURLOW. Yes, sir, 34–52 is specific. There is a chart on 1–10.

Senator MCCAIN. Why would we not just say, the Army FM applies here, with the exception if the President of the United States decided that this was—that the Army FM could be exceeded in outstanding examples? What is wrong with just using the Army FM, which is what we have used in previous conflicts?

General FURLOW. Yes, sir, that is essentially what was done. The initial set-up at Gitmo, the 34–52 was the authority, and the commander on the ground determined that it did not meet his requirement and requested more aggressive interrogation techniques and requested through memo form, in written form, and that is where the December 2 memo comes from that was later rescinded on the 15th of January, and then it followed the next authority process, sir.

Senator MCCAIN. I might add that those guidelines that were approved by SECDEF were not agreed to by the uniformed judge advocate generals because of their concern that we would get into this kind of morass that I find us in now. It is not clear to the members of—it is not clear to this member of this committee, and I do not think it is clear to the American people, exactly and specifically what the guidelines are, which then understandably would lead to some abuses of prisoners.

I hold no brief for the prisoners. I do hold a brief for the reputation of the United States of America as to adhering to certain standards of treatment of people no matter how evil or terrible they may be. I am afraid, General Craddock, that you have not—this hearing has not cleared that up, at least to my satisfaction.

I thank you, Mr. Chairman.

Do you want to respond to that, General Craddock?

General CRADDOCK. Sir, I understand the point you have made.

Senator MCCAIN. Thank you very much.

Thank you, Mr. Chairman.

Chairman WARNER. Thank you, Senator McCain.

That request up to higher authority, do we have documents that reflect how that was put to the higher authority? If not, we would like to have that made a part of the record.

General FURLOW. Yes, sir. We made note of that earlier, that that is part of the fact chain that we are providing to you in documentation with the 2 December memo.

Chairman WARNER. Because it is an important line of questioning and we have really got to probe this very carefully.

General FURLOW. Yes, sir.

Chairman WARNER. Senator Reed.

Senator REED. Thank you, Mr. Chairman.

General Schmidt, at page 12, I just want to try to clarify something in my own mind. You cite FM 34–52. You take out the gen-

eral categories, you go down, and then you give an application at Gitmo, which is mother and sister were whores, dancing with male interrogators, homosexuality allegations, et cetera.

First point: That sounds remarkably similar to what occurred at Abu Ghraib, people being led around in chains, people being forced to wear lingerie. Perhaps a coincidence, perhaps not. But to clarify this, is it your assertion that FM 34–52, which was written in the context of the Geneva Conventions, would allow this type of behavior any place other than Gitmo?

General SCHMIDT. Under the Geneva Conventions, sexual humiliation would not be appropriate.

Senator REED. So these references to 34–52, which are written in the context of the Geneva Conventions, in fact cite the Geneva Conventions, are not at all applicable in your view to Gitmo?

General SCHMIDT. The enemy combatants in this context are also not applicable to the Geneva Conventions.

Senator REED. So the confusion I think here is that there are standards which we have to apply under the Geneva Conventions, which is in Iraq particularly, but the answer here was that we were operating essentially with just the direction of the SECDEF and whatever improvisations could be made down there at Gitmo. Is that fair?

General SCHMIDT. Senator, what would be fair is there are authorized techniques and the applications to someone with a status that was not protected by the Geneva Conventions, although he had to maintain humane treatment, were taken fairly liberally.

Senator REED. Let's turn to ISN–063, the 20th hijacker, probably the most infamous, notorious prisoner down there. What approvals were necessary from the DOD to conduct this interrogation of ISN–063?

General SCHMIDT. The approval process was one where the request to interrogate him was done by the JTF. Those procedures that came down, there was a considerable amount of debate, conferencing, meetings, that sort of thing. Then there was an offering of how many might be suitable, and in the end the SECDEF chose a lesser number and promulgated those down in the 2 December.

Senator REED. But let me—I am talking specifically about this one prisoner.

General SCHMIDT. He was the subject of the request.

Senator REED. So we have with respect to this one prisoner an ongoing dialogue between General Miller, authorities in the DOD, including the SECDEF, about specific techniques that were going to be used, specific parameters for the investigation; is that correct?

General SCHMIDT. To our knowledge, there was a considerable amount of communication up and down the chain. That was not the subject of our investigation.

Senator REED. But you are aware of numerous communications between General Miller and Secretary Rumsfeld and other civilians in the DOD specifically about this one prisoner?

General SCHMIDT. We are aware there was communication.

General CRADDOCK. Let me set the record straight here if I could, Senator. This special interrogation proposal was developed prior to General Miller coming on board. It was done by General Dunleavy, and the preparation was weeks before General Miller showed up.

Senator REED. When did the interrogations take place of ISN–063? Throughout General Miller's tenure? How many months?

General SCHMIDT. Prior to his arrival, and then he arrived while it was already ongoing. He started on 23 November.

Senator REED. Did you look at General Miller's e-mails in your investigation?

General SCHMIDT. We looked at all his promulgated guidance.

Senator REED. But you did not look at any of his e-mails?

General SCHMIDT. Did not see—now, correct me.

General FURLOW. Sir, let me handle that one.

Sir, we went back to the server and the answer is, no, we did not look at his e-mails. We attempted to look at it. The server did not contain the e-mails in its memory past about a year, 18 months. So we were able to get a few memos, but they were not applicable to this particular case.

Senator REED. So you could not recover from any sources the communications he had back and forth about ISN–063?

General FURLOW. Not in the e-mail format, sir.

Senator REED. General Craddock, I think what you have done is taken an investigation which was sincere and detailed and turned it into a justification and exoneration for a senior officer and found a junior officer to recommend for punishment, which is consistent with all these other investigations. General officers apparently are fine, they were overstressed, they were distracted, they did not have the background; but naval Reserve lieutenant commanders are now looking at punishment.

It seems to me to be ludicrous. This prisoner was not someone lost in the shuffle. He is probably the most significant prisoner in Gitmo. He was the subject, even though it was with General Dunleavy, of debate with the SECDEF about precisely what should be done. For you to exonerate General Miller by simply saying he knew how long it was but he did not have to pay attention to details I think is unsubstantiated by any evidence. In fact, the evidence I think would compel following up with General Schmidt's recommendation.

So I just once again am disappointed in an investigation that has turned into something less than accountability, and it is another, again, justification for I think terrible mistakes. I associate myself with Senator McCain's remarks. We are in this muddle because no one has taken responsibility at a senior level for what has been done.

Thank you.

Chairman WARNER. Thank you, Senator Reed.

General Craddock, I want to give you and the other witnesses the opportunity to fully reply to the Senator's observations.

General CRADDOCK. Thank you, Mr. Chairman. My response is I appreciate the Senator's comments. I do not agree, obviously. I looked at this from the perspective of someone with 33 years plus experience trying to put my experience, what I have learned, into that situation, as I always do when I have to make judgments on admonishment or reprimanding or punishing subordinates or others I am judged to do so. I looked at that, and the difference between my investigators and myself essentially is the scope of supervision necessary. I looked at the fact that he placed trust and con-

fidence in his subordinates, and those subordinates I think repaid that trust and confidence, because there was no crossing of the line, if you will, violating the law or the policies as they were provided.

I think that we have to understand, this notion of an interrogation technique as written in 34–52 is a broad level, as General Schmidt discussed, and there are different categories. They then become translated into manifestations, into activity in their application. I think that is where reasonable people will differ in their expectations of what applications are used.

We know, based on this manual [indicating], the al Qaeda training manual, we know how they prepare resistance techniques. If we use interrogation techniques that they are prepared for, they will not work. So the intent there is to get into their space, cause them discomfort, to create a situation where they start to talk and we gain information. That is where the creativity of the interrogators, through proper authorities, as was in place and still is, is applied.

The other fact is this was one individual. It is not applied universally across the entire detainee population.

Thank you, Mr. Chairman.

Senator REED. Mr. Chairman?

Chairman WARNER. Yes, Senator Reed.

Senator REED. Mr. Chairman, I ask General Craddock: Did you read General Schmidt's entire file?

General CRADDOCK. His report?

Senator REED. His report.

General CRADDOCK. Yes, sir.

Senator REED. The statements?

General CRADDOCK. Yes, sir, I read every attachment.

Chairman WARNER. As a matter of fact, you told me you read it twice last night.

Senator REED. Your conclusion was, as I believe you said, there is not enough detail for you to substantiate the point at which this cumulative effect was contrary to policy?

General CRADDOCK. Contrary to policy or crosses the line to something else. I do not know where it is. I asked the question, Senator, of my investigators: I am unsure of where you say the cumulative effect. Is it a multiple application simultaneously of different techniques? Is it one technique over time? Where is the most egregious? I do not know, and that is the basis of my approval of his recommendation.

Senator REED. General——

Chairman WARNER. Senator Reed, I have a problem here.

Senator REED. —the line is where you draw it, and you did not draw it.

Chairman WARNER. Thank you very much. I want to make sure that the other flag officers have had a full opportunity to reply.

Did you wish to add anything, General Schmidt?

General SCHMIDT. No, sir. I respect General Craddock's opinion.

Chairman WARNER. General Furlow?

General FURLOW. No, sir.

Chairman WARNER. Fine.

Senator Inhofe.

Senator INHOFE. Thank you, Mr. Chairman.

Let me give you a different Senator's observations. Sometimes we get bogged down in all the detail and we forget about the overall picture, the big picture. I am shocked when I found only yesterday from the report that, after 3 years and 24,000 interrogations, only 3 acts of violation of the approved interrogation techniques authorized by FM 34–52 and DOD guidelines.

I just, I am shocked. It makes me wonder if we are really getting the most out of these detainees. It talked about one detainee having duct tape, another red ink, and all that stuff.

When you contrast these interrogation techniques with those used in other countries, those fighting us, it is hard to understand why we are so wrapped up in this investigation. Further, you have determined in all but a couple of cases appropriate disciplinary action was taken and in all the cases no further incidents occurred.

Add to that fact, most if not all of these incidents are at least a year old. I am very impressed with the way the military, the FBI, and other agencies have conducted themselves. This report shows me an incredible amount of restraint and discipline was present at Gitmo. Even the small infractions found were found by our own government, corrected, and now reported.

We have nothing to be ashamed of. What other country, attacked as we were, would exercise the same degree of self-criticism and restraint?

Now, let me ask you, General Furlow—you have been getting off easy here. Just give me in your professional opinion, what is the worst substantiated incident of inappropriate use of interrogation techniques that you investigated, just the one?

General FURLOW. Sir, it is the—in my opinion, and that is solely my opinion—would be the one involving the classified detainee and that fact pattern.

Senator INHOFE. Was appropriate disciplinary action taken in a timely manner in that case?

General FURLOW. Sir, that was with our report recommending being passed on to the naval investigation.

Senator INHOFE. Okay. I would like to ask just for a very brief response on something that concerns me and I would like to have this from each of the witnesses. We have heard a lot about the FM 34–52. Are the DOD guidelines as currently published in that manual appropriate to allow interrogators to get valuable information, intelligence information, while not crossing the line from interrogation to abuse? Do you think they are too restrained? What is your opinion?

General CRADDOCK. Senator, I think because that manual was written for enemy prisoners of war we have a translation problem, in that enemy prisoners are to be treated in accordance with the Geneva Conventions; that does not apply. That is why the recommendation was made, and I affirmed it, that we need a further look here on this new phenomenon of enemy combatants. It is different and we are trying to use, I think, a manual that was written for one reason in another environment.

Senator INHOFE. Thank you.

General Schmidt?

General SCHMIDT. Sir, I agree. It is critical that we come to grips with not hanging on a Cold War relic FM 34–52, which addressed an entirely different population. If we in fact are going to get intelligence to stay ahead of this type of threat, we need to understand what else we can do and still stay in our lane of humane treatment.

Senator INHOFE. Do you agree, General Furlow?

General FURLOW. Sir, in echoing that, FM 34–52 was originally written in 1987, further updated and refined in 1992, which is dealing with the Geneva question as well as an ordered battle enemy, not the enemy that we are facing currently. I am aware that Fort Huachuca is currently in a rewrite of the next 34–52 and it is in a draft form right now.

Senator INHOFE. Thank you, General Furlow.

Let me just give my own observations. I think you are entitled to that, to know that we are different Senators and we come from different perspectives. I did have occasion to be in the United States Army. I think that was one of the best things that ever happened to my life.

But I would maintain that these detainees that we are talking about here, they are detainees, they have knowledge about terrorist cells and operations that is useful to the United States in understanding the actions of those who seek to do us harm, destroying our way of life. They are not to be coddled, not if we are to get access to the information that they possess and information that will help us defeat them.

That is what this is all about. I think we are not talking about shoplifters here. We are talking—I think you stated it very well, General Craddock, when you said these are the worst of the worst. When you see some of the things that have been attributed to different people, talking about them, they are watching what we are saying.

I am really concerned about this. I got a lot of criticism a little over a year ago when the Abu Ghraib first investigation was taking place and I looked at the fact that those in those cell blocks were the terrorists, were the murderers, were our enemies, and that I was more outraged by the outrage than I was by the treatment of those.

This is just one Senator speaking. What other country would freely discuss interrogation techniques used against high-value intelligence detainees during a time of war, when suicide bombers are killing our fellow citizens? Why would we freely explain the limitations placed on our interrogators when we know that our enemy trains his terrorists in methods to defeat our interrogations? Today we are handing them new information on how to train future terrorists.

What damage are we doing to our war effort by parading these relatively minor infractions before the press and the world again and again and again while our soldiers risk their lives daily and are given no mercy by the enemy? Our enemies exploit everything we do and everything we say. Al-Zarqawi the other day said to his followers, "The Americans are living their worst days in Iraq now. Even Members of Congress have announced that the U.S. is losing the war in Iraq."

So I just say to you as one person, I applaud all three of you warriors. I applaud the discipline that has been demonstrated, the restraint that has been demonstrated by the interrogators. As one Senator, I admonish you and hope and pray that you do not unduly discipline our interrogators and impair their ability to save American lives. I thank all three of you for your service to America.

Thank you, Mr. Chairman.

Chairman WARNER. Thank you, Senator Inhofe.

I would like to go back to a very important point raised by Senator Inhofe, and you responded, but I think a little clarity is needed. The Army FM was drawn up against a background of what basically the United States had confronted in its previous wars, and that was state-sponsored aggression by nations which I think in many respects were subject to the Geneva Conventions. Now, as Senator Inhofe pointed out very dramatically, we are facing a totally different enemy, and as a consequence that FM has to be—well, remain in place should we have the misfortune of a state-sponsored conflict, but a separate manual has to be drawn up that addresses the complexity of the individuals that we are now capturing in Iraq or have and are continuing.

Am I correct in that, General Craddock?

General CRADDOCK. Mr. Chairman, I would agree. It is a different set of conditions out there that we have to recognize. I think it would be helpful not to—we need to understand what has been done and use that as the building blocks to provide the way for a future look that will put us instead where we do not have these ambiguous situations, where commanders know what they can do, where lines are drawn. Yes, sir.

Chairman WARNER. I thank you very much. Several of us on this committee and I think probably all members of the committee are anxious that Congress has a role in this to try and determine how we best devise Federal law such that the men and women of the Armed Forces of the United States in the promulgation of their duties, be it on the battlefield, here, or in maintaining these detention facilities, have a clear understanding of what they can and cannot do.

Did you wish to add something, General?

General CRADDOCK. Mr. Chairman, if I may, just to respond to your comment and Senator Inhofe. The fact is that probably in my judgment a lot of what has been discussed, a lot of what now is in the open press, and a lot of these applications of these interrogation techniques will feed change one to the Manchester document and a new chapter on interrogation resistance.

Chairman WARNER. You had better explain for the record "the Manchester document."

General CRADDOCK. This is the al Qaeda training manual. It has two chapters here on detention and interrogation resistance techniques.

Chairman WARNER. Good. In case people are captured, how they should conduct themselves——

General CRADDOCK. Exactly.

Chairman WARNER. —to resist.

General CRADDOCK. They are trained using these techniques to resist interrogation.

Chairman WARNER. That is very clear. General Craddock and other witnesses, that is the value of this very important report which each of you have put together.

Senator Clinton.

Senator CLINTON. Thank you, Mr. Chairman.

I do not know where to begin. General Craddock, was it any member of the al Qaeda or Taliban who took pictures of these interrogation techniques and thereby revealed them to the world?

General CRADDOCK. I am not aware of al Qaeda or Taliban taking pictures of any interrogations at—oh, are you talking about for their manual?

Senator CLINTON. No. The discussion about how these interrogation techniques became public and who knew about them and what kind of information that might give to the prisoners to resist interrogation—in fact, these techniques became public because of actions and decisions made by members of the United States military, is that not correct?

General CRADDOCK. Not that I am aware of.

Senator CLINTON. Well, think of Abu Ghraib and think of the pictures that were published, that were taken by members of military police units and others inside that prison. Is that not what happened?

General CRADDOCK. Senator, those were not interrogations.

Senator CLINTON. No, but they led to the inquiry about interrogations, did they not?

General CRADDOCK. The timing on these techniques we talked about here today, the applications, the JTF Gitmo applications of the techniques, preceded those pictures.

Senator CLINTON. I guess my point, General, is that as we look at what our real goal here is, our goal is to be effective in interrogation in order to obtain information in order to deter attacks and in order to find out significant intelligence that will enable us to defeat this enemy. Is that not right?

General CRADDOCK. I agree.

Senator CLINTON. So I think it is important to put in the record that, at least for some of us, at least speaking for myself, my concern about this is driven primarily about how effective we are going to be. There is considerable evidence that the underlying techniques as well as the publicity about those techniques, which did not come from the enemy that we were interrogating but from people on the inside within our own military, is really what should be the focus here, that if these techniques were so effective why did we not get better information, why do we still have people who have been resistant, and especially at Gitmo, where they have been basically out of communication for 3 years?

So I think that the intensity behind some of the questioning that you have received really begins from a fundamental disagreement about how we can be effective in pursuing the objectives that we all agree are the ones that are most important. At least from my perspective, I think that we made serious errors in authorizing and permitting a number of these techniques because they were not effective. In a free society, which we still are, it is very difficult to keep such behavior totally private. So at some point they were

going to be revealed and disclosed, as the log about detainee 063 has been revealed and disclosed.

So I guess, General, the questions that many of us have are really about the underlying attitude that has been taken toward the series of investigations that have been carried out and our belief that we have not done all we should to be as effective as we need to be, and the failure of accountability leads to ineffectiveness.

General Schmidt and General Furlow, let me ask you. Your report indicates that several past interrogators at Gitmo declined to be interviewed and are currently in civilian status. How many of the FBI's allegations of aggressive interrogators involved former interrogators who declined to be interviewed?

General FURLOW. Ma'am, on the FBI side, none of the FBI agents refused to be interviewed. The reason why we were not able to talk to the individuals that had prior experience down there was that we do not have subpoena capability under the AR 15–6, which was an administrative investigation. That is what limited it. If the person was still currently serving in the military, we could force them to visit with us. If they had served their time in Gitmo and returned to civilian life as a reservist, we were not able to subpoena them and force them to visit with us.

Senator CLINTON. How many people were you unable to subpoena or force to visit with you?

General FURLOW. Ma'am, we felt that there was not anybody that was material to this case.

Senator CLINTON. How many, though, were you unable to visit with or subpoena?

General FURLOW. I would say less than 10.

Senator CLINTON. General, is that your recollection?

General SCHMIDT. Yes, ma'am. It was very, very few. Those that we could not get to that were relevant to our investigation was just a small amount. It principally involved the one that involved the death threat and a ruse that we found out about in interrogation. That was the one that concerned us the most.

Senator CLINTON. Was there not also a former interrogator who wrote a book about his experiences?

General SCHMIDT. That is correct. You are referring to Sergeant Eric Saar. He was on his way to make a documentary. We asked if he had seen things, would he like to air that, would he like them investigated. He declined to be interviewed by us repeatedly.

General CRADDOCK. Senator, if I can set the record straight, he was not an interrogator. He was a translator-linguist.

Senator CLINTON. As a translator-linguist he would have been perhaps accompanying interrogators and therefore a witness, would he not?

General CRADDOCK. He participated in one or two interrogations that we can establish as a linguist.

Senator CLINTON. General Craddock, I just hope that at some point we can both clear the air on these matters, because I think we need to, and whatever revisions need to be made in the FM or the Geneva Conventions, the United States ought to be a leader in that, and we ought to do so both because that is what we believe and the kind of people we are and also because we want to be effective.

There is a lot at stake and it does not inspire confidence when we have all of these unanswered questions and when General Miller, who we know went from Gitmo to Iraq and was told to "Gitmoize" Abu Ghraib, is basically the central figure in both of these investigations and yet once again is free of any accountability or any admonishment, it raises serious questions.

Thank you, Mr. Chairman.

Chairman WARNER. Thank you, Senator.

I would like to pick up on the Senator's questions with regard to 10 individuals which you could not reach for interview. At any time did you bring this inability to reach people to General Craddock? General Craddock, did you consider going to a higher level? In other words, we possibly could go to the Director of the FBI to facilitate the interviews.

General CRADDOCK. Mr. Chairman, it was not brought to my attention. This is the first I have heard of 10 people.

Chairman WARNER. It seems to me—and I will work with you—we have to go back and revisit this what appears to be a gap and see whether or not we can facilitate filling that in.

General CRADDOCK. I understand.

Chairman WARNER. I thank you very much.

Did you wish to say something, General Schmidt?

General SCHMIDT. Senator Warner, the idea that we were unable to get to certain people, I just want to make sure we are clear that it was a small number. They were all civilians. None were FBI. We were almost always able to work around to other witnesses to events to corroborate that. This was an informal investigation to fact-find, not a criminal investigation. But when we found something that needed to be elevated, we did in the report, and that was the death threat.

Chairman WARNER. But I think the two unsubstantiated FBI e-mails, I believe—you want to revisit your comment that they were all not FBI? There is an area which troubles me considerably.

General CRADDOCK. The one FBI agent, the one in question, we are very familiar with who she is. We made to my knowledge five or six attempts to get to her. She was not made available. We discussed that with DOJ, who is also running an investigation. They have her e-mails. They have not interviewed her at this time either. She has not been available——

Chairman WARNER. I will come back. I do not want to take the time of my colleague. But that has to be corrected and straightened.

Senator Roberts.

Senator ROBERTS. I do not have the time to ask you a lot of questions and I think a lot of questions have been asked and I think you have answered them to the best of your capability. But I do have an observation and a statement, much in the same fashion as Senator Inhofe.

I want to tell you, General Craddock, I think you did the right thing by not citing General Miller. I do not agree with the assessment by other Senators here that he is a central figure in this case. I am quite sure that General Miller regrets not keeping a closer eye on those two interrogations, two interrogations out of 24,000

that we have had. He probably regrets not knowing what each person down there under his command had for lunch either.

But certainly that lapse is far outweighed by the miracle that he worked in his time at Gitmo. I take that from staff members of the Intelligence Committee who were interrogators at the time, knew of the chaos, knew of the disorder. This officer, while his Military Occupational Specialty was not in keeping with perhaps that assignment, was able to be a problemsolver.

Along with General Craddock, I visited Gitmo this past weekend. I got a thorough look. Nothing was denied to me, more especially as the chairman of the Intelligence Committee. I think that that system that General Miller, much maligned now that he is, brought order to chaos in his management of both the intelligence and the detention operations there—he pioneered the management and oversight systems that have made that detention facility an operation where—my view is in opposition to those who have already spoken—that we can be proud of under the circumstances with what we are gaining in intelligence and, more especially, the treatment of the detainees. They are not "detainees"; they are terrorists and they are very bad people.

Never, never before in history has any country faced with a barbaric terrorism implemented a policy of terrorist detention so unique, so unprecedented, and so humane, in my personal view.

Let me review those numbers again. There were 26 allegations of abuse that came from FBI personnel at Gitmo, nobody taking pictures. That was in Abu Ghraib and had nothing to do with interrogation. Of those nine incidents amounting to what could have been serious allegations, six of those turned out to be false allegations or incidents that were within the rules.

So if I am correct, we ended up with two incidents along with one more that the investigators found along the way, to bring a grand total of three confirmed incidents. That is part of the 24,000 total interrogations that have been conducted at Gitmo. So out of 24,000 interrogations, 3 total incidents. My math, that makes for an incident rate of .000125.

What field manual could be written to prevent incidents or an incident rate or a mistake in regards to 24,000 interrogations that resulted in an incident rate of .000125? Is this what this has come down to, 3 misdemeanors out of 24,000 interrogations, 3 misdemeanors that occurred 2 or 3 years ago, not today, not to practices that are being conducted today under your command and under the commander down there?

Now, I am in no way condoning incidents that are described in this report. Nobody is saying that. But I do not think they are a matter of national press attention, which will probably be the case. They are unfortunate, not only because they are unworthy of our great Nation, but because they are not effective at getting reliable information. That is the point that Senator Clinton made. But you understand that and the commander understands that, and the young men and women that I visited with personally certainly understand that.

Their motto on the back of their cover says "Honor Bound." When you went through that facility, everybody saluted you and said "Honor Bound," and you said "Honor Bound" back to them.

Things have changed at Gitmo in result of all of this that we are talking about.

I will tell you what this report says to me. It says that the three relatively minor incidents are not reflective of the vast majority of the important interrogations being conducted at Gitmo. I am talking about Gitmo as of today. It says that overall things are going well under very dangerous circumstances. I saw this for myself, the outstanding work our hardworking men and women are doing down there.

I am getting into trouble because of the report that I issued back in Kansas, because I said: Food, yes, the detainees are getting a choice of 113 Muslim dishes. Our troops are not getting that kind of choice. On health care, I said the clinic and/or hospital that had to basically treat the wounds of these people who came in from Afghanistan—and we have taken down 80 percent of the Taliban and also al Qaeda; these are the very bad people who are left and are terrorists and are still there. They have better health care and better facilities than many of my rural small communities. That got me in trouble. Ice cream on Sunday did as well.

If they are compliant, what about the home conditions or the conditions in terms of any kind of a communal living? Well, we saw them playing soccer, we saw them playing volley ball. I did not see anybody playing ping-pong, but it was there.

What about the observation of their culture and their religion? They pray 5 times a day, at least 20 times. Everybody is very reverent and silent. No American touches the Koran, none. A Muslim does. They are in each cell, and so we are really respecting that.

General Hood, who is the current commander, happens to be from Kansas, and I talked to his dad this morning and I told his dad he was doing an outstanding job. He gave us a wonderful briefing. He runs a tight ship with excellent oversight, supervision, and detainees are treated humanely and respectfully, both in the interrogation and the detention facilities.

It is getting results. Now, that was another big point that Senator Clinton made, and I wish she was here. We are getting valuable intelligence from Gitmo every day.

I saw the interrogations. I know the material we have. I know—I am not going to get into anything specific here, but I do know that it is current and can save lives, more especially in events like Casablanca and Madrid and, yes, London, and yes, plots against the United States.

We are using carrots, not sticks. I did not see any perfume, I did not see any straddling. I did not see any sleep deprivation, because that does not work. The positive side does work. So the men and women working at Gitmo handle very dangerous people every day, but it seems lately they have more to worry about from Congress—and that is what they told me: What is going on in Congress? Not only do they know it, but the prisoners know it from the terrorists they hold and interrogate.

Why would you shackle somebody to the floor prior to the interrogation in earlier days? Because their lives were at stake. They have made homemade weapons despite our very best efforts. They spit in people's faces, and that is not even the first of it. The rest

of it is so abhorrent that I cannot get into it, not to mention any kind of physical activity, even if shackled, that they would do.

So to protect the person who is leading them into the interrogation room, that would be an obvious thing that you might want to do.

General Schmidt and General Furlow, you have conducted a very thorough investigation. I thank you for that. You have answered all my questions in regards to the allegations.

I think the brave women and men down there at Gitmo are working hard every day to keep us safe. They have enough to worry about without any more ill-informed accusations of abuse or calls for closing down Gitmo. I think with the current practices, the current oversight, I think they need our support.

Thanks for a job well done. General Craddock, the work being done at Gitmo is important. I want you to know, and your people down there, that you have my support.

I would like to remind my colleagues we are in a war on a global scale. It is against a vicious and determined enemy. They reside in Gitmo. They are interested in one thing and that is killing.

The terrorists at Gitmo know today about this hearing. They know about the questions. They know about who goes down there. The people who have asked the most serious questions—and I do not challenge that—go to Gitmo and take a first-hand look.

When they are down there, these terrorists view their incarceration as part of their jihad. It is just like that manual that you held up. The more they know about what we are doing, the more they can offset what we are trying to do in terms of interrogation.

They know about this hearing, and they doubt our resolve and they think down the road, with legal help and wounding themselves and saying they have been basically treated in an inhumane fashion, that they can make a case with the American people. So they say that the Americans do not have resolve and that basically these kinds of hearings, it seems to me, really, I question whether we have the resolve as well. I think it is a most unfortunate statement that I would have to make in that regard.

So I thank you for the job that you are doing, and I called the three parents of the three young men down there who are working so terribly hard, who work 1, 2, 3 days in those camps that are so terribly difficult and then have to take 1 day off, maybe 2 days off, just to get away from it. I remember that thing on the back of their cover, "Honor Bound." They are doing the right thing. They are getting the best intelligence possible. I do not think we need to concentrate on 3 misdemeanors out of 24,000 investigations.

I am way over my time, but I really do not give a damn.

Chairman WARNER. Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

I always thought that we were part of a Geneva Conventions because we were concerned about the safety and the well-being of our own troops today, tomorrow, and in future conflicts. I never thought that the test was we are going to be as bad as whoever we are going to fight in whatever war we are going to be in.

It seems to me that if we are going to have an expectation that we are going to have our people treated decently—we know the history in many cases that they have not been, but if we are going

to find that out, it always seemed to me that the Geneva Conventions was there to make sure that we were going to protect our own people that were being held in other circumstances. That I still feel myself is the appropriate kind of criteria.

We have had other discussions about the Geneva Conventions and enemy combatants and we will get back to that at another time. But I do not think we can simply answer, as some have done, that the behavior, whatever behavior might have taken place at Gitmo, is acceptable because terrorists do worse. By lowering our standards, we reduce our moral authority in the world, undermine our leadership on human rights.

The FBI found that these torture techniques, as they called them, including the stress position, the 20-hour interrogation marathon, the use of dogs, violate the Constitution. They strenuously objected to them. Incredibly, the DOD found that these techniques were permissible despite the FBI analysis. Even under the DOD standards, the investigators found that some of the techniques used were not authorized.

General Craddock, the report—I know you have been asked this, but I want to come back to it. The report—because I think there is whole questions of accountability, both in Gitmo, I think, as well as in Iraq and other places. But let us just focus on this. The report recommended that General Miller be reprimanded, but you rejected the recommendation and simply referred the case to the Army IG.

I know Senator Reed asked you a question, that question or one similar. I believe you gave an answer. I'd be glad to hear you rather than me stating what I think I heard you answer. Maybe you would address that, if you would, again, please.

General CRADDOCK. What is the question, Senator?

Senator KENNEDY. The question is, there was a recommendation for disciplining General Miller. You made a judgment decision—that General Miller be reprimanded. But you rejected the recommendation and simply referred the case to the Army IG. I am asking you why, what was the basis for that?

General CRADDOCK. I disapproved the recommendation that he be held accountable for failing to supervise and be admonished. I am required to forward that to the Army IG because it is an allegation of wrongdoing. So that is the procedural aspect, Senator.

My rationale——

Senator KENNEDY. Let me just go back on this. He is the man in command on this. These violations have taken place on his watch, on his watch. The commission itself found that he ought to be reprimanded on this because it was on his watch. He had the general overall responsibility. What is it that you find that was wrong about the recommendation that he had responsibility?

General CRADDOCK. Senator, their recommendation said he failed to supervise the interrogation of ISN–063. There were no violations of the interrogation of ISN–063.

Senator KENNEDY. Now, which torture policy are you using now? Are you using the Bybee memorandum now, the one that has been completely discredited? Which torture memorandum are you referring to? That of course has been repealed.

General CRADDOCK. I am not referring to any torture memorandum. I am saying what the report said, failed to supervise the interrogation, not that there were violations in the conduct.

Senator KENNEDY. Well, failed to. Are you not just parsing words, "failed to supervise."

General CRADDOCK. Those are not my words.

Senator KENNEDY. Pardon?

General CRADDOCK. Those are not my words. I would have to defer that to General Schmidt. Those are his words, and General Furlow. They sent that recommendation.

Senator KENNEDY. Well, they made that finding that he failed to supervise.

General CRADDOCK. I am not parsing words. I am responding to you.

Senator KENNEDY. Okay. Well, if he failed to supervise, that is not enough—we have had I do not know how many—taking a different time, in 2003 the Navy fired 14 commanding officers for effectively failing to supervise, fired them. Accountability, accountability. I am just trying to find out where the buck stops, because this has been an issue and a question, quite frankly, whether this is just a time—we heard from the SECDEF a long time ago there were just a few bad apples. Then we had a number of, I think 8, 10, or 11, different kinds of reviews that have been done in the military over this, and it never seems to that we get up to any kind of level of accountability.

We have gotten a number of people at the lower levels that are recommended for action and for sanction. But it does not seem to me that it comes up. When it does not come up, then I have to ask, well, are they following, are they doing something? Is there some orders or some procedures that they are following that we do not know about that lets them effectively get away with it?

General CRADDOCK. Senator, I disagreed with that recommendation and disapproved it because of a difference of opinion with regard to my investigators concerning the degree of supervision required, necessary, or executed, take your choice. I looked at this several times. I deliberated a long time. As I said earlier, I always when I am faced with these situations as a commander try to put myself in that individual's position, try to understand the environment, the scope, the wide range of things going on. I have some experience that allowed me to do that.

I looked at what General Miller, according to the report, according to what my investigators told me, what he did know. He did know aspects about that interrogation that I felt were important for him to know. It is stated in the report. He admitted he did not know all of the applications used by the interrogation teams. But he charged and depended on his subordinates to carry it out in accordance with policy and law, which they did. There was no violation of policy and law. So he placed trust and confidence in them and they supported and I think repaid that trust and confidence, in my judgment.

When you combine that with all the other taskings he had, I felt that he exercised a reasonable degree of supervision during the conduct of that special interrogation program.

Senator KENNEDY. The only thing—and my time is running out—he did not know—I find, if he did not know, failure to know is still failure to lead, I thought, in the military. I remember that submarine captain that got cashiered when he ran into that sandbar going full blast. It was not even on the—he was relieved, because he did not know. It was not on any of the charts. He was dismissed, career ended in the United States service.

Now we are being told that he did not know, and the question that I would think some are asking is, is this a failure to lead. If you do not punish, then what you are also saying is that it is allowed. The other side of the coin is, it is allowed. That is what some people—that is the message you get. You might not agree with that, but I think there is a case that can be made for it.

General CRADDOCK. Senator, I would disagree with that, and I would say that if a commander is required to know every detail about all aspects of the organizations that he commands he will be unable to lead.

Senator KENNEDY. This is not every aspect, General. You know what we are talking about. This was the whole purpose for getting information, intelligence. There was a real debate about which techniques were the best to be able to get it. That was all being discussed. Miller was very much involved in this, eventually moved over to Iraq in order to be able to try and bring the intelligence into more effectiveness. He was the master in terms of this.

The idea that on his watch, that these things were going on and that he did not know about—and the people that investigated say that he deserved to be reprimanded and you overturn them is something that many of us wonder about.

General CRADDOCK. As I stated, Senator, he did know about some of those. He stated he knew about it. He stated he did not know about others. He inherited this. This plan and implementation was ongoing. When he arrived, he walked into it and had to, along with many other things, bring it up to speed. He had a significant number of major tasks.

Senator KENNEDY. My time is up, Mr. Chairman. Thank you.

Chairman WARNER. General Craddock, you have three times now explained very carefully your professional judgment in changing this recommendation of General Schmidt. But I would like to put into the record, which I think you will agree with me, in no way do you have any lesser respect for his professional judgment, which was contrary to yours, and in no way is your reversal to reflect adversely on either his judgment or his performance heading up this team at your directive.

General CRADDOCK. Absolutely, Mr. Chairman. I think the team here did a wonderful job. I think that is evidenced by the report they have provided, and in really all but one recommendation which I heartily approve. This was very difficult. Members have said that. Discovery learning is difficult. It is a somewhat ambiguous area and I think, and again I have told General Schmidt and General Furlow, reasonable men will reasonably disagree. I disagree with the scope of supervision required, the degree, the level, and that is it.

Chairman WARNER. The facts are there and I just wanted to make that observation.

There has been some inference about the hearing that we are now having in the public. My understanding is that you briefed the Secretary on this yesterday; am I correct?

General CRADDOCK. I believe it was the day before yesterday.

Chairman WARNER. The day before yesterday. In due course, will you—normally the Department on the previous investigations has afforded the opportunity for the panel, in this case yourself and these two officers, to brief in open session in the Pentagon individuals in the press. Am I correct on that?

General CRADDOCK. Yes, Mr. Chairman. As I understand there is some proposal working now for some activity this afternoon to do that.

Chairman WARNER. That is my understanding, that this report presented to this committee this morning will be presented in open session at the Pentagon tomorrow. I wanted to make that clear. Thank you very much.

Senator Sessions.

Senator SESSIONS. Mr. Chairman, thank you.

I do know that in a free country we have to have public reports and public hearings. I do think that we in Congress have pushed this awfully far. As I calculate it, this is about the 30th hearing we have had on prisoner treatment since the beginning of the war on terrorism. I think there are at least a dozen major investigations have been conducted. I frankly think, unless we are just trying to play politics, unless we are just trying to make some political points, perhaps in the future we would do better to have our hearings in chambers, closed hearings; and if there is something that needs to be made public we will make it public.

Chairman WARNER. But, Senator, I bring to your attention that this report, I was advised earlier, is going to be made public at the DOD this afternoon. It seems to me that it was incumbent upon this committee to receive that report here in open session this morning, in the same way that it will be presented this afternoon at the Pentagon.

Senator SESSIONS. I understand, and I respect the chairman. There is no better patriot or better chairman of any committee I have served on than you. I am just expressing my personal view that it is time to take this out of the number one project on our agenda.

I would just say to my colleague, the senior Senator from Massachusetts, he said—again he has compared the treatment that we give to prisoners to those of our enemy, and that is just not fair. He said we are going to be as bad as those we fight. He said that our prisons are the same as Saddam's, like Saddam Hussein's prisons.

Senator KENNEDY. I want to be quoted—I do not mind being quoted, but I need to be quoted accurately. I have never mentioned Saddam Hussein. I do not know where the Senator—

Senator SESSIONS. Not in this hearing——

Senator KENNEDY. No, I did not.

Senator SESSIONS. Let me see if I can get the correct quote. I believe the correct quote was—see if I am wrong—that "We have opened his prisons under new management."

Senator KENNEDY. I can read back what I said.

Senator SESSIONS. I just wanted to say I am concerned about that. The distinguished Senator has a name known worldwide. Other members of this committee are known throughout the world, and when we make allegations against the men and women in uniform who are out there serving at great risk because we sent them, then we need to be careful we do not suggest we have a policy here of bad treatment when the record indicates otherwise.

As to how their prisoners are treated, their heads have been cut off. They have tortured. Torture chambers have existed. I met and had a press conference with seven or eight who had their hands cut off by Saddam Hussein.

General Schmidt, did you see any prisoner or hear any reports of a prisoner that died in Gitmo or any prisoner there who suffered a broken bone or serious permanent injury as a result of any treatment in Gitmo?

General SCHMIDT. To my knowledge there have been no deaths of any detainee at Gitmo and the only injury that is significant is one that they believe it was self-inflicted and he is under continual care in the hospital down there.

Senator SESSIONS. I think that is important.

I know you substantiated two allegations. One of those was the use of duct tape. Now, I do not dismiss your finding, but I would like for you to reiterate, that is one of your two findings of abuse there, of allegations. Explain the duct tape situation?

General SCHMIDT. Sir, there was a prisoner who was undergoing interrogation and by various accounts he began to chant either Koranic verses or a resistance message, according to two witnesses. There were some number of other detainees, 12 to 17, I believe I heard those numbers, in the vicinity of that. The interrogator directed the military police to quiet him down.

The military policeman looked around and saw some duct tape. He says: This? The interrogator said: Go ahead and do it. He took some duct tape, put it on the detainee's mouth, and within a moment or so he had worked that off by wiggling his jaw, I guess, around.

They applied another one. They wrapped it around his mouth and his face. He continued to work hard and he was able to get it off his mouth. Finally, the military policeman said: Now what do I do? He said: Just wrap it around his head top to bottom, around his mouth, and that will do it. In fact it did.

The FBI allegation of that came when the interrogator or the supervisor walked down the hall and said to two FBI agents—and he was laughing—he said: You need to come see this. That is where the allegation came from and that was the situation that generated that particular allegation.

Senator SESSIONS. I think that shows the sensitivity of the military to improper conduct. I am not sure that was improper under the circumstances. Perhaps it was unnecessary, but it may not have been. I was not there. I do not know the nature of the prisoner or what kind of message he may have been sending to other prisoners.

I remember the colonel in Iraq who fired a gun when his troops were taking fire near the head of an al Qaeda or terrorist person. He was cashiered out of the military, removed from the military.

He did not touch the man, but he used a threat of force in a way that was improper and was removed.

With regard to Abu Ghraib, we have said over and over and over again that the higher-ups are involved, higher-ups are involved. I think we ought to say right here and now that the higher-ups were not involved in Abu Ghraib. They prosecuted those people who were involved, whose pictures showed they were involved. They have been convicted and sentenced to jail, and they have not produced any evidence, credible evidence at all, that higher-ups ordered them to do that. In fact, the facts show there was no interrogation ongoing. It was just bad behavior by a group of soldiers on the graveyard shift that should never have happened. They are now in jail.

General Schmidt, you made a finding that, while some abuses may have occurred, that you found no inhumane treatment; is that correct?

General SCHMIDT. I found those—none crossed the line into being inhumane.

Senator SESSIONS. None crossed the line into torture?

General SCHMIDT. That is correct, Senator.

Senator SESSIONS. You found, I suppose, no systematic plan or process by which prisoners were subjected to inhumane treatment or torture?

General SCHMIDT. That is correct, Senator.

Senator SESSIONS. You were free to conduct this investigation as you saw fit?

General SCHMIDT. That is correct. It was very pointed. The objectives were very pointed on it.

Senator SESSIONS. Mr. Chairman, I think we have created an entirely new misimpression somehow, some way, of what is going on at Abu Ghraib. I look forward to going with you tomorrow. I know you are personally looking forward to examining what went on there. Senator Roberts has been, and I went when it was in the old prison some time ago. This is a new facility. We spent $100 million, I believe, on it. If it is the site they showed me where they intended to build it, it is a beautiful site on the water.

But, Mr. Chairman, I think that it is important for us to remember that these are dangerous individuals; that 17,000 have been detained in Iraq; only 800 have been sent to Gitmo. Now only about 500, a little more, remain. Of those 200 or so that have been released, 12 of them have been rearrested for waging war against our soldiers and against the peace and stability in Iraq or Afghanistan. These are not people that are not dangerous. They are dangerous.

I would say one more thing. Since they are unlawful combatants, they are not entitled legally to the protections of the Geneva Conventions and we have a right to interrogate them and we have a right to try them by military tribunals, in my opinion, just like the case, the defendants in the Ex parte Quirin case, were tried during World War II.

These are not American citizens charged with fraud or dope dealing. They are terrorists waging a war against civilization and democracy around the world. I think we cannot deny ourselves the right to utilize techniques within the rules of war that allow us to interrogate and gain information that can save innocent lives.

Thank you very much.

Chairman WARNER. Thank you very much, Senator.

It is the intention of the chairman to take a trip on Friday to Gitmo and, members of this committee, we may have a seat or two available if they so desire.

Senator SESSIONS. I hope to join you.

Chairman WARNER. Yes, I understand that. But I have to point out that there is a small item of a hurricane and that is now being examined by the aviation department very carefully.

Senator KENNEDY. Mr. Chairman, just briefly in response to what I had said here. I am always glad to have someone misrepresent what I am saying and then differ with it, which we had here.

This country has had a very proud tradition adhering to the Geneva Conventions. Some people think that they ought to—that kind of condition should not continue to be a part of American policy. I differ with them because I accept the concept that the principal reason we have the Geneva Conventions is to protect Americans.

Chairman WARNER. Who may become captives.

Senator KENNEDY. Yes.

The fact is I would hope that we are not going to go and set as a standard the lowest level of conduct and say, well, because another side does it we are going to do it as well. I always remember, echoing in my ears what John McCain said, and that is: The more they tortured me, the less I was willing to give them. John McCain. John McCain said that.

So let me finish. So when we get all of our lectures out here on this committee about how we are treating people, it does seem to me that it is appropriate that it is easy to get all worked up and all of us do about the challenges that we are facing as a country and society and about the service men and women that do so nobly. But I would certainly hope that we are not beyond the point of understanding what has been historically and I believe still is in the best interests of American service men and what works in terms of getting information and intelligence, both works in getting the information and intelligence and that can later be used in terms of bringing those individuals to justice. That is basically the point.

Chairman WARNER. Senator, I assure you there are a number on this committee who are working on that very issue today.

Senator SESSIONS. Mr. Chairman, I would just say, the Senator said we are going to be as bad as those we fight, just a few minutes ago. We are not as bad as those we are going to fight. We are not adopting their techniques. We discipline people who violate the law or the rules. As a matter of fact, almost 200 service personnel have been disciplined in one form or another for failure of discipline.

Chairman WARNER. We have to move on, gentlemen.

Senator SESSIONS. I just feel like we need to be careful about what we say about those who serve us.

Chairman WARNER. Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman.

I do not know what the headlines are going to be written about this hearing today, but I hope they include the conclusion that AR 15–6 found no evidence of torture or inhumane treatment at JTF Gitmo, notwithstanding some of the statements that have been made here and elsewhere. I think that is an important conclusion.

General Craddock, you were engaged in an exchange on the Geneva Conventions. But as you pointed out, the detainees here are either members of the Taliban or al Qaeda fighters. In the case of al Qaeda, of course they do not wear a uniform, they do not recognize a chain of command, they do not conduct their activities according to the law of war.

It is interesting, during the confirmation proceeding for the Attorney General, Alberto Gonzalez, we had quite a debate among legal scholars, including the Dean of Yale Law School, who ultimately conceded that being non-signatories to the Geneva Conventions, not recognizing a military hierarchy or a law of war, that al Qaeda was not covered by the Geneva Conventions. I believe that is essentially what you have said here today, and I happen to agree with you and I think it is really irrefutable.

Three Federal courts have examined that, have so concluded, and I think it is absolutely right.

On the other hand, you have stated it is our policy not to engage in torture or inhumane treatment, as being inconsistent with our values, and certainly I am relieved to know that this exhaustive investigation so concluded.

I want to ask about the 20th hijacker, al-Qahtani, as he has been identified in other contexts. This is the individual that apparently had committed himself to committing suicide, that is losing his own life, in pursuit of his cause by participating in the United Airlines Flight 93 that, due to the bravery of civilians on board that flight, went down in a field in Pennsylvania rather than hit the Capitol or the White House or other places that they intended.

This individual, in addition to being an al Qaeda operative, once he was captured in Afghanistan and transferred to Gitmo, he withstood any interrogation techniques for about 8 months; is that not correct, General Craddock?

General CRADDOCK. That is correct, Senator.

Senator CORNYN. It was in that context, as well as the ongoing war that we were engaged in and our efforts to gather actionable intelligence in order to protect not only our troops in the field but our civilians here in the homeland, that efforts were made to defeat his counter-interrogation defenses, and it was in that context that what we have heard discussed occurred.

I guess when I read the conclusion here—I want to ask you a little bit about that—as a result of this investigation—and I understand, I believe that General Schmidt and General Furlow have done an admirable job here. But just in terms of the ultimate conclusion about General Miller, it is my understanding from what has been said here is that the interrogation plan used on al-Qahtani was legally permissible and that there has been no finding that it deviated in any way from a lawful interrogation of this al Qaeda operative. Is that correct, sir?

General CRADDOCK. The plans, the special interrogation plan developed, used both FM 34–52 interrogation techniques and those authorized in the 2 December memo. Now, the interrogation technique then is manifested by the development of the JTF Gitmo application, and that is where the interrogators look at what is it that this guy has resisted, what have we tried that did not work, how do we get him out of his comfort zone, how do we get him to be

discomfortable, to be on edge? We need to be able to break his resistance. Then they develop those applications to do that.

Those were found to be, again consistent with, in accordance with, pride and ego down and futility.

Senator CORNYN. The means used on this detainee, al-Qahtani, were using authorized procedures; is that correct?

General CRADDOCK. As I understand and read the report, that is correct. But I will defer to General Schmidt. Is that correct, Mark?

General SCHMIDT. They were within the broad authorized techniques, authorized by the FM and the SECDEF memo of 2 December, that is correct. At the application end, they did stay above the threshold of inhumane treatment. There was no torture or inhumane treatment.

Within that, I found that each individual act, whether authorized or unauthorized, had a rolling cumulative effect on this individual, and it was the cumulative effect that we found to be abusive in its totality and degrading.

Senator CORNYN. General Schmidt, I want to lay as a predicate, my great admiration for you and all of our folks in the military, but particularly for the difficult job that you have undertaken here. My dad served 31 years in the Air Force and I have great admiration for you and everyone who wears that uniform.

But I have a little trouble understanding how, if an interrogation on 1 day is within authorized limits and another day it is within authorized limits, how you can say that the cumulative effect was abusive and degrading and somehow fell below authorized limits. Can you explain that for us?

