HEARING OF THE

SENATE SELECT COMMITTEE ON INTELLIGENCE

ON THE NOMINATION OF

GENERAL MICHAEL V. HAYDEN

TO BE THE

DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY

THURSDAY, MAY 18, 2006
216 HART SENATE OFFICE BUILDING, WASHINGTON, D.C.

MORNING SESSION:

SEN. ROBERTS (R-KS): The committee will come to order. The committee meets today to receive testimony of the president's nomination for the director of the Central Intelligence Agency.

Our witness today is the president's nominee, General Michael V. Hayden. Obviously, given his more than 35 years of service to our country, his tenure as director of the National Security Agency and his current position as the principal deputy director of National Intelligence, why General Hayden is no stranger to this committee and he needs no introduction to our members. In other words, we know him well.

So General, the committee welcomes you and your guests and your family. Your nomination comes before the Senate at a crucial and important time, because the Central Intelligence Agency continues to need strong leadership in order to protect our national security.

Now, the public debate in regards to your nomination has been dominated not by your record as a manager or your qualifications, the needs of the CIA, its strengths and its weaknesses and its future, but rather the debate has focused almost entirely on the presidentially authorized activities of another agency. The National Security Agency's terrorist surveillance program became public last December as a result of a grave breach of national security. A leak allowed our enemy to know that the president had authorized the NSA to intercept the international communications of people reasonably believed to be

linked to al Qaeda, people who have and who are still trying to kill Americans.

At that time, largely uninformed critics rushed to judgment, decrying the program as illegal and unconstitutional. I think in the interim that cooler heads have prevailed and there is now a consensus that we should not only be listening to al Qaeda communications, but we must be listening to them.

Last week, in the wake of another story, those same critics reprised their winter performance, again making the denouncements and condemnations on subjects about which they know little or nothing.

Inevitably, all of the media -- all of America, for that matter -- looks to us for comment. More often than not, although very frustrating, we are not -- or we are literally unable to say anything.

Anyone who has ever served on a congressional intelligence committee has struggled with the issue of secrecy. How do we, as the elected representatives of the people, assure the public that we are fully informed and conducting vigorous oversight of our nation's intelligence activities when we can say virtually nothing about what we know, even though we would like to set the record straight?

The result of this conundrum is that we quite often get accused of simply not doing our job. Such accusations by their very nature are uninformed and therefore are not accurate. Unfortunately, I have found that ignorance is no impediment for some critics. I fully understand the desire to know. I'm a former newspaperman, but I also appreciate the absolute necessity of keeping some things secret in the interest of national security.

In this regard, I am truly concerned. This business of continued leaks, making it possible for terrorists to understand classified information about how we are preventing their attacks, is endangering our country and intelligence sources and methods and lives. I believe the great majority of American people understand this; I think they get it.

Al Qaeda is at war with the United States. Terrorists are planning attacks as we hold this hearing. Through very effective and highly classified intelligence efforts, we have stopped attacks. The fact we have not had another tragedy like 9/11 is

no accident. But today in Congress and throughout Washington, leaks and misinformation are endangering our efforts. Bin Laden, Zarqawi and their followers must be rejoicing. We cannot get to the point where we are unilaterally disarming ourselves in the war against terror.

If we do, it will game, set, match, al Qaeda.

Remember Khobar Towers, Beirut, the USS Cole, embassy attacks, the two attacks on the World Trade Center and the Pentagon, 9/11 and attacks worldwide and more to come, if our efforts are compromised. I am a strong supporter of the First Amendment, the Fourth Amendment and civil liberties, but you have no civil liberties if you are dead.

I have been to the NSA and seen how the terrorist surveillance program works. I have never seen a program more tightly run and closely scrutinized. When people asked on September 12th whether we were doing everything in our power to prevent another attack, the answer was no; now we are, and we need to keep doing it. I have often said and I will say again: I trust the American people. They do have a right to know. I do not trust our enemies. Unfortunately, there is no way to inform the public without informing our adversaries.

So how can we ensure that our government is not acting outside the law if we cannot publicly scrutinize its actions? This institution's answer to that question was the creation of this committee. We are the people's representatives, we have been entrusted with this solemn responsibility, and each member of this committee takes it very seriously. We may have differences, but we take our obligations and responsibilities very seriously. Because intelligence activities are necessarily secret, the conduct of our oversight is also secret. In my humble opinion, it doesn't make a whole lot of sense to telegraph to our adversaries how we intend to learn about their capabilities and their intentions.

Oversight of the terrorist surveillance program is necessarily conducted behind closed doors. The Senate Intelligence Committee has been and will continue to exercise its oversight and responsibilities related to the NSA. Yesterday, the entire committee joined our continuing oversight of the program. Each member will have the opportunity to reach their own conclusions. I have no doubt that they will. I encourage that.

As we continue our work, I want to assure the American people and all of my Senate colleagues, we will do our duty.

Now with that said, I want to applaud the brave men and women of the intelligence community who are implementing this program. Their single focus and one and only motivation is preventing the next attack. They are not interested in the private affairs of their fellow Americans. They are interested in one thing: finding and stopping terrorists. America can be proud of them. They deserve our support and our thanks, not our suspicion.

Since I became chairman of this committee, I have been privy to the details of this effective capability that has stopped and, if allowed to continue, will again stop terrorist attacks.

Now, while I cannot discuss the program's details, I can say without hesitation I believe that the NSA terrorist surveillance program is legal, it is necessary, and without it, the American people would be less safe. Of this I have no doubt.

Finally, I want to remind the public that this open hearing is only part of the confirmation process. When this hearing ends, this open hearing, and the cameras are turned off, the members of this committee will continue to meet with General Hayden. It would be inaccurate to state, as one national news editorial did today, that due to the classified constraints, members will be limited in how much they can say at this confirmation proceeding. In the following closed-door and secure session, the elected representatives on this committee will have the ability to pursue additional lines of questioning and will be able to fully explore any topic that they wish.

It is my hope that during this open hearing, we can at least focus to some degree on General Hayden's record as a manager, his qualifications as a leader, and the future of the Central Intelligence Agency -- issues that should be equally as important to the public.

With that said, again, I welcome you to the committee. I look forward to your testimony and your answers to our members' questions.

I note that Vice Chairman Rockefeller sends his deep regrets, as he is necessarily absent today. In his absence, I now recognize the distinguished senator from Michigan for the purpose of an opening statement. Senator Levin.

SEN. CARL LEVIN (D-MI): Mr. Chairman, thank you. Thank you for finding a way also to involve all the members of this committee in the briefings about the surveillance program, which there is so much concern and discussion about.

A few of us had been briefed, at least to some extent, partly into the program. But now, because of your efforts, Mr. Chairman, and your decision, every member of this committee can now have that capability, and for that, I think we should all be grateful and are grateful.

The nomination of a new director for the Central Intelligence Agency comes at a time when the agency is in disarray. Its current director has apparently been forced out, and the previous director, George Tenet, left under a cloud, after having compromised his own objectivity and independence and that of his agency by misusing Iraq intelligence to support the administration's policy agenda.

The next director must right this ship and restore the CIA to its critically important position. To do so, the highest priority of the new director must be to ensure that intelligence which is provided to the president and to the Congress is, in the words of the new reform law, quote, "Timely, objective and independent of political considerations."

That language described the role of the Director of National Intelligence. But as General Hayden himself has stated: "That responsibility applies not only to the DNI and to the director of the CIA personally, but to all intelligence produced by the intelligence community."

The need for objective, independent intelligence and analysis is surely as great now as it has ever been. The war on terrorism and the nuclear intentions and capabilities of Iran and North Korea could be life-and-death issues. Heaven help us if we have more intelligence fiascoes similar to those before the Iraq war, when, in the words of the head of the British intelligence, the U.S. intelligence was being, quote, "Fixed around the policy," closed quote.