General SCHMIDT. Sir, the limits of each interrogation is what they were, and they were usually limited by the amount of time that an interrogation team would be in the interrogation room. It is much like, the analogy would be, playing music that you do not like. That might be annoying. If there are no limits placed on the duration that you are going to listen to that music—pick your worst music and you listen to it and somewhere at 10 hours you think you have had enough, and maybe at 20 hours. At some point there might be a limit where that is abusive music, the environment becomes abusive. That is the cumulative effect that we tried to get to.

Senator, I will tell you that it was very difficult for us as military members to go in there and look for alleged abuses. Of course, you look at a character like al-Qahtani and you say, do the means justify the ends? That was not part of our charter. It is did something happen? Were there abuses? That is what we identified.

Then we attempted to say, well, were they authorized or not, substantiated or not? Then over the course of time we felt that this particular individual, as heinous a person as he is, the cumulative effect of that long duration, 160 days of the segregation and the increased aggressive interrogation applications, constituted abusive, degrading treatment.

It is pretty hard to look through some of those things that are in there and say, was he degraded? What is the definition of "degrading" to a reasonable man? So we had to make those judgment calls and, sir, that is what we did.

Senator CORNYN. Finally—and I respect your answer—for myself, I look at this person as someone who is not only willing to take his own life in pursuit of his cause, but obviously the lives of a lot of other innocent people. I noticed he was dehydrated due to his own refusal to take fluids, so he had to be put on an IV. He obviously was denying himself. You were not denying him water. He was denying it to himself, as well as fasting.

So I personally am glad that the interrogators used humane and authorized interrogation techniques to get the information out of him that they did, and I trust that they saved American lives and lives of other innocent people in that context.

Thank you very much.

Thank you, Mr. Chairman.

Chairman WARNER. Senator Chambliss.

Senator CHAMBLISS. Thank you very much, Mr. Chairman.

First of all, let me join the chorus of my colleagues in commending you gentlemen for the job you did. This is an extremely difficult task that you were given, and obviously there are still some stones unturned that you are going to go back and look at. But at the end of the day I do not see anything we have talked about today affecting a change in your conclusions.

But even with the difficulty of the job that you three men had in carrying out your duty, the job that those guards and those men and women who are serving at Gitmo is frankly much more difficult in my opinion. I have been to Gitmo twice. I was there before Camp Delta was built. I went back after Camp Delta was built.

The images that we see on the television today relative to Gitmo always show the old cages that these prisoners were put in when they first went down there. Those cages, as we know, have not been used in years. Camp Delta was built for the purpose of providing them with more adequate housing, more in line with the Geneva Conventions, although we probably did not have to do that.

When I was down there the first time, I was told by guards about the fact that these prisoners were spitting on them, that they were taking human feces and throwing it on them, and they were having to put up with these kinds of conditions. We just had a delegation that returned from Gitmo this past week, a group of Senators that went down there. Those Senators came back with these same stories from individual guards who now, in spite of the new accommodations that the prisoners have, they are spit on regularly, they are cursed regularly, human feces are thrown at them regularly.

Two African Americans from my home State made the comment to my colleague from Georgia about the fact that the worst racial slurs that could be used against an African American are used against them regularly.

This is the type of condition that our troops are in. Under those conditions we have an allegation that there are allegations of 3 substantiated cases out of 25 interrogations that have taken place. I join Senator Sessions, Senator Roberts, and Senator Inhofe in thinking that, gee whiz, under the conditions that our folks are literally in combat in Gitmo, that is amazing, that we have not had more than three.

One of them, she was spit on and went out of the room and did something she should not have done. But it was a very emotional

act on her part. Certainly she should not have done it. She has been reprimanded, as she should have been, and we have moved on.

I am going back Monday a week from now, Mr. Chairman. If anybody cannot go with you, they are certainly welcome to go with me. I know I have invited all the members of the Intelligence Committee, but anybody on this committee is welcome to go.

General Craddock, you are absolutely right in your comments regarding that training manual. Let us do not stick our head in the sand. The American people need to know and understand that al Qaeda is watching this hearing today as we speak. Their training manual has already been rewritten, I am sure, to upgrade it to where now the terrorists are being trained as to how to respond to new types of interrogation that we may utilize.

So is this the right thing to do or is it not? I guess Senator Sessions may be right in one respect, but I respect the chairman and if it is going to be public then it is only right that we come here today to let the American people know and understand what is really going on in Gitmo.

While I disagree with some of the statements that Senator Clinton made relative to this issue, I do agree with her on one thing. That is, the ultimate question, General Craddock, is whether or not we are being effective with our interrogations. I think I know the answer to that because I have been told that answer by folks who have been down there. We have some Intelligence Committee staff that were interrogators.

But let me just give you an opportunity to answer that question: Are we getting information from these prisoners at Gitmo and have we gotten information in the, what, 3½ years, 2½ years now, that they have been there that has saved the lives of American men and women?

General CRADDOCK. Senator, absolutely yes, in response to your question. We have and we are today still getting information that is relevant, that is actionable, and is supporting our servicemembers in the field in the global war on terrorism. I will defer to my colleagues to further amplify.

General SCHMIDT. To my knowledge, that is absolutely a true statement. It continues to be a fairly fertile ground for information.

General FURLOW. Yes, sir, Senator. In my time at Gitmo visiting with them, they pride themselves on being a model for strategic intelligence gathering, and they continue to get intelligence. Now, the specifics, I am not privileged to that, nor did I delve into that during the portion of our investigation.

Senator CHAMBLISS. One other thing I think we need to emphasize and that is the type of people who are down there. They have been characterized, General Craddock, as the meanest, nastiest people in the world, and their sole purpose in life is to kill and harm Americans right now, and we know that.

In spite of that, we have released some 250 of these prisoners, I believe, over the last 2 years. I also know that we have had public information relative to at least 10 individuals who were incarcerated at Gitmo, who were released, who have either been captured or killed on the battlefield or who we know are operating today in

the process of killing or trying to kill and harm Americans. Am I correct about that?

General CRADDOCK. That is correct, Senator. We believe the number is 12 right now, confirmed 12 either recaptured or killed on the battlefield.

Senator CHAMBLISS. Those are the ones we know about. That does not include the ones that we do not know about, who had nowhere to go but back to Afghanistan or back to Iraq to again try to kill and harm Americans.

So I look forward to going back to Gitmo for any number of reasons, obviously to observe what is going on. One other thing that I did while I was down there, after Camp Delta was built I had the opportunity to go in and observe an interrogation taking place or several interrogations taking place, that they took me into the room and we looked through the glass where they could not see us but we could see them. Obviously there was nothing improper going on.

As I walked out, I said: "What is going on over here?" They said: "Another interrogation." That was not one they planned to take me to see. I said: "Let us go in." We did, unannounced, and obviously there was nothing improper going on relative to an interrogation that was not planned for me to see.

So I again appreciate the job that you do. But there are a lot of folks from my home State who were either guardsmen, reservists, or active duty that were at Gitmo on the occasions that I have been down there and ones that I have talked to who have been there and have come back, and the conditions under which they have had to operate have been deplorable from the standpoint of the treatment directed at them by the prisoners.

In spite of that, they have just done a very professional job in my opinion of conducting themselves and making every branch of the Service proud that they are part of that Service in their rendering of that Service at Gitmo.

So gentlemen, again, thank you very much for your service to our country.

Thank you, Mr. Chairman.

Chairman WARNER. Thank you very much, Senator. I think it is extremely important that you brought out those facts with regard to the abuses being suffered by the military and civilian personnel tasked with this difficult interrogation process. It has been over the years. I judge by now that has been somewhat curtailed and contained, or is it still at a level that is troublesome?

General CRADDOCK. Mr. Chairman, any incident is troublesome. We now have detainees, if you will, aligned based upon their actions towards the guards. We know where to expect it most. However, I was at Gitmo recently. I talked to some sailors who were on the guard force in a camp that was supposedly with detainees who were more cooperative, and I said: What is your worst day? The answer was, they did this or they did that. So it happens in most of the camps still occasionally.

Chairman WARNER. It continues to happen.

General CRADDOCK. Indeed, sir.

Chairman WARNER. I hope appropriate measures are taken.

Senator Levin, you wish to correct the record?

Senator LEVIN. No, not a correction; just clarification of some factual matter for the record.

Chairman WARNER. Let me interrupt for all members. We will reconvene just as quickly as we can in room SR–222 for a closed session of this hearing.

Senator LEVIN. This will just literally take a couple minutes, and I thank you, Mr. Chairman.

As I understand your task, General Schmidt and General Furlow, it was to look at interrogations where the FBI was present; is that correct?

General SCHMIDT. No, sir. To be more correct, we were to look into allegations of FBI assertions that interrogations had taken place. They did not see these interrogations. They possibly had heard of it.

Senator LEVIN. I see.

General SCHMIDT. It was any allegation that they had that we were doing things untoward.

Senator LEVIN. About how many interrogations would have been involved in what you looked at? 50? 100? Give us a rough idea?

General SCHMIDT. I am going to say thousands.

Senator LEVIN. You looked at thousands of interrogations?

General SCHMIDT. Data that would have covered thousands.

Senator LEVIN. Would you be able to determine whether there were abuses at 24,000 or just at a few thousand or a few hundred? Give us an idea where you made a determination as to whether there was abuses or not?

General SCHMIDT. To be sure I am close, one moment. [Pause.]

General FURLOW. Sir, in the process of the methodology and looking at the data that is down there, in addition to the FBI memos and electronic correspondence and the unredacted portions, reviewing them, Gitmo has a very extensive system called the Joint Detainee Information Management System (JDIMS) which—and I had the opportunity to go through and selectively sample a cross-range of these detainees and their records that they have provided and through the logs that the MPs provide that merges into the program there, allowing you to look at a large number of interrogations in a very short period of time.

The next step of methodology we pursued was by actually looking at the paper copies, which were the main means of being able to conduct business prior to around the first calendar quarter of 2003.

So to sit there and say that we have been able to review a couple thousand, 3,000 interrogations is accurate.

Senator LEVIN. Fine, 2,000 or 3,000.

General FURLOW. Yes, sir.

Senator LEVIN. Through those records.

General FURLOW. If there was an indication based on a particular detainee that there was a possibility, then we would trace that fact pattern to follow-on interrogations.

Senator LEVIN. You did not talk to the people who carried out those interrogations?

General FURLOW. No, sir, I talked to those people.

Senator LEVIN. Oh, you did talk to all the people who were interrogated, 2,000 or 3,000?

General FURLOW. No, sir. I misunderstood your question. I talked to the interrogators that were presently at Gitmo.

Senator LEVIN. I do not mean that, but did you talk to the interrogators at 2,000 to 3,000 interrogations?

General FURLOW. No, sir. No, sir.

Senator LEVIN. It would be a lot fewer than that?

General SCHMIDT. Sir, we were——

Senator LEVIN. It would be a lot fewer than that?

General FURLOW. Yes, sir. But what we did do is in the process of identifying who those were we went and interviewed as many as we could.

Senator LEVIN. Okay.

General SCHMIDT. But there were interrogators who had interaction with other interrogators that we did not know, that would have been asked or would have known about other opportunities for abuse. So this thing interlaced well beyond those that we had direct contact with, that could have surfaced an allegation.

Senator LEVIN. Okay.

Next question: Were you tasked to look into cases where there were criminal proceedings pending or was that something you were not supposed to get into?

General SCHMIDT. The criminal proceedings that were pending had nothing to do with detainees at Gitmo. I discussed that with the appointing authority and it turned out it was not related at all.

Senator LEVIN. So none of the pending criminal cases related to any allegations of detainee abuse?

General SCHMIDT. That is correct.

Senator LEVIN. Thank you. Did you make any judgment on the legality of techniques or only as to whether or not those techniques were authorized, not authorized, or whether or not they took place?

General SCHMIDT. Sir, the legality was not within our purview. Whether, again as I stated before, the means justified the ends was not within my charter either.

Senator LEVIN. That is helpful.

Thank you, Mr. Chairman. Thank you.

Chairman WARNER. We will now reconvene in room SR–222 and I thank all participating. I think, General Craddock and General Schmidt, would you like to identify those principals that you have with you that worked on the report so that their names can be a part of this important record?

General CRADDOCK. Thank you, Mr. Chairman.

Before I do that, may I have a correction? I would like to make a correction that I think is important to do in a final closing statement. First, I guess I miscommunicated to Senator Reed—it is unfortunate he is not here—because in his final statement he indicated displeasure with—apparently he believes or as I understood he said that I have by my decision now tried to pin the blame for something on an lieutenant commander.

That is not the case. My modification on that recommendation was——

Chairman WARNER. On Miller?

General CRADDOCK. On the lieutenant commander.

Chairman WARNER. The lieutenant commander.

General CRADDOCK. Was the fact that I felt that, because of the course of the investigation, two individuals very critical to that investigation, the staff judge advocate and his supervisor, refused to comment and to be interviewed; that the way to force that to happen and potentially then to find out that the claim from the lieutenant commander that he got approval to proceed to communicate the threat from his supervisor and his servicing staff judge advocate, would be to force them to make a statement under oath.

So my intent there was not to in any way ascribe blame to him by asking for a criminal investigation. It was to indeed determine that his allegation was true because those other people critical to that determination would not make a statement.

Second, if I may, much of what we have talked about here today is all focused on one detainee, 063, al-Qahtani, the 20th hijacker. When did this happen? The fingerprint correlation to the 20th hijacker was late summer of about a year, less than a year, after September 11, when we were still wondering when and where is the next attack, as we do today, but maybe with greater angst and greater concern.

So when we made this connection and we realized we had had him for 8 months and nothing had happened, he was not providing information, there was an intensity that we must do something to find out what he knows, because our servicemembers, our Nation, could be at risk if he is number 20, which he was. So I think that has to be put in perspective. Now, that is one individual with interrogation techniques that some may find in a cumulative effect degrading and abusive. That is not the population of detainees and the techniques and interrogation applications used. That was one individual. There were two plans developed, only one implemented. The rest of the detainees never got into a special interrogation plan, completely different techniques and applications used for them.

I think we need to keep that in perspective as we think through this.

Now, sir, if I may——

Chairman WARNER. Let me ask General Schmidt and General Furlow if they have any concluding comments, and then we will—do you have any concluding comments? I will give each of you the opportunity.

General SCHMIDT. Mr. Chairman, I just want to make sure that it is clear—let me get back to the admonishment issue—that I agree with General Craddock that commanders to an extent rely on the judgment and the experience of their people, their subordinate commanders, to carry out the duties that they give them.

This was not an assertion of criminal conduct and Major General Miller did not violate any U.S. law or policy. My recommendation was that he failed to monitor or adequately supervise the interrogations of one high-value detainee. I think the report spells that out in some detail.

So I just wanted to make sure that that was clear. I know Jeff Miller, I have worked with him. He is a fine individual, and he had a tall task to complete down there. As we interviewed witnesses on these alleged abuses and that was the focus, to a person very few did not state that, thank God for General Miller to come down

there and clean up some of the chaos that had been organizationally present when he arrived.

So this was a hard task to do. But again, we were focused on the assignment, not on the periphery part of this. We wanted to surface and bubble up the truth, the facts, and we have presented those in this report.

I do thank you for hearing us out.

Chairman WARNER. I thank you, and I assure you this Senator, and I think that all of us, respect the integrity, the difficulty, and your professionalism in handling that delicate issue.

General Furlow?

General FURLOW. Thank you, sir. Regarding a review of the FBI documents and witnesses, I would like to put in the record here that we reviewed hundreds of documents from the FBI, including unredacted e-mails. We also over several months worked diligently to speak personally with every available FBI agent. We also made specific requests to speak with the ones we were not able to for a minimum of three different occasions.

Ultimately, we considered the best material evidence that we had to write a report in a timely manner.

I would like to communicate, sir, that it has been truly an honor to appear before this body today, sir.

Chairman WARNER. I thank you very much.

Senator LEVIN. Can I just add my thanks, Mr. Chairman, to yours. We have two officers who have written a report to the best of their ability. I want to commend them for the professional way in which they have done this to the best of their ability. It is not easy, I am sure, to reach judgments, regardless of the judgments in this case. But you two have done the best you can.

I want to commend you for not just your report, but, very frankly, for the slides, which I think helped us to go through this. Except for the inability to read that one number in the lower right-hand corner, these slides were extremely helpful to us. I just want to add my thanks. Thank you all, you too, General Craddock, for being here this morning.

Chairman WARNER. Thank you.

Now, General, if you would like to put the names of your colleagues in the record?

General CRADDOCK. Thank you, Mr. Chairman. I will introduce my team: My Executive Officer, Colonel Milo Miles; Staff Judge Advocate, Captain Marty Evans; Public Affairs Officer, Colonel Dave McWilliams; Colonel Jorge Silveira there in the second row, who is the Chief of my Actions Group; and Colonel Rob Levinson, who is my Head Representative from the Washington Field Office.

I will turn it over to General Schmidt.

General SCHMIDT. Sir, I would like to start with General Furlow. He and four members spent 2 months pulling this together, doing the majority, the vast majority, of the interviews. When I came in it was because there were some general officers to interview and eventually we got to seven of those.

John, go ahead and introduce your original team.

General FURLOW. Sir, in addition to myself, there was Colonel Alex Carruther, who is not here today; Sergeant Major Beverly

James, who is also not here today. Who is here today is Captain Harvey "Chip" Jarvis, right back here.

Thank you, sir.

Chairman WARNER. Thank you very much.

General SCHMIDT. Sir, the team I brought: I drafted my command's Staff Judge Advocate, Colonel Joe Heimann. He now works for Chairman's Legal, and we have borrowed him and he has put in yeoman's work on this.

My Commander Action Group Chief, Lieutenant Colonel Danny Wolf, has done great work. He typed past midnight last night making these slides to put this together. My Executive Officer, Scott Cirrone, is off doing personnel duty. He is an A–10 fighter pilot. Again, this is not our day job. He did great work. The logistics was pulled together by my Aide, Captain Hector Lopez, everything from getting our airlift to the paper, the sending of things over here, to getting us sandwiches with extra jalapenos because we missed those from Arizona.

They did yeoman work. The team worked together. To step in for 1 month of a 3-month investigation, John Furlow did an absolutely outstanding job.

Chairman WARNER. I thank all of you very much.

We have had an excellent hearing. I felt it very important for this committee to have direct access to each of you in the context of a hearing, which we have had today, for it to be subjected to such cross-examining and expressions of viewpoints as the members may wish to make, and indeed that did take place.

Thank you very much. We are adjourned; we will now reconvene in closed session in room SR–222.

[Questions for the record with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR JOHN MCCAIN

SCOPE OF ARMY FIELD MANUAL 34–52

1. Senator MCCAIN. General Craddock, in the hearing before the Senate Armed Services Committee on July 13, 2005, you asserted that the following interrogation techniques are approved in the Army Field Manual (FM) on Interrogation 34–52, under the approach called "Ego Down and Futility":

- forcing a man to wear a woman's bra and placing underwear on his head;
- tying a leash to the subject and leading him around the room, forcing him to perform dog tricks;
- standing naked for several minutes with female interrogators present; and
- pouring water over their heads.

Is it your opinion that the FM authorizes or in some way allows these examples to be used during interrogations by Defense Department personnel? If it does, or implies that these techniques are OK, should the manual be changed? Please fully explain your answer.

General CRADDOCK. I approved the investigation's finding that the first three techniques listed above were authorized under FM 34–52, Intelligence Interrogation. FM 34–52 provides broad guidance on a number of techniques such as "ego down" or "futility." FM 34–52 does not specify each and every application that is authorized under a particular technique. At Joint Task Force Guantanamo (JTF Gitmo), the interrogation team devised specific applications for one particular detainee—Mohammed al-Qahtani. Al-Qahtani had previously resisted conventional criminal investigation interrogation techniques for months. These specific applications, developed by the interrogation team, under the ego down and futility techniques were creative and aggressive. However, these applications did not violate any U.S. law or policy.

FM 34–52 was designed to provide guidance to traditional, state against state armed conflicts where the Geneva Conventions are fully applicable to enemy pris-

oners of war. I believe FM 34–52, and Department of Defense policy or doctrine in related areas, should be updated to reflect the new phenomenon of conflict against enemy combatants. In fact, I approved several recommendations from the investigation to this effect and I forwarded the investigation report to the Department of Defense for further consideration of these matters.

With regard to the fourth technique listed above, I recall making no assertion at the hearing that the technique was approved or not approved. I only recall a question posed by Senator McCain to me about "water-boarding," a technique never approved for use.

RECOMMENDED REPRIMAND

2. Senator MCCAIN. General Craddock, one of the recommendations from this investigation was that Major General Miller should be held accountable for failing to supervise the interrogation of ISN 063 and should be admonished for that failure. But in your review of the investigation you disapproved of the recommendation. Why?

General CRADDOCK. I disapproved Recommendation No. 16, that Major General Miller be held accountable for failing to supervise the interrogation of al-Qahtani and be admonished for that failure because the interrogation of al-Qahtani did not result in any violation of U.S. law or policy and the degree of supervision provided by Major General Miller did not warrant admonishment under the circumstances. As the commander, even in the early days of his assignment, Major General Miller was responsible for the conduct of his subordinates. However, as all commanders must do to the extent they determine appropriate, Major General Miller relied on the judgment and experience of his people to carry out their duties in a manner that was both professional and authorized.

The evidence shows that he was not misguided in his trust, since there was no finding that law or policy was violated. Major General Miller did supervise the interrogation in that he was aware of the most serious aspects of al-Qahtani's interrogation: the length of interrogation sessions, the number of days over which it was conducted, and the length of segregation from other detainees.

Additionally, I think it is important to note that Major General Miller arrived in Gitmo for the first time when he assumed command on 4 November 2002. Upon arrival, he assumed command of two organizations, JTF 160 and 170 that upon his arrival were merged into JTF Gitmo. Upon assuming command of JTF Gitmo, Major General Miller became responsible for a multitude of tasks that demanded his immediate attention: merging the two task forces into the one task force that would have a common operating system for both the interrogation element and the detention element; managing the construction of new facilities and the manning, equipping, training, and organizing of the force; developing standard operating procedures for and improving the cooperation between interagency interrogations; and, last but not least, improving the quality of life for the military personnel of JTF Gitmo.

Additionally, the report of investigation found that the cumulative efforts of some interrogation applications led to abusive and degrading treatment. However, the report did not identify which applications or frequency of any or all applications were contributory, which in my judgment was essential to a finding of accountability.

FBI ALLEGATIONS

3. Senator MCCAIN. General Craddock, what was the Pentagon's initial response to the FBI's allegations? How were they handled throughout the chain of command?

General CRADDOCK. An FBI official wrote a letter to the Army Provost Marshal General on 14 July 2004 regarding "suspected mistreatment of detainees" at JTF Gitmo, specifically referring to three incidents allegedly involving "highly aggressive interrogation techniques." The Army Criminal Investigative Division forwarded the letter to the U.S. Southern Command on 9 August 2004. My Staff Judge Advocate then coordinated with JTF Gitmo to determine what investigation, if any, had been conducted. Coordination with JTF Gitmo revealed the following. The 14 July 2004 letter referred to three incidents. Of these incidents, the Army's Criminal Investigative Division investigated one of the incidents shortly after the 14 July 2004 letter (allegations of abuse by an interrogator); JTF Gitmo investigated another incident at the time of the incident (the "duct tape" incident, October 2002); and the third incident (the overall interrogation of al-Qahtani) was not investigated by JTF Gitmo because the allegation did not appear to raise any allegations that went beyond techniques authorized for al-Qahtani's interrogation. My Staff Judge Advocate office provided this information to the investigation team led by Vice Admiral Albert T.

Church on 27 August 2004, for their consideration in preparing a Secretary of Defense directed report on all Department of Defense detainee operations.

In December 2004, the American Civil Liberties Union (ACLU) published FBI e-mails that detailed additional allegations of detainee abuse that were not contained in the FBI letter from July 2004. I had no knowledge of these additional FBI allegations until December 2004. Shortly after hearing of these additional FBI allegations, I directed an investigation into all of the FBI allegations on 24 December 2004.

4. Senator MCCAIN. General Craddock, the Pentagon has repeatedly assured this committee that all serious allegations of abuse are investigated. Yet no investigation was launched into the FBI allegations until the e-mails were released to the ACLU. The government had all of this information long before it was made public, so why was there no investigation?

General CRADDOCK. As discussed above, until the ACLU released the FBI documents in December 2004, I had no knowledge of the additional allegations. The Vice Admiral Church Report found that the FBI e-mails were not known to any other DOD authorities either. Once I reviewed the FBI e-mails, I determined that the allegations merited an investigation to establish the truth and ascertain what, if any, actions needed to be taken. Accordingly, I directed an investigation in December 2004.

PUNISHMENT

5. Senator MCCAIN. General Craddock, this most recent investigation into the interrogations of detainees in Gitmo comes to the conclusion that there were violations of Secretary of Defense guidance and the Uniform Code of Military Justice (UCMJ). Have those involved in the violations been punished in any way?

General CRADDOCK. The investigation substantiated several allegations and assessed what disciplinary action, if any, had been taken, and recommended whether additional disciplinary action was needed.

Substantiated allegations:

A female interrogator touched a detainee and ran her fingers through the detainee's hair. The interrogation supervisor was given a written letter of admonishment for failure to document the techniques to be implemented by the interrogator prior to the interrogation.

A female interrogator told a detainee that red ink on her hand was menstrual blood and then the interrogator wiped her hand on the detainee's arm. As the technique was not approved in advance, the interrogator's supervisor verbally reprimanded the interrogator for the incident. No formal disciplinary action was taken. The investigation viewed the command action as inadequate. However, noting the time that had lapsed and the fact that the interrogator had left the service, the investigation recommended closing this allegation.

The Interrogation Control Element (ICE) Chief directed that a military police guard place duct tape on a detainee's mouth to quiet the detainee. The JTF Gitmo Staff Judge Advocate verbally admonished the ICE Chief, but no formal command disciplinary action took place. The investigation viewed the admonishment as inadequate and recommended the ICE Chief be formally admonished or reprimanded. I approved the investigation's finding and recommendation on this allegation and I provided the investigation report to the Director, Joint Staff for forwarding to the ICE Chief's current commander or supervisor for whatever action, if any, he/she deems appropriate.

There were two incidents of "short shackling," chaining a detainee to the floor in a manner requiring the detainee to crouch uncomfortably or lay in the fetal position. However, the investigation could not find any evidence to assign individual responsibility for these incidents. As JTF Gitmo now prohibits this practice, the investigation recommended closing the allegation.

A Navy Lieutenant Commander communicated a threat to a detainee. The investigation recommended the Lieutenant Commander's new commander take disciplinary action. I modified the recommendation by requesting the Naval Criminal Investigative Service conduct further investigation into the matter before forwarding the report to the current commander of the officer for action as the commander deems appropriate. I did so because the Lieutenant Commander alleged he was given permission to use this technique by his first-line leader and his Staff Judge Advocate representative. When questioned a second time about this incident, both of those individuals refused to talk to the investigating officer. In my judgment, to be fair to the Lieutenant Commander, a criminal investigation is warranted (as communicating a threat is a UCMJ violation) .

APPROVED TECHNIQUES

6. Senator MCCAIN. Lieutenant General Schmidt, one FBI agent stated that he saw detainees held in rooms so frigid that they were "left shaking in cold" and an agent saw a detainee "almost unconscious in a room with a temperature probably over 100 degrees" next to a pile of his own hair. I realize much of what we may ask about Gitmo is covered in your investigation, but for the benefit of the American public, please allow these questions. Are these painful descriptions of the technique known as "environmental manipulation," in other words, using extremes of hot and cold to induce suffering and stress?

General SCHMIDT. The Secretary of Defense specifically approved the technique of environmental manipulation in the 16 April 2003 memorandum, Counter-Resistance Techniques in the War on Terrorism, which provides guidance on authorized interrogation techniques. This technique was approved to alter the environment to create moderate discomfort.

The Secretary of Defense memorandum further outlines that: conditions would not be such that they would injure the detainee; and the detainee would be accompanied by interrogator at all times. This application must adhere to the general safeguards outlined by the memorandum, including implementation by a trained interrogator exercising an approved interrogation plan and applied in a humane manner.

7. Senator MCCAIN. Lieutenant General Schmidt, are such techniques now in use or have they been approved for use at Gitmo or in Iraq?

General SCHMIDT. The technique environmental manipulation is still an approved technique in accordance with the Secretary of Defense memorandum dated 16 April 2003. Likewise, the current JTF Gitmo Standard Operating Procedure permits interrogators to adjust the temperature.

Techniques approved or not approved for use in Iraq were outside the scope of this investigation, and I am not qualified to speculate on interrogation techniques conducted with respect to Iraq.

8. Senator MCCAIN. Lieutenant General Schmidt, how extensively were these kinds of techniques used at Gitmo?

General SCHMIDT. The investigation disclosed environmental manipulation was used on a number of occasions. The investigation confirmed this technique was used at least five times.

9. Senator MCCAIN. Lieutenant General Schmidt, I understand that these techniques were officially approved by the Secretary for a period of only a few weeks between December 2002 and January 2003. The Schlesinger panel was told that they were used in Gitmo on "only two detainees." But the FBI e-mails suggest they were used much more frequently, and over a longer time period. If so, then when did this begin? Under whose authority were the techniques used?

General SCHMIDT. On 16 April 2003, the Secretary of Defense memorandum specifically approved the technique of environmental manipulation; it remains as an approved technique in accordance with that guidance. To the best we could determine, on several occasions during 2002 and 2003, interrogators would adjust the air conditioner to make the detainee uncomfortable; the application of this technique was not limited to the two high value detainees.

The approval authority for the use of environmental manipulation is the team chief supervising the interrogators.

10. Senator MCCAIN. Lieutenant General Schmidt, was the Schlesinger panel misled and, if so, by whom, and why?

General SCHMIDT. My investigation was a limited AR 15–6 factfinding, independent investigation. I did not attempt to reconcile my investigation with any other investigation. The Schlesinger question is outside the scope of my investigation, and I am not qualified to speculate on the intent of those responses to the Schlesinger panel.

STRESS POSITIONS

11. Senator MCCAIN. Lieutenant General Schmidt, according to press reports, FBI e-mails described detainees "chained hand and foot in a fetal position on the floor, with no chair, food or water," who had "urinated or defecated on themselves and had been left there for 18–24 hours." I would hope that this is an approach we would all find unacceptable. But is this simply a vivid description of a "stress posi-

tion," a technique that was approved for use at Gitmo and Iraq at various times or does this differ in character from the stress positions that were approved?

General SCHMIDT. We found no evidence of detainees being deprived of food and water. We did find that military interrogators improperly chained detainees and placed them in a fetal position on the floor on at least two occasions; this was an unauthorized technique. We also found that "short shackling" was initially authorized as a force protection measure during the in-processing of detainees. However, since then, current JTF Gitmo leadership has verbally prohibited "short shackling."

Regarding the allegation by an agent who observed a detainee deprived of food and water while chained to the floor, we considered the agent's statement made in a 13 July 2004 e-mail and a 9 September 2004 FBI telephonic interview. We made several efforts to conduct our own interview, but our FBI liaison continually advised us the agent was unavailable. (Brigadier General Furlow has been directed to seek FBI assistance in conducting interviews of FBI agents who were unavailable during the investigation.) During the course of our investigation, we were unable to corroborate any allegations that detainees had been denied food or water. Also, because of the inconsistencies in that agent's testimony and a lack of any other corroboration, we were unable to substantiate the second allegation.

The use of stress positions, such as "standing for a maximum of 4 hours," was requested by Commander JTF Gitmo and authorized by the Secretary of Defense in the memorandum dated 2 December 2002; this authorization was rescinded 15 January 2003. The AR 15–6 found that a stress position described as "chained hand and foot in a fetal position on the floor" was never authorized.

USE OF DOGS

12. Senator MCCAIN. Lieutenant General Schmidt, a witness statement in the report states that using dogs as an interrogation technique was equal to the fear up technique listed in the Army FM. Does the Army FM 34–52 permit the use of dogs as an interrogation technique in any way?

General SCHMIDT. The AR 15–6 concluded that Army FM 34–52 does not permit the use of dogs in interrogation. The Secretary of Defense did approve the use of dogs to exploit individual phobias in the memorandum dated 2 December 2002, later rescinded by the 15 January 2003 memorandum.

ARMY FIELD MANUAL

13. Senator MCCAIN. Lieutenant General Schmidt, are the detention and interrogation techniques employed at Gitmo authorized in the Army FM?

General SCHMIDT. This AR 15–6 found a very small number of incidents of abuse during detention operations; all of which were appropriately addressed by the command. Detention operations were not the focus of this investigation.

All current interrogation techniques employed by JTF Gitmo are authorized by the Secretary of Defense memorandum dated 16 April 2003. Army FM 34–52 provides guidance on many of these Secretary of Defense approved techniques. In deciding if an interrogator's actions were authorized, the 15–6 found it to be authorized if the approach was permitted by FM 34–52 or SECDEF guidance, and did not violate the requirement that it be done humanely. We found a technique to be unauthorized if it clearly exceeded the reasonable bounds of the defined or permitted approaches in the FM or SECDEF guidance. The AR 15–6 did not consider the restrictions of the Geneva Conventions outlined in the FM in deciding if a technique was unauthorized because the Geneva Conventions did not apply to these interrogations.

The AR 15–6 investigation found only three interrogation techniques that were never authorized: 1) on at least two occasions between February 2002 and February 2003, two detainees were "short shackled" to the eye-bolt on the floor in the interrogation room; 2) sometime in October 2002 duct tape was used to "quiet" a detainee; and 3) military interrogators threatened the subject of the second special interrogation and his family.

14. Senator MCCAIN. Lieutenant General Schmidt, are other detention and interrogation techniques also authorized and if so, can you describe them?

General SCHMIDT. Regarding interrogations at JTF Gitmo, the only techniques ever authorized were from Army FM 34–52 and the Secretary of Defense memorandums dated 2 December 2002 and 16 April 2003 (found at exhibits 15 and 16, respectively).

All current interrogation techniques employed at Gitmo are approved by the Secretary of Defense memorandum dated 16 April 2003. Army FM 34–52 provides guid-

ance on many of these Secretary of Defense approved techniques. The details pertaining to the approved techniques, application, and general safeguards are addressed in the attached memorandum.

Further, specific guidelines are in place from the Commander, United States Southern Command, and Commander, JTF Gitmo that further delineate and restrict the application of approved techniques from the Secretary of Defense memorandum dated 16 April 2003.

QUESTIONS SUBMITTED BY SENATOR JAMES M. INHOFE

ACTS INVESTIGATED AGAINST DETAINEE

15. Senator INHOFE. General Craddock, Lieutenant General Schmidt, and Brigadier General Furlow, I maintain these are detainees we are talking about here—with knowledge about terrorists' cells and operations that is useful to the U.S. in understanding the actions of those who seek to do us harm, of destroying our way of life. They are not to be coddled, not if we are to get access to the information they possess, information that will help us in their defeat. I remain, as I did more than a year ago when we started with this subject—outraged at the outrage!

What other country would freely discuss interrogation techniques used against high value intelligence detainees during a time of war when suicide bombers are killing our fellow citizens and those of our allies? Why would we freely explain the limitations placed on our interrogators when we know that our enemy trains his terrorists in methods to defeat our interrogations? We are handing him new information to train future terrorists. What damage are we doing to our war effort by parading these relatively minor infractions before the press and the world again and again while our soldiers risk there lives daily and are given no mercy by their enemy?

We must be careful because our enemies exploit everything to their advantage. In a translated message picked up from Al-Zarqawi to his followers, he said: "the Americans are living their worst days in Iraq now, even Members of Congress have announced that the U.S. is losing the war in Iraq." He assured them "We will conquer Iraq and then God willing head on to Jerusalem." He called President Bush "a fool" and said that his God is "anti-Christ." Our enemy is listening. Let's be careful about what he hears.

We find ourselves holding yet another hearing on detainee abuse. The investigation you have completed seems to show that after 3 years and 24,000 interrogations only 3 acts are in violation of approved interrogation techniques authorized by FM 34–52 and DOD guidance. One detainee had duct tape used to secure his mouth and jaw because he wouldn't stop yelling at the top of his lungs as he tried to insight an uprising in the interrogations area. Another was threatened, yet nothing was done to him or his family and another was tricked into believing that red ink was another substance that was very offensive to him.

When you contrast these interrogation techniques with those used by other countries, those fighting us, those used by us in previous wars, it is hard to understand why we are so wrapped up in this investigation. Further, you have determined in all but a couple cases, appropriate disciplinary action was taken and in all cases no further incidents occurred. Add to that, the fact that most, if not all, these incidents are at least a year old, and I am very impressed with the way the military, the FBI, and other agencies have conducted themselves.

This report shows me an incredible amount of restraint and discipline was present at Gitmo. Even the small infractions found, were found by our own government, corrected and now reported. We have nothing to be ashamed of. What other country, attacked as we were, would exercise this degree of restraint and self-criticism? I would like each of you to give your personal professional opinion to the committee.

General CRADDOCK. In my opinion, very few—if any—countries in the world today—attacked as we were—would demonstrate the restraint and transparency of detainee operations as the United States has. The fact is we started this venture of terrorist/enemy combatant detainee operations with no precedent and little relevant policy. While some in our government focused on interrogations yielding viable judicial proceedings, others—DOD—focused on gaining intelligence to prevent another attack. As we know now, the two were sometimes at odds. During this process, standards for interrogation and treatment of detainees were codified. Where rules were violated by guards or interrogators, punishment and/or corrective action was taken. This process has matured over time and today is consistent in application and enforcement. Quite frankly, when I visit Gitmo I marvel at the professionalism, dedication, and restraint our servicemembers demonstrate in dealing

with these detainees on a daily basis. I only hope that if I were in their shoes I could be that good!

In performing our intelligence mission, we continue to emphasize the U.S. Government's commitment to treat detainees "humanely, and to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." Along these lines, we have a solid working relationship with the International Committee of the Red Cross. We take their recommendations seriously and act upon them when appropriate. All credible allegations of abuse have been investigated and appropriate disciplinary action was taken against those who have engaged in misconduct.

General SCHMIDT. JTF Gitmo interrogations number more than 24,000 over a 3-year period, and we found only three interrogation acts in violation of authorized policy. This investigation—one of many—was briefed in an open forum to scrutinize ourselves to ensure we act in a responsible manner, now and in the future. Considering the timing of these events relative to September 11 and the operatives that we had detained, the context of the environment may lead some to assume "military necessity" allowed interrogations to employ cruel, inhumane, or tortuous techniques. It did not, and incredible restraint was, and is, demonstrated by our troops in this important endeavor. The very few instances of unauthorized use of interrogation techniques clearly highlight the professionalism and humane standards of our soldiers.

General FURLOW. I was appointed to investigate FBI allegations of detainee abuse during interrogation operations at JTF Gitmo on 28 December 2004. During the course of that investigation, we uncovered only three acts that violated authorized interrogation policy. It is not for me to conclude whether that is an example of "restraint." However, I believe the small number of violations versus the large number of interrogations (over 24,000) speak forcefully for kind of soldiers (diligent, dedicated and motivated) who are fighting the war on terrorism. I was proud of my country and military prior to my appointment as an investigating officer and remain as proud, or prouder, of my country and military's willingness to reflect and review and recommend alterations to current operations based on past experiences.

16. Senator INHOFE. General Craddock, Lieutenant General Schmidt, and Brigadier General Furlow, what was the worst substantiated incident of inappropriate use of interrogation techniques you investigated?

General CRADDOCK. As a combatant commander with military justice authority, characterizing one particular incident as "the worst" could be construed as a form of unlawful command influence if an incident is still being investigated or if a similar type of incident occurs in the future. Therefore, I do not believe it is appropriate to respond to this specific question.

General SCHMIDT. In my opinion, I believe the worst substantiated incident of interrogation techniques was that military interrogators threatened the subject of the second special interrogation and his family. Further, the interrogation logs clearly indicate that the interrogation went well beyond the "threat to detain," and in fact was a threat to the subject of the second special interrogation and his family that violated the UCMJ, article 134 communicating a threat. I feel this was the most serious incident because it violated the UCMJ.

General FURLOW. I believe the worst substantiated incident of inappropriate use of interrogation techniques was described in our report on pages 24–26. The report found in pertinent part "the Special Team Chief threatened the subject of the second special interrogation and his family. . ." A review of "the interrogation logs clearly indicate that the interrogation went well beyond the 'threat to detain. . .' and in fact was a threat to the subject of the second special interrogation and his family that violated the UCMJ, article 134 communicating a threat."

17. Senator INHOFE. General Craddock, Lieutenant General Schmidt, and Brigadier General Furlow, was appropriate disciplinary action taken in a timely manner in each case?

General CRADDOCK. For the same reasons I expressed in response to Question #16, I do not believe it is appropriate to respond to this specific question.

General SCHMIDT and General FURLOW. On all but three occasions, the AR 15–6 found that appropriate disciplinary action was taken in a timely manner. The 15–6 did find three cases that, in our opinion, warranted additional action: 1) the use of duct tape was addressed with an inadequate response—recommend admonish or reprimand; 2) the failure to monitor ISN 063—recommend admonish; and 3) communicating a threat to a second high value detainee—recommend discipline.

18. Senator INHOFE. General Craddock, Lieutenant General Schmidt, and Brigadier General Furlow, have the infractions found been corrected so they will not occur again and most importantly, are the DOD guidelines, as currently published along with the guidelines published in FM 34–52, appropriate to allow interrogators to get valuable intelligence information while not crossing the line from interrogation to abuse?

General CRADDOCK. The investigation found that there was no evidence of the substantiated allegations against individuals occurring again. In this respect, I believe the infractions have been corrected.

The Secretary of Defense 16 April 2003 memorandum, Counter-resistance Techniques in the War on Terrorism, is the current authority for interrogation techniques at JTF Gitmo. The Secretary of Defense memorandum draws heavily (although not exclusively) upon FM 34–52. FM 34–52, Intelligence Interrogation, was designed to provide guidance to traditional, state against state armed conflicts where the Geneva Conventions are fully applicable to enemy prisoners of war. I believe FM 34–52, and Department of Defense policy or doctrine in related areas, should be updated to reflect the new phenomenon of conflict against enemy combatants. In fact, I approved several recommendations from the investigation to this effect and I forwarded the investigation report to the Department of Defense for further consideration of these matters.

General SCHMIDT and General FURLOW. The current JTF Gitmo Standard Operating Procedures provide specific guidance and controls on all interrogations, consistent with the Secretary of Defense memorandum dated 16 April 2003.

Regarding the larger question of the line between interrogation, intelligence collection, and detainee abuse, it was not within the charter of the AR 15–6 to draw conclusions on these points. However, the investigation did disclose that additional guidance is needed in this area; therefore, the report has five recommendations.

(a) Recommendation #23. Recommend a policy-level review and determination of the status and treatment of all detainees, when not classified as EPWs. This review needs to particularly focus on the definitions of humane treatment, military necessity, and proper employment of interrogation techniques (e.g. boundaries or extremes);

(b) Recommendation #24. Recommend study of the DOD authorized interrogation techniques to establish a framework for evaluating their cumulative impact in relation to the obligation to treat detainees humanely;

(c) Recommendation #25. Recommend a reevaluation of the DOD and interagency interrogation training consistent with the new realities of the requirements of the global war on terror;

(d) Recommendation #26. Recommend a policy-level determination on role of military police in "setting the conditions" for intelligence gathering and interrogation of detainees at both the tactical level and strategic level facilities; and

(e) Recommendation #27. Recommend an interagency policy review to establish "standards" for interrogations when multiple agencies and interrogation objectives are involved. Particular emphasis should be placed on setting policy for who has priority as the lead agency, the specific boundaries for the authorized techniques in cases with multiple agencies involved, a central "data-base" for all intelligence gathered at a detention facility, and procedures for record keeping to include historical, litigation support, lessons learned, and successful/unsuccessful intelligence gathering techniques.

19. Senator INHOFE. Lieutenant General Schmidt and Brigadier General Furlow, many different investigations have been conducted into allegations of detainee abuse while they are in the custody of the United States. While there have been these alleged incidents, many were found to be ungrounded. While the two of you conducted your investigation, you have been called upon to determine to what extent these allegations were accurate. From what I have seen on my visit to Gitmo and have been briefed by the military leadership, it appears that what has been reported by the media has been blown far out of proportion. In cases where the military has found any mistreatment of detainees it has disciplined the responsible individuals accordingly and improved its procedures to prevent recurrence. I would like you to comment on what has the most egregious violation of a detainee that you came across in your investigation, the frequency of any such action, and was such an action deemed in your view to be an anomaly?

General SCHMIDT. In my opinion, I believe the most egregious violation of a detainee, as stated in the report, was that military interrogators threatened the subject of the second special interrogation and his family. Further, the interrogation logs clearly indicate that the interrogation went well beyond the "threat to detain,"

and in fact was a threat to the subject of the second special interrogation and his family that violated the UCMJ, article 134 communicating a threat. I feel this was the most serious incident because it violated the UCMJ.

We did not discover any other instances of an interrogator communicating a threat to a detainee. Therefore, I conclude that this was an isolated occurrence that developed as interrogators dealt with one of two high value detainees known to possess information critical to the war on terror.

General FURLOW. I believe the most egregious violation of a detainee during the implementation of an interrogation technique was described in our report on pages 24–26. The report found in pertinent part "the Special Team Chief threatened the subject of the second special interrogation and his family. . ." A review of "the interrogation logs clearly indicate that the interrogation went well beyond the 'threat to detain. . .' and in fact was a threat to the subject of the second special interrogation and his family that violated the UCMJ, article 134 communicating a threat."

We did not discover any other instances of an interrogator communicating a threat to a detainee; therefore, based on our investigation this was an isolated occurrence.

GITMO PRISONERS—CHARGE OR RELEASE

20. Senator INHOFE. General Craddock, a lot of controversy has surrounded the Gitmo prisoners—inflammatory statements have been made and inflammatory articles have been written. Many claim that we should charge these prisoners or just let them go. This is of course the same group of people who believed we should treat terrorism as a crime and not as a war. This is the same group of people who watched as Osama Bin Laden and his thugs attacked American interests repeatedly and simply sent the FBI to investigate and try to bring these people to justice, after the fact.

In a Washington Post article dated October 22, 2004, John Mintz wrote: "At least 10 detainees released from the Guantanamo Bay prison after U.S. officials concluded they posed little threat have been recaptured or killed fighting U.S. or coalition forces in Pakistan and Afghanistan. . . One of the recaptured prisoners is still at large after taking leadership of a militant faction in Pakistan and aligning himself with al Qaeda. . . In telephone calls to Pakistani reporters, he has bragged that he tricked his U.S. interrogators into believing he was someone else."

The reporter further reported about one former detainee named Mehsud: "Mehsud said he spent 2 years at Guantanamo Bay after being captured in 2002 in Afghanistan fighting alongside the Taliban. At the time he was carrying a false Afghan identity card, and while in custody he maintained the fiction that he was an innocent Afghan tribesman, he said, U.S. officials never realized he was a Pakistani with deep ties to militants in both countries. . ."

Three weeks ago, Attorney General Alberto Gonzales said, "There are 12 people that we have released that we know have come back and fought against America because they have been recaptured or killed on the battlefield. . ." I would like to hear your view of this debate. Should these men be charged or released?

General CRADDOCK. The fact that released detainees have taken up arms again and have tried to kill U.S. or coalition forces reflects the nature of many of the enemy combatant detainees we hold at JTF Gitmo. They are a fierce and ruthless enemy. Having said that, DOD has a system in place where the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) conducts Administrative Review Boards (ARB) to determine whether enemy combatants should be released, transferred, or remain in detention. The ARB assesses if enemy combatants continue to pose threats to U.S. or allied forces or interests. Several DOD organizations and other Federal agencies, as well as the nation of the enemy combatant, provide input to the ARB. The ARB holds a hearing and makes a recommendation to the Designated Civilian Official (DCO), who makes the final decision. As I am not involved in the ARB process, and do not have access to all of the information the ARB and DCO consider, I cannot comment on any specific cases. But the fact remains as is stated by the Attorney General—we have erred in 12 assessments to date—and that is far too many.

21. Senator INHOFE. General Craddock, do you believe these men would return to theater to cause the U.S. and coalition forces additional trouble?

General CRADDOCK. The ARB and DCO fully consider the threat enemy combatants may pose. However, many detainees at JTF Gitmo have been taught to be deceptive and a detainee may occasionally succeed in persuading an ARB or the DCO

that the detainee's release is warranted. A released detainee could return to theater and cause U.S. and coalition forces trouble (as some have done).

QUESTIONS SUBMITTED BY SENATOR EDWARD M. KENNEDY

SYSTEMIC PROBLEM

22. Senator KENNEDY. General Craddock, since allegations of abuse became public over a year ago, we have heard the Pentagon use the term "a few bad apples" and only hold accountability at lower levels of the chain of command. The similarities that you, Lieutenant General Schmidt, and Brigadier General Furlow acknowledged finding between treatments at Abu Ghraib and Gitmo (such as the use of women's lingerie, leashes, and dogs) indicate that these few, lower ranking interrogators and military police are taking the same actions, stationed half way around the world from one another.

If lower ranking interrogators and military servicemembers deployed to different corners of the earth are taking similar actions, is it possible that the true culpability for these "bad acts" lies further up the chain of command?

General CRADDOCK. There are important differences between JTF Gitmo and Abu Gharib. Because the detainees at JTF Gitmo are unlawful enemy combatants who are not entitled to protection under the Geneva Conventions as enemy prisoners of war, different legal standards apply. OSD approved certain interrogation techniques that applied only to unlawful enemy combatants detained at JTF Gitmo. These techniques were used against al-Qahtani, a high value detainee, who is believed to have been al Qaeda's intended 20th highjacker for the September 11 terrorist attacks on our Nation. The techniques used against al-Qahtani had been approved by the Secretary of Defense and the specific applications of these techniques were carefully planned and executed under closely controlled conditions. The techniques were designed to counter al-Qahtani's long resistance to more conventional interrogation techniques. The intent in using these techniques was to use legally permissible methods to gain intelligence from a key al Qaeda member, intelligence that could save lives.

In contrast, the conflict in Iraq is governed by the Geneva Conventions. OSD never approved the use of JTF Gitmo authorized interrogation techniques in the Iraq theater. At JTF Gitmo, the techniques and their applications were in accordance with law and policy. At Abu Ghraib, guards—not interrogators—engaged in misconduct outside of approved interrogation plans and without legal authority. While there may have been some soldiers who served at JTF Gitmo and later informally told persons at Abu Ghraib about JTF Gitmo interrogation techniques/applications, I do not believe that there was any policy migration intended or authorized at any level.

DEBATES BETWEEN THE FBI AND THE DEPARTMENT OF DEFENSE

23. Senator KENNEDY. Lieutenant General Schmidt and Brigadier General Furlow, in a letter to General Donald J. Ryder, the Deputy Assistant Director of the FBI's Counterterrorism Division, T.J. Harrington, stated that a representative of the FBI's General Counsel Office spoke to two senior members of the Department of Defense Office of the General Counsel: the Principal Deputy General Counsel, and the Deputy General Counsel for Intelligence.

During the course of your investigation, did you find that other senior Pentagon officials knew of the dispute between the FBI and DOD at or around the time of that meeting and if so, who?

General SCHMIDT and General FURLOW. The AR 15–6 team was directed to investigate FBI allegations of detainee abuse during interrogation operations at JTF Gitmo. This question is the beyond the scope of the AR 15–6 investigation.

24. Senator KENNNEDY. Lieutenant General Schmidt and Brigadier General Furlow, your report was specifically tasked with addressing the allegations contained in the FBI e-mails. Along with those allegations, you testified that there was active disagreement between the FBI and the DOD about proper policies and procedures. General Craddock and Lieutenant General Schmidt testified that the substance of the disagreement was based on the difference between FBI and DOD missions.

The December 5, 2003, FBI e-mail expressed concern that, given the nature of the tactics used by DOD interrogators in FBI uniforms, the FBI would be publicly admonished for DOD actions. The author was clearly concerned about the use of "tor-

ture techniques," as he or she called them, for reasons other than admissibility of evidence in court.

How did the DOD respond to FBI concerns that did not have to do with the admissibility of evidence, namely the torture allegations, and the accusation that FBI would have to "hold the bag" for DOD actions they did not condone?

General SCHMIDT and General FURLOW. First, the AR 15–6 investigation did not find any evidence of the use of "torture techniques" being implemented at JTF Gitmo, nor did the investigation find any evidence of torture occurring at JTF Gitmo. Second, the AR 15–6 did find fundamental disagreements between DOD and FBI interrogators concerning permissible interrogation techniques. This disagreement highlights the difference between the law enforcement mission of criminal prosecution and the need for actionable intelligence in the war on terror. The AR 15–6 concluded that the e-mail allegations arose because of these differences. While the DOD requires detainees to always be treated humanely, and to the extent appropriate and consistent with military necessity, in a manner consistent with the Geneva Conventions, the DOD's primary focus in interrogations is to obtain actionable intelligence.

IMPERSONATING FBI OFFICERS

25. Senator KENNEDY. General Craddock, why were DOD interrogators impersonating members of the Department of State and FBI? Who authorized that practice?

General CRADDOCK. The investigation found that the JTF Gitmo Chief of the Special Interrogation Team directed two interrogators to pose as State Department representatives during one interrogation and another interrogator to pose as an FBI agent on a different occasion. While using deception regarding one's identity is an authorized interrogation technique under FM 34–52, Intelligence Interrogation, an FBI supervisor at JTF Gitmo did not appreciate this practice as detainees were complaining during FBI interviews that FBI agents had already asked many of the same questions. Therefore, the FBI supervisor brought this to the attention of the appropriate JTF Gitmo officials and the practice was immediately stopped.

REPRIMANDING MAJOR GENERAL MILLER

26. Senator KENNEDY. General Craddock, the decision to reject the recommendation of the Schmidt-Furlow Report that Major General Miller be held accountable for failing to supervise the interrogation of ISN 063 must have been a difficult one. While making your decision, did you discuss it with any other member of the military, or any other DOD official?

General CRADDOCK. The decision was mine. I did discuss the report and my options with regard to approving or disapproving the report's recommendations with my Staff Judge Advocate and my Deputy Staff Judge Advocate. I did not discuss this specific decision—nor any other to my recollection—with anyone above me in my chain of command either in the Chairman, Joint Chief of Staff's office or with the Secretary of Defense or Deputy Secretary of Defense. I did discuss the public "roll-out" of this report—the process of briefings to Congress, press, etc.—during the time I was finalizing my decisions—with Pete Geren of OSD and Major General Mike Maples, Vice Director, Joint Staff. I do not recall any discussion with them with regard to my decisions. I recused myself from Lt. Gen. Schmidt's "pre-brief" on the investigation to the Secretary of Defense.

27. Senator KENNEDY. General Craddock, you stated that the reason you did not find Major General Miller accountable is that the actions taken under his watch were all legal. Is that a standard that is universally applied when the military considers accountability?

General CRADDOCK. No; military leaders often hold their subordinates responsible or accountable for matters that may be legal but still warrant some measure of counseling or other appropriate action. A leader's military judgment and experience plays a significant role in deciding when to take adverse action. I relied heavily upon my own personal experience and judgment in deciding not to recommend admonishing Major General Miller. While the fact that there was no finding that al-Qahtani's interrogation violated any U.S. law or policy was important, this was not the sole reason I chose not to recommend admonishing Major General Miller. I also believed that the degree of supervision provided by Major General Miller did not warrant admonishment under the circumstances. As I have stated, Major General Miller by his own admission, knew of several of the applications being used, applica-

tions which were used continuously over time and considered harsh and aggressive. Likewise, by his admission, he was not aware of other applications that were episodic in nature, not used during every interrogation period or every day, but labeled by some as degrading and abusive (and found by the report's investigators not to have violated law or policy).

Additionally, Major General Miller had just taken over at Gitmo and had been given several major duties to accomplish—a fact which I also considered. Evaluating Major General Miller's level of supervision as a commander was, in this context, more of a leadership than a legal question.

28. Senator KENNEDY. General Craddock, were you assuming that as long as a military leader's subordinates are not acting in contravention to a written policy, that leader should not be held accountable?

General CRADDOCK. In this case, Major General Miller did not act in contravention of law, regulation, or policy. While others viewing this matter externally may not like Major General Miller's degree of supervision over the interrogation of al-Qahtani, I found no violation of law, regulation, or policy to hold Major General Miller accountable for.

DRAWING THE LINE

29. Senator KENNEDY. General Craddock, during the hearing there was some confusion over what actions would amount to contravention of U.S. policy. Although the Schmidt-Furlow Report concludes that the cumulative effect of the treatments of ISN 063 amounted to degrading and abusive treatment, you stated that you were unsure the treatment was degrading and abusive. Is that your position that, if each individual treatment or technique is allowable according to U.S. policy, then the cumulative outcome is necessarily not degrading and abusive?

General CRADDOCK. FM 34–52, Intelligence Interrogations, provides broad guidance on a number of techniques such as "ego down" or "futility." FM 34–52 does not specify each and every application that is authorized under a particular technique. In fact, FM 34–52 states: "To every approach technique, there are literally hundreds of possible variations, each of which can be developed for a specific situation or source. The variations are limited only by the interrogator's personality, experience, ingenuity, and imagination."

The investigation determined that the creative, aggressive, and persistent interrogation of al-Qahtani "resulted in the cumulative effect being degrading and abusive treatment." However, the investigation could not tell me at what point the cumulative effect became degrading or abusive, or point to any violation of U.S. law or policy from the purported "degrading and abusive treatment." Because that point was not identified, I approved the report's recommendation that a study be conducted of the DOD authorized interrogation techniques to establish a framework for evaluating their cumulative impact in relation to the obligation to treat detainees humanely. I forwarded this recommendation, along with others concerning policy level issues, to the Department of Defense for further consideration.

30. Senator KENNEDY. General Craddock, at what point would such treatment accumulate to being degrading and abusive?

General CRADDOCK. I do not know. While I cannot speculate on hypothetical questions going beyond the scope of the investigation, I did accept the investigation's recommendation to seek a policy level review of interrogation techniques with a view towards evaluating the cumulative impact of interrogation techniques. I forwarded this recommendation and the report to the Department of Defense for further consideration.

31. Senator KENNEDY. General Craddock, you stated that, in reading the report, you could not tell "where to draw the line." Where would you draw the line?

General CRADDOCK. I will continue to follow the guidance in Secretary Rumsfeld's 16 April 2003 memorandum on interrogation techniques which provides: "While techniques are considered individually within this analysis, it must be understood that in practice, techniques are usually used in combination; the cumulative effect of all techniques to be employed must be considered before any decisions are made regarding approval for particular situations."

DEFINITION OF INHUMANE

32. Senator KENNEDY. General Schmidt, you say that none of the treatment "crossed the line" to be inhumane. Yet the report says we need a definition of humane treatment. You were able to determine that the treatment of ISN 063 did cross the line to being degrading and abusive. What definitions of degrading and abusive were you using?

General SCHMIDT. I believe each individual has a personal definition of "degrading" and "abusive," shaped by their environment and the context of the specific situation. For this investigation, I made a judgment based on my perception of how an average person would respond when confronted with the details of an applied technique. What I found in this investigation to be "abusive and degrading" was the cumulative effect of all the applications of authorized techniques; no limits were set on boundaries or extremes on the interrogations of two high value detainees.

I did not consider the techniques inhumane because the baseline for treatment as outlined by the President's instruction regarding treatment of these detainees was not violated. Within the closely supervised, controlled environment, detainees were free from pain or injury, medical treatment was immediately available, and they were provided safe, secure facilities, food and water. Using my personal judgment, the creative, aggressive, and persistent interrogation of the subject of the first Special Interrogation Plan resulted in my determination that the cumulative effect being degrading and abusive treatment.

33. Senator KENNEDY. General Schmidt, how does degrading and abusive treatment differ from inhumane treatment?

General SCHMIDT. Similar to the guidance given to interrogators from FM 34–52, I view these issues on a scale, with degrading and abusive treatment falling below the threshold of inhumane treatment. The only clear redline regards the definition of torture, and "humane treatment," or lack thereof, having only general guidelines or parameters.

This lack of a clear definition is in part the basis of Recommendation #23 from the report, which states, "Recommend a policy-level review and determination of the status and treatment of all detainees, when not classified as EPWs. This review needs to particularly focus on the definitions of humane treatment, military necessity, and proper employment of interrogation techniques. (e.g. boundaries or extremes)."

34. Senator KENNEDY. General Schmidt, how were you able to determine that none of the treatment was "inhumane" without a definition of "inhumane"?

General SCHMIDT. While I cannot precisely tell you when conduct becomes inhumane, the AR 15–6 concluded that the treatment did not rise to the level of inhumane. In evaluating humane treatment, I considered the President's mandate to treat the detainees humanely and the requirement to ensure detainees received adequate food, drinking water, clothing, shelter and medical treatment. Interrogations were conducted under controlled, supervised conditions with medical personnel present or immediately available at all times. Therefore, I concluded the treatment was not inhumane.

35. Senator KENNEDY. General Schmidt, in your testimony, you justified your statement that the treatment was not inhumane by citing the detainees' provision with food, water, shelter, clothing, and medical care. Was that your working definition of "humane" treatment?

General SCHMIDT. In evaluating humane treatment, I considered the President's mandate to treat the detainees humanely and the requirement to ensure detainees received adequate food, drinking water, clothing, shelter and medical treatment. Interrogations were conducted under controlled, supervised conditions with medical personnel present or immediately available at all times.

36. Senator KENNEDY. General Schmidt, do you believe there is a distinction between inhumane treatment and inhuman treatment? How would you distinguish the two?

General SCHMIDT. Practically speaking, the difference is slight. Inhuman and inhumane overlap in meaning to such an extent that it is impossible to sustain a distinction in their use. In general, inhuman refers to the characteristic of a person or action, whereas inhumane considers the same characteristic rather more in relation to the effect or consequences of the action on the sufferer. Bottom line is that inhumane, or inhuman, treatment regards a minimum standard that civilized people would set for treatment of any other persons in humanity. My opinion.

MILITARY NECESSITY

37. Senator KENNEDY. General Craddock, you stated that, according to the President's policy, interrogations and detention should only deviate from the principles of the Geneva Conventions for reasons of "military necessity." Who determines "military necessity?"

General CRADDOCK. President Bush's 7 February 2002 directive requires that "detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." The JTF Gitmo Commander normally determines military necessity at JTF Gitmo.

38. Senator KENNEDY. General Craddock, is it your position that U.S. approved interrogation techniques in Gitmo are considered with the principles of Geneva?

General CRADDOCK. Yes. Secretary Rumsfeld's 16 April 2003 memorandum on interrogation techniques states, "I reiterate that U.S. Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the Geneva Conventions."

39. Senator KENNEDY. General Craddock, can all of the detainees at Gitmo be treated outside the principles of the Geneva Conventions?

General CRADDOCK. No. Given the President and Secretary of Defense's guidance, the presumption is that when appropriate and consistent with military necessity, the detainees at JTF Gitmo will be treated consistent with the Geneva Conventions.

DISAGREEMENT ABOUT FINDINGS

40. Senator KENNEDY. Lieutenant General Schmidt and Brigadier General Furlow, from General Craddock's reports, and the media, we have evidence that high-ranking officers, and perhaps Pentagon leaders, disagree with your recommendation to hold Major General Miller accountable. Prior to General Craddock officially rejecting your recommendation to hold Major General Miller accountable, did you have any knowledge of other members of the DOD who disagreed with you? If so, who?

General SCHMIDT and General CRADDOCK. No. None to our knowledge.

41. Senator KENNEDY. Lieutenant General Schmidt and Brigadier General Furlow, at any point did any Pentagon or military official ask you to change your findings or recommendations or pressure you in any way to make any changes to the report?

General SCHMIDT and General FURLOW. No.

REDACTED E-MAILS

42. Senator KENNEDY. Lieutenant General Schmidt and Brigadier General Furlow, the FBI e-mails that we have access to are heavily redacted. It is very difficult to determine from those e-mails exactly what was included in the conversation, and what other allegations or important content may be excluded. Did you have access to completely unredacted versions of those e-mails during the course of your investigation?

General SCHMIDT and General FURLOW. The AR 15–6 investigation was presented with a packet of unredacted FBI e-mails that formed the basis of the initial allegations contained in the USSOUTHCOM appointment of an AR 15–6 investigation.

DOCUMENTS NOT CONSIDERED IN THE REPORT

43. Senator KENNEDY. Lieutenant General Schmidt and Brigadier General Furlow, you testified that there was at least one document that was not read in its entirety until the day before the hearing, a May 2003 e-mail. What were the contents of that e-mail, and why did it take until the day before the hearing to read it?

General SCHMIDT and General FURLOW. Brigadier General Furlow reviewed an e-mail with attachments the day prior to the hearing. The e-mail contained no additional information. We can say with certainty that the team was aware of the FBI agent's opinions regarding the Special Interrogation Plan, and that the team had an opportunity to interview the FBI agent who drafted the e-mail.

The AR 15–6 did review literally thousands of pages of documents covering e-mails spanning several years of activities at JTF Gitmo. We were always vigilant

to ensure we had complete information to ensure a thorough investigation. We remain confident that the AR 15–6 successfully investigated interrogations at JTF Gitmo.

44. Senator KENNEDY. Lieutenant General Schmidt and Brigadier General Furlow, were there any other documents that you requested but did not receive, were unable to read, or were at all redacted?

General SCHMIDT and General FURLOW. No.

WITNESSES NOT INTERVIEWED

45. Senator KENNEDY. Lieutenant General Schmidt and Brigadier General Furlow, you testified that there may have been as many as 10 witnesses that you sought to interview but were unable to contact. How many exactly were there?

General SCHMIDT and General FURLOW. Out of the 100-plus interviews, the AR 15–6 was not able to conduct full in-person interviews with 11 witnesses because of a variety of limiting factors. This included five FBI agents and six DOD personnel. However, because the testimony of many of the witnesses overlapped and because of the existence of numerous interrogations logs, we felt confident in our ability to fulfill the factfinding task within the scope of AR 15–6 guidance.

46. Senator KENNEDY. Lieutenant General Schmidt and Brigadier General Furlow, which of the substantiated or unsubstantiated allegations would each witness have provided information on?

General SCHMIDT and General FURLOW. The allegations that the witnesses may have provided information on include short-shackling, loud music/strobe lights, the use of menstrual blood and lap dance, denial of food and water, and communicating a threat (not an enumerated allegation, but was discovered).

Concerning the substantiated allegations, we felt we had sufficient evidence and detail to determine what in fact occurred.

With respect to the unsubstantiated allegations, there were only two: the allegation of DOD interference with FBI agents, and the denial of food and water. Concerning the first unsubstantiated allegation, our interviews led us to believe it was a misunderstanding that the FBI and the DOD interrogators resolved among themselves. In fact, the FBI agent who made the allegation, when interviewed, indicated that the true concern was the impersonation of an FBI agent; this matter was resolved and the agent was pleased with the rapid and thorough response to the situation. With regards to the second unsubstantiated allegation that detainees were denied food and water, after the completion of 4 months of investigation and interviewing over 100 witnesses, we still only had a single allegation from the original agent. Despite repeated attempts over several months, we were unable to complete an in-person interview. Considering the lack of any other evidence or testimony, at the end of our investigation, the AR 15–6 was unable to substantiate this allegation.

Since the hearing, we have conducted an in-person interview with this FBI Special Agent who alleged the denial of food and water, and the agent provided no additional corroborating evidence.

QUESTIONS SUBMITTED BY SENATOR DANIEL K. AKAKA

INTERROGATION TECHNIQUES

47. Senator AKAKA. General Craddock, there have been numerous investigations into the interrogation techniques used on detainees, first at Gitmo, then Iraq and Afghanistan. All of these reports found that any substantiated abuses have been isolated occurrences and while some have been identified as degrading, abusive, and at best inappropriate, none have been in violation of any law or official U.S. policy. The reports have also indicated that any questionable interrogation practices were not as a result of guidance given by senior military or civilian officials. Other than Brigadier General Jane Karpinski, USA, who was in charge of the detention center at Abu Ghraib, no senior officials have been held accountable for actions by those under them.

In addition, you stated at the July 13 hearing that you overruled the recommendation of Lieutenant General Schmidt and Brigadier General Furlow that called for the reprimand of Major General Geoffrey Miller, and instead referred the matter to the Army's Inspector General.

My question to you is at what point are senior officials, military or civilian, responsible for the actions of those under their command or supervision and when will

the DOD hold senior leaders accountable for detainee abuse, no matter how isolated?

General CRADDOCK. I have held, and will continue to hold, those under my command responsible and accountable for detainee abuse. In this particular case, I decided not to recommend admonishing Major General Miller because there was no finding that U.S. law or policy was violated and I determined that Major General Miller had exercised an appropriate level of supervision under the circumstances. More broadly, at JTF Gitmo there have been over 24,000 interrogations in over 3 years and there have only been a handful of substantiated detainee abuse allegations. Given this exceedingly small and isolated number of substantiated abuse allegations, I believe the leadership at JTF Gitmo has done a remarkably good job.

48. Senator AKAKA. General Craddock, at the Senate Armed Services Committee hearing, as well as in the Schmidt-Furlow Report, you reported that none of the questionable interrogation practices were in violation of the U.S. Army FM or DOD guidance. You also indicated that the Army FM was written for a more traditional war than we currently face in the global war on terrorism and that we may need to readdress our interrogation practices for this new environment.

The FBI, which has had years of experience questioning suspects, has found that non-coercive interrogation methods yield more reliable results. They claim that force or coercion may cause someone to talk, but it won't necessarily get them to talk.

Since the chief focus of the U.S. military detention center at Gitmo is to gain "actionable intelligence" by interrogating the detainees, would it not make sense to work more closely with agencies who have had experience, and success, in this area in order to be successful in getting the results we want?

General CRADDOCK. I approved two recommendations requesting an interagency review of interrogation training and an interagency policy review to establish standards for interrogations when multiple agencies and interrogations are involved. I forwarded these recommendations and the investigation report to the Department of Defense for their consideration. Additionally, it should be noted that JTF Gitmo coordinates with all organizations across the intelligence community to develop effective tactics, techniques, and procedures in its planning and execution of interrogation operations. The interagency presence and contribution at JTF Gitmo has been invaluable to the refinement of interrogation doctrine.

49. Senator AKAKA. General Craddock, when you referred this matter to the Army Inspector General, did you take the opportunity to provide your own analysis of the matter and make any recommendations on how they proceed with Major General Miller's responsibility in this?

General CRADDOCK. Army Regulation 20–1, Inspector General Activities and Procedures, requires forwarding of "any and all allegations of impropriety or misconduct" against general officers to the Department of the Army Inspector General. I forwarded the investigation report with the explanation that I disapproved the recommendation that Major General Miller be held accountable for failing to supervise the interrogation of al-Qahtani and be admonished for that failure. I also explained that my reason for disapproving this recommendation was that the interrogation of al-Qahtani did not result in any violation of any U.S. law or policy and, that in my view, the degree of supervision provided by Major General Miller did not warrant admonishment under the circumstances.

[Whereupon, at 1:00 p.m., the committee adjourned.]

MILITARY JUSTICE AND DETENTION POLICY IN THE GLOBAL WAR ON TERRORISM

THURSDAY, JULY 14, 2005

U.S. SENATE,
SUBCOMMITTEE ON PERSONNEL,
COMMITTEE ON ARMED SERVICES,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:37 a.m. in room SR–325, Russell Senate Office Building, Senator Lindsey O. Graham (chairman of the subcommittee) presiding.

Committee members present: Senators Warner, McCain, Roberts, Graham, Levin, Kennedy, and E. Benjamin Nelson.

Other Senators present: Senator Wyden.

Committee staff members present: Judith A. Ansley, staff director; and Leah C. Brewer, nominations and hearings clerk.

Majority staff members present: Sandra E. Luff, professional staff member; David M. Morriss, counsel; Lynn F. Rusten, professional staff member; Scott W. Stucky, general counsel; Diana G. Tabler, professional staff member; and Richard F. Walsh, counsel.

Minority staff members present: Richard D. DeBobes, Democratic staff director; Gabriella Eisen, research assistant; Gerald J. Leeling, minority counsel; Peter K. Levine, minority counsel; and William G.P. Monahan, minority counsel.

Staff assistants present: Benjamin L. Rubin, Nicholas W. West, and Pendred K. Wilson.

Committee members' assistants present: Christopher J. Paul and Marshall A. Salter, assistants to Senator McCain; John A. Bonsell, assistant to Senator Inhofe; Chris Arnold, assistant to Senator Roberts; Mackenzie M. Eaglen, assistant to Senator Collins; Clyde A. Taylor IV, assistant to Senator Chambliss; Meredith Moseley, assistant to Senator Graham; Mieke Y. Eoyang, assistant to Senator Kennedy; Elizabeth King, assistant to Senator Reed; William K. Sutey, assistant to Senator Bill Nelson; and Eric Pierce, assistant to Senator Ben Nelson.

OPENING STATEMENT OF SENATOR LINDSEY O. GRAHAM, CHAIRMAN

Senator GRAHAM. The hearing will come to order. Thank you all for coming. If you need a lawyer, this is a good place to come today. Thank you very much. I appreciate all of your taking time out of a busy schedule and I appreciate all the committee members for attending.

We have five stacked votes at 10 o'clock, so we'll deal with it the best we can, but I'll try to keep the hearings going, so we'll just

trade off and on during the hearing—if Senator Nelson comes—and keep it going so we won't have to keep you waiting for an hour. That's the problem we have to face.

To begin with, I'd like to thank Senator Warner for scheduling today's and yesterday's hearings. Some people may have a different view of if we should be doing this or not, but that's a healthy discussion to have in a democracy. I believe it's very important that Congress has this hearing, and that people like yourselves on the panel come and talk with us about a large issue.

This war is complex, it's complicated and it will require adjustments. The enemy adjusts and now I think it's time for us to adjust.

Guantanamo Bay (Gitmo), in my opinion, is a valuable tool on the war on terrorism. It's the right place in terms of location, and the mission that it performs is essential in keeping us safe and free. The purpose of this hearing is to see what we can do, working with the Department of Defense (DOD), to make sure that Guantanamo Bay is working on all cylinders legally and is advancing the cause of this war and is making us more secure.

In my opinion, Gitmo serves three purposes. First, it is a place to take someone who has joined a terrorist organization or shown sympathy to a terrorist organization off the battlefield and out of the fight. That makes us all safer. Since I don't want to become the South Carolina of Guantanamo Bays, I don't think so. If you'll raise your hand, we'll look at your State.

Second, it is a place to gather intelligence, to find out how the enemy is operating, what they have done in the past, what they are up to now, and what they may do in the future. To those who have been responsible for the detainee population at Gitmo, there is some criticism coming your way, but there needs to be some applause coming your way as well. You have done a very good job, generally speaking, in extracting intelligence that has made it safer and given us a chance to get ahead of the enemy.

Finally, the third role is prosecution. One of the things I would like every terrorist wannabe to understand is if you take up arms against us or coalition members, you do so at your own peril, because a couple of things await you, death or injury on the battlefield or detention and accountability.

Guantanamo Bay is an ideal location, in my opinion, to bring people to justice who take up arms and murder innocent people and who engage in acts of terrorism. Every terrorist needs to understand that you're going to potentially lose your life, get injured or be prosecuted if you join these organizations. That's what Guantanamo Bay can provide for this country.

There are three parts to this war. Intelligence is prevention. Detention is taking the enemy off the battlefield, and that's a part of the military component. The third is hearts and minds. The reason I think it's important that we have this hearing is that there have been some mistakes made. In a democracy, it's okay to be set free. It's okay to ask hard questions. It's okay to bring people before Congress and try to find out what happened, because gathering intelligence is important.

But if a misstep is made, it can affect the shape of the battlefield in the future. An inaccurate news report from Newsweek resulted

in people getting killed. Image matters. Part of this hearing process is to try to improve the image of Guantanamo Bay as well as making it substantively more effective in the war on terrorism.

If we ignore that third part of hearts and minds, we do so at our peril. Every general or combatant commander that's come before this committee has one thing they know for certain, and that is a military solution is not going to be the ultimate solution to this war. The military component helps us get a political solution for moderate forces and vanquish extremists in the Middle East. That's why it's important to have this hearing.

The truth is, due to no one's fault, Guantanamo Bay is in a legal mess. I'm here to blame no one. I'm here to address the problem. Some of you I used to work for, so I respect your service to our country. I respect your legal abilities tremendously, but the truth is we have been in operation now for almost 3 years and no one has been prosecuted. I'm not blaming anybody but we need to fix that.

Our Federal courts have had a chance to look at the legal structure in Guantanamo Bay and we are stuck. My goal is to work with the DOD and move forward. Enemy combatant status is in litigation. The tribunal system that would hold people accountable is stuck legally. We have had problems with interrogation techniques not being standard.

The goal of this hearing, and my involvement, is to come up with a comprehensive solution that allows Guantanamo Bay to be effectively used in the war on terrorism, and a place where we can try people sooner rather than later, so that we can continue to get good intelligence using standardized techniques that will not create black eyes for this country in terms of the hearts and minds of the world, and to have a detention policy that will define an enemy combatant in the way that the Federal courts will sign off on.

If we can accomplish that goal, then we will be safer. I have one final thought. Congress has been absent without leave (AWOL). We have criticized and we have applauded, but we have been absent when it comes to designing policies, and dealing with the capture of people on land and sea who are involved in the war. That is a constitutional duty of Congress.

So my offer to each person here and to the DOD in general is, working together, let's see if we can find some statutory solutions to problems that face us at Guantanamo Bay, so that the place can be fully utilized in the war on terrorism. I think it is now time for Congress to look at what we can do.

With that said, I will recognize Senator Wyden, who would like to speak before the committee and has an engagement.

STATEMENT OF HON. RON WYDEN, U.S. SENATOR FROM THE STATE OF OREGON

Senator WYDEN. Thank you very much, Mr. Chairman. I want to thank you and Senator Nelson for the invitation to come and in recognition of the good work that you and a number of Senators on this committee have done to prevent gratuitous filibustering.

I just want to make a couple of points this morning and I appreciate the invitation. I think you are aware, Mr. Chairman, and Senator Nelson, that I went to Guantanamo Bay just a couple of weeks

ago and I want to give you a couple of observations that are very much in sync with your opening remarks.

It seems to me the administration is on point when they say this is a war and the people who are in Guantanamo are not your garden-variety criminal defendants. These are dangerous people. At the same time, it seems to me that the administration has given short shrift to the need for a set of rules, a set of procedures, or a kind of compass to guide what happens at Guantanamo Bay and other facilities. I want to touch on a couple of reasons why.

Senator Nelson and I, for example, were in the room where the combatant tribunals take place and we were, in fact, briefed on the way the administrative review process works. I came away with the clear convictions they are good people, who are dedicated to fairness.

But asking them to conduct these reviews without any clearly defined set of rules that have a basis in law puts them essentially in an untenable situation.

Let me give you an example of the kind of issues that I think we ought to be looking at. For example, if you look at Article 21 of the Geneva Conventions with respect to holding foreign nationals who are dangerous, what is striking about it is that Article 21 coming from the Geneva Conventions is actually stronger in terms of its effect on detainees than is current Supreme Court law.

So we have a situation in which Geneva, which is often held out as this kind of forum for lofty liberalism, really has the tougher set of principles in a number of areas than even current Supreme Court law. That's the kind of issue we ought to be looking at.

A second area that I came away concerned with is what is done with respect to detainees who have what is known as intelligence. Obviously if we are holding people who have knowledge of active terror cells, that's in our national security interest.

But there is a real question about what to do with individuals who are not dangerous. What I think you indicated you wanted in your opening statement is that you want to protect the national security interests of our country. That is different, it seems to me, than creating some kind of human reference library down there without any set of rules with respect to how matters where we have interest in gathering intelligence is conducted.

The last point that I would make, Mr. Chairman, is that if you just close Gitmo, it seems to me that what you will have is a significant amount of reaction. You will in effect be outsourcing the interrogation of these individuals to countries with a much less significant commitment to human rights than we have.

I don't think any one of us want to see that kind of scenario. But at the same time, as we make sure that these dangerous individuals, if released, can't get out and injure our citizens, let us not have the policy that would in effect make the treatment of detainees the Achilles heel of our U.S. antiterrorism policy.

You have a lot of good people down there, and I met a number of them from Oregon. They have been given a very tough assignment. You touched on Congress being AWOL. I'd go even further than that. It seems to me Congress has been derelict, derelict in not meeting its responsibilities so that the good people that are down there—I came away with a sense of commitment and fair-

ness—have a compass by which to guard them in that room where Senator Nelson and I were at the administrative audit review board procedure.

I thank you and Senator Nelson for the chance to come and to work with you, Senator Graham, on a bipartisan basis.

[The prepared statement of Senator Wyden follows:]

PREPARED STATEMENT BY SENATOR RON WYDEN

Thank you for inviting me to appear before you today. I commend you for holding this hearing. Current practices on detention and rendition deserve to be examined very closely by Congress, and I am very glad this matter is finally getting some of the attention it deserves.

I would like to start off by saying that I agree with the Bush administration that this is a war, and that the individuals at Guantanamo are not garden-variety criminal defendants. But the administration is not right to say that just because we are at war, there should be no rules. None of us wants to put the American people at risk by releasing dangerous individuals who want to get out and kill people. At the same time, none of us wants the way that we treat detainees to become the Achilles' heel of U.S. antiterrorism policy.

I saw the policy on detention in practice when I traveled to Cuba last month with Senator Nelson and visited Camp Delta in Guantanamo Bay. I believe there needs to be vigorous, concerted oversight of practices at Guantanamo and other, similar facilities. Now having visited there, in my view the most glaring problem that Congress needs to address is the legal status of these detainees.

Senator Nelson and I were in the room where the Combatant Status Review Tribunals take place, and we were briefed on the Administrative Review Board process. These procedures were established to determine whether individuals pose a threat to the United States. The U.S. soldiers who are involved in these proceedings are good people. They are trying hard to do the right thing. But frankly, I don't know how they sort it out without a compass. By asking them to conduct reviews without establishing clear rules they can follow, the Federal Government has put them in a very difficult situation.

These soldiers need guidance and standards provided to them so that they can do their jobs. Even the reasons that detainees are being held need to be better defined. Many, for instance, have what is known as "intelligence value." If the U.S. is holding people because there is reason to believe that they have knowledge of active terrorist cells or operational planning, then that's in our national security interests. But if the evidence indicates that they are not dangerous, continuing to hold them requires a different set of standards. I'm interested in protecting the national security interests of this country, not in creating a human reference library made up of individuals who no longer pose a threat to the United States.

Of course, some prisoners are not being held because of their intelligence value, but because they are dangerous. The absence of clear rules here raises some questions that Congress ought to explore. For example, Article 21 of the Geneva Conventions would seem to provide the government with stronger grounds for holding detainees than the rules currently being employed by the administration. That article says that if foreign nationals are members of a group that is in armed conflict with the United States, the United States has the right to capture them and hold them prisoner until they are no longer dangerous. I realize that al Qaeda is not a conventional army, but perhaps those Conventions, which are sometimes dismissed as soft and lofty liberalism, can point us to a proper approach in law, that would have the added advantage of having a strong legal precedent.

Based on what Senator Nelson and I observed and learned at Guantanamo, I remain very concerned about past instances of unacceptable practices at Guantanamo and elsewhere. However, I believe that improvements have been made to procedures and conditions—at least at Guantanamo. I strongly prefer even this situation to the inevitable alternative: further outsourcing of prisoner interrogation to countries with a questionable commitment to human rights and the rule of law.

Our servicemen and servicewomen at Guantanamo have been given a very tough assignment. They are working incredibly hard. While in Cuba, I had the chance to sit down with soldiers from Oregon and talk to them about their experiences serving at Guantanamo. These men and women are doing a great job.

But Congress is making those soldiers' job much harder than it needs to be. Colleagues, we could make their job a lot easier by enabling them to operate in an environment where the rules are clear. Some of the soldiers and sailors at Guantanamo Bay have been unfairly maligned by being associated with the errors of their gov-

ernment. Allowing Camp Delta to become a modern-day Bastille where prisoners may be held under humane conditions, but are still kept indefinitely, with no formal charges and little legal recourse, is not likely to change Guantanamo's image around the world as a recruiting poster for al Qaeda. A better solution is for Congress to write rules for detainees that are solidly grounded in United States law, and to hold ourselves to a higher standard of conduct than those who seek to erode our freedoms.

I look forward to working with all of you on this issue.

Senator GRAHAM. I believe it's appropriate to recognize the chairman and ranking member. Mr. Chairman, would you like to say anything?

STATEMENT OF SENATOR JOHN WARNER

Senator WARNER. Very briefly, Mr. Chairman, I thank you and our distinguished colleague, Senator Nelson and also Senator McCain. We have all been discussing these issues and your valuable contribution. I'll be very brief.

I'd like to turn to your phrase that Guantanamo Bay is a legal mess. Let us be careful to say that Guantanamo today is being operated as best they can do under a framework of laws which are either just not clear or need to be refined.

So I agree with you. But let us send a message. Incidentally, you are going to join me and others tomorrow and have our view at Guantanamo Bay.

As we move forward in Congress, we must be very careful not to abrogate or in any way put in conflict the specific powers given to the President of the United States under our Constitution. We must move towards a framework of laws which reflect the longstanding principles of this great Nation, a Nation which continues to be the symbol of freedom and hope throughout the world.

As we proceed, we have to preserve the ability of our military and civilian counterparts in the intelligence field that continue to get the needed information to protect our forces abroad and indeed to protect our citizens here at home.

It's a daunting task. We are embarking on it, and I am very pleased to see thus far a good, strong, bipartisan interest in achieving these goals.

Senator GRAHAM. Senator Levin.

STATEMENT OF SENATOR CARL LEVIN

Senator LEVIN. Thank you, Mr. Chairman, thank you for convening this hearing. I thank Senator Warner also for supporting and authorizing this hearing.

Mr. Chairman, I very much support your opening statement. I think it was very accurate in terms of your assessment of the issue. On December 12, 2001, the full committee held a hearing that the Department plans to implement the President's plan regarding the trial by military commission of certain detainees in U.S. custody.

Since that time, in December 2001, the Secretary of Defense issued a series of military orders and instructions detailing the procedures for military commissions, and military personnel have been appointed or assigned to commissions, prosecutor's offices, and defense counsel offices.

The President has determined that 12 detainees were subject to his order to be tried by military commission, the appointing author-

ity has approved specific charges for 4 of those 12 detainees, and referred those charges to military commissioners for trial.

The Federal courts, however, intervened raising legal questions about the commission and detention process as is currently structured.

Now, during this time, the Office of Legal Counsel (OLC), in the Department of Justice (DOJ), issued a number of memoranda setting up the legal framework for interrogations at Gitmo and elsewhere, and a new memo was declassified August 1, 2002 which was the first by Gitmo.

The OLC concluded if physical pain amounts to torture, it must be equivalent in intensity to the pain accompanying serious physical injury such as organ failure, impairment of body function or even death.

According to the Church report on interrogation techniques, those OLC findings were included virtually word for word in a March 14, 2003, OLC memo prepared by Deputy Assistant General John Yoo to William Haynes.

Despite repeated written requests, the March 14, 2003, OLC memo has not been provided to this committee. A second highly relevant document has also been denied us.

Assistant Attorney General Bybee prepared another opinion known as the second Bybee memo on the legality of significant detention techniques around the time of August 1, 2002, OLC memo.

Mr. Chairman, I'm speaking here to both our chairmen. These two memos are apparently still in effect. These documents are absolutely essential to our understanding of the legal framework for our detention and interrogation policy.

I had recommended the chairman of the committee issue a subpoena, if necessary, in order to obtain them. Every Senator should join in assisting on these highly relevant and essential documents, and I know that Chairman Warner, and his staff have sought these documents.

Again, I believe that we must issue a subpoena to get these documents. They go right to the very issue, that our committee and subcommittee and Congress are all in the process of looking into and must look at.

These techniques which have been approved apparently include the use of stress positions, isolation, deprivation of light, 20-hour interrogations, removal of clothing, use of phobias such as fear of dogs to induce stress.

The Secretary established a Defense working group to make recommendations on interrogation techniques. Several of our witnesses today apparently participated in that working group. The Church report states that despite the number of objections and concerns the working group was directed to the March 14, 2003, OLC legal memo on what constitutes cruel, inhuman treatment, they were directed to accept that as a controlling authority on all legal issues.

The March 14, 2003, memo is one of two documents that have been withheld. Mr. Chairman, again, I commend you in your opening statement for having these hearings for the reasons that you called them and I would hope that in addition to hearing from our witnesses today, we will continue to press for those two documents

which Congress, it seems to me, is not only entitled to but really obligated to review.

Senator GRAHAM. Senator Nelson.

Senator BEN NELSON. Thank you, Mr. Chairman, I want to express my appreciation for this hearing today and I want to express thanks to the witnesses. I think the first panel might help us on how we might address the legal concerns of establishing standards.

Our goal of establishing standards is to reaffirm that this is a nation of laws, we abide by law and we want to send a message to the world that we will not succumb to the tactics of those against whom this battle is being waged, and that we will apply laws in an appropriate fashion in the detention of prisoners of whatever status.

I also want to say that as we seek to do this, we need to get the kind of input that we are going to get today with people who have the expertise, experience, and knowledge of the law, and how it's been applied in other situations.

I ask that my more complete opening statement be made a part of the record.

Senator GRAHAM. Without objection.

[The prepared statement of Senator Nelson follows:]

PREPARED STATEMENT BY SENATOR E. BENJAMIN NELSON

Thank you Mr. Chairman for holding this very important hearing. I join you in extending a warm welcome to our witnesses.

I recently visited the detainee facility at the U.S. Naval Station at Guantanamo Bay, Cuba. I was very impressed with what I observed while there. At least at the present time, that detention facility is being run in a professional, humane manner.

While there, I was able to meet and talk with three sailors and a marine from Nebraska. Each of them assured me that they have not personally observed any instances of abuse during their tours of duty there. I know that I can trust these young Nebraskans to tell me like it is.

I want to thank Anthony Mroczek of Grand Island, Nebraska; Jerry Garhart of York, Nebraska; Theesen Brant from Norfolk, Nebraska; and Chad Luke from Doniphan, Nebraska, for their hospitality and candid assessment of conditions at Guantanamo. Each of these servicemembers is serving honorably in difficult conditions. I thank them or their dedication, commitment to duty, and service to our Nation.

From the outset, I want to make clear that I support the use of military commissions to try detainees for violations of the law of war. Military commissions have been used during times of war throughout our history and have served us well. I am, however, concerned about some of the procedures that have been approved for the military commissions as currently configured. The Federal Courts are now addressing these concerns, and I am confident that we can learn from their decisions.

I do have concerns about how we classify detainees. I am also concerned about the lack of clear standards for how detainees, whatever their classification, are treated. Finally, I am concerned about the United States losing the moral high ground because we have not adhered to our traditional standards of fundamental fairness and how we treat people, even bad people.

I agree that the detainees in the global war on terrorism do not meet the criteria for a legally required application of the Geneva Conventions. I also agree that enemy combatants can be detained to prevent them from returning to the battlefield. However, I don't think that means that we should have no standards whatsoever for how we treat them. Perhaps it is time for Congress to establish a new category for detainees that takes into account the complexities of the global war on terrorism and to prescribe appropriate standards for how we treat this new category of detainee.

I was disappointed to hear senior military officers testify at yesterday's Armed Services Committee hearing on the investigation into allegations of detainee abuse at Guantanamo that it is consistent with United States policy to treat detainees in a degrading, abusive, or humiliating manner, so long as they were not subject to torture and were not treated "inhumanely."

It seems to me that it is inhumane to treat someone in a degrading, abusive, or humiliating manner. However, yesterday's witnesses limited humane treatment to providing adequate food, water, clothing, and shelter.

Witnesses at yesterday's hearing described approved interrogation techniques that would, as a minimum, constitute sexual harassment, or sexual assault in our society. They described a female interrogator straddling a male detainee, massaging him, whispering in his ear, and running her fingers through his hair. A detainee was forced to wear a bra, and to wear a woman's thong on his head.

If these are the standards of the Department of Defense, it is time for Congress to step in and establish reasonable standards of conduct that are consistent with our history as a moral leader. Treating detainees this way has incited people of Muslim faith and assisted terrorists in their recruiting efforts. If official policies permit this kind of behavior, why are we surprised when young soldiers take it upon themselves to treat detainees in a humiliating and degrading way? We owe it to our service men and women who are assigned duties involving the treatment of detainees to give them clear, reasonable standards and guidelines for appropriate conduct. We have not done that.

Mr. Chairman, I hope that our witnesses today can give us some help in developing new rules to address the legal status of detainees. These rules could define an enemy combatant, articulate standards for detention and release of enemy combatants, prescribe procedures for military tribunals, and establish reasonable standards for interrogation of enemy combatants. Thank you, Mr. Chairman.

Senator GRAHAM. Mr. Dell'Orto, please. I understand you have an opening.

STATEMENT OF DANIEL J. DELL'ORTO, PRINCIPAL DEPUTY GENERAL COUNSEL, DEPARTMENT OF DEFENSE

Mr. DELL'ORTO. My statement is one on behalf of the Judge Advocate General (JAG). Mr. Chairman, thank you for the opportunity to contribute. We understand that the committee is focusing on military aspects of the Department of Defense, including the classification of enemy combatants, the role of military commissions, as well as responsibilities of the United States, in the conduct of detention operations and U.S. laws under existing international treaty organizations.

Our Nation has faced many challenges since the attacks of September 11, 2001. The devastation of human lives have been echoed in cities and countries of our friends and allies, including Baghdad, Kabul, Istanbul, Bali, Riyadh, Madrid, Russia, Uzbekistan, and most recently London. The armed conflict of al Qaeda and its supporters continues.

For as long as it does, we will continue to meet each challenge steadfastly and consistently with the rule of law. Throughout this conflict, we have looked at the United States Constitution, and U.S. treaty obligations.

The President acting as commander in chief has taken action for the country and to prevent additional attacks. Congress, in authorizing use of military force on September 18, 2001, supported that use against those nations, organizations or persons who planned, authorized, committed, or aided the terrorist attacks or harbored such organizations or persons.

Congress also understands that the forces responsible for the September 11 attacks continue to pose an unusual and extraordinary threat to the national security, and that the President has the authority under the Constitution to take action to deter and prevent actions, to deter acts against the United States.

Consistent with this authority, U.S. and coalition forces have removed the Taliban from power. In the conflict of these operations,

U.S. Armed Forces consistently won and have seized many hostile persons and detained a small portion of them as enemy combatants.

On February 7, 2002 the President determined that the Third Geneva Convention applies to the Taliban detainees, but not to the al Qaeda detainees because Afghanistan is a party to the Geneva Conventions, but al Qaeda, an international terrorist group, is not.

They also determined that Taliban detainees are not entitled to prisoner of war (POW) status. Even so, he directed the Armed Forces to treat such detainees humanely. Those who are members of al Qaeda, Taliban and supporters are enemy supporters who may be detained.

Such detention serves military objectives of preventing initial attacks, and preventing combatants from rejoining the conflict and gathering intelligence. The military defines enemy combatants as personnel engaging in hostilities during armed conflict on behalf of the party to the conflict.

Enemy combatants are lawful targets unless they are captured or are no longer resisting. In a more conventional armed conflict between states, and any fighters of a government are recognizable by their uniforms or fixed insignia, with a responsible command, carry arms lawfully.

Enemy fighters in the global war on terrorism are not recognized among those ways. In fact, their strategy and tactics include hiding and illegally targeting civilians in violation of the law. As private citizens, these fighters do not have a right to engage and wage war.

The law for the Geneva Conventions offers specific privileges to combatants but not to terrorist fighters. The DOD doctrine defines enemy combatants who can be properly detained under the customs of the law.

The definition has the flexibility to meet specific circumstances within a particular conflict. It has been adapted in the war on terrorism operations to define opposing fighters. For example, the Deputy Secretary of Defense establishing tribunals defined an enemy combatant for purposes of that order as an individual who is part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners.

Consistent with these definitions, the Supreme Court has recently endorsed a similar definition of enemy combatant in a case involving the detention of enemy combatants captured from Afghanistan. The Court's statement, for the purposes of this case, says an enemy combatant is an individual who is part of or is supporting forces hostile to the United States or coalition partners in Afghanistan, or who is engaged in armed conflict against the United States.

With respect to the classification and definition of enemy combatants, it's important to maintain flexibility of the terminology in order for us to operate effectively with coalition forces and to address the types of conflicts in which we are engaged and will be engaged.

Generally speaking, the terms combatant, unprivileged combatant, unlawful combatant, and enemy combatant are well established in law in the detention and review process. From the early

stages in military operations in Afghanistan, the DOD has taken steps to capture personnel and continue the need for their continued detention.

In a conflict in which an army does not use insignia or uniforms to distinguish itself, the Department has established new mechanisms to test each detainee as an individual combatant in connection with the ongoing hostilities, undergoing a multistep screening process to determine if their detention is necessary.

If an individual is captured, commanders in the field, using all available information, make a determination as to whether an individual is an enemy combatant, that is, whether the individual is part of or supporting forces hostile to the United States or our coalition partners, and engaged in armed conflict against the United States.

Individuals who are not enemy combatants are released. Between August 2004 and January 2005, Combatant Status Review Tribunals (CSRTs) have reviewed the status of all individuals detained at Guantanamo in a fact-based proceeding to determine whether an individual is still properly classified as an enemy combatant.

The CSRTs gave each detainee an opportunity to contest their designation as an enemy combatant. In December 2004, the Administrative Review Board (ARB) process began to assess whether enemy combatants continue to pose a threat to the United States or its allies or whether there are other factors bearing on the need for detention.

The process permits the detainee to appear in person for an ARB panel of three military officers to explain why the detainee is no longer a threat to the United States or allies and provide support. This process remains ongoing and we'll review each detainee status annually.

With respect to the role of military commissions, their use is firmly based in international law, our Constitution, the Uniform Code of Military Justice (UCMJ), our Nation's history and international practice.

The United States employed a military commission to try eight Nazi saboteurs during World War II. At the conclusion of that conflict, U.S. military commissions heard some 500 cases against enemy war criminals. Australia, Canada, China, France, Greece, Norway, and United Kingdom used military commissions to prosecute 1,166 cases against war criminals.

In Article 21 of the UCMJ, Congress expressly recognizes military commissions and military tribunals as lawful and legitimate means of the President to try violations.

Additionally, Article 36 of the UCMJ codifies the President's authority to prescribe trial, pre-trial and post-trial procedures for military commissions.

They have not been used since World War II and constitute an exceptional situation, such as with respect to terrorists who have violated the law. On November 13, 2001, the President authorized use of military commissions in treatment and trial of certain noncitizens in the war against terrorism.

The President took this action in response to the acts of terrorism, including the attacks of September 11, 2001, on the Pen-

tagon, World Trade Center, and on civilian aircraft in Pennsylvania.