General Hayden has the background and credentials for the position of CIA Director, but this job requires more than an impressive resume. One major question for me is whether General Hayden will restore analytical independence and objectivity at the CIA and speak truth to power, or whether he will shape

intelligence to support administration policy and mislead Congress and the American people, as Director Tenet did.

Another major question is General Hayden's views on a program of electronic surveillance of American citizens, a program which General Hayden administered for a long time. That is the program which has taken up a great deal of the public attention and concern in recent weeks.

The war on terrorism not only requires objective, independent intelligence analysis, it also requires us to strike a thoughtful balance between our liberty and our security. Over the past six months, we have been engaged in a national debate about NSA's electronic surveillance program and the telephone records of American citizens. That debate has been hobbled because so much about the program remains classified. Public accounts about it are mainly references by the administration, which are selective and incomplete or the result of unverifiable leaks.

For example, the administration has repeatedly characterized the electronic surveillance program as applying only to international phone calls and not involving any domestic surveillance. In January, the president said, quote, "The program focuses on calls coming from outside of the United States, but not domestic calls."

In February, the vice president said: "Some of our critics call this a, 'domestic surveillance program.' It is not domestic surveillance." Ambassador Negroponte said, quote, "This is a program that was ordered by the president of the United States with respect to international telephone calls to or from suspected Al Qaeda operatives and their affiliates. This was not about domestic surveillance." Earlier this year General Hayden appeared before the Press Club where he said of the program, quote, "The intrusion into privacy is also limited: only international calls."

Now, after listening to the administration's characterizations for many months, America woke up last Thursday to the USA Today headline, quote, "NSA has massive database of Americans' phone calls," closed quote. The report said, quote, "The National Security Agency has been secretly collecting the phone call records of tens of millions of Americans. The NSA program reaches into homes and businesses across the nation by amassing information about the calls of ordinary Americans -- most of whom aren't suspected of any crime," closed quote.

The president says we need to know who al Qaeda is calling in America, and we surely do. But the USA Today article describes a government program where the government keeps a data base, a record, of the phone numbers that tens of millions of Americans with no ties to al Qaeda are calling. In the May 12 New York Times article quotes, quote, "one senior government official" who, quote, "confirmed that the N.S.A. had access to records of most telephone calls in the United States," closed quote.

We are not permitted, of course, to publicly assess the accuracy of these reports. But listen for a moment to what people who have been briefed on the program have been able to say publicly. Stephen Hadley, the president's national security adviser, after talking about what the USA Today article did not claim, he said the following, quote, "It's really about calling records, if you read the story: who was called when, and how long did they talk? And these are business records that have been held by the courts not to be protected by a right of privacy.

And there are a variety of ways in which these records lawfully can provided to the government. It's hard to find the privacy issue here," Mr. Hadley said.

Majority Leader Frist has publicly stated that the "program is voluntary." And a member of this committee has said, quote: "The president's program uses information collected from phone companies. The phone companies keep their records. They have a record. And it shows what telephone number called what other telephone number."

So the leaks are producing piecemeal disclosures, although the program remains highly classified. Disclosing parts of the program that might be the most palatable and acceptable to the American people while maintaining secrecy, until they're leaked, about parts that may be troubling to the public is not acceptable.

Moreover, when Stephen Hadley, the president's national security adviser, says that it's hard to find a privacy issue here, I can't buy that. It's not hard to see how Americans could feel that their privacy has been intruded upon if the government has, as USA Today reports, a database of phone numbers calling and being called by tens of millions of Americans who are not suspected of any wrongdoing.

It is hard to see, however, if the leaks about this program are accurate, how the only intrusions into Americans' privacy are

related to international phone calls, as General Hayden said at the National Press Club. And it's certainly not hard to see the potential for abuse and the need for an effective check in law on the government's use of that information.

I welcome General Hayden to this committee. I thank you, General, for your decades of service to our nation. I look forward to hearing your views.

I also ask that a letter from Senator Rockefeller, sent to General Hayden yesterday, be made part of the record at this point.