After the President authorized use of military commissions, work began to establish, consistent with the President's order, the procedures to be used and the rights to be afforded the accused. This process involved working to achieve ensuring trial for the accused, protecting classified and sensitive information and protecting the safety of personnel participating in the process, including the accused.

Use of military commissions with terrorists who violated laws of war, as opposed to other forums such as Federal courts or military courts, provides the flexibility necessary to ensure that it's equally important yet competing goals are attended.

In conclusion, the contemporary battlefield has challenged members of the DOD legal community as intensively as it has challenged the commanders and soldiers, sailors, airmen, and marines they advise. The exceptional performance of our judge advocates at every level of command, and in particular in combat in Iraq and Afghanistan where members of the uniformed legal branches have been killed and wounded in action, has been essential to ensuring the overall excellent record of compliance with the law achieved by our Armed Forces.

For this, our Nation should be proud. This success has not occurred in a legal environment without uncertainty. This has generated reviews and commentaries on how we should realize national security objectives. The Department of Defense, both military and civilian, have worked long and hard to ensure our forces have this, while upholding the rule of law and preserving American values.

We are confident judge advocates will continue to make essential contributions to our efforts to reconcile the nature of facing these threats with the traditional and historic commitment of our armed forces to conduct disciplined military actions in compliance with the law of war. Established principles have served us well to meet the challenges of military operations in the war on terrorism. We are confident that they provide the firm foundation for meeting future challenges. Thank you very much, Mr. Chairman.

[The prepared joint statement of Mr. Dell'Orto, General Romig, General Rives, Admiral McPherson, and General Sandkuhler follows:]

PREPARED JOINT STATEMENT BY DANIEL J. DELL'ORTO; MG THOMAS J. ROMIG, USA; MAJ. GEN. JACK L. RIVES, USAF; RADM JAMES E. MCPHERSON, USN; AND BRIG. GEN. KEVIN M. SANDKUHLER, USMC

Mr. Chairman and members of the subcommittee, thank you for the opportunity to contribute to this important discussion concerning military justice and detention policy in the global war on terrorism. We understand the subcommittee is focusing on military justice aspects of detention policy in the Department of Defense (DOD), including the definition and classification of enemy combatants; legal aspects of the detention, review, and interrogation of enemy combatants; the role of military commissions, as well as responsibilities of the United States for the conduct of detention operations under U.S. laws, existing international treaty obligations and the law of war.

Our Nation has faced many challenges since the deadly and savage attacks of September 11, 2001. The devastating loss of civilian lives and destruction of property and infrastructure of that day have been echoed in the cities and countries of our friends and allies, including Baghdad, Kabul, Istanbul, Bali, Riyadh, Madrid,

Russia, Uzbekistan, and, most recently, London. The armed conflict with al Qaeda and its supporters continues. For as long as it does, we will continue to meet each challenge steadfastly and consistent with the rule of law.

Throughout this conflict, we have looked to the U.S. Constitution, U.S. statutes, U.S. treaty obligations, and the law of war to frame our actions. The President, acting as Commander in Chief, has taken action to defend the country and to prevent additional attacks. Congress, in the Authorization for Use of Military Force, September 18, 2001, supported the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist [September 11] attacks . . . or harbored such organizations or persons."[1] Congress also emphasized that the forces responsible for the September 11 attacks "continue to pose an unusual and extraordinary threat to the national security," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."[2]

Consistent with this authority, U.S. and coalition forces have removed the Taliban from power, eliminated the "primary source of support to the terrorists who viciously attacked our Nation on September 11, 2001" and "seriously degraded" al Qaeda's training capability.[3] In the conduct of these operations, U.S. Armed Forces, consistent with the law and settled practice during armed conflict, have seized many hostile persons and detained a small proportion of them as enemy combatants.

On February 7, 2002, the President determined that the Third Geneva Convention applies to the Taliban detainees, but not to the al Qaeda detainees because Afghanistan is a party to the Geneva Conventions but al Qaeda—an international terrorist group—is not. He also determined that under article 4 of that Convention, Taliban detainees are not entitled to prisoner of war (POW) status. Even so, he directed the Armed Forces to treat such detainees humanely. Those who are members of al Qaeda, the Taliban, or their affiliates and supporters are enemy combatants who may be detained for the duration of hostilities. Such detention serves the vital military objectives of preventing additional attacks, preventing captured combatants from rejoining the conflict, and gathering intelligence to further the overall war effort. The military's authority to capture and detain enemy combatants is both well-established and time honored.

ENEMY COMBATANTS

Enemy combatants are personnel engaging in hostilities during an armed conflict on behalf of a party to the conflict. Enemy combatants are lawful targets unless they are captured or wounded, sick, or shipwrecked and no longer resisting.

In a more conventional armed conflict between States, enemy fighters of a government are recognizable by their uniforms or fixed insignia, fight under responsible command, carry their arms openly, and otherwise abide by the law of war.[4] Enemy fighters in the global war on terrorism are not recognizable in those ways—in fact, their strategy and tactics include hiding within civilian populations and deliberately targeting civilians in violation of the law.[5] As private citizens, these enemy fighters do not have a law of war right to initiate and wage war. The law of war, including the Third Geneva Convention, offer specific protections and privileges to conventional combatants, but not to terrorist fighters.

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[1] Publ. L. No. 107–40, §§ 1–2, 115 Stat. 224.

[2] Ibid.

[3] Office of the White House Press Secretary, Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Sept. 19, 2003) <www.whitehouse.gov/news/releases/2003/09/20030919–1.html>

[4] Lawful combatants include members of the regular armed forces of a State party to the conflict; militia, volunteer corps, and organized resistance movements belonging to a State party to the conflict, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war; and, members of regular Armed Forces who profess allegiance to a government or an authority not recognized by the detaining power. They are entitled to prisoner of war status upon capture, and are entitled to "combatant immunity" for their lawful pre-capture warlike acts. They may be prosecuted, however, for violations of the law of war. If so prosecuted, they still retain their status as prisoners of war.

[5] Unlawful combatants, or unprivileged belligerents, may include spies, saboteurs, or civilians who are participating in hostilities, or who otherwise engage in unauthorized attacks or other combatant acts. Unprivileged belligerents are not entitled to prisoner of war status, and may be prosecuted under the domestic law of the captor.

DOD doctrine currently defines an enemy combatant to be, "Any person in an armed conflict who could be properly detained under the laws and customs of war."[6] The definition has the flexibility to meet the specific circumstances of a particular conflict. It has been adapted in war on terrorism operations to define who is part of an opposing force. For example, the Deputy Secretary of Defense's Order Establishing Combatant Status Review Tribunals (CSRTs) defined an "enemy combatant" for purposes of that order as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."[7] Consistent with these definitions, the Supreme Court has recently endorsed a similar definition of "enemy combatant" in a case involving the detention of an enemy combatant captured in Afghanistan. The Court stated that "for purposes of this case, enemy combatant . . . is an individual who . . . was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639 (1994) (plurality op.) (internal quotation marks omitted).

With respect to the definition and classification of enemy combatants, it is important to maintain flexibility in the terminology in order to allow us to operate effectively with coalition forces, and to address the changing circumstances of the types of conflicts in which we are engaged, and will be engaged. Generally speaking, the terms "Combatant," "Unprivileged Belligerent," "Unlawful Combatant," and "Enemy Combatant," are well-established in the law of war.

DETENTION REVIEW PROCESS

From the early stages of military operations in Afghanistan, the Department of Defense has taken steps to examine the status of captured personnel and determine the need for their continued detention. In a conflict in which the enemy does not use distinctive insignia or uniforms to distinguish itself from the civilian population, the Department has established review mechanisms to test and revalidate the status of each detainee as an enemy combatant.

Individuals taken into DOD control in connection with the ongoing hostilities undergo a multi-step screening process to determine if their detention is necessary. When an individual is captured, commanders in the field, using all available information, make a determination as to whether the individual is an enemy combatant, i.e., whether the individual is "part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States."[8] Individuals who are not enemy combatants are released.

Between August 2004 and January 2005, the CSRTs reviewed the status of all individuals detained at Guantanamo, in a factbased proceeding, to determine whether the individual is still properly classified as an enemy combatant. The CSRTs gave each detainee the opportunity to contest the designation as an enemy combatant.

In December 2004, the Administrative Review Board (ARB) process began to assess whether an enemy combatant continues to pose a threat to the United States or its allies, or whether there are other factors bearing on the need for continued detention. The process permits the detainee to appear in person before an ARB panel of three military officers to explain why the detainee is no longer a threat to the United States or its allies, and to provide information to support the detainee's release. This process remains ongoing and will review each detainee's status annually.

COMMISSIONS

With respect to the role of military commissions, their use is firmly based in international law, our Constitution, the Uniform Code of Military Justice (UCMJ), our Nation's history, and international practice. The United States employed a military commission to try eight Nazi saboteurs during World War II. At the conclusion of that conflict, U.S. military commissions heard some 500 cases against enemy war criminals. Australia, Canada, China, France, Greece, Norway, and the United Kingdom used military commissions to prosecute another 1,166 cases against war criminals. In Article 21, UCMJ, Congress expressly recognizes military commissions and other military tribunals as a lawful and legitimate means available to the President

[6] See Joint Publication 1–02, DOD Dictionary of Military and Associated Terms (as amended through May 9, 2005).

[7] Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretary of the Navy (July 7, 2004).

[8] Department of Defense, Fact Sheet: Guantanamo Detainees <www.defenselink.mil/news/detainees.html.>

to try violations of the law of war. Additionally, Article 36, UCMJ, codifies the President's authority to prescribe pretrial, trial, and post-trial procedures for military commissions. That they have not been used since World War II constitutes acknowledgement of the necessity for their use only in exceptional situations. Such is the case with respect to international terrorists who have violated the law of war. On November 13, 2001, the President authorized the use of military commissions in his Military Order, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." The President took this action in response to the grave acts of terrorism and threats of terrorism, including the attacks of September 11, 2001, on the Pentagon, the World Trade Center, and on the civilian aircraft that crashed in Pennsylvania.

After the President authorized the use of military commissions, work began within the DOD to establish, consistent with the President's order, the procedures to be used and the rights to be afforded the accused. This process involved working to achieve certain ends, including: ensuring a full and fair trial for the accused; protecting classified and sensitive information; and protecting the safety of personnel participating in the process, including the accused. The use of military commissions for terrorists who violate the laws of war, as opposed to other trial alternatives such as the Federal courts or military courts-martial, best provides the flexibility necessary to ensure that these equally important yet competing goals are attained.

CONCLUSION

The contemporary battlefield has challenged members of the DOD legal community as intensively as it has challenged the commanders and soldiers, sailors, airmen, and marines they advise. The exceptional performance of our Judge Advocates at every level of command, and in particular in combat in Iraq and Afghanistan where members of the uniformed legal branches have been killed and wounded in action, has been essential to ensuring the overall excellent record of compliance with the law of war achieved by our Armed Forces. For this, our Nation should be justifiably proud.

This success has not occurred in a legal environment without its share of uncertainty. This complex legal reality has generated significant discussions, reviews and commentaries on how issues related to executing national security objectives should be resolved. DOD lawyers, both military and civilian, have worked long and hard to ensure that our forces had the tools to meet this threat while upholding the rule of law and preserving American values. We are confident that Judge Advocates and DOD civilian attorneys will continue to make essential contributions to our efforts to reconcile the unconventional nature of combating these threats with the traditional and historically essential commitment of our Armed Forces to conduct disciplined military operations in compliance with the law of war.

Established principles of law have served us well to meet the challenges of military operations in the war on terrorism. We are confident that they provide the firm foundation for meeting future challenges.

Senator GRAHAM. Admiral.

STATEMENT OF RADM JAMES M. MCGARRAH, CEC, USN, DIRECTOR, OFFICE OF THE ADMINISTRATIVE REVIEW OF DETENTION OF ENEMY COMBATANTS

Admiral MCGARRAH. Senator Graham, members of the committee, I'm Admiral Jim McGarrah, Civil Engineer Corps, United States Navy, and I'm glad to have this opportunity to appear before your today. Enemy fighters being detained at Guantanamo Bay are being held to prevent them from returning to the fight. This is consistent with internationally accepted principles of the law of armed conflict, which allows parties to detain enemy fighters for the duration of hostilities. The Supreme Court last June affirmed the President's authority to detain enemy fighters during the conflict. However as we all know, this is not a traditional type of armed conflict and is unlikely to end with the signing of a formal armistice. As a result in May of last year, Deputy Secretary of Defense Paul Wolfowitz named Navy Secretary Gordon England the designated civilian official to oversee a process to review annually the cases of

all detainees held under DOD control at Naval Base Guantanamo. This process is called the Administrative Review Board or ARB. Its purpose is to assess whether each enemy combatant continues to pose a threat to the United States or its allies or whether there are other factors that support continued detention. Based on this assessment the ARB panel can recommend to Secretary England that detainees be released, that they continue to be detained, or that they be transferred to another country, typically their country of nationality. Secretary England as the designated civilian official is the final decision maker for this process.

A process like the ARB is not required either by Geneva Conventions or by international or domestic law; however, because of the highly unusual nature of the global war on terrorism, and because we do not want to detain any combatant any longer than is necessary, we have taken this unprecedented and historic action to establish a process to permit enemy combatants to be heard while a conflict is ongoing.

While the ARB procedures were being developed last summer the Supreme Court issued three rulings related to detained combatants. Among other things a plurality of the Court cited Army regulation 190–8 as an example of a military process that might satisfy the due process requirements that the plurality indicated might apply. As a result, Deputy Secretary of Defense Wolfowitz established the CSRT. That process is to assess formally whether each detainee was properly detained as an enemy combatant and to permit each detainee the opportunity to formally contest the enemy combatant designation. The CSRT process was based on Army Regulation 190–8, though it provides more opportunities for detainees than that regulation, and specifies provisions for tribunals consistent with Article 5 of the 1949 Geneva Convention. The CSRT is a one-time process and provides each detainee with a number of opportunities: a review and consideration by a neutral decision-making panel composed of three commissioned military officers sworn to execute their duties faithfully and impartially; to attend all open portions of the proceedings if the detainee desires; to call relevant and reasonably available witnesses; to question witnesses called by the tribunal; to testify in his own behalf if he desires; to receive assistance of an interpreter; and when necessary to freely decline to testify.

The CSRT also provides more processes and protections than Army Regulation 190–8. A detainee can receive assistance from a military officer to ensure he understands the process and the opportunities available and to prepare for the hearing.

The CSRTs contain 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 that the detainee is not an enemy combatant. In advance of the hearing the detainee is provided with an unclassified summary of evidence supporting his enemy combatant classification. The detainee is allowed to introduce relevant and reasonably available documentary evidence, 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.

The tribunals make their decision by majority vote based on preponderance of the evidence. In less than 6 months tribunal hearings were conducted on all 558 detainees under DOD control at Guantanamo Bay. 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 designation as enemy combatants. Those found no longer to meet the criteria for enemy combatant designation were processed for release. To date, 23 have been released and DOD continues to work closely with Department of State to effect the release of the remaining 15.

While the one-time CSRTs were winding down, we started the ARB process. The first Administrative Review Board was conducted in December of last year. The ARB process is still ongoing and we expect to complete the first annual review for all eligible detainees by the end of this calendar year. The ARB process is similar to the CSRT in the opportunities it affords detainees to have their cases reviewed by a neutral panel of decisionmakers and to participate in the proceedings. The ARB panels make their assessments on whether there is reason to believe the enemy combatant no longer poses a threat to the United States or its allies or any other factors bearing on the need for continued detention. We coordinated within DOD and across many U.S. Government agencies to acquire relevant to each detainee. Additionally, unless national security concerns dictate otherwise we coordinate through Department of State to provide each detainee's home nation the opportunity to provide information, including the opportunity to submit information from family members. To date, we have completed 164 ARB hearings at Guantanamo Bay. Secretary England has made final decisions in 70 of these cases. Those decisions were that 4 detainees should be released, 25 detainees should be transferred, and 41 detainees should continue to be held in detention. We have notified Department of State, and they are pursuing the appropriate assurances from detainees' countries of nationality.

The ARB and CSRT processes have required significant time and resources, but we must do this right because there are two sides to the fairness coin. First, fairness to the American people requires that detainees who still pose a threat should not be released and permitted to return to terrorist activities. Second, fairness to the detainee as well as our clear desire not to detain persons any longer than necessary suggest that those who no longer pose a threat to the United States or our allies be released or transferred to their own countries.

Mr. Chairman, thank you again for the opportunity to provide this information. I'd be happy to answer questions.

[The prepared statement of Admiral McGarrah follows:]

PREPARED STATEMENT BY RADM JAMES M. MCGARRAH, USN

Senator Graham, Senator Nelson, and members of the subcommittee, I appreciate the opportunity to appear before you today.

In May of last year, Deputy Secretary of Defense Paul Wolfowitz named Secretary of the Navy Gordon England the Designated Civilian Official (DCO) to supervise the process to review annually the cases of all detainees held under DOD control at the U.S. Naval Base, Guantanamo Bay, Cuba. Secretary England appointed me as the Director of the Office for the Administrative Review of the Detention of Enemy Combatants (OAR DEC), the organization charged with carrying out the review process. We solicited input from the International Committee of the Red Cross (ICRC), from

nongovernmental organizations, and from the Ambassadors of countries whose nationals are detained 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 (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 that individual detainees be released, continue to be detained, or be transferred to another country, typically the detainee's country of nationality. Secretary England, as the DCO, is the final decisionmaker 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, 28 U.S.C. Section 2241, 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 would 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 Tribunal (CSRT) process to assess formally whether each detainee was properly detained as an enemy combatant and to permit each detainee the opportunity to contest the enemy combatant designation. The CSRT process was based on Army Regulation 190–8, which provides policy, procedures and responsibilities for the handling of prisoners of war and certain other detainees. Specifically, it outlines provisions for tribunals that exceed the requirements of tribunals that implement Article 5 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW), 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 prisoner of war status. The CSRT is a one-time process, and provides each detainee with the following opportunities consistent with Army Regulation 190–8:

- 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. The tribunals make their decisions by majority vote, based on the preponderance of the evidence;
- The opportunity to attend all open portions of the proceedings if he desires;
- 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 the opportunity to receive assistance from a military officer to ensure he understands the process and the opportunities available, and to prepare for his hearing.
- The CSRTs contain express qualifications to ensure the independence and lack of prejudgment of the tribunal
- 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 classification
- The detainee is allowed to introduce relevant and reasonably available documentary evidence
- 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 the CSRT process. The CSRT tribunal panels were the decision makers in this process. In my Convening Authority review, I could either approve a panel's decision or return a case for further deliberations. In less than 6 months, tribunal hearings were conducted on all 558 detainees under Department of Defense control at Guantanamo Bay. Of the 558 cases heard, the CSRT panels determined that 520 detainees were properly

classified as enemy combatants, and that 38 detainees no longer met the criteria for designation as enemy combatants. Those found no longer to meet the criteria for enemy combatant designation were processed for release. Twenty-three have been released; the DOD continues to work closely with Department of State to effect the release of the remaining 15 detainees.

The first Administrative Review Board was conducted on December 14, 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. The ARB process provides each eligible detainee with the following opportunities:

- The opportunity for review by a neutral decisionmaking panel of three commissioned military officers sworn to execute their duties faithfully and impartially. The tribunals make their assessments, in writing and by majority vote, on whether there is reason to believe the enemy combatant no longer poses a threat to the United States or its allies and any other factors bearing on the need for continued detention;
- The opportunity to attend all open portions of the proceedings;
- The opportunity to testify on his own behalf if he desires;
- The opportunity to receive assistance of an interpreter, when necessary; and
- The opportunity to receive assistance from a military officer to ensure he understands the process, and to prepare for his hearing.

Again, the intent of the ARB process is to assess annually whether each detainee continues to pose a threat to the U.S. or its allies and to recommend whether each detainee should continue to be detained, released, or transferred.

In order to accomplish this assessment, we coordinate within the Department of Defense, and with the Department of State, Department of Justice (including the Federal Bureau of Investigation), Central Intelligence Agency, Department of Homeland Security, and the National Security Council staff to acquire information relevant to each detainee's situation. Additionally, unless national security concerns dictate otherwise, we coordinate through the Department of State to provide each detainee's home nation the opportunity to provide information, including the opportunity to submit information from the detainee's family.

To date, we have completed 164 ARB hearings at Gitmo. Secretary England has made the final decisions on 70 of these cases, that 4 detainees should be released, 25 detainees should be transferred, and 41 detainees should continue to be detained. We have notified Department of State, and they are pursuing the appropriate assurances from the detainees' countries of nationality.

A process like the ARB is not required by either the Geneva Conventions or international law; it is discretionary on the part of the U.S. Government. There are no absolutes and this process does contain some risk to American citizens, for example, the possibility of releasing a detainee who returns to the fight against U.S. forces.

However, to do it right, the ARB and CSRT processes have required time, and have not been without their challenges. For example, the pursuit of off-island witness input for CSRT hearings was very time consuming, and we have received very little input from home countries in the ARB process. But we must do this right, because there are two sides to the fairness coin. First, fairness to the American people requires that those in detention who still pose a threat should not be released and permitted to return to terrorist activities. Second, fairness to the detainee, as well as our clear desire not to detain persons any longer than necessary, would suggest that those who no longer pose a threat to the United States or our allies be released or transferred to their own countries.

However, because of the highly unusual nature of the global war on terrorism, and because we do not want to detain any combatant any longer than is necessary, we have taken this unprecedented and historic action to establish a process to permit enemy combatants to be heard while a conflict is ongoing.

Mr. Chairman, thank you again for the opportunity to provide you this information. I am happy to answer any questions you or your subcommittee members might have regarding the CSRT or ARB processes.

Senator GRAHAM. Admiral.

General Hemingway.

STATEMENT OF BRIG. GEN. THOMAS L. HEMINGWAY, USAF, LEGAL ADVISOR TO THE APPOINTING AUTHORITY FOR THE OFFICE OF MILITARY COMMISSIONS

General HEMINGWAY. Mr. Chairman, members of the committee, I'm Brigadier General Thomas L. Hemingway. I'm the legal advisor to the appointing authority in the Office of Military Commissions, and I'm pleased to discuss the operations of the Office of Military Commissions.

America is at war. It's a war as tangible as the blood and dust that littered the streets of Manhattan on September 11. In response to the attacks on the United States, the President established military commissions to try those noncitizen members of al Qaeda and other persons engaging in specified terrorist activities who are alleged to have committed violations of the law of wars and related offenses.

Military commissions tried enemy combatants for violations of the law of war in many of the conflicts in which the United States has been involved. The President has determined that military commissions shall be full and fair trials. However, the application of the Federal rules of evidence have been deemed impracticable. The President's military order focuses on the unique factors of the ongoing hostilities and affirms that national security interests require the continued application of U.S. national security laws in developing commission instructions and regulations, consistent with a full and fair trial for each accused.

One DOD directive, six commission orders, nine separate commission instructions, and three appointing authority regulations implement military commission processes. Our commission rules which afford an accused multiple procedural protections, balanced with national security interests, compare favorably to those being used in the international criminal tribunal for Rwanda and the international criminal tribunal for the former Yugoslavia. The Office of Military Commissions has taken key steps to move the commission processes forward. Trials commenced in 2004.

Trials are stayed pending an appellate court decision in the case of Mr. Hamdi. Counsel for Mr. Hamdi brought action in United States District Court to review the legality of military commissions. The court recognized the authority of the President to establish military commissions to try offenders or offenses that by statute or the law of war may be tried by military commission and a review panel as an appeals mechanism. However the court raised concerns about the exclusion of the accused during the hearing of classified and protected information. 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.

The ongoing global war on terrorism continues to pose unique challenges. 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.

[The prepared statement of General Hemingway follows:]

PREPARED STATEMENT BY BRIG. GEN. THOMAS L. HEMINGWAY, USAF

Mr. Chairman and members of the subcommittee: I am Brigadier General Thomas L. Hemingway. I am the Legal Advisor to the Appointing Authority for the Office of Military Commissions. I am pleased to discuss the operations of the Office of Military Commissions, the protections afforded accused before Military Commissions, and the current status of cases pending before Military Commissions.

America is at war. This war is not a metaphorical war; it is as tangible as the blood, the dust, and the rubble that littered the streets of Manhattan on September 11, 2001. The reality of this war could be seen in the faces of those who stood in stark horror as they saw helpless, 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 engaging in specified terrorist activities who are alleged to have committed violations of the law 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 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 full and fair trials. The President also determined that the Federal Rules of Evidence are not practicable for military commissions given the nature of the 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 on-going armed conflict. Instead of the Federal Rules of Evidence, military commissions have adopted the internationally accepted standard for admissibility of evidence—probative value.

The President's Military Order focuses on the unique factors of the current ongoing hostilities and affirms that national security interests require the continued application of U.S. national security laws in developing commission instructions and regulations consistent with the accused's right to a fair trial. These orders, instructions, and regulations afford an accused the following rights:

1. Presumption of innocence
2. Trial before an impartial and independent panel of three to seven officers
3. Notification of charges in language understood by the accused
4. Call witnesses and present evidence
5. Cross-examine witnesses and examine evidence
6. Election not to testify at trial with no adverse inference
7. Appointment of military counsel at no cost to defendant and right to hire civilian counsel at no expense to the government
8. Privileged communications with defense counsel
9. Adequate support and resources to defense counsel
10. Appointment of interpreters and translators
11. Open proceedings, except as absolutely necessary to protect national security
12. Proof of guilt beyond a reasonable doubt
13. 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, 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 the Federal courts. While the appeal is pending, investigations and submissions 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 is 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 pose many unique challenges in an 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.

Senator GRAHAM. Thank you, General. We are in a series of votes, and we'll try to keep the committee process going the best we can. Thank you all for your testimony and showing up.

One of your statements, General Hemingway, I totally agree with. No one has really contemplating this kind of war before. But we are past the contemplation stage, we are in it, and we are learning. We are adjusting, and overall, I think we've done a very good job.

Number one, military tribunals are the way to go. I totally, completely agree with the concept with which you had started. Enemy combatant status is a legitimate legal status to confer on certain people. I don't want to do away with it; I want to be sure it operates in a way that the courts will sign off on and we can move forward in terms of world image to show the world that an enemy combatant can be fairly determined, the status can be fairly challenged, and they will stay there as long as they need to, to keep this country and the world safe from people who want to do harm.

In terms of intelligence gathering, the stress, physical and psychological, that can be applied, should be applied. Let's just do it in a way that doesn't create a black eye. The reforms that you've made are very good.

My central theme here is that under Article 1, Section 8, Clause 11 it says Congress shall have the power to make rules concerning captures on land and water, among other things. Mr. Dell'Orto, do you agree with this general proposition, that the courts who have reviewed enemy combatant status and the tribunal system that's currently in effect, have on more than one occasion spoken to the idea that Congress should get involved. Justice Scalia is very direct about that in his opinion, that Congress should help give us guidance. Because to do this by habeas review, I think, is a hodgepodge of inconsistent legal decisions that will be appealed forever.

No matter what the Court of Appeals decides in the case you just mentioned, General Hemingway, there will be an appeal, and this could go on for a while. So what I'm proposing, or the idea that I'm suggesting, is do you believe congressional action in defining enemy combatant status and approving a military tribunal system, would that be well received by the courts? Would that help us in terms of our current legal situation? What would your opinion be of that?

Mr. DELL'ORTO. Mr. Chairman, my view is, as I think I expressed in the opening statement, that the framework of laws under which we currently operate give us the ability to prosecute the war under the rule of law as it currently stands and that legis-

lation is not necessary. I believe the courts ultimately will see their way through these issues and I believe they have already indicated that. As I indicated during those opening remarks, the Supreme Court has determined——

Senator GRAHAM. So it your legal opinion that a statute passed by Congress determining enemy combatant status would not have a preferred legal position in courts, versus what you're currently doing?

Mr. DELL'ORTO. I'm not sure that it would. I can't predict how a court would rule given a statute presented to it. I do say at this point in the absence of any legislation to that effect, the courts I believe are aligning themselves in such a way, and it may take decisions by the Supreme Court that continue to affirm the framework under which we are currently operating.

Senator GRAHAM. I'm going to have to vote. I'll continue my line of questioning here a bit later. Senator Nelson.

Senator BEN NELSON. Thank you, Mr. Chairman. Mr. Dell'Orto, in categorizing the detainees in custody as enemy combatants, can you enlighten us on the kind of treatment that they would be entitled to or the kind of treatment that would be outside the limits of acceptable treatment?

Mr. DELL'ORTO. Under the determinations that have been made to date on the war on terrorism by the President, in confirming what the Secretary of Defense had directed on January 19, 2002, the baseline standard is humane treatment; but to the extent that a treatment is appropriate and consistent with military necessity, the treatment should also be consistent with the principles of Geneva. So we have, at least we have a baseline standard, a minimum standard under all circumstances, and a standard to which we should be ascribing consistent with our military needs in these ongoing operations and this ongoing conflict.

Senator BEN NELSON. In her opinion in the Hamdi case, Justice O'Connor made the statement that the Government has never provided any court with the full criteria that it uses in classifying individuals as enemy combatants. Is there a definition that is accepted internationally as to what an enemy combatant is? Does this include what Justice O'Connor would refer to as full criteria?

Mr. DELL'ORTO. I'm not sure that I have the precise answer to that question, Senator. Again, we have people who have taken up arms who are engaged in hostilities against a foreign government. In this instance, it does incorporate the acts of al Qaeda as a nonnation state actor in addition to the acts of the Taliban as a part of what was then the Afghan Government.

Senator BEN NELSON. Would anybody else have any thoughts about the full definition or the full criteria might constitute a definition? I guess you're on your own. I appreciate that.

I know that each Service has a fairly extensive, maybe broadly extensive training program for judge advocates and part of the training includes the doctrine for dealing with detainees in military operations. Could each of you describe what your doctrine is by Service, for handling detainees? In doing so, is there interservice consultation to maintain some consistency within each branch? Maybe, General Romig, you might lead off.

General ROMIG. Thank you, Senator. Well, the baseline starting point is we train them on the international conventions, the Geneva Conventions and what the law of war requires. That's done at the entry stage in the basic courses. All of the basic courses in all of the Services train the Geneva Conventions and law of war, and with a historical overview of how it's been planned in the past and that sort of thing.

We also do a lot of joint training. We have courses at our school. There are courses at the Air Force and the Navy school that we send people to. So we do law of war courses, specific law of war courses, operational law courses where they actually address what needs to be done in the legal environment as far as handling of detainees and the different statuses of different kinds of detainees: prisoners of war, civilians, unlawful combatants, those sorts of things.

Senator BEN NELSON. Do you feel that there is sufficient definition, or clarification, at the present time to be able to deal with the detainees at Guantanamo?

General ROMIG. Well yes, sir, because al Qaeda and the Taliban are individuals not subject to the Geneva Conventions. They are not parties to a conflict, they don't meet any of the definitions for criteria under the Geneva Conventions for lawful combatants. So I think however you look at it, yes, there is sufficient definition for them to address that.

Now, it's a different situation in Iraq where we are dealing with the conventions. Our people know what the rules are in that environment, too, as far as whether they are POWs or under the civilians convention and that sort of thing.

So I think if we had a very precise definition, it would end up perhaps being too restrictive on the ability of commanders and soldiers and lawyers to work within the international treaties.

Senator BEN NELSON. Does your service doctrine permit degrading, abusive, or humiliating treatment?

General ROMIG. No, sir, it does not. In fact, under the UCMJ that would be an offense, maltreatment of subordinates. We have, in fact, court-martialed and taken other action against a number of people in Iraq and other places that have engaged in that. In fact, we've tried 197 people for detainee abuse since the war on terrorism started.

Senator BEN NELSON. So the standard of humane treatment raises certain questions about what constitutes still acceptable treatment under the Army doctrine, is that accurate?

General ROMIG. The baseline is pretty clear, Senator. Humane treatment means you protect them, you clothe them, you feed them, you give them medical care, you give them a religious accommodation, and you account for them. All of these basic baseline items that we are doing, everybody is trained on that; they know that.

In addition, all of our people are trained that when you capture somebody on the battlefield, you initially treat them as a POW. That is the highest status that they can have on the battlefield is a POW. We train everyone to initially treat whoever they capture as a POW. They don't make a determination whether they are an unlawful combatant or otherwise.

Senator BEN NELSON. Thank you. My time has expired.

Senator Roberts.

Senator ROBERTS. Thank you, Mr. Chairman. Gentlemen, allow me to start by thanking you for being here today, all of you, and for your service to the country. In past weekend, I visited Gitmo along with Senator Hagel. Many others have gone before me, and I'm very pleased to hear that the chairman of the full committee will be going down along with the chairman of the subcommittee.

I think this is an operation that today we can be proud of. Were there mistakes in the past, yes, but certainly not today in regards to what many of our concerns are.

As has been said, we all have the best interest in ensuring that those released through the ARB process, or the CSRT—we get into a lot of acronyms here—do not pose a threat to American or coalition soldiers overseas, do not maintain the desire or capability to levy attacks on our homeland and are of no further value to the military or law enforcement agencies with regard to the intelligence that they may possess. So I have a couple of questions in that regard.

I'm concerned about releasing the detainees that should not be released. We just can't afford to be making any mistakes when it comes to releasing releasing some of these enemy combatants, I call them terrorists. We all know that for violations of domestic law, we often find that offenders who are released reappear as repeat offenders. All the newspapers and media are replete with coverage of that. If we release the wrong detainee, he's a repeat offender, it could result in the death of American troops or an attack on our homeland. So what assurance can you give us that every new effort is being made to ensure that this does not happen?

Mr. DELL'ORTO. Senator, I'll take that. In attempting to be flexible in this particular war, early on it was determined that we would have to consider releasing some people over time because of the, at least the apparent indefinite duration of the conflict. Now, I would point out that any conflict appears at various points in time as one that will be indefinite. I mean, it's a balancing test. Having made the decision that we don't want to detain people unnecessarily, beyond the time we consider them a threat, you have to go on the available information. So we do our best to screen, and have from the earliest days, screen these people and reassess the threat that they pose, based on additional information we receive or indications they give us, as they're on the grounds at Guantanamo, as to what the future may hold.

It's not perfect. I cannot give you a 100-percent guarantee. If this were a normal conflict, we would hold every one of these people until the cessation of hostilities. We don't know when that will be. But for the moment we are trying to strike a balance between not keeping them too long and yet ensuring that those who pose a threat of significance are not released.

Senator ROBERTS. You've testified extensively concerning the status of the detainees at Gitmo that have gone through a CSRT. How quickly are the new tribunals held for incoming detainees?

Mr. DELL'ORTO. I'll defer to Admiral McGarrah on that.

Admiral MCGARRAH. Senator, the last incoming detainees to Guantanamo were in September of last year and they were imme-

diately integrated into the schedule and those hearings were completed within the 6-month period that I mentioned, by January.

Senator ROBERTS. I appreciate that. Since they were established in July of last year, how many instances have there been when a tribunal for an incoming detainee has been delayed?

Admiral MCGARRAH. Sir, I wouldn't characterize any of them as having been delayed. They were integrated immediately into the schedule.

Senator ROBERTS. How many instances do you know of where someone went through the tribunal process and was found not to be an enemy combatant and then found fighting against U.S. forces after their release, appearing on the al Qaeda Web page?

Admiral MCGARRAH. Of the 38 that we have determined through the CSRT process, none have been found yet to have returned to the battlefield. There were prior processes before we implemented both the CSRT and ARB, and about a dozen of the over 200 that have been released since the start of the operations in Gitmo have been found to return to the battlefield.

Senator ROBERTS. I know there was a comment earlier that the situation down there in regards to how we review these cases is a mess. I quarrel with that. I don't quarrel with the Senator's concern, and that Senator has been to Gitmo. But the tenets of ARB are the annual administrative review to review all reasonably available relevant information not governed by Federal rules of evidence, independent review, the detainee may actually participate and provide information during a war, to consider information from home country and relatives. To consider threat determination, intelligence, value, law enforcement interest and potential for war crimes charges. Unclassified portions of the ARBs are open to the media. There is a recommendation for options, i.e., release, transfer, detain. The Designated Civilian Official (DCO) makes the final decision. There is obviously the interagency communication of outcomes. I don't think that's a mess.

There is a handout that you get at Gitmo, I'm not saying it's a handout that is just a handout. I think if you read through it and you look at the situation down there and the unique situation we face, I think this process is unprecedented. Never before in the history of any kind of warfare attack on any country has any country tried so hard to treat prisoners humanely and try to come up with some legal process whereby it can be of value and we can get, and we could get to where we want to be. It's historic. It's discretionary, it's not required by the Geneva Conventions, international or domestic laws. The combatants, i.e., the terrorists, can be heard during the ongoing hostilities. I think it's substantive, I think it's comprehensive, I think it's rigorous, and I think it's repeatable.

Now the fact that we have not come up with some better definition or solved what I call a perception problem, I think is probably the case. But certainly, as we go through, it will hopefully mitigate the concern about indefinite detention during this very unconventional type of war. We are in an unconventional situation. My time has expired. I thank you again for your contribution.

Senator BEN NELSON. Senator Kennedy.

Senator KENNEDY. Thank you very much, and thank all of you gentlemen for being here.

We began holding these hearings on these issues more than a year ago. At that time the administration promised the American people to get to the bottom of the abuses that shocked the world, yet since that time we have seen neither hide nor hair of the General Counsel Haynes and his absence speaks volumes. Mr. Dell'Orto, can you tell us why he didn't come today?

Mr. DELL'ORTO. Senator, the invitation that Senator Graham issued came to me and I don't have any other explanation beyond that.

Senator KENNEDY. You have no understanding why he hasn't appeared here?

Mr. DELL'ORTO. No, sir.

Senator BEN NELSON. Can I ask you, are you going to give a positive response to the memorandas that Senator Levin mentioned?

Mr. DELL'ORTO. The March 14, 2003, memorandum I responded to Senator Levin several weeks ago and indicated that is under review. I will for the purposes of this record indicate that that memorandum was withdrawn as an operational document, and so it is no longer in effect and it is no longer being considered a precedent of any sort.

Senator KENNEDY. What was the date of the withdrawal?

Mr. DELL'ORTO. It was certainly as recently as February of this year, but we were asked not to rely upon it going back to December of 2003. I have not relied upon it since.

Senator KENNEDY. Senator Levin obviously is going to follow up with this. Last year, the Federal Bureau of Investigation (FBI) raised serious concerns. I address this to our panel about the interrogation techniques at Guantanamo. The FBI repeatedly raised the concern that these techniques were not effective at producing reliable intelligence, and these "torture techniques," as they called them, would become an issue if military commissions were used. In the case of the twentieth hijacker, the FBI noted that he had been subjected to intense isolation for 3 months and then military working dogs were used to threaten him. They said he showed signs of extreme psychological trauma: talking to nonexistent people, reporting hearing voices, crouching in the corner of the cell covered with a sheet for hours on end.

The interrogation techniques that were described by the FBI and again yesterday in graphic detail to this committee, were eerily reminiscent of the abhorrent practices that took place at Abu Ghraib: forcing a detainee to wear women's underwear on his head, leashing the detainee like a dog and forcing him to do dog tricks, intimidating detainees with military dogs, and stripping detainees.

General Miller was in charge of Guantanamo when these abuses occurred and after that he went back to Abu Ghraib, and those same interrogation techniques were used. General Craddock yesterday said that while this treatment is degrading and abusive, it was not inhumane, and thus did not violate U.S. policy. If that is so, why in the world are lower ranking military police (MPs) at Abu Ghraib and Guantanamo being prosecuted for engaging in similar behavior, and General Miller is not?

Mr. DELL'ORTO. Senator, the incidents at Abu Ghraib had no connection to any authorized interrogation gathering effort. Fur-

thermore, Abu Ghraib was conducted in a Geneva Conventions-governed environment, and we did have different standards at place there.

Senator KENNEDY. I don't know whether any of the others are troubled by that conclusion, our situation, but I find that enormously troublesome myself, why we have a dual standard. We have been trying since the beginning to find out why the civilian authorities, civilian authorities, changed the rules and who changed them and when did they change them. Why, for example, in some of these meetings that the JAG offices actually indicated that they expressed opposition to some of these changes.

This was true—when was that date?—when we had the hearing, the working group report on 2003. We had the report that the JAG offices expressed some reservations, and nonetheless that those reservations were overruled by General Counsel Haynes. Were any of the officers here today in any of those meetings where they expressed reservations about those interrogation techniques? Could I ask?

General ROMIG. Yes, sir, I did attend. There was a working group that I and many of the members here were part of. It was very open and candid. We provided our input and our view of what was proper as far as procedures and techniques.

Senator KENNEDY. Let me just give it to you quickly if I could, to be precise. I couldn't find the reference earlier. I asked Vice Admiral Church about the legal underpinning that set some of these difficulties, interrogations in motion. He acknowledged that within the Pentagon there was disagreement about whether to adopt these bodies embodied in the April 2003 working group on interrogation. He told us that it had been well reported that top JAG offices were under civilian authorities, that adopting the policies contained in the report would lead to undermining military culture and abuse. Importantly, Vice Admiral Church told the committee that the JAG's objections were overruled by General Counsel Haynes.

I'm just interested whether any of those JAGs that are on our panel today were at that particular meeting, whether they expressed a view. Could any of you respond, please?

General SANDKUHLER. Senator Kennedy, I was present in the process along with General Romig and General Rives. We expressed our opinions, throughout the process, whether in support or against various procedures and techniques, and I believe our opinions were considered. The policymakers and decisionmakers made their decisions based upon our input, so we were present at those meetings.

Senator KENNEDY. You were present and you made your recommendations, and were the recommendations you supported included in the final or were they overruled?

General SANDKUHLER. I don't know if I would say they were overruled. They were considered, and I can't say specifically——

Senator KENNEDY. Were they included in the final?

General SANDKUHLER. I mean they were, our opinions were recognized.

Senator KENNEDY. Well, that's the best we are going to get from you that our views were recognized. When we have the testimony that it was—expressed opposition and now we have before the

United States Senate, you're called up here on a panel and direct questioning you say our rules were recognized. I'm asking you, we have had the testimony from the director of this report, that said that opposition to that was expressed by the JAGs. I'm just asking you, were you there and did you express opposition, please? Can I get an answer? My time is running out.

General ROMIG. Senator, I believe I did say that. We did express opposition to certain things that were being proposed. Other things we did not, and I believe that our opposition was, was accepted in some cases, maybe not in all cases. But it did modify the proposed list of techniques and procedures, so I have to say that we did have an impact. It was listened to.

Senator KENNEDY. Please, any of the others that were there?

General RIVES. Senator, along with others here on the panel and other senior members of the JAG Corps of the Services, as well as junior personnel participating, I participated in these discussions. Military attorneys advised on both law and policy considerations. On the legal issues, we come down most strongly as to where legal lines have to be drawn. On policy considerations it's very important to make sure that our observations based on military experience be considered. I am satisfied that we properly raised the concerns of what the legal limits are, as well as what policy considerations should be brought to bear, and then ultimately, the individuals charged with making those policy calls did take those matters into consideration.

Senator KENNEDY. Well, my time is up. But I do find that Admiral Church told the committee that the JAG's objections were overruled by General Haynes. That's what his testimony was. But we are getting different answers here today. Thank you.

Senator GRAHAM. Senator Kennedy, I'd like to pursue that a bit, too. I have some knowledge of it. The bottom line is that the DOJ memo or recommendation about what would constitute torture, what would be a violation of international law or domestic law regarding interrogation techniques, alarmed the JAGs who reviewed it, is that true or not? Speak up.

General ROMIG. Yes, sir, that is true.

Senator GRAHAM. General Rives.

General RIVES. That is true, Mr. Chairman.

General SANDKUHLER. Yes, sir.

Senator GRAHAM. It alarmed you because you're not soft on terrorism, because you understand that we have been supporting for 60 years a certain way of doing business. That as military lawyers you don't want to get your troops in trouble by having a confusing legal situation. You don't want to do something that would violate the UCMJ in terms of treating people in your charge.

October 7, 2004, Senator McCain, Senator Levin, and I wrote a letter to the Secretary of Defense requesting the declassification of the memos that Senator Kennedy is talking about. I'm not going to get into the subject matter other than I agree with the legal analysis. People did adjust later, to the Secretary's credit, when he was told several months later that there was a division about these interrogation techniques, that he basically got the input received and the interrogation techniques were modified based on your input.

But I think it is I think it is fair to say that the Department of Defense was secondary to the DOJ in a political sense, and that was your problem. If they had listened to you from the onset, we wouldn't have a lot of the problems that we have dealt with in the past.

Now I've been told by the White House that these memos are going to be declassified. I have asked for them a thousand times, almost literally, and they tell me that they have talked to you. Is that true, sir, about these memos?

Mr. DELL'ORTO. Yes, sir, they have.

Senator GRAHAM. Are we going to get them or not?

Mr. DELL'ORTO. I suspect you're going get them very soon.

Senator GRAHAM. Okay.

Mr. DELL'ORTO. But I would add this, Mr. Chairman, the contents of those memos remain very much a part of the deliberations of the DOD during the period of time that those deliberations were ongoing. They remain sensitive in that respect. Now, they have been classified to date, but as I believe you know, they've been available to you during this entire time for consideration.

Senator GRAHAM. I understand. I'm trying to use the memos to illustrate a point of how well off we are as a Nation, that we have people in uniform that can speak their mind and that have a good sense of balance, and all of them signed up to be warriors, and to advise warriors. They have had some concerns about the road that we are going down and there has been correction.

The whole point of this hearing is not to close Guantanamo Bay, on my part. It's to try to bring some legal remedies or legal assistance to our current dilemma, and I'm going to ask this question again. General Hemingway, I have read these cases. It is clear to me that the administration position that Guantanamo Bay is extraterritorial, was rejected. It is clear to me that the courts are sympathetic to military tribunals. It is clear to me that the courts are sympathetic to the idea of enemy combatant status, but there are some legal objections for the way enemy combatant status is being defined. There are some legal concerns about the military tribunal makeup, and it's no one's fault.

I supported what you were doing. I went to a press conference saying this is the way to go. Two and a half, 3 years later, gentlemen, here is where we are. We are still in court and nobody has been prosecuted. No matter what the Appellate Court says, it's going to go to the Supreme Court and God knows how long that's going to take. So what I'm trying to offer is under Article 1, Section 8, Clause 11, Congress has the power to regulate captures on land and sea.

I'm trying to put on the table a collaborative process where we can come up with a definition of enemy combatant status where Senator Levin and I and the President can agree what it means, put it in a statute, that we can come up with the idea that military tribunals are an appropriate way to try terrorists, and have a procedure that protects the homeland that will be seem internationally as fair, and is not a Federal Court system, not an UCMJ system. I'm trying to offer the idea that statutory involvement will break this legal logjam.

My question to you, General Hemingway: Do you believe that if a statutory definition were offered by Congress and statutory blessing of military tribunals were offered by Congress, would the courts receive that in a preferential way over the current system? Do you believe that would be the case?

General HEMINGWAY. Senator, I can't divine what the courts would say, but I think that the definitions that Congress has already provided us under the UCMJ, Title X Section 821, are adequate. I think the rules and procedures that the executive has established currently are adequate, and I don't know of any statutory way to convince the courts to recognize the doctrine of abstention.

Senator GRAHAM. Are you familiar with Justice Scalia's comments about the role of Congress and his opinion regarding the status of Guantanamo Bay? What do you think he is telling us?

General HEMINGWAY. His comments were not addressed to me, Senator.

Senator GRAHAM. They were addressed to the Nation. He is telling us Congress needs to get involved, because the courts do not want to run this war through habeas corpus, or habeas relief. They don't feel comfortable doing that, but that's exactly where we are. What I am proposing is that we correct that, that we don't change the concepts, we improve them, and that you get blessing by Congress.

Mr. Dell'Orto, do you believe that if a congressional action were taken where the President could agree about enemy combatant status and military tribunal makeup, that it would enhance the status of Gitmo because you have congressional buy-in?

Mr. DELL'ORTO. Mr. Chairman, the President has powers under the Constitution. He has Congress's authorization of September 18, 2001. I believe under Supreme Court precedent, that gives him an awful lot of authority to run this war. I would also say that——

Senator GRAHAM. Do you believe we have authority as Congress to regulate captures on land and sea?

Mr. DELL'ORTO. I'd have to take a look at that particular constitutional provision; I haven't examined that one of late, but if that's what it says, I suspect you have that authority to attempt to legislate. I would also say, though, and this goes back to your other comment about a bunch of lawyers in this room, regardless of what happens, whether there be legislation or no legislation, we are going to stay in litigation. That is the type of world in which we live today, for better or worse. As we, our office and I, deal with legislation every day and I'd like to think it's perfectly clear when we interpret it, when we get it on the ground. That's not necessarily the case.

So again, I do not mean to be glib in any way, but I don't know that that's a panacea for any problem we might have right now, and I don't think we need additional authorities.

Senator GRAHAM. The point is we are in litigation and it's going to continue. The courts are telling us in my opinion that a statutory definition or congressional involvement would be given more weight. You don't agree with that general legal concept, that courts tend to defer to legislative bodies versus executive action when it comes to something like this?

Mr. DELL'ORTO. I think they tend to do that in most instances. But again, when we are talking about the waging of war overseas, perhaps in the country, that historically there is much more latitude given to the President.

Senator GRAHAM. Given our current litigation stalemate where we are under a stay of prosecution, would anybody venture a guess as to when we will be able to prosecute someone at Guantanamo Bay, who God knows deserves it? One year, 2 years? Six months? Does anybody have any idea when we can finally bring somebody to justice down there?

Mr. DELL'ORTO. Mr. Chairman, I believe we are waiting for the D.C. Circuit's decision in Hamdi very soon. It's on expedited appeal.

Senator GRAHAM. What would happen after that? What is the most likely legal scenario?

Mr. DELL'ORTO. Within a short period of time, General Hemingway may have a better prediction on this, but probably on the order of 30 to 45 days, if not sooner, we'd be back——

Senator GRAHAM. Will it be appealed to the Supreme Court?

Mr. DELL'ORTO. I would assume that if we lose, we will appeal to the Supreme Court. I assume that if the Defendant loses he may attempt to.

Senator GRAHAM. General Hemingway, how long will it be before we have someone prosecuted at Guantanamo Bay?

General HEMINGWAY. Senator, assuming that the mandate of the court removes the restraining order, I think that Mr. Dell'Orto's assessment of 30 to 45 days is correct. We will be back underway trying cases at Guantanamo.

Senator GRAHAM. I'm sorry. Could you repeat that.

General HEMINGWAY. Surely. Assuming that the Circuit Court in its mandate overturns the restraining order in the Hamdi case, we will be back underway and trying cases at Guantanamo in 30 to 45 days after that's removed.

Senator GRAHAM. Okay. Is that the best case scenario?

General HEMINGWAY. That's correct.

Senator GRAHAM. What is the worst case scenario?

General HEMINGWAY. That we'd be delayed pending a Supreme Court decision.

Senator GRAHAM. How long will that be?

General HEMINGWAY. Your guess is as good as mine, Senator.

Senator GRAHAM. I understand, General.

All right. Enemy combatant status. It's my understanding that a Federal Court has reviewed the enemy combatant status procedure and found fault, is that correct? There's a District Court decision on that, is that right?

General HEMINGWAY. Judge Green.

Senator GRAHAM. How long will it take for that to work its way through the legal system?

General HEMINGWAY. It's my understanding that's scheduled for argument October 6, 2005.

Senator GRAHAM. What level of Federal Court are we in now? Judge Green is a District Court judge?

General HEMINGWAY. That's correct.

Senator GRAHAM. All right. You would imagine if we lost we would appeal, and I'm saying we, I'm on the home team here. If the other side lost, I imagine they would appeal, is that correct?

General HEMINGWAY. That's correct.

Senator GRAHAM. It goes to the appellate court system. I would imagine the same scenario. The bottom line is, a reasonable view of the legal situation we currently find ourselves in at Guantanamo Bay regarding prosecution ability and enemy combatant status, it looks a long time before we get this resolved under the current model. I believe we could bring it to closure much quicker through statutory definitions and involvement. That is the point of this hearing from my perspective.

The administration, like every administration, is probably reluctant to cede anything, but as Senator Levin works his way back, the war is beyond military engagement. It is a combination of forces, military engagement being one of them. We need buy-in to win this war, gentlemen. We don't need to be up here arguing with ourselves all the time. We don't need to be looking back. I do believe there is a window of opportunity here, where we can come together as a Congress and an administration and give definition and certainty to the concepts at Gitmo which are legitimate and protect this country.

If we continue to resist adjusting, if we have to wait months for memos that show the good side, not the bad side, we are hurting ourselves. This may be above your pay grades, but I wanted you to hear that from me. We are missing a golden opportunity, gentlemen, to get this war on a legal track that will allow us to take it to this enemy, and we can't afford any more political fights than we already have on our hands. With that, I'll recognize Senator McCain.

Senator MCCAIN. Thank you. Mr. Dell'Orto, under DOD rules for the military commissions defendants will lack an independent appeal. They can appeal up the chain of command within DOD, but not to U.S. Federal Courts or to the U.S. Court of Appeals. What is the rationale behind that decision?

Mr. DELL'ORTO. Sir, military commissions are function of the President's commander and chief authority as authorized by Congress. As such, they are his war powers; and it's appropriate to keep the entire process of military commissions within the executive branch for the purposes of that review.

Senator MCCAIN. These are classified as military combatants, the prisoners in Guantanamo, is that right?

Mr. DELL'ORTO. Enemy combatants, Senator.

Senator MCCAIN. Enemy combatants. The definition of enemy combatant is that the Geneva Conventions are applicable or not applicable? You can leave it on for a minute. We are going to have a little exchange here, Mr. Dell'Orto.

Mr. DELL'ORTO. For purposes of detainees at Guantanamo.

Senator MCCAIN. Yes.

Mr. DELL'ORTO. Those who are detained pursuant to the war on terrorism. I'm keeping Iraq completely aside.

Senator MCCAIN. Well, yes. In other words, those captured in Afghanistan, which is the population of Guantanamo. The reason I

keep focusing on Guantanamo is because the public is focusing and the media is focusing on Guantanamo. Go ahead, please.

Mr. DELL'ORTO. They are determined to be enemy combatants captured on the battlefield. Given the way, either their lack of nation state organization, if you will——

Senator MCCAIN. But they were in a nation that was governed by the Taliban, as horrible as that government may have been.

Mr. DELL'ORTO. Now let me make the distinction between the two categories, Senator. For al Qaeda, not part of any nation state, not part of any government—

Senator MCCAIN. How do you separate the Taliban from al Qaeda?

Mr. DELL'ORTO. The al Qaeda have their own agenda. They are not operating on behalf of the Afghan Government. Their agenda goes back quite some time before the Taliban.

Senator MCCAIN. Al Qaeda and the Taliban didn't work hand and glove in Afghanistan?

Mr. DELL'ORTO. I believe they did to advance particularly the al Qaeda's interest.

Senator MCCAIN. So you capture somebody on the battlefield and he says to you, "I'm al Qaeda" or "I'm part of the Taliban," is that how you differentiate?

Mr. DELL'ORTO. You sort them out based upon the fact that they were bearing arms on the battlefield, you police them up, and you then begin your process of interrogation.

Senator MCCAIN. They're on the battlefield, they are captured. You see one guy and you say okay, you're part of the Taliban army and you, you are part of al Qaeda. There are two different methods of treatment, is that correct? Is that what you're saying?

Mr. DELL'ORTO. You receive the same treatment, but you get to that point through slightly different analysis.

Senator MCCAIN. So you determine that someone is Taliban, which was the government, either legitimate or illegitimate, of Afghanistan. Are they eligible for the treatment under the Geneva Conventions?

Mr. DELL'ORTO. Taliban are not.

Senator MCCAIN. Taliban are not.

Mr. DELL'ORTO. Correct.

Senator MCCAIN. On what basis was that decision made?

Mr. DELL'ORTO. The President made that determination based upon the following analysis. The government of Afghanistan as you point out was a signatory to the Geneva Conventions.

The Taliban is, as that government at the point in time when hostilities commenced, operated its, its armed forces if you will, in a way that was inconsistent with the way that lawful combatants operate. They didn't wear uniforms, didn't wear insignia, didn't answer to a responsible chain of command, did not conduct themselves in terms of how they targeted people consistent with the laws of armed conflict, the laws of war. It was consistent across the board. It wasn't some who did and some who didn't. A determination was made they did not qualify for the protections of Geneva through the Geneva Conventions analysis.

Senator MCCAIN. That analysis is not agreed to by most international organizations. Was North Vietnam a signatory to the Geneva Conventions? Do you know?

Mr. DELL'ORTO. I don't recall, Senator.

Senator MCCAIN. I don't believe they were. What happens next time we're in a conflict and an American not in uniform on some kind of clandestine operation, such as our people were on in Afghanistan in civilian clothes, is captured? What kind of protections do you think that an American service man or woman is going to get?

Mr. DELL'ORTO. I would have to——

Senator MCCAIN. I think we know, Mr. Dell'Orto, I think we know. That's what I worry about. I worry about what happens to the next American that is captured in a conflict and if that conflict is with a nation that's a nonsignatory to the Geneva Conventions, and I think that Congress has to step in here and at least give some kind of regularized procedures for the treatment of prisoners, which is not clear in the minds of many numbers of Congress. We do have that obligation under the Constitution of the United States.

My time has expired. I hoped there would be another round because I'd be interested in the views of some of our other witnesses here. Maybe Admiral McPherson, just off the top of your head, what do you have to say about what I've had to say? Go ahead.

Admiral MCPHERSON. The bottom line whether they're recognized as falling within the Geneva Conventions is you must treat them humanely. Our President has said——

Senator MCCAIN. What is the definition of humanely? Is it in the eye of the beholder? If you had a North Vietnamese interrogator right here today, he'd tell you that we were treated very humanely in the North Vietnamese prison camps.

Admiral MCPHERSON. We have a definition of humane.

Senator MCCAIN. So did they.

Admiral MCPHERSON. I understand that, sir. But for us, that definition is in concrete. That's what we apply to our prisoners in Guantanamo. We treat them humanely.

Senator MCCAIN. We do.

Admiral MCPHERSON. Yes, sir.

Senator MCCAIN. How about use of dogs, is that humane?

Admiral MCPHERSON. There are differences of opinion, as Senator Graham——

Senator MCCAIN. Not according to the Geneva Conventions, there's not differences of opinion.

Admiral MCPHERSON. There are differences of opinion with regard to stress factors for purposes of interrogation. There will always be those differences of opinion.

Senator MCCAIN. Who judges that, what the stress factors are, Admiral? The person there that's doing the interrogating?

Admiral MCPHERSON. Well, I think the chain of command judges that, sir.

Senator MCCAIN. How do they know what is going on? If there is a dog there, how do they know that the dog is sitting over in the corner, or behaving as we saw in the pictures of Abu Ghraib?

Admiral MCPHERSON. Abu Ghraib was a breakdown in the chain of command, Senator.

Senator MCCAIN. It certainly was. It certainly was, Admiral. That's maybe the first statement that you and I have agreed with in our exchange here. Senator Levin.

Senator LEVIN. Thank you, Mr. Chairman. In your judgment, are the following practices humane? A detainee subjected to wear a leash, to do dog tricks, to wear women's lingerie, to appear naked in front of a woman interrogator, are those humane techniques?

Admiral MCPHERSON. I don't know whether they're humane or not. When I heard that those were occurring, the first thing that came to my mind is they were awfully juvenile, they were almost like fraternity tricks.

Senator LEVIN. No, the question is, are they authorized under the manual?

Admiral MCPHERSON. Under the field manual?

Senator LEVIN. Yes.

Admiral MCPHERSON. I don't know if they are or not, sir. I would have to look.

Senator LEVIN. Okay.

Admiral MCPHERSON. But again, differences——

Senator LEVIN. I've asked you whether in your judgment those were humane tactics, and you said you said humane is in concrete. The definition is in concrete.

Admiral MCPHERSON. I don't think that's inhumane treatment. No sir, I don't.

Senator LEVIN. All right, thank you. General Romig, would you consider those tactics to be consistent with Geneva?

General ROMIG. Sir, they are not consistent with the Geneva Conventions. But as I understand——

Senator LEVIN. They are?

General Romig. Are not. Are not consistent with Geneva Conventions. But we are talking about Guantanamo where the Geneva Conventions did not apply. But in Iraq they would be violations of the Geneva Conventions.

Senator LEVIN. All right. In your judgment would they be violations therefore of the Army field manual?

General ROMIG. Sir, the Army field manual is merely guidance. It's not a regulatory manual and there is a lot of flexibility in that field manual, as you well know, sir. So, they're certainly not within the spirit of field manual but what they are violations of, or could be violations of, is the UCMJ.

Senator LEVIN. Do you believe that those techniques are consistent with the field manual? Thirty four——

General ROMIG. Fifty two, yes, sir. Consistent with, I think I would have to know a little bit more about it. At first blush, I would say no, but I think I would have to know a little bit more about the interrogation plan and what the intent was and how it was being administered and all of that.

Senator LEVIN. All right. So you're saying that your first reaction would be no, but you'd like to know more details?

General ROMIG. Yes, sir.

Senator LEVIN. Do you know the way in which those were used at Guantanamo?

General ROMIG. Sir, I do not. The——

Senator LEVIN. That's fair enough.

General ROMIG. The field manual, if I may just add, is directed towards the Geneva Conventions.

Senator LEVIN. I understand that, and that's why I'm asking you whether or not those techniques could be consistent with Geneva. Your first answer it doesn't look to you like they are, but you'd like to know more?

General ROMIG. Absolutely. Yes, sir.

Senator LEVIN. Let me try General Rives. In your opinion, are those techniques consistent with Geneva? Would we like to see our POWs treated that way?

General RIVES. No, Senator. We would not.

Senator LEVIN. Okay. Is Geneva supposed to apply to our POWs?

General RIVES. It does, Senator.

Senator LEVIN. So I'm not asking you about Guantanamo yet. I will get to that in a moment. I'm asking about the field manual, which is supposed to be consistent with Geneva.

So we don't want to see our POWs treated that way. General Rives, do you believe those techniques are consistent with Geneva?

General RIVES. I personally do not, Senator. The law provides outer limits of what is acceptable. Policies typically are well within those outer limits. We train people both on what law permits but especially for the junior people who will enforcing these, we try to give them effective training on what is admissible under the law. Under the normal Geneva categories people are well aware of what the standards are.

Senator LEVIN. In your personal judgment those specific practices are not consistent with Geneva?

General RIVES. That's correct, Senator.

Senator LEVIN. Yesterday, I just want to let you all know, we were told at our full committee hearing that those practices are being utilized to implement U.S. Army field manual 34–52, which is consistent with Geneva. In your judgment, General Rives, that could not be the case, because they are not consistent with Geneva.

I just want to let you know what we heard yesterday, folks, because what we heard yesterday to me was pretty shocking. Putting aside the specifics on a case or two, what we were told yesterday was that in the judgment of the witnesses, that there are two parts of the field manual 34–52, one called fear down and the other called ego—one called fear up and the other one called ego down. That those practices were implementing those two general categories in a field manual.

That's what I think is so dangerous to our troops. Once you can say that those specific practices which we heard about, really for the first time, at Guantanamo are ways of implementing our field manual since, our field manual must be consistent with Geneva, our troops are in danger. That's a threat. It's not just to our values, although that's important. It's to our troops. I would just hope that particularly our JAGs, whom we rely on so heavily, would really take a look at that testimony yesterday. I would even ask that you give us your opinion on it.

Now let me ask our JAGs who participated in the working group, and I understand that Generals Romig, Sandkuhler, and Rives

were in that working group. I believe you were asked by Senator Graham, relative to your opinion at the time relative to the memo which was—the Church report, and here I'm talking about the March 13, 2003, memo.

The Church report states the following: that that memo, which we are awaiting a copy of, states that the substance of that memo was virtually identical to the Office of Legal Counsel's August 1, 2002, so-called "torture memo," which was later disavowed by the administration. So you have the March 13, 2003, memo from you to Haynes, according to the Church report, being based, or virtually identical on that earlier August 1 memo.

My question would be to the three JAGs who are present at the working group. I want to read to you from the August 2002 memo, first of all, and ask you whether or not you believe that what I'm going to read to you is consistent with either our own values or what standards we were supposed to be following: Physical pain amounting to torture was equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death.

Now, let me just ask the three JAGs, was that language discussed in the working group? Maybe General Romig, do you remember that?

General ROMIG. Sir, I am not positive, but I think that language, it was a whole spectrum of things that were discussed. That language may have been discussed. We wrote memos back that have not been declassified yet laying out in very strong terms our opinion on some of these things.

Senator LEVIN. Right. I'm going to get to that in a moment, but for the time being, do you believe that that description of what must be inflicted in order for the torture to be the characterization, do you believe that is an acceptable definition, in your judgment?

General ROMIG. No, sir. I do not.

General SANDKUHLER. I agree with General Romig.

Admiral MCPHERSON. I don't agree.

Senator LEVIN. General Rives?

General RIVES. I also agree with General Romig.

Senator LEVIN. You agree with General Romig.

Now going to the working group, I'm a lawyer; and I can't tell you how much we rely on all of you to give us both a system that's effective, and efficient, and that's workable, achieves its goal obtaining of information and treating people humanely, but also doing it in a way which is not only consistent with our values but will protect our troops.

If the same techniques are used against us so that we have standing, to not only object, but to act against anybody who treats our troops with these kind of techniques, that's the issue here. Our troops are looking at us. They're looking at us to see whether or not we are going to adopt a standard which they, if they are captured, would find acceptable or whether they would expect us as a nation to come in to their defense and to take action to extricate them, from capture.

Now the Church report. I want to go back to the Church report. The Church report said the working group expressed a great deal of disagreement with the legal analysis contained in the March 14,

2003, memo. I understand that there were some things you agreed with, and that were modified, and some you continued to disagree with that remained. First, General Romig, where did you continue to disagree? What specific techniques were left that you disagreed with?

General ROMIG. Sir, I think going into specific techniques are still classified. I will say this, though, I never did see the final report because shortly after that, the Secretary of Defense published another memo that was much more constricted than the scope of things we were looking at.

Senator LEVIN. More constricted than the March 13, 2003, report?

General ROMIG. I believe so. Yes, sir.

Senator LEVIN. You're referring to an April 2003 policy report?

Mr. DELL'ORTO. Senator, can I provide some context for this?

Senator LEVIN. If you don't mind, just to make sure I understand first what the generals say.

General ROMIG. Sir, I don't remember the exact date of the memo.

Senator LEVIN. All right. Okay. Now, Mr. Dell'Orto, we know—would you supply to us on a classified basis the memos that you wrote which disagreed with the conclusions of the working group.

Mr. DELL'ORTO. Senator, the committee has those memos.

Senator LEVIN. We have the memos where the members of the working group expressed disagreement specifically with the outcome of the working group?

Mr. DELL'ORTO. You have memos from each of the then-sitting judge advocates general, and the staff judge advocates of the commandant, expressing their views on a draft of the working group report that was dated approximately February 6, 2003.

Senator LEVIN. All right. So that's what the Chairman here asked that we be furnished in a declassified way, is that correct?

Mr. DELL'ORTO. Yes, Senator.

Senator LEVIN. Mr. Dell'Orto, that's where you said that will happen?

Mr. DELL'ORTO. We expect that it will. But as I pointed out to Senator Graham, and I don't know that you were here, sir, we continue to consider the arguments that were in there quite candid and the types of arguments that we don't necessarily need to have out in the public domain.

Senator LEVIN. All right.

Mr. DELL'ORTO. Because they are deliberative.

Senator LEVIN. Now on the two documents that I've been pressing for; my time is up, so I'll end here. I don't believe these are on the list the chairman referred to. The March 13, 2003, memo from the Assistant Attorney General John Yoo to Haynes. Are we going to get that document, classified or otherwise?

Mr. DELL'ORTO. Sir, as I indicated earlier, that remains under review at this point in time.

Senator LEVIN. Well, how long is that going to remain under review? I don't know how long I've been asking for this document.

Mr. DELL'ORTO. You'll probably hear something from me early next week.

Senator LEVIN. Okay. I would hope, Mr. Chairman, that if we can't get a document which was in effect for at least a year, minimum——

Mr. DELL'ORTO. Less than a year. In effect from March 2003 until December 2003 for the purposes of reliance.

Senator LEVIN. All right, and then not formally rescinded until this year, is that correct?

Mr. DELL'ORTO. That's correct, sir.

Senator LEVIN. If we can't get that document, I don't know what it is that the Senate or the U.S. Congress can get. I mean, this is directly relevant to our inquiry. This isn't working documents, this isn't opinions of lawyers. I understand all the sensitivities there. This is a document which set forth techniques which were allowed, is that correct?

Mr. DELL'ORTO. Sir, it was a legal opinion that set forth broad legal analysis, not specific techniques.

Senator LEVIN. This was binding, is that correct?

Mr. DELL'ORTO. Yes, sir.

Senator LEVIN. Okay. So we had a binding legal opinion that was operative for 6 months, not rescinded until 2 years or so later. Mr. Chairman, and I'm going to reiterate this, I would hope every member of the U.S. Senate, I don't care what their position is on various issues which we have to struggle with, on this issue, on access to that type of document, it seems to me it must be absolute. It must be something Senators of varying opinions would insist upon. I would add to that the document, the other document which I made reference to which is the August, the second Bybee memo, you know the memo I refer to here.

Mr. DELL'ORTO. Sir, not specifically.

Senator LEVIN. Okay, I'll be very specific here. There was a so-called second Bybee memo, which came out around the time of the August 1, 2002, memo, it's called the second Bybee memo. It's in my letter to you. So if you're going to give me an answer on the other one in the next week, and I would say give it to this committee, because I think there are a lot of other members of the committee, and I hope the chairman, who feel just as strongly as I do. I won't speak for Senator Graham, he's here. But Senator Warner and his staff have attempted to get these documents orally. I know that much. So can we get the answer on both memos next week, Mr. Dell'Orto?

[The information referred to follows:]

I have not seen a "second" memorandum signed by Mr. Bybee and dated in the early August 2002 time period. I respectfully suggest that the request for such a memorandum be made to the Department of Justice.

Mr. DELL'ORTO. I'll do my best.

Senator LEVIN. Thank you. Thank you, Mr. Chairman.

Senator GRAHAM. I echo what you said, Senator Levin. I find myself in the same camp and would like the information.

Senator McCain has a few follow-up questions. I apologize for keeping you here for 2 hours. It's just been a very difficult way to conduct a hearing. But until he gets back, we have looked backward, we talked about friction points. We talked about input from judge advocates. I think it would be good for the Nation to know what that input was. I understand your concerns about dialogue

and disclosing dialogue, but the bottom line is things were changed eventually.

I would like to ask each judge advocate now, in the current situation, do you feel better about our legal attitudes and responses to interrogation techniques, and the structures at Guantanamo Bay? Have we improved? How do you feel today?

General ROMIG. Sir, you're talking about limiting it exclusively to Guantanamo Bay? I think——

Senator GRAHAM. Overall.

General ROMIG. I think it's much better. I think there is more focus on it. I think there has been reviews at all levels. We have revised training. There has been much reference to 34–52, the field manual, that's being revised and will be out fairly soon. There have been a number of things done to bring the focus back where it should have been, and I think we are in much better shape.

Admiral MCPHERSON. I would agree. I feel much better with the interrogation techniques and the guidance that's provided, and the oversight that is provided.

Senator GRAHAM. One of your original concerns is that we have a body of law in the military and it has, any interrogation procedure has to be evaluated in terms of what we require of our troops under the UCMJ. You don't want to go down one road and put somebody in legal trouble because of another legal path. You feel that we have kind of reconciled those concepts?

Admiral MCPHERSON. I think we have. But I harken back to the words you spoke earlier, concerning stress, both physical and psychological in conjunction with interrogation techniques. I can't help but think that one person's stress position is another person's inhumane treatment.

Senator GRAHAM. Right. It's a hard concept, but we have a body of law and we have 60 years of it, we have the Army field manual, and we have a lot of things to draw upon. As I understand it, your concerns were that when you drew upon what was in the past, the proposed future route did not reconcile itself well with the past. That we were taking a kind of a legal detour with no real understanding where it would take us, and that was your objection basically, right?

Admiral MCPHERSON. I think you're right, yes, sir.

Senator GRAHAM. From the Marines' point of view, are we doing better, sir?

General SANDKUHLER. Sir, I think we are doing well overall. If you look at the big broad topic of detainee operations on the battlefield today, we are much more in tune to make sure we have trained all our forces and we do that on a continuous basis. We have judge advocates with each battalion that are deployed in Iraq to provide the legal services necessary to be able to take care of detainee operations. They can go from claims to detainee operations to the law of war question in a flash, and we have people to do that.

We continue our training and the emphasis for young judge advocates especially is to understand how it all works, and how our values are involved with the way we handle and interact with prisoners on the battlefield. I feel much more confident now across the

force, than if you would have asked me when we first started this adventure.

Senator GRAHAM. Well, that shows that we are improving and we're adjusting because the war is, on an easy day it's hard, because there is so many new things going on here, and the fact that we have to adjust, and we look back and say that's not quite right; it's not a slam on anyone. It's the sign of a great nation. It's not the sign of a weak nation. General Rives, how do you feel?

General RIVES. General, we are certainly much more sensitive to the issues and that has helped. Beginning with the publicity that attended the horrors of Abu Ghraib, we realized this is not for closed door meetings, but it is something we have to get the right control over. We have continued to emphasize this training both to new judge advocates and more experienced judge advocates. Every Air Force JAG who deploys gets specific training on this just before deploying, as well as other broader, continuing training we do.

One of the current initiatives that has been true since December 2004 is the Joint Staff Deputy Director of War On Terrorism has created a Detainee Senior Leadership Oversight Council, and we participate in those monthly meetings. So that helps keep the spotlight on this issue as well.

Senator GRAHAM. General Hemingway, we are going recess for about 5 or 10 minutes. Senator McCain will come back and finish his line of questioning. Then we will allow the panel to go and you can take a comfort break here.

When we come back, be prepared to tell us a little bit about, without disclosing classified information, the type people we have at Guantanamo Bay. There is a reason we want to prosecute them. If you could maybe share that with us for a minute or two here before I leave?

General HEMINGWAY. Senator, I think that the charges that we have pending currently are an accurate reflection. We have people charged with conspiracy to violate the law of war by conspiring to kill civilians, by attempting to murder. These are unprivileged belligerents who are alleged to have committed these acts. I think that gives the public some idea of the kind of individual we are facing within the group that we have at Guantanamo.

Senator GRAHAM. That's why I really want to move forward as quickly as I can with prosecution to let the public know that we are fighting and winning this war, and the type people we are dealing with, and let future recruits know what comes your way if you get captured. Long prison terms, maybe even death, in accordance with the rule of law. With that we'll adjourn and reconvene just in a few minutes. Thank you very much. [Recess.]

I just want to, for the record, thank the panel for coming. You can go back to work now. You have been an invaluable asset to this committee. I appreciate your service to our country. I know most of you personally, and I am very proud of our military legal community and I could not be more proud to have been a member of the JAG Corps, and currently am. You have acquitted yourselves well. Thank you very much, Mr. Dell'Orto. Senator Nelson, if it's all okay, we'll go on to the next panel.

Senator BEN NELSON. That's fine with me. I want to thank you all. I know there are lots of challenges to try to sort out some of

the ideas that have been thrown out today. We appreciate your effort and we will also appreciate any continuing advice and counsel that you might be able to provide us.

Senator GRAHAM. Thank you. We'll have the next panel. Thank you. [Recess.]

Thank you all for being patient. I apologize. The Senate on a good day is a hard place to run. We have had five back to back votes, and you have been very patient. Our first panel was terrific. Thank you all for coming and helping this committee with a very difficult series of decisions to make. You are all well-known and respected. Senator Nelson, would you like to——

Senator BEN NELSON. No, Mr. Chairman, I think we would like to go right to the panel. Thank you very much. I do want to thank the panel, though.

Senator GRAHAM. Mr. Barr.

STATEMENT OF HON. WILLIAM P. BARR, FORMER ATTORNEY GENERAL OF THE UNITED STATES

Mr. BARR. Thank you, Mr. Chairman. Let me say that I think your opening statement was one of the most cogent explanations of where we are and I really agree with everything you said. I think the administration's policies are justified and lawful and that they are fully in accord with the law of war, and I think frankly, Senator, the thing that makes it appear messy is not because of anything the administration or our military is doing. I think the really——

Senator GRAHAM. Could I interrupt here? I don't mean messy as a blame term. It's just a legal situation that's hard to deal with, no one is at fault. I think we did a good job defining enemy combatant status and military tribunals but the courts are now in play. What has made it messy is habeas and is the worst way imaginable in my opinion to deal with the legal problems that we face. I just wanted to interject that it's not because anybody did anything wrong. It's just the nature of the legal situation we find ourselves in.

Mr. BARR. That's right, and you made that clear, Senator. I fully agree with that. I think the confusion arises from several different sources. One is the tendency for people at large, and for judges, to confuse war with, law enforcement activities which are totally different from a constitutional standpoint. Another is, I think we would all recognize that over the past 30 years there has been expansion of judicial power. Judges are more and more willing to try to sort of second-guess and make decisions that heretofore they have relied on accountable political officials to make. That's now carrying over into the war area, unfortunately. I think there's also been, since Watergate, a depreciation of the importance of executive power. Executive power to our framers really meant something, they viewed it as a distinctive kind of power to deal with exigent circumstances that really weren't amenable to setting all the rules out in advance, which is what the legislature does, or through the judicial method, which is to try to apply absolute objective standards and then weigh the evidence to see whether something is in or out.

Now, in our war, as opposed to our law enforcement, there are two important attributes that I think we have to recognize. One is it that it is subject to the laws of war, and the other is that fundamental decisions that have to be made in war are executive in nature. The framers did not give the commander in chief authority to the President because they played enie-meanie-miney-mo or flipped a coin; they felt that the President, that the executive, had to make the kinds of decisions that came up, who was to be approached as the enemy, what force was to be—yes.

Senator MCCAIN. The Constitution says very clearly, "to declare war, grant letters of marque and reprisal and make rules concerning captures on land and water." So I don't understand your logic there, that it's all up to the executive.

Mr. BARR. No, I'm saying that the executive is the Commander in Chief.

Senator MCCAIN. The executive is Commander in Chief, but the Constitution says Congress shall make rules concerning captures on land and water.

Mr. BARR. Okay, well, let's discuss that provision, Senator.

Senator MCCAIN. Let's discuss it. Yes.

Mr. BARR. In the 18th century and at the time of the framing of the Constitution there was a concept that when a state of war existed, all the citizens of the two communities could engage in hostilities against each other, willy-nilly, and the concern was under international law and the evolution of that law was the countries should give specific license to who was going to wage combat on behalf of a society through regular means. That's why reprisals, letters of marque and making the rules governing captures were established. It was who is going to fight on behalf of the Republic. That's what that provision deals with. But you don't find many statutes to try to anticipate in advance and set forth in codification how we are going to fight a particular war. That's the point I'm making. It's very hard to make these rules in a statutory straitjacket, that sort of says how we're going to fight or define with precision every category.

Turning to the situation in Guantanamo, these are people being held as detainees. There is no due process requirement as far as foreign persons are concerned to have adversary hearings to determine whether someone is or is not a detainee. However, in this case, because of the nature of this war, we have provided these individuals with more process than any set of prisoners in wartime has ever received, through annual reviews, through multilevel battlefield and theater reviews, and now through CSRT, which is a hearing procedure.

Senator MCCAIN. Not one is going to be tried.

Mr. BARR. Excuse me?

Senator MCCAIN. Not one is going to trial.

Mr. BARR. I'm sympathetic with the notion we should start trying these people. But the fact of the matter is from a legal standpoint, we did catch Hess in 1939, I believe; we tried him in 1946. If people are being held as detainees, there is no immediate need to try them for war crimes if they are detained anyway as detainees. Now, I think it's largely a prudential judgment as to when we

bring charges against these people and I'm sympathetic to the notion we that should proceed with that.

I'd like to get a little bit into this issue. I'd like to open up a can of worms and get into this issue of interrogation. Because we frequently hear a lot of people criticize the administration, but it seems to me that when an enemy is operating as these people are, they are committing two horrific crimes against humanity.

One is they are disguising themselves as civilians and hiding out among civilians. That in itself is an atrocity, because it increases the vulnerability of civilians, and because you have to sort out who is the enemy and who isn't. Second, they are carrying out deliberate attacks against civilians. So these are two grave crimes.

When you are fighting that kind of an enemy, as opposed to enemy that is fighting by the laws of war, it seems to me critical and a moral imperative that you take every step you can to figure out who is the enemy and who isn't the enemy. I don't know of any organization like this that has ever been counteracted without that coercive interrogation, by capturing an individual and then figuring out who else is involved and who they're reporting to and who else is in the cell. This is really the main intelligence means you have of defeating an organization like this.

Now, I can understand if someone wants to say there is no right to coercive interrogation. I disagree with that as a moral matter, but I have not heard the critics saying that. If you can use coercion in interrogation, the question is where you draw the line. This administration says they're not going to engage in torture, but they will engage in coercive interrogation, and I'm not sure if it would be helpful for Congress to try to figure out what exactly constitutes torture and what's coercion under the circumstances.

Finally, let me just say I'm not sure the definition of enemy combatant is really the problem here. Like any rule that deals with a complicated area, it has to be necessarily framed in general terms and applied to meet the circumstances. You said, Mr. Chairman, at the beginning, war is fluid; the enemy adapts; we have to adapt. Now we are dealing with an enemy that is consciously trying to avoid these categories and organize themselves in a way, not only to avoid detection, but so they have cover stories for whatever they do. So, there are some areas like fraud, for example, where we prohibit fraud. Fraud is a general term. It's very hard to codify that and think of all the instances that could be considered fraud, and I think the definition of combatant is that kind of definition and it has two components. One, you are either part of the armed force of the enemy or you are providing direct support to the military operations, or hostilities and normally, when you are fighting an army that's a regular army, that's easy to discern. But when you are fighting a guerrilla army it is sometimes hard. I'm worried that if we try to codify, and think of all the different instances where someone could be providing that kind of support, we'll leave things out, or we'll create mischief.

So those are some opening thoughts, Mr. Chairman, I'd be glad to answer any questions you have.

[The prepared statement of Attorney General Barr follows:]

PREPARED STATEMENT BY WILLIAM P. BARR

Mr. Chairman, and members of the subcommittee, I am pleased to provide my views on the important issues surrounding our response as a Nation to attacks against our homeland and the continuing national security threat posed by al Qaeda. By way of background, I have previously served as Assistant Attorney General for the Office of Legal Counsel, the Deputy Attorney General, and the Attorney General of the United States. I have also served on the White House staff and at the Central Intelligence Agency (CIA). The views I express today are my own.

My remarks today focus on the detention of foreign enemy combatants captured during our military campaign against the Taliban and al Qaeda and, specifically, on the adequacy of the procedures governing their continued detention as enemy combatants and, in the cases of some detainees, their prosecution before military commissions for violations of the laws of war.

In my view, the criticisms of the administration's detention policies are without substance. The administration's detention measures are squarely in accord with the time-honored principles of the law of war and supported by over 230 years of unbroken legal and historical precedent.

It is important to understand that the United States is taking three different levels of action with respect to the detainees. These are frequently confused in the popular media.

First, as a threshold matter, the United States is detaining all these individuals simply by virtue of their status as enemy combatants. It is well established under the laws of war that enemy forces are subject to capture and detention, not as a form of punishment, but to incapacitate the enemy by eliminating their forces from the battlefield. Captured enemy forces are normally detained for as long as the enemy continues the fight.

The determination that a particular foreign person seized on the battlefield is an enemy combatant has always been recognized as a matter committed to the sound judgment of the Commander in Chief and his military forces. There has never been a requirement that our military engage in evidentiary proceedings to establish that each individual captured is, in fact, an enemy combatant. Nevertheless, in the case of the detainees at Guantanamo, the Deputy Secretary of Defense and the Secretary of the Navy have established Combatant Status Review Tribunals (CSRTs) to permit each detainee a fact-based review of whether they are properly classified as enemy combatants and an opportunity to contest such designation.

As to the detention of enemy combatants, World War II provides a dramatic example. During that war, we held hundreds of thousands of German and Italian prisoners in detention camps within the United States. These foreign prisoners were not charged with anything; they were not entitled to lawyers; they were not given access to U.S. courts; and the American military was not required to engage in evidentiary proceedings to establish that each was a combatant. They were held until victory was achieved, at which time they were repatriated. The detainees at Guantanamo are being held under the same principles, except, unlike the Germans and Italians, they are actually being afforded an opportunity to contest their designation as enemy combatants.

Second, once hostile forces are captured, the subsidiary question arises whether they belonged to an Armed Force covered by the protections of the Geneva Conventions and hence entitled to prisoner of war (POW) status? If the answer is yes, then the captives are held as prisoners of war entitled to be treated in accord with the various "privileges" of the Convention. If the answer is no, then the captives are held under humane conditions according to the common law of war, though not covered by the various requirements of the Convention. The threshold determination in deciding whether the Convention applies is a "group" decision, not an individualized decision. The question is whether the military formation to which the detainee belonged was covered by the Convention. This requires that the military force be that of a signatory power and that it also comply with the basic requirements of Article 4 of the Treaty, e.g., the militia must wear distinguishing uniforms, retain a military command structure, and so forth. Here, the President determined that neither al Qaeda nor Taliban forces qualified under the Treaty, and he was obviously correct in that decision.

The third kind of action we are taking goes beyond simply holding an individual as an enemy combatant. It applies so far only to a subset of the detainees and is punitive in nature. In some cases, we are taking the further step of charging an individual with violations of the laws of war. This involves individualized findings of guilt. Throughout our history we have used military tribunals to try enemy forces accused of engaging in war crimes. These tribunals are sanctioned by the laws of war. Shortly after the attacks of September 11, the President established military

commissions to address war crimes committed by members of al Qaeda and their Taliban supporters.

Again, our experience in World War II provides a useful analog. While the vast majority of Axis prisoners were simply held as enemy combatants, military commissions were convened at various times during the war, and in its immediate aftermath, to try particular Axis prisoners for war crimes. One notorious example was the massacre of American troops at Malmedy during the Battle of the Bulge. The German troops responsible for these violations were tried before military courts.

I would like to address each of these matters, but before doing so I would like to discuss briefly the legal and Constitutional framework that governs our activities.

I. THE CONSTITUTIONAL FRAMEWORK

Most of the carping and criticism I have heard over the administration's policies are based on a completely false premise—that our operations against al Qaeda are in the nature of law enforcement activities and therefore that, when our forces seize someone, the government is subject to all the constraints, process-requirements and rules that apply in the criminal justice context. This is a dangerous misconception. This is not "Hawaii Five-0." We are not "booking them, Danno." This is a war—not in a figurative, but in a very literal, real sense. We are in an armed conflict with foreign enemy forces who are trying to kill us.

There is a clear and critical distinction between the role the government plays when it is enforcing our domestic laws against members of our body politic, and the role it plays when it is defending the body politic from armed assault by an external enemy. This distinction is critically important because the scope of the government's power and the restrictions we place on the government differ fundamentally depending on which function the government is performing.

When the government enforces law within the community by seeking to discipline an errant member, the Constitution is concerned with dividing, diluting, and weakening the government, which it does both by hemming it in with restrictions and by investing those against whom it is acting with "rights"—creating, in a sense, a level playing field as between the government and the individuals it is seeking to discipline. But when the government is defending the community against armed attacks by a foreign enemy, the Constitution seeks to unify and strengthen the power of the government. It does not grant rights to our foreign enemies. It is concerned with one thing—preserving the freedom of our political community by destroying the external threat.

To gain a better appreciation of this dichotomy, it is useful to "go back to basics." What is a Constitution? It is the fundamental agreement by which a certain people bind themselves together as a separate and distinct political community. It sets forth the internal rules by which the particular body politic will govern itself. Our Constitution was not written to govern the world as a whole. It was written for "the people"—the American people

There were two chief reasons why the American people decided to establish a Federal Government—to "ensure domestic Tranquillity" and to "provide for the common defence." To achieve the first purpose, the Federal Government is given its domestic law enforcement functions; to achieve the second purpose, the Federal Government is given its warfighting or national defense powers.

When the government acts in its law enforcement capacity, the government's role is disciplinary. It preserves "domestic Tranquillity" by punishing an errant member of society for transgressing the internal rules of the body politic. However, the Framers recognized that in the name of maintaining domestic order an overzealous government could oppress the very body politic it is meant to protect. The government itself could become an oppressor of "the people."

Thus our Constitution makes the fundamental decision to sacrifice efficiency in the realm of law enforcement by guaranteeing that no punishment can be meted out in the absence of virtual certainty of individual guilt. Both the original Constitution and the Bill of Rights contain a number of specific constraints on the executive's law enforcement powers, many of which expressly provide for a judicial role as a neutral arbiter or "check" on executive power. In this realm, the executive's subjective judgments are irrelevant; it must gather and present objective evidence of guilt satisfying specific constitutional standards at each stage of a criminal proceeding. The underlying premise in this realm is that it is better for society to suffer the cost of the guilty going free than mistakenly to deprive an innocent person of life or liberty.

The situation is entirely different in armed conflict where the entire nation faces an external threat. In armed conflict, the body politic is not using its domestic disciplinary powers to sanction an errant member, rather it is exercising its national

defense powers to neutralize the external threat and preserve the very foundation of all our civil liberties. Here, the Constitution is not concerned with handicapping the government to preserve other values. The Constitution does not confer "rights" on foreign persons confronted in the course of military operations, nor does the judicial branch sit as a "neutral arbiter" as between our society and our foreign enemies, or a second-guesser of military decisions. Rather, the Constitution is designed to maximize the government's efficiency to achieve victory—even at the cost of "collateral damage" that would be unacceptable in the domestic realm.

What is this Constitutional framework for fighting a war? In framing the Constitution, the Founders did something that was unimaginable just a dozen years before the Convention. They created a single powerful Chief Executive, vested in that office all "The Executive power," and conferred on that official the power as "Commander in Chief." They did this for two reasons. First, from bitter experience in fighting the Revolution, they concluded that, when fighting a foreign war, the Nation's military power had to be maximized by putting directive authority into a single set of hands. Second, they understood that the kinds of decisions involved in war are inherently "executive" in character. Like all the classical philosophers, the founders viewed executive power as a distinctive type of power quite different from either judicial or legislative power. They understood that contingencies arise that are simply not amenable to being handled by a set of hard-and-fast, adopted in advanced by a legislature or applied after-the-fact by judges.

The pre-eminent example is military decision making, which calls for judgments that cannot be reduced to neat objective tests, but rather requires the exercise of prudential judgment. Warfare requires that certain decisions be made on an ongoing basis: how, and against whom, should military power be applied to achieve the military and political objectives of the campaign. The Framers created one office—a President, elected by all the people of the country and alone accountable to all the people—to make these decisions. If the concept of a commander in chief means anything, it must mean that the office holds the final and conclusive authority to direct how force is to be used.

It is simply inarguable that, in confronting al Qaeda, the United States is fighting a war. Al Qaeda is a highly organized foreign force that has openly declared war on the United States and launched a series of carefully coordinated attacks, here and abroad, for the purpose of imposing its will on our country. These are organized armed attacks to achieve political objectives. That is the very essence of war. The fact that al Qaeda does not formally control a nation state does not make our contest with them any less a war. We have fought foreign political factions before. The fact that al Qaeda seeks to operate in secret, disguising itself among civilians, and striking out in violation of the laws of war, does not change the essential character of their acts. We have fought irregular enemies before.

I think the American people fully understand that this is a real war. We can apply a common sense test to see that this is so. Suppose that tomorrow we were to determine that we had located Osama bin Laden in his hideout. Would the American people think it legitimate for us to peremptorily drop a bomb on the location to kill him? Or do you think that the American people would think that Osama bin Laden (as he sits in his lair) has rights under our Constitution and that we would have to give warning and try to capture him alive for trial? Do we really think that we could only deal with Osama bin Laden as a criminal suspect and could only use lethal force to the extent permitted against such suspects? The overwhelming majority of Americans clearly understand that, when we locate them, it would be perfectly appropriate for us to use peremptory force against Osama bin Laden and his associates solely for the purpose of destroying them. That is because they understand this is a war.

I hear a lot of hand-wringing about civil liberties in connection with the Guantanamo detainees. I fail to see how our holding of those detainees raises legitimate civil liberties issues. It seems to me there are two respects in which fighting a war against a foreign enemy can be said to raise "civil liberties" concerns, and neither apply to the Guantanamo detainees. First, even where the government is using military power only against foreign persons who have no connection with the United States, there is the danger that, the government might impose domestic security measures that trench upon the liberties of our own people. For example, the government might assert rights of censorship, rationing, or broader search powers. The government's claim in such cases is not that the people are the "enemy," but that the exigencies of war require greater imposition on the people. This is allegedly the kind of issue raised by the Patriot Act. But this is not what we are discussing today.

The second type of civil liberty concern arises where the government directs its military power against its own people. In many of our foreign wars, there have been American citizens who have fought with the enemy. In World War II, for example,

there were hundreds who did so, including some natural born citizens. As the Supreme Court recently ruled in the *Hamdi* case, the government can legitimately use military power against citizens who are part of enemy forces and can detain them as "enemy combatants." But, in such cases involving our own citizens, civil liberties concerns naturally arise. In theory, there is a risk that the government might oppress the body politic, and bypass law enforcement procedures, simply be using war as a pretext for labeling innocent citizens as enemies. Thus, the administration has always acknowledged that citizens have the right to habeas corpus and that some level of judicial scrutiny is required to ensure that the government is not just acting pretextually. Thus, as the *Hamdi* court ruled, some unspecified due process rights may apply when the government seeks to hold its own citizens as foreign enemies. None of this applies here, however. As far as I am aware, none of the detainees at Guantanamo are American citizens.

II. THE PROPRIETY OF THE ADMINISTRATION'S DETERMINATIONS

With foregoing basic principles in mind, let us turn to the various issues that have been raised—namely: (1) whether the detainees at Guantanamo can be held without greater process than they are already being afforded; (2) whether these al Qaeda or Taliban forces are entitled to the protections of the Geneva Convention; and (3) whether some of the detainees may be tried for war crimes before the military commissions established by the President.

A. The Detention of the Guantanamo Captives as "Enemy Combatants"

As I stated at the outset, and as the Supreme Court just reaffirmed in *Hamdi*, an inherent part of war is capturing and holding enemy forces for the duration of hostilities. While *Hamdi* teaches that American citizens cannot be so held without some process, there has never been a requirement that our military engage in evidentiary proceedings to establish that each foreign person captured is, in fact, an enemy combatant. On the contrary, the determination that a particular foreign person is an enemy combatant has always been recognized as a matter committed to the sound judgment of the commander in chief and his military forces.

Now obviously the military has procedures for reviewing whether persons being detained deserve to be held as "enemy combatants." In the case of the Guantanamo detainees, their status has been reviewed and re-reviewed within the executive branch and the military command structure. Nevertheless, the argument is being advanced that foreign persons captured by American forces in the course of military operations have a due process right under the fifth amendment to an evidentiary hearing to fully litigate whether they are, in fact, enemy combatants. We have taken and held prisoners in war for over 230 years, and the suggestion that, as a legal matter, we owed each foreign detainee a trial is just preposterous.

Now the easy and short answer to this particular criticism about the Guantanamo detainees is that the claim has been totally mooted by the military's voluntary use of the CSRT process. Under these procedures, each detainee is given the opportunity to contest his status as an enemy combatant. To my knowledge, we have provided more "process" for these detainees than for any group of wartime prisoners in our history. While clearly not required by the Constitution, these measures were adopted by the military as a prudential matter. They were modeled on those that the *Hamdi* decision indicated would be sufficient for holding an American citizen as an enemy combatant.[1] Obviously, if these procedures are sufficient for American citizens, they are more than enough for foreign detainees who have no colorable claim to due process rights.

Indeed, most of the process embodied in the CSRT parallel and even surpass the rights guaranteed to American citizens who wish to challenge their classification as enemy combatants. The Supreme Court has indicated that hearings conducted to determine a detainee's prisoner-of-war status, pursuant to the Geneva Convention,[2] could satisfy the core procedural guarantees owed to an American citizen.[3] In certain respects, the protocols established in the CSRTs closely resemble a status hearing, as both allow all detainees to attend open proceedings, to use an interpreter, to call and question witnesses, and to testify or not testify before the panel.[4] Furthermore, the United States has voluntarily given all detainees rights that are not found in any prisoner-of-war status hearing, including procedures to ensure the

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[1] Hamdi v. Rumsfeld, 124. S.Ct. 2633 (2004).

[2] The procedures are created under Army Regulation 190–8. Opening Brief for the United States, *Odah v. United States,* at 31.

[3] *Hamdi,* 124 S.Ct. at 2651.

[4] Opening Brief in *Odah* at 33–34.

independence of panel members and the right to a personal representative to help the detainee prepare his case.[5]

Nevertheless, there appear to be courts and critics who continue to claim that the Due Process Clause applies and that the CSRT process does not go far enough. I believe these assertions are frivolous.

I am aware of no legal precedent that supports the proposition that foreign persons confronted by U.S. troops in military operations have fifth amendment rights that they can assert against the American troops. On the contrary, there are at least three reasons why the fifth amendment has no applicability to such a situation. First, as the Supreme Court has consistently held, the fifth amendment does not have extra-territorial application to foreign persons outside the United States.[6] As Justice Kennedy has observed, "[T]he Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of non-citizens who are beyond our territory."[7] Moreover, as far as I am aware, prior to their capture, none of the detainees had taken any voluntary act to place themselves under the protection of our laws; their only connection with the United States is that they confronted U.S. troops on the battlefield. Finally, the nature of the power being used against these individuals is not the domestic law enforcement power—we are not seeking to subject these individuals to the obligations and sanctions of our domestic laws—rather, we are waging war against them as foreign enemies. As I have already explained, this is a context in which the concept of due process is inapposite.

In society today, we see a tendency to impose the judicial model on virtually every field of decisionmaking. The notion is that the propriety of any decision can be judged by determining whether it satisfies some objective standard of proof and that such a judgment must be made by a "neutral" arbiter based on an adversarial evidentiary hearing. What we are seeing today is an extreme manifestation of this—an effort to take the judicial rules and standard applicable in the domestic law enforcement context and extend them to the fighting of wars. In my view, nothing could be more farcical, or more dangerous.

Let us make no mistake about it. Any extension of due process rights to foreign adversaries in war would effectuate probably the most profound shift in power in our Constitutional history. Any decision that affected the life or liberty of the foreign persons being confronted by our Armed Forces would be subject to judicial review. Either before or after military actions are taken, judges, purporting to balance all the competing interests, would pronounce whether the actions passed legal muster. This would make the judges the ultimate decision makers. For the first time in our history, judges would be in charge of superintending the fighting of wars.

These are not the "Men in Black" we should want to see in charge of fighting our wars. A moment's reflection should tell us that courts and judges lack both the institutional capacity and the political accountability for making these types of decisions. As I observed above, at the heart of a commander's military decisions is the judgment of what constitutes a threat or potential threat and what level of coercive force should be employed to deal with these dangers. These decisions cannot be reduced to tidy evidentiary standards, some predicate threshold, that must be satisfied as a condition of the President ordering the use of military force against a particular individual. What would that standard be? Reasonable suspicion, probable cause, substantial evidence, preponderance of the evidence, or beyond a reasonable doubt? Does anyone really believe that the Constitution prohibits the President from using coercive military force against a foreign person—detaining him—unless he can satisfy a particular objective standard of evidentiary proof?

Let me posit a battlefield scenario. American troops are pinned down by sniper fire from a village. As the troops advance, they see two men running from a building from which the troops believe they had received sniper fire. The troops believe they are probably a sniper team. Is it really being suggested that the Constitution vests these men with due process rights as against the American soldiers? When do these rights arise? If the troops shoot and kill them—i.e., deprive them of life—could it be a violation of due process? Suppose they are wounded and it turns out they were not enemy forces. Does this give rise to *Bivens* Constitutional tort actions for viola-

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[5] *Id.* at 34–35.

[6] Johnson v. Eisentrager, 339 U.S. 763 (1950); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (explaining that "we have rejected the claim that aliens are entitled to fifth amendment rights outside the sovereign territory of the United States"); Zadvydas v. Davis, 533 U.S. 678 (2001) (citing Eisentrager and Verdugo for the proposition that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders").

[7] Verdugo-Urquidez, 494 U.S. at 275 (Kennedy, J., concurring).

tion of due process? Alternatively, suppose the fleeing men are captured and held as enemy combatants. Does the due process clause really mean that they have to be released unless the military can prove they were enemy combatants? Does the Due Process Clause mean that the American military must divert its energies and resources from fighting the war and dedicate them to investigating the claims of innocence of these two men?

This illustrates why military decisions are not susceptible to judicial administration and supervision. There are simply no judicially-manageable standards to either govern or evaluate military operational judgments. Such decisions inevitably involve the weighing of risks. One can easily imagine situations in which there is an appreciable risk that someone is an enemy combatant, but significant uncertainty and not a preponderance of evidence. Nevertheless, the circumstances may be such that the President makes a judgment that prudence dictates treating such a person as hostile in order to avoid an unacceptable risk to our military operations. By their nature, these military judgments must rest upon a broad range of information, opinion, prediction, and even surmise. The President's assessment may include reports from his military and diplomatic advisors, field commanders, intelligence sources, or sometimes just the opinion of frontline troops. He must decide what weight to give each of these sources. He must evaluate risks in light of the present state of the conflict and the overall military and political objectives of the campaign.

Furthermore, extension of due process concepts as a basis for judicial supervision of our military operations would be fundamentally incompatible with the power to wage war itself, so altering and degrading that capacity as to negate the Constitution's grant of that power to the President.

First, the imposition of such procedures would radically alter the character and mission of our combat troops. To the extent that the decisions to detain persons as enemy combatants are based in part on the circumstances of the initial encounter on the battlefield, our frontline troops will have to concern themselves with developing and preserving evidence as to each individual they capture, at the same time as they confront enemy forces in the field. They would be diverted from their primary mission—the rapid destruction of the enemy by all means at their disposal—to taking notes on the conduct of particular individuals in the field of battle. Like policeman, they would also face the prospect of removal from the battlefield to give evidence at post-hoc proceedings.

Nor would the harm stop there. Under this due process theory, the military would have to take on the further burden of detailed investigation of detainees' factual claims once they are taken to the rear. Again, this would radically change the nature of the military enterprise. To establish the capacity to conduct individualized investigations and adversarial hearings as to every detained combatant would make the conduct of war—especially irregular warfare—vastly more cumbersome and expensive. For every platoon of combat troops, the United States would have to field three platoons of lawyers, investigators, and paralegals. Such a result would inject legal uncertainty into our military operations, divert resources from winning the war into demonstrating the individual "fault" of persons confronted in the field of battle, and thereby uniquely disadvantage our military vis-a-vis every other fighting force in the world.

Second, the introduction of an ultimate decisionmaker outside of the normal chain of command, or altogether outside the executive branch, would disrupt the unitary chain of command and undermine the confidence of frontline troops in their superior officers. The impartial tribunals could literally overrule command decisions regarding battlefield tactics and set free POWs whom American soldiers have risked or given their lives to capture. The effect of such a prospect on military discipline and morale is impossible to predict.

In sum, the claim that the Guantanamo detainees are not getting adequate process is totally without substance. As foreign persons confronted by U.S troops on the battlefield, they have no legal right to Constitutional due process. They are being properly held under the laws of war. They have, in fact, received the same process that American citizens would get under the circumstances.

I have heard some additional suggestion that it would be useful at this juncture for Congress to adopt a precise definition of the category of persons who can be detained as "enemy combatants." I disagree. The existing definition that is now part of the common law of war is fully adequate and sensible. Any attempt by Congress to codify a more specific definition is unnecessary and would end up unduly hamstringing our military forces. Moreover, trying to frame a more specific statutory definition would be incompatible with the law of war as an evolving body of "common law"—one that develops with experience and can adapt to meet new and changing circumstances. Especially given the state of affairs we face today and the

type of enemy we are confronting, I think trying to lock in any particular verbal formulation would be extremely unwise.

Certainly no legislative action is necessary to ensure that the President has adequate detention authority. The President's power does not come from Congress in the first place; it comes directly from Article II of the Constitution. After all, since the country's inception, our military forces have engaged in at least 10 major wars and literally hundreds of military expeditions in which we have faced a broad range of opposing forces, ranging from regular armies to irregular forces, including Barbary pirates, hostile Indians, Mexican guerillas, Chinese Boxers, Villa's banditti, Philippine Insurrectionists, and the Viet Cong, just to name a few.

No one has had the temerity to suggest that our forces in all these campaigns lacked authority to capture the enemy, or that they needed some carefully-crafted statute to do so. Nor, as far as I know, have we ever found it necessary or prudent to define in advance with any statutory detail the class of persons who could be detained in connection with our military operations. On the contrary, when Congress has authorized force—either in declarations of war or otherwise—it has done so in the most general terms in way that reinforces and augments the President's inherent war fighting powers, not in a way that seeks to curtail them.

In dealing with foreign persons, the proper scope of military detention authority is governed by the body of customary international law commonly referred to as "the law of war." This body of law is in the nature of a "common law" that reflects the usages of civilized nations. It is this "law of war" that has traditionally defined the class of persons that may be detained and held in connection with military operations. That traditional definition is perfectly serviceable and has proven neither too sweeping, nor too crabbed. There is simply no good reason to impose on our military any greater constraint than already exist under those time-honored law-of-war principles. There are obvious reasons why imposing greater limits on our Armed Forces would be foolhardy.

Under the traditional law of war, the core principle is that military authorities may capture and hold persons who are part of the enemy's forces, as well as those who directly support hostilities in aid of enemy forces. By necessity, that definition is cast in general terms. Even in classic warfare between regular armies, gray zones can arise at the margin in determining who is directly supporting hostilities in aid of enemy forces to a degree to make them subject to detention. Over time, those subject to detention has been found to include not only the actual armed fighters, but also "civil persons . . . in immediate connection with an army, such as clerks, telegraphists, aeronauts, teamsters, laborers, messengers, guides, scouts, and men employed on transport and military railways. . . ." W. Winthrop, Military Law and Precedents 789 (2nd ed. 1920) (emphasis added).

As with any effort to classify an area as complex as war, definitions must retain some generality. The fact that difficult judgment calls will inevitably arise on the margin does not mean that any more precise definition makes sense or that the general definition is faulty. These are not the kinds of activities that lend themselves to exhaustive codification in advance. The genius of a common law system is that it allows the law to develop guided by experience. I think any effort to codify "enemy combatant" status with greater specificity will simply create a new set of gray zones, arrest the rational development of the law of war based on real experience, and end up unwisely putting our military in a statutory straightjacket.

B. Determination of Status under the Geneva Convention

The President has determined that neither members of al Qaeda nor Taliban fighters are entitled to the protections of the Geneva Convention. While some lower courts and critics have carped about this decision, there can be no doubt that al Qaeda and the Taliban fail to meet the Geneva Convention's eligibility criteria.

It must be borne in mind that the choice here is not between applying the Geneva Convention versus applying no law at all. Under the common law of war, military detainees must be held under humane conditions—that is the general rule in the absence of specific treaty agreement. The Geneva Convention establishes an additional level of special "privileges" that are to be enjoyed by the forces of those countries that conduct their military operations in accord with civilized norms, and that agree to treat their own prisoners in like manner. The whole purpose for offering these "privileges" is to promote adherence to the laws of war by rewarding those countries that comply.

It is perverse to suggest that we should extend the privileges of the Geneva Convention to al Qaeda or Taliban fighters—groups who have flagrantly flouted all civilized norms and are among the most perfidious and vicious in history. As one leading treatises in this area notes, "the only effective sanction against perfidious attacks in civilian dress is deprivation of prisoner-of-war status." Rosas, The Legal

Status of Prisoners of War 344. In 1987, when the Reagan administration rejected a proposed protocol that would have extended POW rights to captured terrorists, his decision was almost universally hailed, with both the New York Times and the Washington Post weighing in with approving editorials.

If we did grant privileged status to al Qaeda and Taliban captives they would enjoy the right to be held in essentially the same billet conditions as the capturing country's own forces; the right to be immune from the full range of coercive interrogation that would otherwise be permissible under the laws of war; and, if tried for offenses, the right to be tried before the same kind of tribunal that would apply to the capturing country's own troops. Voluntarily granting these rights to al Qaeda operatives would make no sense; subvert the very goals the Conventions are intended to promote; and gravely impair our ability to break down al Qaeda as an organization and to collect the intelligence essential to accomplish this.

The Geneva Conventions award protected POW status only to members of "High Contracting parties."[8] Al Qaeda, a non-governmental terrorist organization, is not a high contracting party.[9] This places al Qaeda—as a "group"—outside the laws of war. Furthermore, al Qaeda and the Taliban fail to meet the eligibility criteria set forth in Article 4 of the Geneva Convention. To qualify for protected status, the entity must be commanded by a person responsible for his subordinates, be outfitted with a fixed distinctive sign, carry its arms openly, and conduct its operations in accordance with the laws of war.[10]

Al Qaeda and the Taliban fail to satisfy even one of these four bedrock requirements. These enemies our Armed Forces face on the battlefield today make no distinction between civilian and military targets and provide no quarter to their enemies. They have no organized command structure and no military commander who takes responsibility for the actions of his subordinates. Al Qaeda and the Taliban wear no distinctive sign or uniform and violate the laws of war as a matter of course. Consequently, these organizations do not qualify for the POW protections available under the Geneva Convention.

For these reasons, the President rightly concluded that al Qaeda and the Taliban do not qualify for POW status under Article 4 of the Geneva Convention.[11] The President's determination that the Geneva Convention does not apply to al Qaeda and Taliban members is conclusive. This determination was an exercise of the President's war powers and his plenary authority over foreign affairs,[12] and is binding on the courts.[13] Furthermore, the United States has made "group" determinations of captured enemy combatants in past conflicts.[14] Accordingly, "the accepted view" of Article 4 is that "if the group does not meet the first three criteria . . . the individual member cannot qualify for privileged status as a POW."[15]

As far as I can tell, none of the President's critics have advanced any set of facts that would call into question the merits of the President's decision. I have heard no serious argument that either al Qaeda or the Taliban fall within the requirements of Article 4 and thus are entitled to protection under the Convention. Instead, what we see is a lot of sharp "lawyer's" arguments that the President is somehow precluded from making a group decision and that the eligibility of detainees must be determined through individualized hearings before "competent tribunals." These arguments largely rest on a misreading of Article 5 of the Convention.

Article 5 of the Convention provides that:

> [t]he present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such per-

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[8] Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 2.

[9] See Memorandum for the Vice President, et al. from President, Re: Humane Treatment of al Qaeda and Taliban Detainees at 1.

[10] Id. at art. 4A(2).

[11] See Memorandum for the Vice President, et al. from President, Re: Humane Treatment of al Qaeda and Taliban Detainees at 1.

[12] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

[13] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964).

[14] See, e.g., Howard S. Levie, Prisoners of War in International Armed Conflict, 59Int'lStud. 1, 61 (1977); Adam Roberts, Counterterrorism, Armed Force, and the Laws of War, 44 Survival no. 1, 23–24 (Spring 2002).

[15] W. Thomas Mallison and Sally V. Mallison, The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict, 9 Case W. Res. J. Int'l 39, 62 (1977).

sons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[16]

There is nothing in this Article that forecloses the President from reaching a threshold decision that a particular military formation does satisfy the Treaty standards. Since the Convention's coverage depends, in the first instance, on whether a group in which the detainee participated has the requisite attributes, it necessarily calls for a "group" decision. Certainly, Article 5 does not mean that a group's eligibility can be relitigated through a series of individualized proceedings. By its terms, Article 5 applies only where an acknowledged belligerent raises a doubt whether he is qualifies for POW status. I am not aware that any detainee has raised any "doubt" as to his status. On the contrary, the principal argument of critics has been that a detainee can successfully raise doubt, within the meaning of Article 5, simply by asserting he is eligible. But the United States has expressly refused to adopt a modification of the Treaty that sought to establish that regime.

It seems to me that, once a particular organization has been found not to qualify under Article 4, no individualized inquiry under Article 5 is appropriate or necessary unless a detainee is raising a plausible claim that he belongs to another category that does qualify under Article 4. The classic example is the case of a pilot who, after conducting his mission, is shot down, sheds his uniform trying to escape, and is later apprehended and accused of sabotage. The evident purpose of Article 5 is to allow the pilot to make the claim that he is covered by the Geneva Convention because he carried out his belligerent acts as a member of the regular Armed Forces of a signatory power. Here, the detainees have raised no colorable claims that they are members of a force that falls within the categories set forth in Article 4.

C. The Propriety of Military Tribunals

I would like to turn, finally, to that group of detainees whom the United States is accusing of committing violations of the laws of war. The President has, by order, established military commissions to try these individuals for their offenses. While the law of war once permitted summary execution for certain war crimes, the use of military commissions has now emerged as the norm, affording a more regular mechanism by which military commanders can impose punishment on enemy forces. Ever since the Revolution, the United States has had a consistent practice of using military commissions to try members of foreign forces for violations of the laws of war.[17] Congress has long recognized the legitimacy of military commissions as a means to prosecute war criminals,[18] and the courts have specifically upheld their use.[19]

In one sense we seem to making progress. Originally, when the President promulgated his military tribunal order, there was a hue and cry in some quarters that this was an end run around Article III courts and that all proceedings belonged in out civilian court system. But at this stage there does not appear to be any real argument that these trials belong in civilian courts. It now seems to be widely conceded that military commissions are, in fact, the place where war crimes should be prosecuted.

Some have suggested that there is a need for Congress to expressly authorize the use of military commissions. There have also been suggestions that Congress should dictate the precise procedures to be used in military commissions, and that these should be required to mirror the process used in regular courts-martial. I disagree with both of these suggestions.

First, there is no need for Congress to authorize military commissions. The authority to establish military commissions is expressly granted to the President under Article II of the Constitution as an inherent part of his power as "Commander in Chief." It has long been recognized, both as a matter of legal theory and historical practice, that the power to punish enemy forces is integral to a commander's authority—it is one and the same with the commander's power to direct the killing or capturing of enemy forces. Military commissions are thus a military instrument—a means by which a commander attempts to control the conduct of enemy forces in

[16] Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 5.

[17] William Winthrop, Military Law and Precedents, 464, 832 (2d ed. 1920); Major William Birkhimer, Military Government and Martial Law, 533–35 (3d ed. 1914).

[18] See, e.g., Act of March 3, 1863, § 30 (12 Stat. 731, 736).

[19] As the Court stated, "the detention and trial of [war criminals]—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." Ex Parte Quirin, 317 U.S. 1, 25 (1942).

the field by punishing, or threatening to punish, their forces for violations of certain civilized norms. As Abraham Lincoln's attorney general correctly observed, "The commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles." Undoubtedly, this is why military commissions have been so consistently used throughout our history.

Second, Congress has, in fact, already authorized the use of military commissions. In 1916 Congress revised the Articles of War to expand court-martial jurisdiction (i.e., jurisdiction over members of the U.S. military) to include offenses against the laws of war. Article 15 of this codification stated that the creation of statutory jurisdiction for courts martial does not "deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that . . . by the law of war may be tried by military commissions." In proposing this new article, the Army Judge Advocate General explained that it was meant to "save" the pre-existing jurisdiction of common law military commissions. In both the *Yamashita* and *Madsen* cases, the Supreme Court noted that Article 15 was intended to preserve non-statutory jurisdiction of military commissions established by the President or commanders in the field to try law-of-war violations.

In Quirin, the Supreme Court held that Article 15 constituted congressional authorization for the President to create military commissions. The Court noted that "Congress [in Article 15] has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases," and held that "Congress [in Article 15] has authorized trial of offenses against the law of war before such commissions." In 1950, Congress affirmed the Court's construction when, against the backdrop of the Court's decisions, it recodified Article 15 as Article 21, expressly indicating in the legislative history that it was aware of, and accepted, the Court's construction. See S. REP. 486, Establishing a Uniform Code of Military Justice, 81st Cong., 1st Sess., at 13 (June 10, 1949) ("The language of [Article of War] 15 has been preserved because it has been construed by the Supreme Court. (Ex Parte Quirin, 317 U.S. 1 (1942)"); H.R.REP. 491, Uniform Code of Military Justice, 81st Cong., 1st Sess., at 17 (April 28, 1949) (same).

The great advantage of military commissions, obviously, as common law courts, is that their procedures are flexible and can be tailored to meet military exigencies at any given time. Neither the Constitution nor the laws of war dictate any particular set of rules for trials before military commissions. Because these are executive courts, designed to aid the President in carrying out his Commander in Chief responsibilities, the President and his commanders can readily adapt their procedures to changing conditions. In selecting procedures, the President must balance the interests of fairness with the National security interests of the country and the practical exigencies of the particular military campaign. In recognition of this, Congress has, in Article 36, given the President broad authority to prescribe "[p]retrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in . . . military commissions and other military tribunals." 10 U.S.C. § 836. For this reason, I think it would be a mistake to set in statutory concrete any particular set of procedures or standards. Especially given the fluid threats we face today, it is essential to maintain the flexibility inherent in military commissions.

STATEMENT OF PROFESSOR STEPHEN A. SALTZBURG, WALLACE AND BEVERLEY WOODBURY UNIVERSITY PROFESSOR OF LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. SALTZBURG. Thank you, Mr. Chairman. It's a pleasure to be here today, and I'd like to say it's particularly delightful on this panel with Attorney General Barr, who is someone I have the greatest respect for, and Dean Hutson is also one of the great thinkers about military law. If we can help today, it's largely because of what they do, probably more than I.

I have given you an extensive written statement and I don't want to read it and I don't want to go through it in detail. It covers almost all of the issues that you have asked us to think about. But I do want to address several things that appear to have been important on your first panel.

First, Mr. Chairman, you asked a very important question, and I don't think you got a good answer to it, and that is if Congress acts and enacts legislation, will that improve, or will it bolster the executive's ability to defend actions in Federal court? The answer to that is clearly, yes. I was a little surprised that—it is well established, we teach this now in Constitutional Law 101—no one mentioned, Justice Jackson's opinion in Youngstown Steel, where he basically defined three categories of situations: the first is when the President, as General Barr said, acts alone invoking executive power; well, he has some. The courts will look at that and defer to some extent to the President. But where Congress acts and authorizes the President to act, and it's Congress plus the President, it's Article I and Article II of the Constitution together, the Article III courts give greatest deference. Of course, where Congress chooses to impose restrictions on the executive, that's when the courts believe the President's power is weakest.

So the real question I think is not whether it would be helpful to the President for Congress to act; it would. This is not something where it's Congress versus the administration. We are in this together. This is Congress trying to figure out how to enact legislation that will say to the world that this entire government stands behind what we are doing. The American people stand behind it. We have taken a careful look at it, and it's no coincidence I use the term AWOL to describe Congress in my written testimony. Mr. Chairman, I think you're exactly right in your opening statement. Congress has not shown sufficient interest in this. You funded everything, but haven't looked at it, and haven't tried to tailor it. You don't want to get into micromanaging, but there are certain issues that I think are on the table that need to be examined carefully.

Let's look at what they are. First, and you don't need just Youngstown Steel, by the way. If you want further modern recent evidence of the importance of Congressional action, just look at Hamdi, the plurality opinion by Justice O'Connor basically makes it clear, if you hadn't issued the joint resolution in September 2001, then the enemy combatant detention would have been in big trouble in the Supreme Court. It's because Congress acted and the President relied on Congress's authority that the President was upheld by, even there, by a divided court.

But what are the issues that have arisen? Well, first there is this question of who is an enemy combatant. Contrary to some of the things you heard this morning, that term is not one of those terms of art that has a clearly established meaning. The Geneva Conventions do define who is lawfully engaged in warfare and who is engaged in warfare unlawfully, but this term enemy combatant was one that was drawn from a Supreme Court opinion in Ex parte Quirin and it's one that hasn't been used that often. The question is who should be detained or eligible for detention? We have detained people in circumstances in which it's easy to defend what the executive has done. On the battlefield in Afghanistan. On the battlefield in Iraq, people fight us, they fight us unlawfully; we have the right to seize them and to detain them. In my opinion, whether a person is an American citizen as Yassir Hamdi was, if he is on the battlefield fighting against United States troops, he is just as subject to being detained as anybody else fighting for the

enemy. That's my view about it. That's not to say what process he should have, but just that he is eligible for detention.

More difficult is the case being readied for argument as we sit here, the Padilla case, where the President has claimed the right to detain as an enemy combatant a United States citizen seized in O'Hare Airport who was far from the battlefield, who is alleged to have been studying with al Qaeda, looking at bombing. But there is a question. Does that kind of person qualify? What does it mean to be a supporter of or someone in sympathy with al Qaeda or related or affiliated organizations?

The question is how far are we as a country willing to go to broaden the definition of what we ordinarily think of as a combatant, to cover people who are far, far removed but are offering some kind of support or cheerleading perhaps for things that we despise, and that pose dangers to us. That's one of the issues. Does it matter? I have laid out some of the questions I think Congress should ask. Does it matter whether we're dealing with American citizens? Does it matter whether people are captured on the battlefield or far removed from it? That's one set of issues.

A second set of issues is how long can we keep people without trial. Some people we want to try and I think one of the problems that, Mr. Chairman, you point out is by not bringing anyone to trial, we cast doubt on whether or not these people are such serious criminal elements as we have maintained. Because there is no public presentation of evidence, no one in the world is sure whether the people who were detained are really as bad as we say they are, and warrant the kind of trials that we say they warrant. So it is important to get this process moving.

As to the question about military commissions, I couldn't agree more with Attorney General Barr. Military commissions have been around since the Revolutionary War. They have a pedigree. They are used throughout the world. There is nothing to apologize about for military commissions. However, this is a unique use of them. We have not used military commissions before against groups like al Qaeda, because we have never had to fight this kind of battle. We have never had to set up a thing like Guantanamo, where we move people from around the world into our facilities for interrogation, for detention and now for prosecution. The question is, should we have procedures that recognize that this is in fact unique?

If we captured somebody—Senator McCain is a person that I should defer to on this—but if we captured somebody committing a war crime in Vietnam, and we being the United States, we would reserve the right to have a military commission and to prosecute that person and we would probably do it right there, in country, and the punishment would be right there. But that's because they were on the battlefield. We didn't have to worry so much about making a mistake about whether or not we had somebody that was really the enemy. When you reserve the right to seize people who were far removed from the battlefield, and you move them into a place like Guantanamo, additional issues arise. The question is what kind of procedures are we to have?

Now, the American Bar Association with whom I do a lot of work, but for whom I cannot speak completely today, has an operating policy which I strongly support, and that is that civilian

counsel should be welcomed in these military commissions. We have lawyers, fine lawyers who are there to make sure that due process is provided, and yet the military commission process has done a lot to discourage them, and to treat civilian counsel, who in Federal courts throughout the United States are deemed perfectly capable of handling classified information, as being threats. There is something wrong with that process, it's cast doubt on whether we have confidence in the legal system in the United States and the rule of law. I think that's an issue that your subcommittee and the entire committee needs to look at.

There is a question about, and I think it may have come up in the earlier panel; I think Senator McCain may have asked it. Why don't we have some kind of civilian review here? I spoke to an attorney general with one of our principal allies who has spent hours and hours and hours with the administration urging that if we had civilian review, appellate review of the commissions, that his country would be satisfied with the process. That that would provide a sense of fairness, a sense that this is not some kind of a criminal prosecution where the executive picks the judges, picks the jurors, picks the appellate tribunal, and therefore everything is kind of fixed in advance. Civilian review matters and I think that's something that this committee could consider. It could consider recommending, for example of a panel of Article III judges. It could consider giving jurisdiction to the United States Court of Appeals for the Armed Forces, an Article I court, but a court of five civilian judges who have extensive experience in military justice.

The American Bar Association urged the President and urged the executive when the commissions were being set up to follow the rules on court-martial as much as possible, and the decision was made not to do that. I think that undercut a sense of fairness. It's not the Federal Rules of Evidence, by the way, that people think perhaps should be used here. It's the military rules of evidence, which have been in effect for many years now. Those rules, modified to recognize the necessities of Guantanamo, would have been a much better place to start than the decision that all relevant evidence would be admissible, which again cast doubt on whether the same kind of fairness that we give our soldiers is going to be provided to the detainees who are actually put on trial.

So the question of what kinds of procedures, and who ought to be tried, these are questions that I think are very real and very important questions.

You heard a lot yesterday, and you've heard some today about the treatment of detainees. I have included a lot in the testimony that I've written on recommendations for what we should do to assure the fair treatment of detainees. I think that the point that was made and should be emphasized is, every time people in high positions of authority express doubt on whether the use of dogs, or whether the threats, or whether making people, men wear women's clothing or expose themselves naked to women interrogators—every time we express doubts about whether that's inhumane, or whether that's degrading, we invite the world to do that to our soldiers when they're captured. The Geneva Conventions and everything about them after World War II were to assure that we were setting standards that we were confident that we would apply, and

that we would demand would be applied to our soldiers. When we give on those things, when we weaken it, all we do is put the men and women who are out there at risk, we put them at greater risk. That's something we don't want to do.

I don't have a doubt in my mind that the Geneva Convention's prisoner of war provisions may not apply to al Qaeda, that may be a very reasonable judgment. There is a big debate in the international community about the Taliban and whether they can be denied prisoner of war status. I'll let the people who are better experts on the Geneva Conventions than I speak to that. But there is a very strong argument, and I think most people subscribe to it, that common Article 3 of the Geneva Conventions providing for humane treatment of prisoners applies to everybody, and that we're bound by that, even though we're dealing with people who are not themselves signatories.

Well, that's my opening remarks. I'd be happy to answer any questions that any of you might have.

[The prepared statement of Mr. Saltzburg follows:]

PREPARED STATEMENT BY STEPHEN A. SALTZBURG

I. INTRODUCTION

Senator Graham, and members of the subcommittee, I appreciate the opportunity to testify before you this morning. In 2001, shortly after the attacks on the World Trade Center and the Pentagon, the President of the American Bar Association (ABA) appointed a Task Force on Terrorism and the Law. That Task Force was succeeded by the American Bar Association Task Force on Enemy Combatants which continues to this day. I had the privilege of serving on both Task Forces and in participating in debates in the ABA House of Delegates on many of the issues this subcommittee is considering this morning. I draw upon ABA resolutions and Reports to the House of Delegates for much of this testimony. I shall identify ABA policy where it exists and also indicate some of my own views as I proceed.

For many years I have served as the General Counsel of the National Institute of Military Justice (NIMJ), a non-partisan entity designed to improve and educate the public about military justice. Although NIMJ has been involved in discussions about the issues I address, it has taken no position on those issues. Nothing I say here today should be viewed in any way as endorsed by NIMJ.

The horrific bombings of the London subway and bus last week remind not only those of us who reside in the United States but all those who reside in Western-style democracies throughout the world of the dangers posed by international terrorism. Since the unprecedented attacks suffered by the United States on September 11, 2001, the United States has devoted enormous resources to protecting the homeland against additional terrorism attacks. The President, the Department of Defense (DOD), the Department of Justice (DOJ), intelligence agencies and the relatively new Department of Homeland Security (DHS) have made eradicating terrorism one of the most important priorities of the United States.

The London bombings, following bombings in Madrid and elsewhere in the world, demonstrate that, while the United States may be the principal target of terrorists, it is not the exclusive target. It has become clearer and clearer that one nation acting alone cannot effectively respond to the terrorist threat. International cooperation is essential. Just as the world's sympathy was with Britain when its celebration over being awarded the 2012 Olympic games quickly turned to mourning the deaths of scores of innocent people and injuries to hundreds of others, the world's sympathy was with the United States following the attacks in New York and the Washington, DC, area on September 11. But, as time has passed, sympathy toward the United States has turned to dismay in many parts of the world as to the manner in which the United States has carried out its "war on terror."

In truth, we now understand, better than we ever have, that we have a new type of enemy and face novel challenges in seeking to defeat that enemy. Tools that might have seemed sensible, even necessary, in the immediate aftermath of September 11 need to be re-evaluated. We must be constantly aware of how our actions are perceived throughout the world, and how easy it is to turn trust into distrust as a result of missteps. We cannot win the war on terror alone, any more than Brit-

ain or Spain can win it alone. We need their help as they need ours. It is imperative, therefore, that the policies of the United States be seen throughout the world as just and fair responses to the clear and present dangers posed by international terrorism.

On September 18, 2001, Congress enacted a Joint Resolution (Public Law 107–40, 115 Stat. 224) authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." The Preamble to the resolution states that the acts of September 11 were attacks against the United States that "render it both necessary and appropriate that the United States exercise its right to self-defense."

The United Nations (U.N.) Security Council approved a resolution recognizing the United States' right to self-defense, see U.N.S.C.Res. 1368, and the North Atlantic Treaty Organization's (NATO) North Atlantic Council stated that it regarded the attack as an action implicating Article V of the Washington Treaty that "an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against all."

Congress's Joint resolution was bolstered by the actions of the U.N. and NATO. The international community understood the need for the United States to act. The President sent troops to Afghanistan, those troops removed the repressive Taliban regime from power, and there was widespread support for and understanding of the need to prevent a nation from providing territory for terrorist training camps and from harboring terrorist groups.

Questions about the plans of the United States to deal with terrorism began to arise in connection with the November 13, 2001 military order in which the President announced that certain non-citizens would be subject to detention and trial by military authorities. The order provides that non-citizens whom the President deems to be, or to have been, members of the al Qaeda organization or to have engaged in, aided or abetted, or conspired to commit acts of international terrorism that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States or its citizens, or to have knowingly harbored such individuals, are subject to detention by military authorities and trial before a military commission. The President's Military Order was cause for concern for a number of reasons. One of the most important was that it appeared to arrogate to the President complete authority to "deem" individuals to be members of al Qaeda or to have aided, abetted, or conspired to commit acts of terrorism and to prescribe procedures for prosecutions that lacked many of the hallmarks of American criminal justice that are associated with basic notions of due process and fundamental fairness.

The DOD has now adopted procedures for military commissions and has developed a non-exclusive list of war crimes that can be prosecuted before such commissions. The proposed use of military commissions, as opposed to civilian courts, has been controversial from the date the military order issued, and the controversy has become more rather than less heated over time. The procedures governing the commissions have generated much of the controversy.

In addition to prescribing military commissions to try unlawful combatants, the executive constructed the Guantanamo facility to hold unlawful combatants. Although the executive announced plans to put some of the combatants on trial for violations of the laws of war, it became clear that many would be held for long periods of time without any plan to try them. They were detained for security reasons, and in many parts of the world there were concerns about the legality of detaining, perhaps indefinitely, individuals without trial.

The executive also seized two Americans, one in Afghanistan, and another at the O'Hare airport in Chicago, and charged them as enemy combatants. Both were housed in the United States as their cases worked their way through Federal courts to the United States Supreme Court. One, Yaser Hamdi, has now been released and returned to Saudi Arabia following a Supreme Court decision recognizing his right to consult with counsel and to some procedural protections. *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004). The other, Jose Padilla, continues to seek his release in Federal court after the Supreme Court held that he had brought his habeas corpus challenge in the wrong Federal court. *Rumsfeld* v. *Padilla*, 542 U.S. 426 (2004).

As the controversy has mounted, some of our crucial allies have protested the use of or the procedures for military commissions and the prolonged detention of individuals without trial. Civil liberties groups have questioned the detention of American citizens as enemy combatants. Throughout it all, Congress has been silent. During the almost 4 years since Congress authorized the President to take action

against those responsible for the September 11 attacks, Congress has left to the President and the executive branch virtually unfettered discretion in conducting the war on terrorism. The executive's actions have been challenged in Federal courts. The United State Supreme Court held in Hamdi that the Constitution imposes some limits upon the ability of the President to hold "enemy combatants" in indefinite detention. The Court also held that Federal law permits those detained in Guantanamo to seek Federal habeas corpus review. *Rasul* v. *Bush*, 542 U.S. 466 (2004). Lower Federal courts have struggled to decide what constitutional protections are due individuals whom the government either plans to hold without trial or to prosecute in military commissions. While Federal courts have not welcomed having to second guess the President as to the balance that should be struck between protecting the Nation and preserving individual rights, they have recognized their duty to decide the cases brought before them. The courts could not and did not shirk their responsibility to assure that basic constitutional values are not lost in the executive's war on terrorism.

This duty is not the courts' alone; it is shared with Congress. Yet, while the courts have met their responsibilities, Congress has provided the courts with no more guidance than it has provided the President. Congress has been silent for too long. There is no evidence of congressional determination or courage to participate in the growing debate about how to combat terrorism without compromising the values for which the United States has long been proud to stand. Congress's potential to advise the President, to assist the executive by adopting legislation to deal with some of the knotty problems of substance and procedure that have arisen, and to demonstrate both to the American people and people throughout the world that the September 18, 2001, Joint Resolution was not a blank check from Congress to the President has gone unfulfilled.

II. CONGRESS AND THE PRESIDENT SHARE POWER OVER THE MILITARY, MILITARY COMMISSIONS, AND DETENTIONS

The Constitution of the United States unmistakably gives Congress as well as the President authority over military matters. Article I, Section 8, grants to Congress the powers: "To . . . provide for the common Defence" (clause 1); "To define and punish piracies on the high seas, and offenses against the Law of Nations; To declare war, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies ; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces" (clauses 10–14). Article II confers on the President the "executive Power" (Section 1) and makes him the "Commander in Chief of the Army and Navy" (Section 2).

Congress exercised its constitutional authority when it enacted the Uniform Code of Military Justice (UCMJ). Indeed, Congress provided in the Code for military commissions in Article 21 (10 U.S.C. § 821). That section provides:

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commission, provost court, or other military tribunals.

The history of the section indicates that Congress intended to preserve the option in some circumstances for the executive to choose between using military commissions or other tribunals such as court-martial. In Application of *Yamashita*, 327 U.S. 1 (1946), the Supreme Court explained that Article of War 15, which was substantially similar language to UCMJ Article 21, was adopted in 1916 in response to other amendments of the Articles of War that which granted jurisdiction to courts-martial to try offenses and offenders under the law of war. The Court found that the language was intended to preserve the traditional jurisdiction of military tribunals. In *Madsen* v. *Kinsella*, 343 U.S. 341, 346–47 (1952), the Court made the following statement about military commissions: "Since our Nation's earliest days, such [military] commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities relating to war. They have been called our common-law war courts."(Footnote omitted)

In Article 18 of the UCMJ, Congress provided that "[g]eneral courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." Thus, Congress has given the President and the military choices as to how to proceed against those who violate the law of war. Whether Congress should do more and provide clearer guidance as to the manner in which military commissions should be employed and what should happen when there is insufficient evidence to

prosecute individuals for violating the laws of war or there are other reasons why prosecution is impractical is a question that cries out for an answer.

Just as Congress had the power to authorize the continued use of military commissions and to prescribe court-martial jurisdiction, Congress has the constitutional authority to impose restraints and conditions upon the exercise of the power to prosecute. Congress also shares authority with the executive to define the conditions under which individuals may be detained. This includes the power to define when, how, and under what circumstances and procedures enemy combatants may be detained. Nevertheless, as the executive built the detention and interrogation facilities at Guantanamo, Congress provided the funds but no guidance, direction or control.

Congress did enact the USA Patriot Act in response to the war on terror. That statute, while controversial, expanded executive power in recognition of the increased dangers to the United States posed by terrorism. Because some provisions of the statute will expire this year unless reenacted, Congress now must examine the way in which the statute has been implemented. But, aside from examining the provisions of the Patriot Act that will otherwise sunset soon, Congress has been absent without leave (AWOL) in the war on terror for too long.

III. WHAT TO DO WITH ENEMY COMBATANTS?

One of the most controversial aspects of the war on terrorism has been the use of the term "enemy combatant" and the executive's claim that such combatants may be detained until the war on terrorism is over—which may be for life. Congress has not been heard on the question of how to treat such combatants, despite the fact that life imprisonment without trial is almost incredible to contemplate in a country devoted to due process and the rule of law.

The executive position had been that enemy combatants may not only be detained indefinitely, but also that while they are detained they have no right under the laws and customs of war or the Constitution to meet with counsel. The U.S. Supreme Court rejected the executive's position regarding counsel in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), but the executive continues to claim the power to detain such combatants for their entire lives.

Under any circumstances, the claim of power to detain indefinitely would be cause for concern. Under the circumstances of the war on terror, there is special reason for concern. Contrary to what might seem the case when the term is used again and again by executive officials, the term "enemy combatant" is not one that has been frequently used by the military or one that has a well-established meaning when the law of war is discussed.

The law of war generally assumes that states or quasi-states are warring, and the word "enemy" generally means the state against which another state is fighting. When there is no declaration of war that specifically dates the beginning of a war, one looks to whether the use of force has risen to such a level that a de facto state of war exists. Based on the September 18, 2001 Joint Resolution and the existence of United States forces on the ground in Afghanistan, it appears that the United States was at war in 2001. But, it is less clear precisely who the enemy was and is. Were we at war against Afghanistan? Or were we at war against al Qaeda (the party responsible for the September 11, 2001 attacks) and the Taliban (who harbored al Qaeda)? Whether or not our original effort was directed against the country or only against selected groups within the country, once Afghanistan had a new government, the American military effort was clearly directed at al Qaeda and the Taliban as well as other groups and individuals supporting them. Fighting a war against distinct groups as opposed to against a nation poses unique problems for any nation.

A "combatant" in the law of war is typically a member of an Armed Force, who is readily distinguishable from a civilian, because the combatant typically wears a uniform and carries a distinctive identification card or document. A combatant in the war on terrorism is not so readily identified, because he/she is unlikely to be in uniform or carrying an identification document showing his/her group membership. A combatant in the war on terror may attack his or her own country's soldiers as in Afghanistan and Iraq as well as soldiers from other countries.

The law of war applies to non-state actors, such as insurgents. See Common Article 3 of the 1949 Geneva Conventions, e.g., Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287. See also The 1977 Protocols Additional to the Geneva Conventions, 16 I.L.M. 1391 Although the U.S. has not ratified the 1977 Protocols, it recognizes that parts of them reflect customary law of war. The fact that the law of war applies to non-state actors does not mean, however, that nations prefer to apply that law as opposed to domestic criminal law when dealing with insurgencies. In fact, there is substantial

evidence that nations have resisted applying the law of war to internal conflicts. Their concern has been that treating insurgencies as wars might legitimate acts of violence carried out by non-state actors.

If, for example, Iraq and the United States are at war with insurgents, then the insurgents under the law of war may kill and engage in other acts of violence against legitimate targets. If, on the other hand, insurgencies are simply treated as criminal acts, the non-state insurgents may be prosecuted and punished for violence against both civilians and military forces as well as for destruction of property, and cannot claim a right to use deadly force against military or other targets.

There is no question that the United States and Britain have the right to prosecute those responsible for the September 11 attacks and the attacks in London last week for their homicidal and horribly destructive acts. The questions that have arisen for the United States are whether the United States may detain individuals as unlawful combatants and for how long, and what forum should be used for any prosecutions. The United States has chosen to refer to al Qaeda members, some Taliban fighters, and possibly others suspected of involvement in terrorist acts as "unlawful combatants" or "enemy combatants." The use of these terms is consistent with the executive's claim that we are at war, even though the war against terrorists is directed at groups that are not confined to a single nation.

If we are at war with al Qaeda, the Taliban, and/or the Iraqi insurgency, then members of those groups have the right to kill as long as they focus on military targets. This might suggest that denominating the struggle against terrorism as "war" is unwise, for it may legitimize some of the acts that otherwise would simply be criminal. This concern is largely theoretical, however, since there is no reason to believe that those who commit terrorist acts will refrain from doing so simply because we choose not to recognize their jihad as war. Moreover, terrorists show no respect for the laws of war and no allegiance to the principles underlying those laws. Terrorists engage in murder without regard to law the law of war or any other. Their disregard of the law of war does not immunize them, however, from responsibility for violating it. Terrorist acts may violate domestic criminal laws, and they also may violate the law of war. Under appropriate circumstances, terrorists may be prosecuted as ordinary criminals or as war criminals. Accordingly, the United States properly has reserved the right to prosecute terrorists for violations of the law of war and/or violations of domestic criminal law as the wise exercise of discretion dictates.

Once we decide that we are at war with terrorist groups and they are combatants who are acting unlawfully, all doubt disappears about whether we can prosecute members of these groups and punish those who are found guilty. What, however, are we to do with those members who are caught but as to whom there is insufficient evidence to prosecute or whose possible prosecutions are hindered by concerns about disclosing military secrets or classified information? Can we detain such persons as prisoners for as long as the war on terrorism continues? This might well mean incarceration for life. It is no wonder that such a prospect is disturbing to many people within the United States and around the world. If there is insufficient evidence to prosecute or it is impractical to prosecute, must there at least be sufficient or substantial evidence of group membership? Must the membership be active? Or is any connection, however attenuated, sufficient to warrant detention? Can an individual be detained as an enemy combatant if he or she has not committed any act that would violate the law of war?

Al Qaeda members, for example, may commit acts of war, but not every member of al Qaeda or an affiliated group necessarily will have committed an act that violates the law of war. If an individual is alleged to have "supported" or to be "associated" with al Qaeda, is this sufficient to support detention? Or, must there be evidence as to each that he or she actually engaged in combative acts to be so classified? Who decides whether a person's actions support detention? In what forum? Under what standards? How long can the person be detained?

There are no easy answers to these questions. But, they must be addressed by Congress as well as the executive. In the end, the judiciary might well have to measure the answers given by its co-equal branches against the requirements of the Constitution, but its work will be demonstrably easier if the other two branches of government have come to grips with the issues and have endeavored to resolve them in a responsible manner consistent with the values for which America stands and the international norms to which we have long been committed.

At its 2002 mid-winter meeting, the American Bar Association adopted a resolution urging the President and Congress to assure that the President's November 13, 2001 Military order should "[n]ot permit indefinite pretrial detention of persons subject to the order." Permanent detention of persons against whom there is insufficient

evidence to prosecute or as to whom prosecution is impractical is cause for much greater concern.

The ABA has not taken a position on what standards should be applicable if non-citizens captured outside the United States are to be detained as unlawful combatants. The question of whether a non-citizen can be detained without prosecution raises a host of difficult issues. There can be no denying their difficulty, but there can be no excuse for Congress not facing them.

The ABA adopted a resolution in August 2002 with respect to United States citizens and other persons lawfully in the United States who are detained as enemy combatants. The resolution called for meaningful judicial review and access to counsel in conjunction with the opportunity for such review. The resolution also called upon Congress, in coordination with the executive branch, to establish clear standards and procedures governing the designation and treatment of U.S. citizens and other person lawfully present in the United States as enemy combatants. The ABA also urged that Congress and the executive consider how the policies of the United States may affect the response of other nations to future acts of terrorism.

In my opinion, Congress should examine all the standards and procedures for detaining individuals as enemy combatants. In its examination, Congress should ask the following questions as it seeks to balance liberty and security interests:

1. Should the executive be permitted to detain individuals seized as enemy combatants for extended periods of time?
2. Does it make a difference whether a seized individual is an American citizen, whether a citizen was seized on foreign soil or in the United States, and/or whether a citizen is detained in the United States?
3. Who should make the initial determination that an individual is an enemy combatant?
4. What standard of proof should be used to make the determination? For example, should clear and convincing evidence be required to detain an individual to protect society (using the standard required for civil commitment of persons in the United States, *Addington* v. *Texas*, 441 U.S. 418 (1979))? Does the individual have a right to counsel when the initial determination is made?
5. Must an individual have committed a specific act in support of terrorism, or should it be sufficient that a person is found to be a member or supporter of a terrorist group? Should any act, no matter how minor, be sufficient? Or, must a showing be made that the person, if released, poses a genuine threat to the United States, its people or its property?
6. If the initial determination that an individual is an enemy combatant is not made by a court, should a detained person have an opportunity for judicial review? If so, in what court? Should Congress consider establishing a panel of Article III judges to review detention decisions, or giving jurisdiction to the United States Court of Appeals for the Armed Forces to review the decisions? What provision for counsel should be made in conjunction with judicial review?
7. How frequently should a detained person's status be reviewed to assure that continued detention is required?
8. If a person was seized as part of the Afghanistan or Iraqi military actions, when United States involvement in the hostilities in those countries ends, must the person be released? Does the war on terrorism justify continued detention when military action ends?
9. Should the tribunal that decides to detain an individual or a reviewing court be required to find that there are no alternatives to detention that would adequately protect the United States? If, for example, an individual is a citizen of a country that offers to receive and monitor that individual, should the person be released to that country unless a showing is made that release would not adequately protect the United States?
10. Should there be an outer limit on the length of detention without prosecution?

The Supreme Court began to address some of these questions in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), but that decision addressed the situation of an American citizen allegedly seized on the battlefield. The Court required some procedural protections for *Hamdi*, but was divided as to precisely what due process required. Because he was released from custody, we do not know what process ultimately would have been required. The fact that *Hamdi* provides only minimal guidance and that the Court avoided the merits in *Padilla* leave open issues that Congress should address. Ultimately, Federal courts will decide what standards and procedures are required by the Constitution, but the courts' task will be greatly eased if Congress

and the executive together can derive carefully tailored standards and procedures that recognize the danger associated with detaining individuals for lengthy periods without trial as well as the dangers of terrorism in the 21st century.

IV. MILITARY COMMISSIONS

The military commissions which the President authorized and for which the Department of Defense has planned have an historical pedigree. Military commissions have been used to prosecute violations of the law of war, and their use has been upheld by the United States Supreme Court.

Military commissions existed during the Revolutionary War and have continued to be used during various conflicts since. W.Winthrop, Military Law and Precedents, (2d Ed., 1920 reprint) at 832. George Washington ordered the trial of John Andre for spying by a "Board of Officers," which was a form of military commission. Id. The term "military commission" was used during the Mexican War, and by the time of the Civil War was well established. Id. The jurisdiction of military commissions has extended to trying individuals for violations of the law of war and for offenses committed in territory under military occupation

President Roosevelt authorized a military commission to try eight German soldiers for war crimes after they smuggled themselves into the country, hid their uniforms and planned sabotage. The Supreme Court upheld their convictions and death sentences for six defendants in In *Ex parte Quirin*, 317 U.S. 1 (1942). The Court specifically noted that "[b]y the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases." Id., at 28. The Court distinguished between lawful and unlawful combatants: "Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." Id. at 30–31 (footnotes omitted).

United States Army military commissions tried more than 1,600 individuals in Germany for war crimes after Germany surrendered. Similar commissions tried almost 1000 persons in the Far East. Military commissions also tried individuals, including U.S. citizens, for ordinary criminal activity in the occupied territories. The Supreme Court upheld the commissions' jurisdiction in these cases.

Citing *Quirin* in Application of *Yamashita*, 327 U.S. 1 (1946), the Court upheld the jurisdiction of a military commission to try Japanese General Yamashita for war crimes. The Court recognized that Congress had sanctioned the use of the commissions: "The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. Id. at 11.

Madsen v. *Kinsella*, 342 U.S. 341 (1952), upheld the jurisdiction of a military commission to try a civilian U.S. citizen for the murder of her U.S. serviceman husband in occupied Germany in 1950. The Court's opinion discussed the history of military commissions.

The Court did not decide in *Quirin* or in the other cases whether the President as Commander in Chief has inherent power to establish a military commission, since Congress had authorized such Commissions. The same remains true today. Congress has provided for military commissions in the Code of Military Justice. In Quirin and other cases, the Supreme Court had no occasion to decide what could be done with unlawful combatants who are not tried or who are tried and acquitted. Congress has taken no position on these issues either.

As noted above, if we are at war and war crimes are committed, Article 21 of the Code of Military Justice recognizes the authority of military commissions to prosecute those crimes. It is well established that a deliberate attack on noncombatant civilians violates the law of war. The customary law of war recognizes this principle and it is also reflected in several conventions, such as Common Article 3 of the Geneva Conventions of 1949, see, e.g., Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287.

The September 11 attacks were not the first by al Qaeda against the United States. Al Qaeda was responsible for several earlier attacks; the World Trade Center bombing in 1993: U.S. military barracks at Khobar, Saudi Arabia, in 1996: U.S. embassies in Kenya and Tanzania in 1998; and the U.S.S. *Cole* in 2000. Thus, if the United States is in armed conflict with al Qaeda, its use of military commissions

to prosecute violations of the law of war is consistent with the use of such commissions from the founding of the Nation.

There are questions, however, about how far military commissions can reach. The President's November 13, 2001 order applies to members of al Qaeda, to people complicit in acts of international terrorism, and to those who have harbored such persons. It is not clear that all of these individuals participated in or are responsible for violations of the law of war. Not all acts of international terrorism or support for such acts constitute violations of the law of war. Congress may wish to decide whether the jurisdiction of military commissions should be expanded. But, I would urge Congress to consider the 2002 resolution of the American Bar Association urging the President and Congress to assure that the President's November 13, 2001 Military order should "[n]ot be applicable to cases in which violations of Federal, State, or territorial laws, as opposed to violations of such law of war, are alleged."

In addition to examining the jurisdiction of military commissions, Congress needs to examine the procedures military commissions should use. The American Bar Association's 2002 resolution urged the President and Congress to assure that the President's November 13, 2001 Military order should "[r]equire that its procedures for trial and appeals be governed by the UCMJ except Article 32 and provide the rights afforded in courts-martial thereunder, including but not limited to, provision for certiorari review by the Supreme Court of the United States (in addition to the right to petition for a writ of habeas corpus), the presumption of innocence, proof beyond a reasonable doubt, and unanimous verdicts in capital cases."

The procedures adopted by the DOD depart from the UCMJ and provide fewer rights than are recognized in courts-martial. The exclusion of the defendant from portions of the trial, the reduced evidence standard set forth for the commissions, and the effort to limit judicial review are among the controversial procedural provisions.

For example, the President's Military Order provided that, as to individuals subject to it, "military tribunals shall have exclusive jurisdiction with respect to offenses by the individual"; and "the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding brought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nations, or (iii) any international tribunal." Notwithstanding the Order, the Supreme Court has recognized the right of those detained at Guantanamo to seek habeas corpus relief. *Rasul* v. *Bush*, 542 U.S. 466 (2004). This is not surprising, since the Court reviewed habeas corpus petitions in *Madsen, Yamashita,* and *Quirin*. The scope of habeas corpus review is not settled, however, since the Court in Rasul interpreted a Federal statute which Congress could modify. Although the Rasul Court distinguished the denial of habeas review of a military commission in *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), it is unclear whether that decision remains good law as applied to defendants prosecuted for war crimes outside territory controlled by the United States. Congress has the opportunity to clarify and define the reach of the Great Writ to those detained as enemy combatants, whether or not they are prosecuted.

It is understandable why the President would find military commissions preferable to prosecutions in U.S. civilian courts. Security is the number one concern with two principal dimensions. The first is a concern for the safety of judges, witnesses and jurors (members). The second is a concern for protection of classified information. It is the latter concern that has resulted in the adoption of procedures for the tribunals that have led many to question its fairness.

Concerns about security have led the DOD to impose restrictions on civilian defense counsel in military tribunals that have made it difficult for them to play the full role in promoting justice they otherwise might. At its annual meeting on August 11–12, 2003, the ABA House of Delegates passed a resolution calling "upon Congress and the executive branch to ensure that all defendants in any military commission trials that may take place have the opportunity to receive the zealous and effective assistance of Civilian Defense Counsel (CDC), and opposes any qualification requirements or rules that would restrict the full participation of CDC who have received appropriate security clearances." The ABA further resolved that the government should not monitor attorney-client communications, should assure that CDC can be present at all stages of commission proceedings, and should ensure that CDC should be able to consult with and do research in preparation for proceedings and be able to speak publicly consistent with their obligations under the Model Rules of Professional Conduct and their duty to protect classified information. The ABA's resolution followed an August 2, 2003, unanimous decision by the Board or Directors of the National Association of Criminal Defense Lawyers (which cosponsored the ABA resolution) that it would be unethical for a criminal defense lawyer

to represent an accused before military commissions given the restrictions imposed upon defense counsel.

The decision to use military commissions to try individuals accused of violating the law of war would have been much less controversial if the ABA recommendations had been followed. If the procedure used in a court-martial (with any essential modifications that might be required) were used in military commissions, there would have been much more confidence in the fairness of the proceedings. If the rules of evidence used in a court-martial (with slight modification possible) were used in military commissions, there would have been more confidence in their fairness. If civilian judicial review were provided, the concern of several of our important allies would have been satisfied.

The fairness of military commissions is not an executive issue; it is a national issue. The credibility of the United States is at stake. The jurisdiction, procedures and judicial review issues should be a congressional concern. Congress, in consultation with the executive, is capable of providing a system of justice which fair-minded observers throughout the world will conclude is consistent with the highest standards of fairness as measured against our own traditions and those of the international community. The United States has seen itself as a shining example of a country committed to the rule of law and due process. The world watches to see what standards we set. As the ABA has noted, our actions "may affect the response of other nations to future acts of terrorism." We have protested the use of military tribunals to try our citizens in other countries. If the United States concludes that such commissions can be fairly conducted and provide due process to our enemies despite the fact that the accused is not given the same access to counsel as in a court-martial or criminal trial, the rules of evidence provide less protection than in a court-martial or criminal trial, and civilian review is denied or extremely limited we shall be hard pressed to argue that other countries are less capable or entitled than we to use such commissions and to adopt similar procedures.

Congress has an important role to play as we define through our actions for all the world to see what we think it means to do justice.

V. TREATMENT OF PRISONERS

No one event has called United States policy regarding and commitment to humane treatment of prisoners into question as much as the treatment of prisoners at Abu Ghraib prison in Iraq. Although there have been allegations of prisoner abuse in Afghanistan and a number of highly publicized allegations of alleged abuse of prisoners at Guantanamo, Cuba, it is the pictures of American soldiers abusing prisoners at Abu Ghraib that created an unmistakable impression on many that our country was willing to use torture and/or other degrading measures to interrogate and/or control prisoners within our custody. The graphic depictions of misconduct and disregard for human dignity requires a strong response by the United States to show the world that Abu Ghraib is an aberration which Americans profoundly regret.

On August 9, 2004, the American Bar Association adopted an extensive set of resolutions dealing with treatment of prisoners. I recommend each of these to Congress and hope that the subcommittee will give each serious consideration. The American Bar Association does the following:

> 1. condemns any use of torture or other cruel, inhuman, or degrading treatment or punishment upon persons within the custody or under the physical control of the United States Government (including its contractors) and any endorsement or authorization of such measures by government lawyers, officials and agents;
>
> 2. urges the United States Government to comply fully with the Constitution and laws of the United States and treaties to which the United States is a party, including the Geneva Conventions of August 12, 1949, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and related customary international law, including Article 75 of the 1977 Protocol I to the Geneva Conventions, to take all measures necessary to ensure that no person within the custody or under the physical control of the United States Government is subjected to torture or other cruel, inhuman or degrading treatment or punishment;
>
> 3. urges the United States Government to: (a) comply fully with the four Geneva Conventions of August 12, 1949, including timely compliance with all provisions that require access to protected persons by the International Committee of the Red Cross; (b) observe the minimum protections of their common Article 3 and related customary international law; and (c) enforce

such compliance through all applicable laws, including the War Crimes Act and the Uniform Code of Military Justice;

4. urges the United States Government to take all measures necessary to ensure that all foreign persons captured, detained, interned or otherwise held within the custody or under the physical control of the United States are treated in accordance with standards that the United States would consider lawful if employed with respect to an American captured by a foreign power;

5. urges the United States Government to take all measures necessary to ensure that no person within the custody or under the physical control of the United States is turned over to another government when the United States has substantial grounds to believe that such person will be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment;

6. urges that 18 U.S.C. §§ 2340(1) and 2340A be amended to encompass torture wherever committed, and regardless of the underlying motive or purpose;

7. urges the United States Government to pursue vigorously (1) the investigation of violations of law, including the War Crimes Act and the Uniform Code of Military Justice, with respect to the mistreatment or rendition of persons within the custody or under the physical control of the United States Government, and (2) appropriate proceedings against persons who may have committed, assisted, authorized, condoned, had command responsibility for, or otherwise participated in such violations;

8. urges the President and Congress, in addition to pending congressional investigations, to establish an independent, bipartisan commission with subpoena power to prepare a full account of detention and interrogation practices carried out by the United States, to make public findings, and to provide recommendations designed to ensure that such practices adhere faithfully to the Constitution and laws of the United States and treaties to which the United States is a party, including the Geneva Conventions, the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and related customary international law, including Article 75 of the 1977 Protocol I to the Geneva Conventions;

9. urges the United States Government to comply fully and in a timely manner with its reporting obligations as a State Party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

10. urges that, in establishing and executing national policy regarding the treatment of persons within the custody or under the physical control of the United States Government, Congress, and the executive branch should consider how United States practices may affect (a) the treatment of United States persons who may be captured and detained by other nations and (b) the credibility of objections by the United States to the use of torture or other cruel, inhuman or degrading treatment or punishment against United States persons.

I also recommend to you the Report accompanying these resolutions. It identifies the issues that first arose as a result of the DOD approving harsh questioning techniques in Guantanamo and the migration of those techniques to Iraq. The Report describes the legal justifications that were offered by the executive for its actions:

> As the DOD and the Central Intelligence Agency (CIA) were preparing and implementing their approach to interrogations, a series of memoranda were being prepared by various high-ranking legal officials in the executive branch which appear designed to provide a legal basis for going beyond established policies with regard to treatment of detainees. These memoranda set out a series of arguments for restrictive interpretation of the laws and treaties relevant to the subject, so as to greatly curb their effect. One example, in the August 1, 2002 memorandum from the Department of Justice Office of Legal Counsel to Alberto R. Gonzales, Counsel to the President (recently rescinded by the Justice Department) concluded that for an act to constitute torture as defined in 18 U.S.C. § 2340, "it must inflict pain that is difficult to endure", "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."
>
> Beyond their strained interpretation of the law, the memoranda attempted to craft an overall insulation from liability by arguing that the

> President has the authority to ignore any law or treaty that he believes interferes with the President's Article II power as Commander in Chief. In one such example, government lawyers argued that, for actions taken with respect to "the President's inherent constitutional authority to manage a military campaign, 18 U.S.C. § 2340A (the prohibition against torture) must be construed as inapplicable to interrogations undertaken pursuant to his Commander in Chief authority."
>
> These documents, which were released publicly after they were widely leaked, purported to provide authority for an aggressive effort to extract information from detainees using means not previously sanctioned. We do not construe the giving of good faith legal advice to constitute endorsement or authorization of torture. Moreover, it is unclear to what extent these memoranda represented or formed the basis for official policy. However, what does seem clear is that the memoranda and the decisions of high U.S. officials at the very least contributed to a culture in which prisoner abuse became widespread.
>
> The administration has acknowledged that the conduct that was featured in the Abu Ghraib tapes violated the law, and pledged that those who committed the violations would be brought to justice. In addition, at least six investigations are underway with regard to the abuse of detainees. It is important these investigations be thorough and timely, and that they be conducted by officers and agencies with the scope and authority to reach all those who should be held responsible.

Report 10B to House of Delegates at 3–4 (footnotes omitted).

I believe that the United States is as committed to the humane treatment of prisoners as any nation, and the actions of some soldiers, and perhaps even some commanders, are aberrational. But, there can be little question that the image of this country throughout the world has rarely been damaged more in a short period of time than by the photos and stories about the treatment of the Abu Ghraib prisoners.

It is time for Congress to act and to make clear that the Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment (CAT), to which the United States is a party, recognizes no exceptional circumstances in which torture may be used, and that the United States' ratification committed this country to reject cruel, inhuman or degrading treatment if such treatment is prohibited by the Fifth, Eighth or Fourteenth Amendments to the United States Constitution (which we provided as a reservation when ratifying CAT). Congress should make clear that it is a crime for an American soldier or a contractor to torture prisoners, and should amend 18 U.S.C. 2340A to encompass torture wherever committed and regardless of the underlying motive or purpose. At the current time, the UCMJ prohibits those covered from engaging in "cruelty and maltreatment" of prisoners whether or not the conduct violates CAT. 10 U.S.C. 893. There is no civilian parallel to the UCMJ provision. Although the ABA did not recommend it, Congress might consider making it a crime for any person to engage in "cruelty and maltreatment" of prisoners outside the United States.

There has been much debate—more heat than light in many instances—as to who is entitled to the protections of the Geneva Conventions. Much of the world believes that there are no gaps in the conventions and that all detainees are entitled to humane treatment under Common Article 3 of the Conventions. "Common Article 3" provides that detainees "shall in all circumstances be treated humanely" and prohibits the following acts "at any time and in any place whatsoever": "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;" and "outrages upon personal dignity, in particular humiliating or degrading treatment." Common Article 3 also provides that the "wounded and sick shall be collected and cared for." Article 75 of Additional Protocol I protects all detainees captured in situations of either international or internal armed conflict. Although the United States has not ratified the treaty (nor has Afghanistan), it is generally acknowledged that relevant sections of Protocol I constitute either binding customary international law or good practice, in particular the minimum safeguards guaranteed by Article 75(2). See Michael J. Matheson, Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, reprinted in The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 AM. U. J. INT'L L. & POL'Y 415, 425–6 (1987). Article 75 provides that "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions" "shall be treated humanely in all circumstances" and that each State Party

"shall respect the person, honour, convictions and religious practices of all such persons." Paragraph 2 of Article 75 prohibits, "at any time and in any place whatsoever, whether committed by civilian or military agents": "violence to the life, health, or physical or mental well-being of persons, in particular . . . torture of all kinds, whether physical or mental," "corporal punishment," and "mutilation"; "outrages upon personal dignity, in particular humiliating and degrading treatment . . . and any form of indecent assault"; and "threats to commit any of the foregoing acts."

The U.S. rejection of Additional Protocol I was explained in a presidential note to the Senate as follows: "Protocol I . . . would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations. . . ." See 1977 U.S.T. LEXIS 465. It is time for Congress to look at the standards set by and relied upon by other civilized nations and to provide that the United States will abide by the highest standards for treatment of prisoners.

VI. CONCLUSION

In this testimony, I have had the chance to address use of military commissions, detention of enemy combatants and treatment of detainees in United States custody. I urge Congress to raise its voice as to these issues. The executive has had little congressional guidance in its efforts to deal with terrorism. Congress shares authority with the executive when it comes to wars of all sorts, and it is time for Congress to exercise its authority in cooperation and consultation with the executive. It is not easy to fight any war, and the war on terror poses unique challenges. We struggle to arrive at appropriate responses to the challenges, and it is not surprising that we may make missteps or falter from time to time. But, we do not struggle alone. Terrorism has stricken Spain, England and other countries in addition to the United States. The international community must fight the battle together, and the United States must be a leader. To lead effectively, however, we need to show the power of our ideas and our principles as well as the power of our guns. We do this best when Congress is actively involved with the executive setting standards for the United States of which we and the world can be proud and holding us true to them.

Thank you.

STATEMENT OF JOHN D. HUTSON, PRESIDENT AND DEAN, FRANKLIN PIERCE LAW CENTER

Mr. HUTSON. Thank you, Mr. Chairman. Thank you for the opportunity to address the committee. I'll do what my colleagues have done and ask that my written statement be made a part of the record and try to bounce off what has already been said by colleagues here in this panel and also earlier today in the first panel.

I think we have a serious problem and you have the opportunity to fix it if you care to take it. I would agree that it is incumbent upon Congress to take this opportunity in its oversight capacity. If there is one thing that's come out clearly in the hearing today, the hearing yesterday and in the lead up to all of this, it is confusion. I'd go back to the word that you used at the very beginning, Mr. Chairman. I will bet that if you ask the Attorney General of the United States and Secretary Rumsfeld and Chairman of the Joint Chiefs and the judge advocates general and all the senior people who have worked on this issue to write down what their definition of a combatant is, what they think the rules are that apply, to whom they apply, where they apply, when they apply, you would come up with as many different answers as you would ask the question. If those people can't write it down, if they don't understand it clearly, you surely can't expect the colonels and the captains and the staff sergeants to understand that. If you can't expect

the staff sergeants to understand it, you're going to have the kind of problems that we have seen.

Whatever it is we do, it has to be foolproof. We have to keep it simple. We are talking about these issues in terms of legal niceties and that's fine for law school, that's fine for seasoned lawyers to try to do; it doesn't work on the battlefield. The other thing about the legality issues here, is I think that in many respects, it misses the more important issues.

I like to think of the United States as being above the law. Above the law in a sense that the law provides the floor. The law provides, and we are in the basement at this point in many respects, but the law provides the floor, and the United States should be above that. We should be considering these things not so much from a legal point of view as from a moral point of view, a diplomatic point of view, what is right militarily, what is right practically, what makes common sense, what is going to work not only in this war but in the next war and the war after that, because right now we are looking at it in a very shortsighted way. We are trying to deal with the very narrow immediate issue and not doing that very well, and we have completely lost sight of what is over the horizon. I think that's why the JAGs had a different point of view than the political appointees because the policymakers were looking immediately, the JAGs were looking over the horizon and trying to figure out what is going to be best for the United States, which is more forward deployed, past, frequent and future, than all other countries combined in terms of numbers of troops deployed, numbers of deployments and locations of the deployments.

We are the ones who are running the risks here. It protects U.S. troops now and in the future for us to come to some sort of understanding about what the rules are going to be. Parsing the convention against torture and the Geneva Conventions and your points about how you identify the Taliban and al Qaeda were right on the mark, Senator. It just don't work. It's absolutely necessary that we straighten this out. What we need to say is they may be terrorists, they may be evildoers, but they are human beings and we are Americans and we will treat them with the dignity and respect that Americans should always treat human beings, simply by virtue of their humanity.

Then in doing that, we can fix the military commission process. I was an early and ardent and vocal supporter of military commissions. I think they can be fixed. We can fix the interrogation policy, we can enact the Army field manual so that it applies to every person, every place, in every interrogation. We can do the things that are necessary for history, when they write the chapter, treatment of detainees in the book on the war on terrorism, the end of the chapter will be better than the beginning of the chapter. Thank you, Mr. Chairman. I look forward to your questions.

[The prepared statement of Mr. Hutson follows:]

PREPARED STATEMENT BY JOHN D. HUTSON

When historians write the book on the war on terrorism, there will be a chapter entitled "Treatment of Detainees." The first part of that chapter has already been written and it's not pretty. We don't yet know how that chapter will end. Fortunately, we have the opportunity—you have the opportunity—to write that ending.

At first blush, the issues are primarily legal in nature. Some have already been litigated and decided by courts. I believe that while the issues are legal in the first analysis, there are other ways to consider them, that in the end, are even more profound—moral, diplomatic, military and practical aspects must be considered. The legal analysis provides the floor, but the United States should strive for higher aspirations.

I want to make three points today. The first is to call for a limit on the duration of detention. The second is to urge that we either fix military commissions or use courts-martial to prosecute detainees. Finally, that we enact the provisions of the Army Field Manual relating to interrogation into law.

We have a very difficult problem with regard to the duration of the detention of those whom we have captured or who otherwise have been turned over to coalition forces. As has been often noted, this war won't end soon, and we may not even know when it's over. It likely will simply peter out someday and the end will be marked only by the passage of time. This uncertainty is exacerbated by the nature of the enemy. As has also been noted, he doesn't wear a uniform and isn't necessarily part of an army organized in a familiar manner. He is half civilian and half military and moves stealthily between those two worlds. He is not easy to identify. The flip side of this confusion is that true civilians can also be easily mistaken for enemy combatants.

This conundrum creates problems for detention policy. I believe we should place a reasonable time limit on the duration of confinement without a trial. If the war lasts 5, 10, or 20 years, we simply can't confine people for that long without a resolution to their confinement, especially if we aren't absolutely sure of their status. We haven't done that in prior wars, and we mustn't do it now in this war. Throughout history, the law of war has moved inexorably towards a higher level of civility. We can't be the Nation to take a step backwards.

At the end of that reasonable length of confinement, if they have not been prosecuted, they must be released to their country of origin absent a showing by the government that their continued detention is imperative. That showing could be based on their continued intelligence value or because of demonstrated threat to the security of the United States or our allies.

The government would bear a heavy burden. It would have to meet a high standard. A burden of proof such as beyond a reasonable doubt or, perhaps, by clear and convincing evidence, would have to be met. That standard would have to be achieved by articulable, specific evidence. Conjecture, opinion, rumor, or over-caution would not suffice.

I'm not sure about the forum. U.S. District Court or a specifically designated panel of jurists would work. There may be other alternatives. Whatever the duration of confinement, burden of proof, admissibility of evidence or forum, they must all be reasonably acceptable to the international community. If they are not, history will not be kind to us.

Now, turning to the prosecutions themselves. I was an early, ardent, and vocal supporter of military commissions as the appropriate forum. I still believe they can be fair, legal, and generally accepted by all but the most persistent naysayers. If done properly, they are historically founded, practical, and make sense. It is appropriate for military personnel to try their enemy by military commissions.

All of that said, although I don't necessarily agree with it, I understand the point of view of the critics who say that the commission process is now so flawed and maligned that we should simply start over. I should add, not quite as a parenthetical, that as a former Navy judge advocate for 28 years, I am pleased and proud, but not surprised by the strong advocacy of detailed military defense counsel in these cases. These are not popular cases, but they have served admirably.

For the success and viability of commissions, the devil is in the details. They aren't legal, they aren't appropriate, and they aren't practical, if they are done badly. They have to be accomplished reasonably promptly. The defense counsel must have reasonable access to their clients. Defense counsel must be able to confer with their clients in confidence. There must be a just review process. In summary, they must be fair and be perceived to be fair.

The Geneva Conventions require that military commissions approximate the same procedures by which we prosecute our own troops. That implicates the courts-martial system contained in the Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial.

Consistency is a virtue, but it can also be the hobgoblin of small minds. We're the United States of America. If we decide in our might and wisdom that we need to make a course correction, we can do that. Knowing what we now know, perhaps we might decide to use the UCMJ and MCM for prosecuting enemy combatants. It's a tried and true system. All we really would need to do is relax the rules of evidence

a bit to accommodate the reality of battlefield operations, understanding that evidence is being gathered by soldiers, not police detectives.

Finally, let me speak briefly about interrogation policy. We are all patriots here. We wouldn't be here if we weren't. I don't mean to preach but some of these things can't be said too often. I like to think of America as being above the law. By that I mean that the law provides a floor below which no nation may descend. But the United States . . . the United States should soar above that. The law says we can't torture people. The law says we can't treat them cruelly, or inhumanely, or degrade them.

I say they may be terrorists, they may be evil, but they are human beings and we're Americans and we should treat them with the dignity and respect that Americans should always treat all human beings by virtue of their humanity. I urge you to put the Army Field Manual into law for all U.S. agencies.

I understand and appreciate the need for the enemy to not know the limits of interrogation techniques. On the other hand, and more importantly, Americans and the community of nations must have confidence that we won't abuse people in our custody no matter what their status.

Our greatest strength as a nation is not our military might, awesome as it is; it's not our strong economy, natural resources or even our historic individual spirit. Our greatest strength is the rightness of our cause. For generations, Americans have stood tall for the Rule of Law and in support of human rights. That's our strength; that's why other civilized nations look to us for leadership and then follow that lead. If we lose that, we will have lost our greatest weapon.

On the other hand, the enemy's only weapon is terrorism. The true object of that weapon isn't so much human life or undermining our will to resist, as much as it is an effort to make us more like them. We must resist that at all costs. If we let that happen we will have lost the war. We will have lost our National identity. We must not take that fateful step down the slippery slope from the high road to the low road.

The Army Field Manual stands as a bulwark against that temptation. By enacting into law the interrogation techniques found in the current Army Field Manual for all U.S. interrogators, we will take a huge step in the right direction. It won't make us weaker, it will confirm our power for all to see and protect U.S. troops now and in the future.

As I stated early in this testimony, the important issues are legal, to be sure. But they are more than that. They have profound moral, diplomatic, military, and practical implications. How we are viewed by history and the community of nations, how we feel about ourselves, and how history treats us may in large part be determined by what you do, or don't do, now.

In summary, I urge you to place a reasonable limit on the duration of detention for enemy combatants absent a specific showing for the need for continued confinement. I urge you to either fix the Military Commission process or ensure cases are referred to the equivalent of courts-martial. Finally, I urge you to enact the Army Field Manual for all interrogations, regardless of location, the interrogator, or who is being interrogated.

Senator GRAHAM. Excellent, each of you. Thank you very much. Now, I know why I didn't get a more definite answer to the question would statutory definitions have a preferred position in the court than the current situation. Because there is a political component to this. Mr. Barr, I know that every executive branch legal advisor and every representative of the executive branch is very cautious about ceding authority, particularly when it comes to matters of war, and I don't think anyone up here wants to micromanage this war. But it is unique and it has taken us to a place far beyond six saboteurs in World War II.

I have to completely buy into the idea that enemy combatant status with an indeterminate amount of time is a legally correct position, and will enhance our national security. The problem I have is that the enemy combatant status that we are currently using is in court, being challenged, with a never-ending process ahead. But it goes back to what you said, Mr. Hutson. We'll be stronger if we are together, and I do believe there is a willingness of Congress and I may be wrong, it may fall apart, for all of us to come together

working with the executive branch to define enemy combatant status in the most flexible way possible, but give it a congressional blessing.

Mr. Barr, do you believe that if we did that we would be stronger legally and be more united as a country?

Mr. BARR. In general, when Congress supports executive power and they're acting together, that does strengthen the hand of the Government, obviously, but as I said earlier the definition of military combatant is not the issue. The thing that's going to cause problems is the extension of *habeas corpus* to foreign prisoners of war. I believe American citizens should be treated differently and I believe that they do have the right of *habeas corpus*.

Senator GRAHAM. Statutorily could we address that problem and fix it?

Mr. BARR. Yes. That' s what Scalia was talking about.

Senator GRAHAM. That's what he's yelling at us to do.

Mr. BARR. The first time in history, Under British habeas corpus, the idea of using a writ of habeas corpus for a foreign prisoner of war was an absurdity, and it was never recognized. But the Supreme Court here said well, this statute sort of makes us do it. That's an area that I think should be addressed.

The second issue that's going to cause difficulty no matter how these definitions are made is whether or not the court is going to say for the first time in history that a foreign person outside the United States who has no connection with the United States other than they are confronted by our troops, has due process rights. That is contrary to the existing law and if they go that far, then no matter how we define these terms it's going to mean judges supervising this thing. Now the fact that one district court judge doesn't like the definition of military combatant, to me is irrelevant. There are so many district court judges now you can get anyone to say anything. I think the D.C. Circuit is going to rule on that, and I think it will be straightened out.

Senator GRAHAM. The bottom line, the habeas route, we are going into a situation where courts will have a great say about how to fight this war. Scalia is saying we are ill equipped to do that, would you please get involved and help us, Congress? That's what this is all about. The invitation is out there to the administration. I hope they will take us up on it because I believe, as Senator McCain has stated, that we have an affirmative duty to do so.

Now, when it comes to military tribunals, clearly everybody in the panel has bought off on this. Critics of military tribunals have their right to be critical, but there is a rich legal history that the military tribunal system works and is an acceptable manner of delivering justice. Do you believe that if the military tribunal system were codified, it would be an advantageous position for that system in our current Federal court system?

Mr. BARR. First, I believe military commissions as opposed to court-martials are common law courts that exist because they are supposed to be adaptive to the exigencies of the circumstance. That's why I think inherently they have to be flexible tools. So I would be concerned about anything that tries to lock in a particular set of rules.

Could I give one example? After a war, after we have won, it may be one thing to show classified information or provide for a right to confront all of the evidence against you, because we've won the war. We don't care if Speer finds out something about our military plans. But right now we are in the middle of this confrontation, and allowing people to see classified information is something we shouldn't accept.

Senator GRAHAM. All due respect, we have a military legal system, the UCMJ, which is statutory, and we have the Manual for Courts-Martial which is the implementing directive of the executive branch.

We deal with classified information in court martial proceedings all the time. I don't think that's a problem because no one here wants to use the military tribunal commission system to hurt the Nation's security.

All I'm suggesting is that the current attacks on the military commission that are now in court are never ending. One way to bring closure would be to give a statutory blessing to the concept, tweak it a bit. My question again is would that help in terms of the status of the military commission legally with Congress getting involved?

Mr. BARR. Well, I think you might be in a situation where judges might accept it more. But I don't think the executive would, unless it allowed the discretion to adapt proceedings to specific circumstances.

Again, the court martial system that we have applies to American troops, people that are part of our political community, and I have no problem with those procedures. But providing all the same protections to a member of a hostile force during the confrontation, it's just——

Senator GRAHAM. I'll take another stab at this. I understand what you're saying. But the current system is going to be in litigation for a while to come. General Hemingway gave a best case scenario. I think we're going to be months or years before we get this thing figured out about enemy combatant status. We're going to have a lot of judges speaking about what they like and don't like about military tribunals.

I'd like to close that down, come up with a system that is not a threat to the country, is not a Federal court system, is not UCMJ, but a hybrid that deals with realities of the war on terrorism. But it's codified, that will be more deferred to by the courts and we'll have two branchs of government, as you said. That's my goal.

I'm going to now turn it over to Senator Nelson, but you have been very helpful. The idea, I'll put this on the record, I have crossed the Rubicon in this regard. I do not believe it is responsible for this country, legally or politically, for Congress to sit this out. If we can come up with congressional involvement that makes it stronger, not weaker, that allows us to get good intelligence, it allows us to detain people who deserve to be detained for an indeterminate period of time, and allows people to be prosecuted in a way where it will stick.

The way to have that legal breakthrough occur soon rather than later is for Congress to get involved.

Senator McCain.

Senator MCCAIN. I thank you, Mr. Chairman. Very briefly and I appreciate you allowing me just to comment. Mr. Barr and Mr. Saltzburg, Mr. Hutson has suggested that the Army field manual apply to all detainees, is that correct?

Mr. HUTSON. Yes, it is.

Senator MCCAIN. Do you agree with that, Mr. Saltzburg?

Mr. SALTZBURG. I think so.

Senator MCCAIN. How about you, Mr. Barr?

Mr. BARR. I agree that we are bound to treat all detainees humanely.

Senator MCCAIN. Please, Mr. Barr——

Mr. BARR. Which as I understand——

Senator MCCAIN. If you say you don't want to answer the question, that's fine.

Mr. BARR. No, that's not what I'm saying.

Senator MCCAIN. The question is, should the Army field manual apply to all detainees or not?

Mr. BARR. Well, no, the Army field manual applies to people that are covered by the—given the privileges of the Third Geneva Convention, no. To the extent that it says that all detainees should be treated humanely, even if they're not covered by the Third Convention, I agree with that too.

Senator MCCAIN. Because you feel that part of the Constitution has become irrelevant as far as Congress is concerned is not something that I agree with. It still says make rules concerning captures on land and water. Until we amend the Constitution because of its irrelevancy, I will use that as a reason for Congressional involvement.

I guess my only other question, Mr. Hutson, you were one of the uniformed JAGs at the time that the initial set of rules were formulated, isn't that correct, which were later rescinded?

Mr. HUTSON. No, sir. I retired in 2000. I preceded that.

Senator MCCAIN. It was my understanding that the uniformed JAGs disagreed as, I think, Mr. Saltzburg mentioned in his opening comments. All the uniformed people disagreed with the civilian policy that was articulated, that was put into effect, is that correct, do you know?

Mr. HUTSON. I can't say that all of the uniformed people did, but I know that there was a great deal of disagreement between the two groups indeed. In fact, the uniformed people were struggling to find avenues to vent their disagreements.

Senator MCCAIN. I thank you. Mr. Saltzburg, it's a small point, but many of our American soldiers in Afghanistan that were fighting there were not wearing a uniform. So according to at least some interpretation of the treatment of these prisoners because they were not wearing a uniform then therefore they are not eligible for the Geneva Conventions. So I just say that as an aside.

I, like you, am very concerned about the next conflict in which American fighting men and women may become captive. Right now, I think it would be difficult for us to assert as we did vociferously—and by the way, Mr. Barr, we are still at war in Korea, there was a cease-fire, but we are still at war.

Mr. BARR. Cease-fire means you're not still at war.

Senator MCCAIN. Yes, we are, in a state of war.

Mr. BARR. But I disagree with you that we have soldiers in our military fighting out of uniform in Afghanistan.

Senator MCCAIN. You disagree we have soldiers fighting out of uniform in Afghanistan.

Mr. BARR. I think there may be intelligence operatives who are operating who are not wearing military uniforms, yes.

Senator MCCAIN. That's Special Forces. Wrong again. I'm sorry. Well, anyway. But I guess my point is that without the kinds of behavior that you articulate, Mr. Saltzburg, I'm afraid that it would give our enemies some excuses which they may or may not have had anyway to mistreat our American fighting men and women when they fall prey to them.

Again, we are still in a war in Korea, it's a cease-fire. If we are going to use that criteria, then I think many of our detainees would die of old age. I thank you, Mr. Chairman.

Senator BEN NELSON. Thank you, Mr. Chairman. Admiral Hutson, I think you probably heard the distinction between how we might deal with prisoners or detainees in Iraq and those that are taken just in the general war on terrorism.

In trying to deal with status and treatment, the question of duration of detention is significant. Obviously, I think we must deal with that. Is there any clarification that you might be able to provide for us on that?

Mr. HUTSON. I'm not sure I can clarify it. I would urge Congress and the administration to consider putting a termination on the duration of detention for most of the prisoners. I think that it's just not possible for the United States to hold people, and we are not talking about Speer or Hess particularly, we are talking about chauffeurs and people like that, indefinitely.

The war on terrorism is going to go on, as we have all agreed, and we all understand, for a long time. At some point, it's just going to sort of peter out and will end by the passage of time. There is going to be no surrender on the deck of the U.S.S. *Missouri* in the war on terrorism.

So that I think we have to decide how long we can reasonably detain people, if no charges have been brought. We have not prosecuted them. We are just holding on to them until the end of the war as Senator McCain points out. I think you have to have an out. I think that the administration has to be able to demonstrate that the continued detention of a particular individual is necessary because of the great intelligence value that they may continue to have or because they continued to be a threat to the United States or to our allies.

But that determination has to meet some sort of standard. I think that there are a number of ways you could do it, and the tribunal would certainly be one. A specially designated panel of judges. But there would have to be a standard. There would have to be evidence. It couldn't just be conjecture, rumor, innuendo, or over caution.

Senator BEN NELSON. But there is some value in detaining these individuals for some significant period of time if they represent a particular threat, if by releasing them they go back to do battle against us or to do further harm, or if they represent a fundamen-

tally important part of our intelligence gathering operation as an important source for intelligence information.

Mr. HUTSON. I couldn't agree more, Senator, that it would be incumbent upon us to continue to detain for as long as necessary people that fit into those categories that you enumerate. But that for a large number of people, I think I understood the testimony earlier today to be that the annual review boards had released four people. We have 13,000 detainees involved around the world right now.

We can't just hold them until 25 years from now we say, oh yes, remember the war on terrorism, I guess it's over.

Senator BEN NELSON. What would you do with those detainees if their country of citizenship doesn't want them back? What do we do there?

Mr. HUTSON. Good question.

Senator BEN NELSON. I thank you very much for your enlightenment. I think you're helping us go down the road to progress here, and we appreciate it very much.

Senator GRAHAM. I want to thank you all. I just want to wrap this up quickly. The current legal environment we have is we are on appeal now, I think the Court of Appeals, regarding the military tribunal system, that is correct?

Mr. BARR. Yes, Senator, *Hamdi*, which was a chauffeur.

Senator GRAHAM. You were right about Hess. We didn't prosecute him until after the war. But I think this is a different war. I think it is very important that this country send a signal to all wannabe terrorists, you are either going to get killed, or you are going to get captured, and be held accountable.

The quicker we get on with holding people accountable, I think the safer we'll be. Mr. Barr, worst case scenario, or best case scenario, how long do you think it will take the current legal situation to resolve itself regarding prosecution?

Mr. BARR. I think probably within a year we will be able to complete the first prosecution. If I could, Senator, that last line of questioning from Senator Nelson, as you recognize in your opening statement, there are two different issues here.

One issue is detaining someone, not punishing them, but just detaining them. The other issue is trying those people that we want to try before a commission for war crimes.

I agree with what you said about let's get on with that. But on the issue of detention, we shouldn't act as if there is not a process in place. For the first time in history, we are permitting adversary proceedings, legal representatives, a preponderance of the evidence standard for these people to have their day in court to be held. That's never been done before and that's a recognition of the kind of war we are fighting.

Senator GRAHAM. I'll be honest with you. I don't have a desire to fundamentally change things. I just want to get a statutory blessing to it, tweak it to make sure it does pass scrutiny. There will be some people who are not subject to prosecution for different reasons. Maybe you don't want to go through the exposure of a trial, maybe it's not exactly the venue for them. They should be kept for a long time, Mr. Hutson, because this war will go on for a long time.

But the due process involved is the check and balance. An enemy combatant legally can be held, I think, for an indeterminate period. Now, that decision has to be made in accordance with who we are as a people, and it has to be made in light of the fact that we are a rule of law nation.

I stand very firmly with the idea that holding enemy combatants for a long period of time is in this Nation's national self-interest. I just hope we can make the process more acceptable to our legal system and abroad. What about you, Mr. Saltzburg?

Mr. SALTZBURG. I actually think that if you enacted legislation, you would moot the *Hamdi* case.

Senator GRAHAM. I totally agree——

Mr. SALTZBURG. Otherwise, I think it's fairly likely that the Supreme Court would grant review. I mean, one of the things we should not lose sight of is that *Hamdi* was closely divided with a plurality plus two, the author of the plurality opinion has resigned or announced her resignation from the Court. We'll go through a replacement process. We know the Chief Justice is ill. We don't know what will happen. He was part of the plurality.

So that if you ask what the end result will be, even after a year is up, I agree with Attorney General Barr, a year may be a good estimate. Sometimes the Supreme Court gives us less certainty after it decides than before, which is part of the problem. I think *Hamdi*'s an example.

I'd just like to say one other thing if I could. That is, Senator Graham, you mentioned the third part of what we are really after here, the hearts and minds.

Senator GRAHAM. That's very important.

Mr. SALTZBURG. I would really urge the subcommittee and I'd urge the committee not to treat the decision about what processes are due and so on solely based on how the United States looks at this right now.

We are not in this alone. What happened a week ago in London reminds us that this al Qaeda threat, this terrorist threat, is not just against us, we are just the biggest target. It's against everything we stand for, and everything that western democracies believe in. I think this picks up Senator Nelson's question, it's a very serious matter of saying if we are going to release somebody, where?

I mean, the world has to look at this together; we need to know what our allies think about how long somebody should be detained, because they don't want us to be releasing these people. Then if we're going to release them, how? How is it to be done? I think some input from allies who are just as concerned as this country is, and they have reason to be, would actually benefit our thinking.

I don't think, by the way, you'd find them less supportive. I think you'd find that the shared concerns you've heard today are shared not just within our borders but they are shared around the world. I think we haven't reached out enough.

That's been part of our problem. That we, in winning the hearts and minds, we have to win the hearts and minds of the American people and persuade them that we're true to our own values. Because of some of the mistakes that have been made, because of Abu Ghraib, we have to do a better job of convincing the world—that

the standards that Dean Hutson said—that we are still committed to the highest standards, and that we are still the leader.

I think some contributions from some other countries that share problems with us about how we ought to go would probably not be a bad thing for this committee to really consider.

Senator GRAHAM. That's very well said. If you could get the executive, legislative, and judicial branches signing off on what is going on at Guantanamo Bay, and making it a very good place to detain people, to keep them off the battlefield, a place to get good intelligence, be aggressive, a place to prosecute the worst of the bunch, I think we are safer. I think it does change world opinion of that.

What is your belief, Mr. Hutson, about how long it will be before we get legal answers to these questions?

Mr. HUTSON. Predicting judicial speed is very dangerous. That's almost as bad as predicting what the jury's going to do. But I think that a year or 2, probably, depending on what the Supreme Court does or doesn't do.

Senator GRAHAM. Well, I will be working as diligently as I can with other members of the committee to come up with some statutory definitions that meet, I think, most of your goals, Mr. Barr. We may have a philosophical difference about how to do this, but your concerns are legitimate. We need not have statutes that lock us down. We need to have statutes that free us up, and let us really get on with fighting this war in the most effective way.

I think Guantanamo Bay's potential is not being reached from a national security perspective. I think we could do more with the place if we had more buy into it. I really do worry, gentlemen, about this war being managed by a series of legal decisions from different venues that will create stagnation and create image problems and the Court is not equipped to do this. I think they are telling us that.

Some judges will take us up on it, Mr. Barr, they will certainly take us up on it. If we are going to fight this war the way we need to fight it, the more elected official involvement, the better, and God bless. Thank you for coming. We will be back with each of you about how to do this. Thanks very much.

[Questions for the record with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR JOHN MCCAIN

DETAINEE HEARINGS

1. Senator MCCAIN. Mr. Dell'Orto, Admiral McGarrah, and General Hemingway, I understand that, of 520 individuals at Guantanamo (Gitmo), just 12 have been deemed suitable for military commissions. I understand that we have the legal right to detain the rest of them until the end of hostilities, but since there is no foreseeable end to the war on terrorism, what is the plan for those not receiving a hearing before the military commission?

Mr. DELL'ORTO, Admiral MCGARRAH, and General HEMINGWAY. Although we anticipate that a significant number of enemy combatants held at Guantanamo will face trial by military commission, many will not. Among those who may not be tried by a military commission are individuals who are either providing actionable intelligence through interrogations, or are still considered a threat to U.S. forces on the battlefield. Some of them may not have committed law of war violations or other crimes. These individuals will be held until the end of the conflict or until they are determined no longer to be a threat to U.S. forces by the Designated Civilian Official, acting on a recommendation from an Administrative Review Board (ARB).

The ARBs were established in order to review the case of every detainee annually. The ARB assesses whether an enemy combatant should be released, transferred, or further detained.

During the review, each eligible enemy combatant is given the opportunity to appear in person before an ARB of three military officers and provide information to support his release. The enemy combatant is provided with a military officer to assist him. In addition to information provided by the enemy combatant, the ARB considers written information from the family and national government of the enemy combatant and information provided by DOD and other U.S. Government agencies. Based on all of the information provided, the ARB makes a recommendation to release, transfer, or continue to detain the individual.

The process to release a detainee is completed only after the U.S. Government receives appropriate assurances that the receiving government will not torture the detainee and will continue to treat the detainee humanely, consistent with the country's international legal obligations.

As of March 2006, 267 detainees have been released or transferred to their home countries: 187 have been released, and 80 have been transferred to the control of other governments (Denmark, Pakistan, Morocco, France, Russia, Saudi Arabia, Spain, Sweden, United Kingdom, Kuwait, Australia, and Belgium). In regard to Iraqi and Afghan nationals, we are working with other U.S. Government agencies to help Iraqi and Afghan authorities assume responsibility for detention operations in their countries.

DETAINEE APPEALS

2. Senator MCCAIN. Mr. Dell'Orto, Admiral McGarrah, and General Hemingway, under Department of Defense (DOD) rules for military commissions, defendants will lack an independent appeal—they can appeal up the chain of command within DOD but not to U.S. Federal courts or to the U.S. Court of Appeals for the Armed Forces (a civilian court independent of the executive branch that handles appeals from the courts martial). Could you explain the rationale behind this decision? Why not permit an appeal to the U.S. Court of Appeals for the Armed Forces? Please explain your answer fully.

Mr. DELL'ORTO, Admiral MCGARRAH, and General HEMINGWAY. The Review Panel process provides for an independent review of the decisions of the Military Commission. By design and implementation, the Review Panel is composed of senior jurists with impeccable credentials and judicial experience. The current group of panel members was specifically chosen for their proven track record of making difficult decisions on unique and difficult questions of law—the very kinds of questions that they will face when deciding Commission questions involving the interplay of the law of war, military law, and applicable international law .

Under the Detainee Treatment Act, the United States Court of Appeals for the District of Columbia Circuit has jurisdiction to determine the validity of any final decision of a Military Commission. Review is required in capital cases and cases in which the defendant is sentenced to a term of imprisonment of 10 years or more; in all other cases, review is at the discretion of the Court. The jurisdiction of the Court is limited to the consideration of (i) whether the final decision was consistent with the standards and procedures specified in the Military Commission Order No.1, and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision was consistent with the Constitution and laws of the United States.

The Court of Appeals for the Armed Forces is an Article I appellate court with jurisdiction limited to certain courts-martial cases with significant sentences. See Clinton v. Goldsmith, 526 U.S. 529, 540 (1999). Expanding the Court of Appeals for the Armed Forces' jurisdiction to include military commissions would blur important distinctions between courts-martial and military commissions.

The independence of military commissions and courts-martial is protected primarily by Article 37, UCMJ, 10 U.S.C. Sec. 837, which prohibits unlawful command influence with respect to courts-martial and other tribunals, such as military commissions. Violations of Article 37, UCMJ, are punishable under Article 98, 10 U.S.C. Sec. 898, by up to 5 years of confinement and a dishonorable discharge. See Weiss v. United States, 510 U.S. 163 (1994).

The military commission process was established by the President pursuant to the authority granted to him under the Constitution and the Authorization for Use of Military Force, Public Law 107–40, 115 Stat. 224. The decision on who is subject to trial by commission, the rules that govern the commissions, and the procedures

for review of commission decisions are an executive branch function performed pursuant to this authority.

UNIFORM CODE OF MILITARY JUSTICE

3. Senator MCCAIN. Mr. Dell'Orto, Admiral McGarrah, and General Hemingway, the Pentagon made a decision to start from scratch and develop an entirely new system of military commissions, one that has run afoul of the U.S. court system. One effect of this has been that we have yet to bring even one terrorist to trial, nearly 4 years after September 11. Would it not be simpler, easier, and better to use the Uniform Code of Military Justice (UCMJ)?

Mr. DELL'ORTO, Admiral MCGARRAH, and General HEMINGWAY. On November 13, 2001, the President directed the establishment of military commissions to conduct criminal trials of those suspected of having committed war crimes. It would not be simpler, easier, or better to use the court-martial process authorized by the HCMJ. Rather, as the President directed, military commissions, as recognized by the UCMJ, provide the appropriate forum for the disposition of the allegations of war crimes committed by enemy combatants arising from the Global War on Terrorism. There are many provisions of the UCMJ applicable to courts-martial that would be inappropriate or unacceptable to apply in military commission trials of detainees at Guantanamo Bay, Cuba, including, but not limited to, the speedy trial provision (Article 10), the criminal rights warning requirements (Article 31(b), the extensive pretrial investigation hearing process (Article 32), equal opportunity to obtain witnesses and evidence regardless of any pertinent security classifications (Article 46), and extensive post-trial review and appeal procedures (Articles 59–76).

Additionally, many UCMJ provisions have been interpreted by military and Federal courts to apply, with some exceptions, the full range of protections afforded persons under the Constitution of the United States. Such U.S. Constitutional safeguards should not be extended to the trials of enemy alien combatants for violations of the law of war.

Finally, the UCMJ (Article 36) provides for the use of rules of evidence in courts-martial that, so far as the President determines practicable, apply the principles of law and rules of evidence generally used in criminal trials in United States district courts. Courts-martial use Military Rules of Evidence that are modeled after the Federal Rules of Evidence. Both of these sets of evidentiary rules would have to be modified significantly for use in military commissions. For example, these rules do not permit the admission of hearsay evidence, unless an exception to the hearsay rule exists. Therefore, they do not address adequately the unique challenges presented by a battlefield environment that is fundamentally different from the traditional law enforcement rubric applicable during peacetime in the United States.

Throughout American military history, hearsay evidence has been admissible in military commissions. In the Seminole War, hearsay evidence was admitted in military commissions to try British subjects for inciting and aiding the Creek Indians in warring against the United States. See Louis Fisher, Congressional Research Service, Military Tribunals: Historical Patterns and Lessons, 8–11 (2004).

During the Civil War, a military commission admitted hearsay evidence in the trial of Captain Henry Wirz for the atrocities committed against Union prisoners of war at the. Andersonville prison. Lewis Laska & James Smith, "Hell and the Devil": Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865, 68 MIL. L. Rev. 77, 118 & n.128 (1975) (e.g., a witness who did not observe an alleged murder was permitted to testify that he heard another individual identify Captain Win as the gunman).

During World War II, hearsay evidence was admitted in the military commission. that tried Japanese General Yamashita for war crimes committed while defending the Philippine Islands. See In re Yamashita, 327 U.S. 1, 18–19 (1946). Similarly, the military commission that tried Japanese General Homma for war crimes related to the infamous Bataan Death March considered hearsay evidence. Major William H. Parks, Command Responsibility for War Crimes, 62 Mil. L. Rev. 1, 75 (1973); In re Homma, 327 U.S. 759, 760–61 & n.1 (1946).

Internationally, it is well settled in the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY/ICTR) that hearsay evidence is admissible. Rules 89(c) and 89(d) of the ICTY Rules of Procedure and Evidence (RPE), read together, provide guidelines for admissibility of evidence based on relevance and probativeness, subject to exclusion to ensure a fair trial. The ICTR has adopted similar provisions. See ICTR RPE 89 and 92.

In addition, the rules of evidence in courts-martial do not currently provide for the consideration of classified evidence by the finder of fact unless the defendant

is also provided access to that classified evidence. See the Classified Information Procedures Act, 18 U.S.C. Appendix III, §§ 1–16, and Military Rule of Evidence 505. These procedures work well when the defendant already has a security clearance, which has historically been true in criminal prosecutions concerning classified information. However, the procedures used in Article III courts and courts-martial are problematic when the defendant does not have a security clearance and does not qualify for one under security clearance procedures. Disclosure of classified information concerning sensitive intelligence sources and methods or military operational procedures would compromise that classified information and potentially endanger the lives of members of the U.S. Armed Forces engaged in the global war on terrorism. Trial before the conclusion of hostilities creates security concerns not present in prosecutions after the end of a conflict.

4. Senator MCCAIN. Mr. Dell'Orto, Admiral McGarrah, and General Hemingway, we have a world class system of military justice, one that is adapted for dealing with classified information, for trials that do not take place in the bright lights of the media. Precisely what is it about that system that makes it unusable here? Please explain your answer fully.

Mr. DELL'ORTO, Admiral MCGARRAH, and General HEMINGWAY. The rules of evidence in courts-martial do not currently provide for the consideration of classified evidence by the finder of fact unless the defendant is also provided access to that classified evidence. See the Classified Information Procedures Act, 18 U.S.C. Appendix III, §§ 1–16, and Military Rule of Evidence 505. These procedures work well when the defendant already has a security clearance, which has historically been true in criminal prosecutions concerning classified information. However, the procedures used in Article III courts and courts-martial are problematic when the defendant does not have a security clearance and does not qualify for one under security clearance procedures. Disclosure of classified information concerning sensitive intelligence sources and methods or military operational procedures would compromise that classified information and potentially endanger the lives of members of the U.S. Armed Forces engaged in the global war on terrorism. Trial before the conclusion of hostilities creates security concerns not present in prosecutions after the end of a conflict.

APPLICATION OF GENEVA CONVENTIONS

5. Senator MCCAIN. Mr. Dell'Orto, Admiral McGarrah, General Hemingway, and Mr. Hutson, what would have been different at the Gitmo detention facility had Secretary Powell's position prevailed—i.e., had the administration applied the Geneva Conventions to all detainees captured in Afghanistan (as we've done in all past wars), but then, in accordance with Geneva, denied the special privileges of prisoner of war (POW) status to the al Qaeda prisoners. Under Geneva, we still could have detained and interrogated the prisoners for the duration of the war against al Qaeda. What did we really gain by choosing not to apply the Geneva Conventions? Please explain your answer fully.

Mr. DELL'ORTO, Admiral MCGARRAH, and General HEMINGWAY. What was gained was a determination consistent with the law of war and applicable international law that provided the legally correct framework for the detention and interrogation of enemy combatants detained in the global war on terrorism. Since September 11, 2001, the United States and its coalition partners have been engaged in a war against al Qaeda, the Taliban, and their affiliates and supporters. There is no question that under the law of war, the United States has the authority to detain persons who have engaged in unlawful belligerence until the cessation of hostilities. The detention policy of the U.S. Government, including the responsibilities of the Department of Defense, was set forth in the President's Military Order of November 13, 2001 enclosed at TAB A.

The Department of Defense is complying with the guidance issued by the President in his February 7, 2002, memorandum.

The White House
President George W. Bush

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TAB A #7

For Immediate Release
Office of the Press Secretary
November 13, 2001

President Issues Military Order

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

Section 1. Findings.

(a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Sec. 2. Definition and Policy.

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant

times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit,

acts of international terrorism, or acts in preparation therefor,

that have caused, threaten to cause, or have as their aim to

cause, injury to or adverse effects on the United States, its

citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in

subparagraphs (i) or (ii) of subsection 2(a)(1) of this order;

and

(2) it is in the interest of the United States that such individual

be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

Sec. 3. Detention Authority of the Secretary of Defense. Any individual subject to this order shall be --

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for --

(1) military commissions to sit at any time and any place, consistent

with such guidance regarding time and place as the Secretary of

Defense may provide;

(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

Sec. 5. Obligation of Other Agencies to Assist the Secretary of Defense.

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

Sec. 6. Additional Authorities of the Secretary of Defense.

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. Relationship to Other Law and Forums.

(a) Nothing in this order shall be construed to --

(1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or

(3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.

(b) With respect to any individual subject to this order --

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

Sec. 8. Publication.

This order shall be published in the Federal Register.

GEORGE W. BUSH

THE WHITE HOUSE,

November 13, 2001.

# # #

Return to this article at:
http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html

Mr. HUTSON. Much of any answer is speculative but one thing is certain: We would have maintained the heretofore uninterrupted adherence to the Geneva Conventions by the United States since their inception in 1949. We also be in a much better position in the future to encourage other nations to do so when they may have preferred to ignore them, or at least to complain when they don't comply.

I speculate that the confusion that erupted in Afghanistan and Iraq about the applicability of the Geneva would not have occurred. Misguidedly, we parsed who was covered and who as not and decreed that all terrorists were not covered. Then the war in Iraq morphed into a war against terror; a fortiori, the enemy were terrorists and not protected. At that point, the consequences became virtually inevitable.

SCOPE OF ARMY FIELD MANUAL 34–52

6. Senator MCCAIN. Mr. Barr, in the hearing before the Senate Armed Services Committee on July 13, 2005, General Craddock asserted that the following interrogation techniques are approved in the Army Field Manual on Interrogation 34–52, under the approach called "Ego Down and Futility":

- forcing a man to wear a woman's bra and placing underwear on his head;
- tying a leash to the subject and leading him around the room, forcing him to perform dog tricks;
- standing naked for several minutes with female interrogators present; and
- pouring water over their heads.

Is it your opinion that the field manual authorizes or in some way allows these examples to be used during interrogations by Defense Department personnel? If it does, or implies that these techniques are okay, should the manual be changed? Please fully explain your answer.

Mr. BARR. As to whether the specific techniques cited are approved by the Army Field Manual, I defer to military authorities to interpret their own guidelines.

I would advise against changing the Manual to address specific techniques. The Manual should set forth general principles which should be applied prudentially in given circumstances. It should not seek to become a comprehensive code cast in minute detail.

While some techniques may never be justifiable, other particular techniques might be inappropriate in most circumstances, while justifiable in another. For example, in the case of a uniformed enemy, conducting war in accordance with the rules of war and held as a prisoner of war, I would think the scope of appropriate coercive interrogation should be quite narrow. Things may be different if our forces capture a terrorist—someone engaged in violating the rules of war by concealing himself among innocent civilians for the very purpose of slaughtering innocent civilians through surprise attacks. In such a case, if a military commander has reason to think that he can extract crucial information and save innocent lives by using an interrogation technique that involves neither significant pain nor injury, there may be more room for leeway.

More concretely, for example, if we captured Zarqawi's chief of operations and found that he had a particular horror of donning woman's lingerie (to use the technique mentioned in your question), would it really be immoral or improper to exploit that fear if it meant saving lives? In this regard, the term "degrading" is not self-defining. It can mean different things in different contexts. There are some things that a teacher might do to a pupil, or a boss to a secretary, or a policeman to a suspect, or a fraternity brother to a pledge, that we would consider "degrading"—perhaps even just calling a name; perhaps something demeaning or very embarrassing. And yet the same treatment might not be troublesome when employed on the battlefield against a terrorist captive. In judging what constitutes degrading treatment of terrorists captives under interrogation, it seems to me we should not apply the same standard we would apply to interactions in the classroom, the office, the precinct station, or the frat house.

INTERROGATION TECHNIQUES

7. Senator MCCAIN. General Romig, Admiral McPherson, General Sandkuhler, General Rives, and Mr. Hutson, the investigation by Lieutenant General Randall M. Schmidt, USA and Brigadier General John T. Furlow, USA, into the FBI's allegations of detainee abuse at the Gitmo detention facility substantiated several interrogation techniques. Does the Army Field Manual 34–52 permit the following interrogation techniques which were substantiated by the investigating General Officers to

have been used as interrogation techniques at Gitmo. Please answer yes or no. If longer answers are required, please provide additional responses:

General ROMIG. Military doctrine is defined as fundamental principles by which the military forces or elements thereof guide their actions in support of national objectives. Army Field Manuals, such as FM 34–52, contain doctrine and training principles with supporting tactics, techniques, and/or procedures and describe how the Army and its organizations function in terms of missions, organizations, personnel, and equipment. Field Manuals are differentiated from Army Regulations, which are directives that set forth missions, responsibilities, and policies, delegate authority, set objectives, and prescribe mandated procedures to ensure uniform compliance with those policies.

It is important to note that the Army Field Manual (Field Manual 34–52) reinforces "the stated policy of the U.S. Army that military operations will be conducted in accordance with the law of war obligations of the U.S." In doing so, however, it does not attempt to distinguish among the various "sources" in applying the interrogation doctrine set forth therein. The Army Field Manual lists as possible "sources" civilian internees, insurgents, EPWs, defectors, refugees, displaced persons, agents or suspected agents, and other non-U.S. personnel, but also makes it clear that all of these personnel "are entitled to PW protection until their precise status has been determined by competent authority." The policies and procedures for making such a determination are not set forth in the Army Field Manual.

Admiral MCPHERSON. As a preface for answering each of the questions below in the context of interrogations, it would be useful first to set forth a key portion of the guidance provided by the Army Field Manual 34–52 (FM). The FM provides the following two tests to determine if a contemplated approach or technique would be considered unlawful:

- Given all the surrounding facts and circumstances, would a reasonable person in the place of the person being interrogated believe that his rights, as guaranteed under both international and U.S. law, are being violated or withheld, or will be violated or withheld if he fails to cooperate?
- If your contemplated actions were perpetrated by the enemy against U.S. Prisoners of War, would you believe such actions violated international or U.S. law?

The FM continues, "[i]f the answer is yes to either of these tests, do not engage in the contemplated action." These tests will be the foundation for answering all of the committee's questions addressing the use of specific activities as interrogation techniques.

General SANDKUHLER. The Army Field Manual 34–52 (FM 34–52) sets forth as doctrine a highly protective standard for the interrogation of detainees. The Field Manual states: "The use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the U.S. Government." The field manual also states "the use of force is a poor technique as it yields unreliable results." (FM 34–52, Chap. 1) Therefore, for both humane and operational reasons, it is far better for the interrogator to choose those techniques that suit the detainee's natural propensities and not those that attempt to overcome the will to resist. With these two principles in mind, the answer to all of the following questions would generally be "no."

General RIVES. Please note the following prefatory comment, which is applicable to all answers, that follow. Army Field Manual (FM) 34–52 explicitly states that it is Army policy that military operations will be conducted in accordance with the law of war obligations of the United States. It provides doctrinal guidance, techniques, and procedures, and it also cautions that limitations on the use of expressly prohibited methods should not be confused with psychological ploys, verbal trickery, or other nonviolent or noncoercive ruses. The Army Field Manual further states that the Geneva Conventions and U.S. policy prohibit acts of violence or intimidation, including physical or mental torture, threats, insults or exposure to inhumane treatment in interrogation. Finally, FM 34–52 advises that great care must be taken to avoid threatening or coercing a source as that would be a violation of the Geneva Convention on the treatment of enemy prisoners of war, Article 17.

A. Is the use of dogs during interrogations, muzzled or unmuzzled, consistent with the intent and the spirit of the Army Field Manual, which is consistent with Treaties on Human Rights, the Geneva Conventions, our International Obligations, and domestic law;

General ROMIG. The use of military working dogs as a security or control measure, when properly controlled by a trained dog handler, is not objectionable. The use of dogs as a method of interrogation (as distinguished from a security or control

measure) would not be consistent with the intent and spirit of the Army Field Manual.

Admiral MCPHERSON. No, this is not consistent with the intent and spirit of the FM. If a dog is used as part of an interrogation approach to harass, intimidate, threaten or coerce a detainee, the use is not consistent with the FM. Proper use of dogs for security purposes independent from interrogations is not inconsistent with the intent and spirit of the FM.

General SANDKUHLER. No, the use of dogs as an interrogation method intended to place the detainee in fear of death or injury would not be consistent with FM 34–52, which prohibits threats and exposure to unpleasant treatment. The use of military working dogs in their usual function of security and detection may be permissible, so long as they do not threaten the detainee.

General RIVES. No, this is not consistent with the intent and spirit of Army Field Manual 3452. The use of dogs for legitimate security, control, patrol and inspection functions is appropriate, but use of dogs as an interrogation approach or tactic is inconsistent with the intent and spirit of the Army Field Manual.

B. Is forcing a detainee to wear a woman's bra and thong placed on their head during the course of the interrogation consistent with the intent and the spirit of the Army Field Manual, which is consistent with Treaties on Human Rights, the Geneva Convention, our International Obligations, and domestic law;

General ROMIG. No. Forcing a detainee to wear a woman's bra and thong placed on his head during the course of the interrogation, in an attempt to humiliate or degrade the detainee, would not be consistent with the intent and the spirit of the Army Field Manual.

Admiral MCPHERSON. No, this is not consistent with the intent and spirit of the FM. The FM provides that the Geneva Conventions provisions concerning protected persons be strictly adhered to in the quest to identify legitimate threats and gain needed intelligence. Among those provisions are the prohibition on physical or moral coercion and the prohibition on subjecting individuals to humiliating or degrading treatment.

General SANDKUHLER. No, this is not consistent with FM 34–52, which prohibits insults and unpleasant treatment. Furthermore, the Geneva Conventions prohibit "outrages upon personal dignity, in particular humiliating and degrading treatment." (GC, Art. 3(1)(c))

General RIVES. No, forcing a detainee to wear a woman's bra and thong on his head as an interrogation tactic designed to humiliate or degrade the detainee is not consistent with the intent and spirit of the Army Field Manual.

C. Is telling a detainee that his mother and sister were whores consistent with the intent and the spirit of the Army Field Manual, which is consistent with Treaties on Human Rights, the Geneva Conventions, our International Obligations, and domestic law;

General ROMIG. No. Telling a detainee that his mother and sister are whores, thereby degrading him and his family, would not be consistent with the intent and the spirit of the Army Field Manual.

Admiral MCPHERSON. No, this is not consistent with the intent and spirit of the FM.

General SANDKUHLER. No, this is not consistent with FM 34–52, which prohibits insults.

General RIVES. No, telling a detainee that his mother and sister were whores as an interrogation tactic is not consistent with the intent and spirit of the Army Field Manual.

D. Is telling a detainee that he is a homosexual, had homosexual tendencies, and other detainees had found out about these tendencies consistent with the intent and the spirit of the Army Field Manual, which is consistent with Treaties on Human Rights, the Geneva Conventions, our International Obligations, and domestic law;

General ROMIG. No. Telling a detainee that he is a homosexual, had homosexual tendencies, and other detainees had found out about these tendencies, thereby humiliating and possibly endangering the detainee, would not be consistent with the spirit or intent of the Army Field Manual.

Admiral MCPHERSON. No, this is not consistent with the intent and spirit of the FM.

General SANDKUHLER. No, this is not consistent with FM 34–52 if it is meant to insult or threaten. The FM 34–52 also recommends "not inquiring into those private affairs which are beyond the scope of the interrogation." (FM 34–52, Chap. 1)

General RIVES. No, telling a detainee that he is a homosexual, had homosexual tendencies, and other detainees had found out about these tendencies as an interro-

gation tactic is not consistent with the intent. and the spirit of the Army Field Manual.

E. Is leading a detainee around the room on all fours and forcing him to perform a series of dog tricks consistent with the intent and the spirit of the Army Field Manual, which is consistent with Treaties on Human Rights, the Geneva Conventions, our International Obligations, and domestic law;

General ROMIG. No. Leading a detainee around the room on all fours and forcing him to perform a series of dog tricks, thereby humiliating or demeaning him, would not be consistent with the intent and the spirit of the Army Field Manual.

Admiral MCPHERSON. No, this is not consistent with the intent and spirit of the FM.

General SANDKUHLER. No, this is not consistent with FM 34–52, which prohibits insults and unpleasant treatment. Furthermore, the Geneva Conventions prohibit "outrages upon personal dignity, in particular humiliating and degrading treatment." (GC, Art. 3(1)(c)).

General RIVES. No, leading a detainee around the room on all fours and forcing him to perform a series of dog tricks is not consistent with the intent and the spirit of the Army Field Manual.

F. Is forcing a detainee to dance or touch an interrogator in a provocative fashion consistent with the intent and the spirit of the Army Field Manual, which is consistent with Treaties on Human Rights, the Geneva Conventions, our International Obligations, and domestic law;

General ROMIG. No. Forcing a detainee to dance or touch an interrogator in a provocative fashion, thereby humiliating or demeaning him, would not be consistent with the spirit and intent of the Army Field Manual.

Admiral MCPHERSON. No, this is not consistent with the intent and spirit of the FM.

General SANDKUHLER. No.

General RIVES. No, forcing a detainee to dance or touch an interrogator in a provocative fashion as an interrogation tactic is not consistent with the intent and the spirit of the Army Field Manual.

G. Is subjecting detainees to strip searches and forcing them to stand naked while females are present consistent with the intent and the spirit of the Army Field Manual, which is consistent with Treaties on Human Rights, the Geneva Conventions, our International Obligations, and domestic law;

General ROMIG. Use of strip searches for lawful safety and security purposes is not objectionable. Subjecting detainees to strip searches and forcing them to stand naked while females are present, as a method of interrogation, would not be consistent with the intent and the spirit of the Army Field Manual.

Admiral MCPHERSON. No, this is not consistent with the intent and spirit of the FM. Properly conducted strip searches for security purposes independent of interrogations are not inconsistent with the intent and spirit of the FM.

General SANDKUHLER. No, forcing a detainee to strip or to stand naked in front of the opposite sex as a means of interrogation is not consistent with the intent and spirit of FM 34–52. A strip search conducted in a respectful manner for security or law enforcement purposes may be permissible.

General RIVES. No, subjecting a detainee to strip searches and forcing him to stand naked while females are present as an interrogation tactic is not consistent with the intent andthe spirit of the Army Field Manual.

H. Is preventing detainees from praying and mishandling the Koran consistent with the intent and the spirit of the Army Field Manual, which is consistent with Treaties on Human Rights, the Geneva Convention, our International Obligations, and domestic law; and

General ROMIG. Mishandling the Koran in order to coerce cooperation by the detainee would not be consistent with the intent and the spirit of the Army Field Manual. Also, threatening to subject a detainee to disadvantageous treatment with respect to the exercise of religious duties, because of a failure to cooperate with interrogators, is a form of coercion and would not be consistent with the intent and spirit of the Army Field Manual.

With respect to religious practices, however, a balance must be found between a detainee's obligation to comply with the disciplinary routine prescribed by military authorities and the obligation of the authorities to afford latitude to prisoners in the reasonable exercise of their religious duties. For example, a detainee may not demand to attend prayer all day in order to avoid interrogation.

Admiral MCPHERSON. No, this is not consistent with the intent and spirit of the FM.

General SANDKUHLER. No, preventing detainees from praying and deliberate mishandling of the Koran is not consistent with the intent and spirit of FM 34–52. Furthermore, guards should be properly trained to avoid accidental mishandling of any items held sacred by detainee religious groups.

General RIVES. No, preventing detainees from praying, and mishandling the Koran is not consistent with the intent and the spirit of the Army Field Manual.

I. Is pouring cold water on detainees' head and water boarding consistent with the intent and the spirit of the Army Field Manual, which is consistent with Treaties on Human Rights, the Geneva Convention, our International Obligations, and domestic law?

General ROMIG. Water boarding would not be consistent with the intent and the spirit of the Army Field Manual. There may be valid health and safety reasons to pour cold water on a detainee's head in particular circumstances and, in those circumstances, such actions would not be inconsistent with the intent and the spirit of the Army Field Manual. Under other circumstances, however, pouring water on a detainee's head as a means of or aid to interrogation could be considered unlawful coercion and would not be consistent with the intent and the spirit of the Army Field Manual.

Admiral MCPHERSON. No, this is not consistent with the intent and spirit of the FM. Pouring cold water on a detainee's head in situations other than as an interrogation technique would not necessarily be inconsistent with the intent and spirit of the FM.

General SANDKUHLER. No. Water boarding, which I understand is intended to place the detainee in fear of drowning, and pouring cold water on a detainee's head, which I understand is intended to cause discomfort, would not be consistent with FM 34–52.

General RIVES. No, pouring cold water on detainee's head and water boarding is not consistent with the intent and the spirit of the Army Field Manual.

Mr. HUTSON. I would say "no" to all with the possible exception of "D." I would also add that in my opinion, if the answers were determined to be "yes" I would change the AFM to ensure no Americans engage in that type of behavior. It is not appropriate, it's demeaning to the interrogators, and it is not productive.

QUESTIONS SUBMITTED BY SENATOR CARL LEVIN

OFFICE OF LEGAL COUNSEL MEMORANDUM

8. Senator LEVIN. Mr. Dell'Orto, at the hearing you stated that the March 14, 2003, Office of Legal Counsel (OLC) memorandum from Deputy Assistant Attorney General John Yoo to Defense Department General Counsel William J. Haynes "was withdrawn as an operational document, and so it is no longer in effect and is no longer being considered as any precedent of any sort." You also stated that "It was certainly as recently as February of this year, but we were asked not to rely upon it going back to December 2003. I have not relied upon it since." Who directed you in December 2003 to no longer rely on the March 14, 2003 OLC memo and what led to that decision being taken at that time? Please provide the committee with the documents officially rescinding the March 14, 2003, OLC memo.

Mr. DELL'ORTO. Assistant Attorney General Goldsmith (See DOJ Office of Legal Counsel letter dated February 4, 2005, enclosed at Tab B). Although I was informed that the March 14, 2003. OLC memo was under review, I was not told what led to the decision to conduct that review.

U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

February 4, 2005

Honorable William J. Haynes II
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, D.C. 20101-1600

Re: Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (March 14, 2003) ("March 2003 Memorandum")

Dear Jim:

In December 2003, then-Assistant Attorney General Jack Goldsmith advised you that the March 2003 Memorandum was under review by this Office and should not be relied upon for any purpose. Assistant Attorney General Goldsmith specifically advised, however, that the 24 interrogation techniques approved by the Secretary of Defense for use with al Qaeda and Taliban detainees at Guantanamo Bay Naval Base were authorized for continued use as noted below. I understand that, since that time, the Department of Defense has not relied on the March 2003 Memorandum for any purpose. I also understand that, to the extent that the March 2003 Memorandum was relied on from March 2003 to December 2003, policies based on the substance of that Memorandum have been reviewed and, as appropriate, modified to exclude such reliance. This letter will confirm that this Office has formally withdrawn the March 2003 Memorandum.

The March 2003 Memorandum has been superseded by subsequent legal analyses. The attached Testimony of Patrick F. Philbin before the House Permanent Select Committee on Intelligence, July 14, 2004, reflects a determination by the Department of Justice that the 24 interrogation techniques approved by the Secretary of Defense mentioned above are lawful when used in accordance with the limitations and safeguards specified by the Secretary. This also accurately reflects Assistant Attorney General Goldsmith's oral advice in December 2003. In addition, as I have previously informed you, this Office has recently issued a revised interpretation of the federal criminal prohibition against torture, codified at 18 U.S.C. §§ 2340-2340A, which constitutes the authoritative opinion of this Office as to the requirements of that statute. See Memorandum for Deputy Attorney General James B. Comey from Daniel Levin,

Acting Assistant Attorney General, Office of Legal Counsel, Re: Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004) (copy attached).

Please let us know if we can be of further assistance.

Sincerely,

Daniel Levin
Acting Assistant Attorney General

Attachments

9. Senator LEVIN. Mr. Dell'Orto, according to a recent news article (Washington Post, July 15, 2005), DOD General Counsel Haynes issued a memo earlier this year rescinding the Working Group Report on Detainee Interrogations in the global war on terrorism. Has the Working Group report been rescinded? If so, please provide the committee with a copy of the memo rescinding that report.

Mr. DELL'ORTO. The working group report on detainee interrogation was rescinded on March 17, 2005. The memorandum is enclosed at TAB C.

GENERAL COUNSEL

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

MAR 17 2005

MEMORANDUM FOR THE JUDGE ADVOCATES GENERAL AND THE STAFF JUDGE ADVOCATE TO THE COMMANDANT

SUBJECT: Department of Defense Interrogation Policy

Thank you for your memorandum of January 18, 2005 and follow-on memorandum of January 31, 2005 (see attached). I agree that, in light of the Justice Department's modification of its earlier legal analysis, the legal portion of the 2003 DoD Working Group Report on Detainee Interrogations does not reflect now-settled executive branch views of the relevant law. As the DoD Working Group Report was never officially distributed (it was provided in final only to the Secretary of Defense), and as the operative Justice Department memorandum of December 30, 2004 has been distributed publicly as well as through command channels, one could reasonably conclude no further action is required.

Nevertheless, I determine that the Report of the Working Group on Detainee Interrogations is to be considered a historical document with no standing in policy, practice, or law to guide any activity of the Department of Defense. This determination should be disseminated throughout the Department of Defense, as appropriate.

Your proposed DoD interrogation policy attached to your January 31, 2005 memorandum is an excellent starting point for discussion and coordination with my staff and the General Counsels of the military departments. We must be mindful of the work of the Defense Intelligence Agency, the Joint Staff, the Office of Detainee Affairs, and others as they also are working to promulgate Department-wide interrogation policy. This is a profoundly important issue that must surely both comply with the law and incorporate appropriate consideration of operational, intelligence, and policy matters.

for Daniel J. Dell'Orto, Principal Deputy
William J. Haynes II

Attachment: As stated

cc: GCs of the Mil Depts

QUESTIONS SUBMITTED BY SENATOR EDWARD M. KENNEDY

AWARENESS OF FBI OBJECTIONS

10. Senator KENNEDY. Mr. Dell'Orto, a 2004 FBI e-mail indicated that the DOD was obtaining unreliable intelligence and was jeopardizing future prosecution of the detainees. The e-mail states that these concerns were raised in weekly meetings with high-ranking Criminal Division personnel at the Justice Department, including Deputy Assistant Attorney General Alice Fisher, and that all of them agreed the interrogation techniques would be an issue in trials by military commissions, since the statements were being coerced. According to the e-mail, the concerns were brought to the attention of the Office of General Counsel by Bruce Swartz.

A. When did you first become aware that the Federal Bureau of Investigations (FBI) was concerned about the effectiveness and reliability of the DOD interrogation techniques?

B. Who brought it to your attention?

C. What was the substance of the complaints?

D. What was your response?

E. How did General Counsel Haynes respond?

Mr. DELL'ORTO. As intelligence collection and criminal investigative activities involving detainees evolved from the inception of DOD detention operations at Guantanamo, there had been occasions when the professional and doctrinal approaches of intelligence collectors and criminal investigators led to disagreements in the field. From time to time, I had been made aware of such disagreements as reported by the responsible officials in the appropriate command or component. Discussions with Department of Justice officials focused on matters relating to the collection of evidence in criminal investigations and the collection of intelligence information critical to carrying out the global war on terrorism. My response and that of the DOD General Counsel have been to address these matters consistently within the requirements of U.S. law and consistent with U.S. policy concerning the humane treatment of detainees.

Differences in approaches toward interrogation between the military intelligence community and the law enforcement community were reported beginning relatively early in the evolution of DOD detention operations at Guantanamo. For example. the law enforcement community raised issues regarding the requirement to provide Miranda warnings to detainees. The military intelligence community was not obligated to provide such warnings. It also was reported on several occasions that the law enforcement community believed the most effective way to obtain information from a detainee was to build rapport with the detainee. I understood that the military intelligence community desired to pursue a course of interrogation that drew heavily on the techniques described in Army Field Manual 34–52. From time to time reports of these differences in approaches to interrogation came to our office from various sources. Some reports came from the military Intelligence Community at Guantanamo, and some came from Department of Justice attorneys who met with Department of Defense attorneys from time to time. Whenever Mr. Haynes learned of such reports, he directed inquiry through the Joint Staff to the chain of command to determine whether the differences between the communities reflected the historically different roles of the two communities or whether there were specific complaints about the interrogation of particular detainees and the specific techniques employed. To the best of my recollection, no specific complaints about abuse of detainees or any FBI concerns about interrogation of particular detainees or specific techniques were brought to our attention in any of these reports. As for concerns about the admissibility of statements obtained during interrogations and the possible effect that interrogation approaches might have on the admissibility of such statements, I was mindful of two factors that were counterweights to the DOJ concerns about admissibility as evidence; first, that the principal purpose for interrogations at Guantanamo was to acquire intelligence about current and future planned al Qaeda operations so as to thwart those operations and protect the United States and its citizens from future attacks, and second, that the military commission rules provided for greater latitude in the admissibility of such statements than was the case in Article III courts, the latter forum being the principal focus of the DOJ attorneys.

MEETINGS WITH THE FBI GENERAL COUNSEL

11. Senator KENNEDY. Mr. Dell'Orto, in a 2004 letter to major General Donald Ryder, FBI Deputy Assistant Director T. J. Harrington specifically referred to discussions between you and the FBI Office of General Counsel about the FBI concerns. What action did you take in response to those discussions?

Mr. DELL'ORTO. I did not meet with the FBI General Counselor any attorney from that office. My recollection is that I had a telephone conversation with an attorney from the FBI Office of General Counsel in the summer of 2003. During that telephone call, I ascertained that the time frame of the concerns being expressed was prior to January 2003, the month during which the Secretary of Defense responded to Mr. Haynes' reports about concerns brought to his attention by an official within the Department of Defense by suspending a number of the interrogation techniques being employed with respect to one detainee at Guantanamo. The FBI attorney did not report specific techniques or detainees to me or report any concerns about tech-

niques employed after January 15, 2003. I asked this attorney to provide me with any details or additional information if he later learned of any.

12. Senator KENNEDY. Mr. Dell'Orto, what did General Counsel Haynes instruct you to do?

Mr. DELL'ORTO. I do not recall discussing this telephone call with Mr. Haynes. In the absence of further specifics relating to the concerns expressed and the time frame of the interrogations that appeared to be the source of the FBI concerns, there was nothing more to be done since the Secretary had taken clear action in January 2003 to limit the types of lawful techniques to be used at Guantanamo and again in April 2003 to direct a new set of techniques for use at Guantanamo that also were well within the law and based on a solid policy foundation.

13. Senator KENNEDY. Mr. Dell'Orto, did you discuss DOD's response with the FBI and the Justice Department and if so, with whom and what information was communicated?

Mr. DELL'ORTO. I do not recall a subsequent conversation with the FBI or Department of Justice on this issue.

14. Senator KENNEDY. Mr. Dell'Orto, what techniques were the subject of the FBI's complaint?

Mr. DELL'ORTO. As far as I recall, the FBI attorney did not provide any specific techniques during. our telephone call and did not subsequently call with any further detail.

15. Senator KENNEDY. Mr. Dell'Orto, did you stop the techniques that were the cause of the FBI's concern?

Mr. DELL'ORTO. In the absence of any detailed information provided during the call I received in the summer of 2003 and given that the call referred only to the pre-January 2003 time frame, I took no further action. On January 15, 2003, the Secretary of Defense had suspended the use of any technique that was not included among those identified in Army Field Manual 34–52.

CONCERNS ABOUT DOD INTERVIEW METHODS

16. Senator KENNEDY. Mr. Dell'Orto, Alice Fisher told the Judiciary Committee that she recalled having general discussions about the effectiveness of the DOD's interview methods, including whether the FBI's methods were more effective in obtaining intelligence. Did you or anyone on the General Counsel's staff have knowledge of the substance of Ms. Fisher's concerns and if so, to whom were they communicated, and what were the concerns?

Mr. DELL'ORTO. Differences in approaches toward interrogation between the military intelligence community and the law enforcement community were reported beginning relatively early in the evolution of DOD detention operations at Guantanamo. For example, the law enforcement community raised issues regarding the requirement to provide Miranda warnings to detainees. The military intelligence community was not obligated to provide such warnings. It also was reported on several occasions that the law enforcement community believed the most effective way to obtain information from a detainee was to build rapport with the detainee. I understood that the military Intelligence Community desired to pursue a course of interrogation that drew heavily on the techniques described in Army Field Manual 34–52. From time to time reports of these differences in approaches. to interrogation came to our office from various sources. Some reports came from the military Intelligence Community at Guantanamo, and some came from Department of Justice attorneys who met with Department of Defense from time to time. To the best of my recollection, no specific complaints about abuse of detainees or any FBI concerns about interrogations of particular detainees or specific techniques were brought to our attention in any of these reports. As for concerns about the admissibility of statements obtained during interrogations and the possible effect that interrogation approaches might have on the admissibility of such statements, I was mindful of two factors that were counterweights to the DOJ concerns about admissibility as evidence; first, that the principal purpose for interrogations at Guantanamo was to acquire intelligence about current and future planned al Qaeda operations so as to thwart those operations and protect the United States and its citizens from future attacks, and second, that the military commission rules provided for greater latitude in the admissibility of such statements than was the case in Article III courts, the latter forum being the principal focus of the DOJ attorneys.

17. Senator KENNEDY. Mr. Dell'Orto, please describe any communication, either direct or indirect, which you or members of the DOD Office of the General Counsel had with then Assistant Attorney General Chertoff about the FBI's complaints of coercive interrogation tactics.

Mr. DELL'ORTO. I am not aware of any communication that I or any member of the Office of General Counsel had with then-Assistant Attorney General Chertoff about FBI complaints of coercive interrogation tactics.

OVERRIDING JUDGE ADVOCATE GENERAL INPUT

18. Senator KENNEDY. Mr. Dell'Orto, the DOD's Church Report reveals a disagreement primarily between military legal leadership on one side, and DOD General Counsel, the Department of Justice, and White House Counsel Alberto Gonzales on the other side, over interrogation tactics and what constitutes torture.

In response to requests from other government agencies, the Department of Justice produced the Bybee memo: a legal framework for interrogation guidance. Mr. Haynes then convened a Pentagon working group to look at interrogation policies, and wanted to adopt the Bybee memo. According to Admiral Church's report, many military lawyers and some civilian lawyers objected to the contents of the Bybee memo. At a Senate hearing in March, Admiral Church told us he concluded that DOD General Counsel William J. Haynes overrode the objections and imposed the Bybee analysis.

Why did Mr. Haynes decide to override the expert suggestions of the military lawyers in the Judge Advocate General (JAG) Corps?

Mr. DELL'ORTO. On January 15, 2003, the Secretary of Defense directed the DOD General Counsel. to establish a working group within the Department of Defense to assess the legal, policy and operational issues relating to the interrogation of detainees held by the United States Armed Forces in the global war on terrorism. On January 16, 2003; the DOD General Counsel asked the General Counsel of the Department of the Air Force to convene this working group, comprised of representatives of the Office of the Under Secretary of Defense (Policy), the Defense Intelligence Agency, the General Counsels of the Air Force, Army, and Navy, the Counsel to the Commandant of the Marine Corps, the Judge Advocates General of the Air Force, Army, and Navy, the Staff Judge Advocate to the Commandant of the Marine Corps, the Legal Counsel to the Chairman of the Joint Chiefs of Staff, and the Director of the Joint Staff. The working group was tasked to make recommendations concerning employment of particular interrogation techniques by DOD interrogators. The assessments and recommendations of this working group were considered carefully by senior DOD officials in their deliberations.

The deliberations of the working group were extensive, with vigorous exchanges of views and consultations, including among the senior legal advisors of DOD components, which the DOD General Counsel encouraged. The DOD General Counsel met with and listened to the views expressed by the Judge Advocates General, the Staff Judge Advocate to the Commandant, the General Counsels of the military departments, the Counsel to the Commandant of the Marine Corps, and the Legal Counsel to the Chairman of the Joint Chiefs of Staff individually and collectively. He offered to meet with any working group staff attorney who desired to discuss his or her views on the issues under review ,and did so on at least one occasion with multiple attorneys. The working group's assessment of the legal issues included the input of and consultation with Department of Justice representatives. The DOJ Office of Legal Counsel is the authoritative entity in the executive branch for interpretations of the law. In light of the complexity and significance of the issues presented for consideration by the working group, consultation with DOJ Office of Legal Counsel was especially prudent and desirable. The DOD General Counsel encouraged interaction and debate between the working group and the DOJ Office of Legal Counsel. This resulted in at least two meetings between DOJ Office of Legal Counsel attorneys and the working group and at least one meeting between a senior Office of Legal Counsel attorney and a Military Department General Counsel.

In my experience and consistent with my understanding of the role of the Office of Legal Counsel within the Department of Justice, legal opinions of the Office of Legal Counsel are considered to be authoritative within the executive branch. Mr. Haynes did not override the objections of the military lawyers in the Judge Advocate General's Corps. He communicated this longstanding executive branch policy. Nevertheless, although the Office of Legal Counsel legal opinion was considered to be authoritative with respect to the Department of Defense as to the opinion's analysis of the law it reviewed, there were other matters of law as well as considerations

of policy that the working group did address and incorporate into its report without reliance on the views of the Office of Legal Counsel. The Office of Legal Counsel properly left those other matters of law and considerations of policy solely to the working group. For instance, the Office of Legal Counsel deferred to the working group on the application of the Uniform Code of Military Justice. The policy arguments regarding reciprocity, among other things, that appear in the working group report were the product solely of the working group efforts. Indeed, the Office of Legal Counsel never suggested, nor did it opine on, any of the interrogation techniques considered by the working group or included in its report during the report's preparation. Mr. Haynes considered all aspects of the report, as did the Secretary of Defense when he approved, consistent with the recommendations of the Chairman of the Joint Chiefs of Staff, the Deputy Secretary of Defense, the Under Secretary of Defense for Policy, and Mr. Haynes, the 24 techniques for use at Guantanamo in April 2003. As was disclosed publicly in June 2004, these 24 techniques were a relatively small subset of the 35 techniques that the working group had recommended for consideration by the Secretary and included only 7 techniques that had not been reflected in earlier versions Army Field Manual 34–52. In sum, there is no basis for asserting that Mr. Haynes overrode the suggestions of anyone who participated in the working group process. Indeed he embraced those suggestions and communicated all views to the Secretary of Defense.

I note that no "Bybee memo" was shared with the working group. The Office of Legal Counsel opinion to which I refer above was not signed by Mr. Bybee, but rather by a senior Office of Legal Counsel attorney and dated March 14, 2003. This opinion, itself, was being drafted and reviewed during the period that the working group was performing its task and benefited from some of the discussion that members of the working group had with Office of Legal Counsel attorneys while they were reviewing and concluding the opinion.

I am not aware of any involvement by then-Counsel to the President Alberto Gonzales in this process as the question appears to suggest.

Addendum to answers provided previously. I request that you consider as part of the answers to both questions the attached July 19, 2005, letter that Michael Marchand, Major General , U.S. Army (retired) sent to Senators Specter and Leahy.

July 19, 2005

Senator Arlen Specter
Senator Patrick Leahy
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Specter and Senator Leahy:

On July 1, 2005, I retired as a Major General from the United States Army after 31 years service as a Judge Advocate. The last 12 years of my career were in the National Capitol Region in positions providing significant exposure to the various DOD General Counsels. In my most recent assignment as The Assistant Judge Advocate General of the Army – a position I held from October 2001 until my retirement – I was privileged to work with William J. Haynes in his capacity as General Counsel of the Department of Defense.

In light of much inaccurate reporting on Mr. Haynes' performance as general counsel during these last four years that our Country has been at war, I feel compelled to speak on the record on one important point.

In my experience, Mr. Haynes has been more inclusive of the Judge Advocates General and the senior service lawyers of the armed services than any General Counsel of the Department of Defense. He has consistently and repeatedly reached out to the senior lawyers of the Department of Defense on some of the most difficult legal issues to confront our armed services, our Department, and our Country. He has done so throughout my tenure in formal and informal ways. He has been respectful of our views, even on those occasions when he may not have agreed with one or more of us. The Department and its legal community – and the Country – have been well served.

I made this point recently to some members of the Judiciary Committee staff while presenting a briefing. Even so, I wanted to be sure that you understand my views on this matter.

With deep respect for your service to our Country, I am,

Sincerely,

Michael Marchand
Major General (ret.), U. S. Army

CONTENT OF JUDGE ADVOCATE GENERAL DISAGREEMENT

19. Senator KENNEDY. Mr. Dell'Orto, a January 2003 Air Force JAG memo for the record objects to the conditions that were seen on the ground at Gitmo. At our hearing, General Romig, General Rives, and General Sandkuhler all stated that they wrote memos and spoke in opposition to some of the determinations in the Bybee memo and the subsequent Working Group Report. Mr. Hutson, the former Navy JAG, said the Bybee legal framework "was shallow in its legal analysis, shortsighted in its implications, and altogether ill-advised. Frankly, it was just wrong." The Navy General Counsel said this legal analysis is questionable at best. Mr. Haynes overrode all their objections and decided the Bybee framework would apply. Why did Mr. Haynes convene a working group if he was going to ignore their expert opinions and go with the Bybee memo?

Mr. DELL'ORTO. Please refer to my answer to Question 18 above. In addition, and with respect to the matter of the various memoranda submitted by the Judge Advocates General duringthe working group process, a review of those memoranda demonstrates that much of their focus was on the applicability of the Uniform Code of Military Justice and on policy concerns. I believe that an objective reading of the

working group report leads to the conclusion that those issues are more than fairly addressed in the report. And, as I indicated in the answer to Question 18 above, in communicating his recommendation to the Secretary of Defense, Mr. Haynes embraced those suggestions and communicated all views to the Secretary.

Addendum to answers provided previously. I request that you consider as part of the answers to both questions the attached July 19, 2005, letter that Michael Marchand, Major General , U.S. Army (retired) sent to Senators Specter and Leahy.

July 19, 2005

Senator Arlen Specter
Senator Patrick Leahy
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Specter and Senator Leahy:

On July 1, 2005, I retired as a Major General from the United States Army after 31 years service as a Judge Advocate. The last 12 years of my career were in the National Capitol Region in positions providing significant exposure to the various DOD General Counsels. In my most recent assignment as The Assistant Judge Advocate General of the Army – a position I held from October 2001 until my retirement – I was privileged to work with William J. Haynes in his capacity as General Counsel of the Department of Defense.

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With deep respect for your service to our Country, I am,

Sincerely,

Michael Marchand
Major General (ret.), U. S. Army

20. Senator KENNEDY. Mr. Dell'Orto, was there an understanding that certain elements of the Bybee memo would not change under the working group?

Mr. DELL'ORTO. Drafts of what later emerged as the March 14, 2003, Office of Legal Counsel opinion were made available for review by and discussed with the working group as the opinion evolved. Upon finalization, the March 14, 2003, signed opinion was considered to be authoritative within the executive branch, including the Department of Defense, with respect to the matters of law it addressed. To the extent that the working group report addressed those areas of law that the Office of Legal Counsel opinion analyzed, the working group relied on that interpretation of the law. To the extent that the Office of Legal Counsel opinion did not address

other matters—for example, the applicability of the Uniform Code of Military Justice and the considerations of policy as discussed in the answer to Question 18 above—the Office of Legal Counsel deferred all review of those matters to the working group.

POLICY ON TREATMENT OF DETAINEES

21. Senator KENNEDY. Mr. Dell'Orto, the President's policy on treatment of detainees asserts that all detainees are to be treated humanely. What is the definition of "humanely" or "humane treatment" according to the DOD Office of the General Counsel?

Mr. DELL'ORTO. As outlined by the White House on February 7, 2002, U.S. policy, as determined by the President, is to treat an persons detained in the global war on terrorism "humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949. Even though th detainees are not entitled to POW privileges, they will be provided many POW privileges as a matter of policy." The White House Fact Sheet of February 7, 2002, identifies that all detainees are being provided:

- three meals a day that meet Muslim dietary laws;
- adequate shelter;
- water and medical care;
- clothing and shoes;
- showers;
- soap and hygiene items;
- foam sleeping pads and blankets;
- towels and washcloths;
- the opportunity to worship and reading materials;
- correspondence materials and the means to send mail:
- the ability to receive packages of food and clothing, subject to security screening.

In addition, the February 2002 Fact Sheet states that "The detainees will not be subjected to physical or mental abuse or cruel treatment. The International Committee of the Red Cross has visited and will continue to be able to visit the detainees privately. The detainees will be permitted to raise concerns about their conditions and we will attempt to address those concerns consistent with security."

Furthermore, in accordance with existing DOD regulations, including Army Regulation 190–8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees:

- "All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation."
- "The inhumane treatment of EPW, CI, RP is prohibited and is not justified by the stress of combat or with deep provocation."
- "All prisoners will receive humane treatment without regard to race, color, nationality, religion, political opinion, sex, or other criteria. The following acts are prohibited: murder, torture, corporal punishment, mutilation, the taking of hostages, sensory deprivation, collective punishments, execution without trial by proper authority, and all cruel and degrading treatment."
- "All persons will be respected as human beings. They will be protected against all acts of violence to include rape, forced prostitution, assault and theft, insults, public curiosity, bodily injury, and reprisals of any kind. They will not be subjected to medical or scientific experiments."

22. Senator KENNEDY. Mr. Dell'Orto, the policy also calls for treatment in accordance with the principles of the Geneva Conventions, as long as it is consistent with "military necessity." Who determines when "military necessity" exists, and how is that term defined?

Mr. DELL'ORTO. The conditioning of certain rights under the law of war based upon the military necessity requirements of the detaining power is a fundamental concept within the law of war that is reflected within the Geneva Conventions of 1949. Throughout history, the need for the law of war to accommodate the security concerns of the detaining power has been recognized. Pictet's Commentary to the Third Geneva Convention of 1949, for example, states that limitations on access to prisoners of War for "reasons of imperative military necessity" were necessary: "Otherwise, [detaining powers] would sometimes have been put in a position where they

were faced with the choice of either violating the Conventions or harming their own military position. Here as elsewhere, humanitarian principles must take into account actual facts if they are to be applicable." (p.611).

DIFFERENCE BETWEEN TREATMENT OF DETAINEES

23. Senator KENNEDY. Mr. Dell'Orto, at the hearing you and the JAGs confirmed that the treatment of detainees in Iraq, who are covered by the Geneva Conventions, is subject to different guidelines than treatment of detainees in Gitmo. Part of the justification for approval of certain interrogation techniques at Gitmo, which would fall outside the Geneva Conventions, is that they are necessary to combat terrorism and save American lives of troops on the ground. Iraq is also currently a battleground for combating terrorism. Do you distinguish between individuals detained as terrorism suspects with links to al Qaeda or other jihadist organizations in Iraq, and those detained as non-jihadist Iraqi insurgents?

Mr. DELL'ORTO. From the outset in the conflict in Iraq, the administration position has been unequivocal that the Geneva Conventions applied to Operation Iraqi Freedom. The application of the Geneva Conventions to the conflict in Iraq, however, does not necessarily result in their protections applying to non-Iraqi, al Qaeda members who enter Iraq to conduct terrorist attacks against coalition forces. The facts of any such case would need to be carefully scrutinized, but significant al Qaeda figures cannot legitimize their terrorist activities in the global war on terrorism simply by entering Iraqi territory.

24. Senator KENNEDY. Mr. Dell'Orto, is the intelligence you obtain from terrorism suspects in Iraq superior to the intelligence you obtain from those detained in Gitmo?

Mr. DELL'ORTO. I am not in a position to compare the quality of intelligence obtained from detainees in Iraq and Guantanamo.

MILITARY INSIGNIA

25. Senator KENNEDY. Mr. Dell'Orto, part of the justification for not detaining the individuals at Gitmo in a manner consistent with the Geneva Conventions is that they were not wearing proper insignia on the battlefield. Are there American servicemembers on the ground not wearing military insignia? If so, where?

Mr. DELL'ORTO. DOD Directive 5100.77, DOD Law of War Program, December 9, 1998, provides that U.S. Armed Forces must comply with the law of war during all armed conflicts, however such conflicts are characterized. The law of war includes prohibitions on perfidy and requires combatants to distinguish themselves during combat operations.

The President determined that although the conflict with the Taliban is covered by the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (GPW), the Taliban detainees are not entitled to POW status under the terms of GPW Article 4. One aspect of this determination was based on the factual determination that the Taliban, as a force, failed to wear a fixed distinctive sign recognizable at a distance. The requirements for POW stat11s in Article 4 for Armed Forces, militias, and other volunteer corps refer to the actions of the collective forces, not individuals.

Standard U.S. military uniforms satisfy the requirements of GPW Article 4. Unlike the Taliban, U.S. Armed Forces operate in accordance with the generally accepted practice of States with respect to the wearing of uniforms by members of the Armed Forces. The requirements of Article 4 may, however, be satisfied by other than a standard military uniform, e.g., a partial uniform or a fixed, distinctive sign, provided that forces are recognizable as combatants. In limited, exceptional circumstances, a small number of U.S. forces may be authorized to operate in other than standard military uniforms, but in all cases are required to conduct their operations in accordance with the law of war.

26. Senator KENNEDY. Mr. Dell'Orto, if captured, would members of the U.S. military not wearing insignia receive the protections of the Geneva Conventions?

Mr. DELL'ORTO. As already noted, U.S. Armed Forces conduct their operations in accordance with the law of war. In an international armed conflict where the Geneva Conventions apply, captured U.S. forces would be entitled to, and should be provided, POW protections. Should there be doubt regarding whether a captured U.S. servicemember belongs to any of the categories enumerated in GPW Article 4, he

or she would be entitled to, and should enjoy, POW protections until such time as his or her status has been determined by a competent tribunal.

Regardless of whether the Geneva Conventions apply to a conflict, captured U.S. servicemembers should be provided appropriate care and humane treatment from the time they are captured until their ultimate release or repatriation, consistent with the law of war.

It should be noted in addressing this question in the context of a U.S. servicemember captured by the Taliban or al Qaeda that their forces have demonstrated repeatedly their absolute disregard for the law of war and any obligation to provide humanitarian care and treatment to persons they capture.

[Whereupon, at 12:47 p.m., the subcommittee adjourned.]