And I just am delighted to report to each of us and to all of his colleagues and so many friends that Senator Rockefeller's recovery from his surgery is proceeding well, on schedule, and he is not only following these proceedings, but he is participating to the extent that he can without actually being here.

And I thank you again, General, for your service, and I thank you also, Mr. Chairman.

SEN. ROBERTS: And without objection, your request is approved. And we are delighted to hear of Senator Rockefeller's progress. And I know that in talking with him, when he talks about the Atlanta Braves, that he's getting a lot better. (Laughter.)

Now, General Hayden, would you please rise and raise your right hand?

(The chairman administers the oath to the witness.)

General Hayden, you may proceed.

GEN. HAYDEN: Thank you, Chairman Roberts, Senator Levin, members of the committee.

Let me first of all thank the members of my family who are here with me today -- my wife, Jeanine, and our daughter Margaret, my brother Harry and our nephew Tony. I want to thank them and the other members of the family yet again for agreeing to continue their sacrifices. And they know I can never repay them enough.

SEN. ROBERTS: General, if you would have them stand, why the committee would appreciate it.

GEN. HAYDEN: Sure. Go, guys.

SEN. ROBERTS: Thank you for being here.

GEN. HAYDEN: And Mr. Chairman, if it's not too much, can I also thank the people of the last agency I headed, the National Security Agency. NSA support while I was there and in the years since has been very much appreciated by me. And I also deeply appreciate the care and the patriotism and the rule of law that continues to govern the actions of the people at the National Security Agency.

Mr. Chairman, it's a privilege to be nominated by the president to serve as the director of the Central Intelligence Agency. It's a great responsibility. There's probably no agency more important in preserving our security and our values as a nation than the CIA. I'm honored and, frankly, more than a little bit humbled to be nominated for this office, especially in light of the many distinguished Americans who have served there before me.

Before I talk about my vision for CIA, I would like to say a few words about the agency's most recent director, Porter Goss. Over the span of more than 40 years, Porter Goss has had a distinguished career serving the American people, most recently as director of the CIA, the organization where he started as a young case officer. As director, Porter fostered a transformation that the agency must continue in the coming years. He started a significant expansion of the ranks of case officers and analysts, in accord with the president's direction. He consistently pushed for a more aggressive and risk-taking attitude towards collection. And he spoke from experience as a case officer and as a long-time member and then chairman of the House Permanent Select Committee on Intelligence.

It was Porter who, as chairman of the HPSCI, supported and mentored me when I arrived back in Washington as director of NSA in 1999.

More importantly, we developed a friendship that continues to this day.

So I just want to thank Porter for both his service and his friendship.

The CIA is unique among our nation's intelligence agencies. It's the organization that collects our top intelligence from human

sources, where high quality, all-source analysis is developed, where cutting-edge research and development for the nation's security is carried out. And as this committee well knows, these functions are absolutely critical to keeping America safe and strong. The Central Intelligence Agency remains, as Porter Goss has said, the "gold standard" for many key functions of American intelligence. And that's why I believe the success or failure of this agency will largely define the success or failure of the entire American intelligence community.

The act you passed last year, the Intelligence Reform and Terrorism Prevention Act gives CIA the opportunity and the responsibility to lead in ensuring the success of the director of National Intelligence. Let me elaborate on that last sentence. The reforms of the last two years have, in many ways, made CIA's role even more important. Now it's true the Director of Central Intelligence, the DCI, no longer sits on the 7th floor of the old headquarters building at Langley, both the head of the intelligence community and CIA. But it's also true that no other agency has the "connective tissue" to the other parts of the intelligence community that CIA has.

CIA's role as the community leader in human intelligence, as an enabler for technical access, in all-source analysis, in elements of research and development -- not to mention its worldwide infrastructure -- underscore the interdependence between CIA and the rest of the community. And although the head of the CIA no longer manages the entire intelligence community, the director continues to lead the community in many key respects.

Most notably, the director of CIA is the National HUMINT Manager, responsible for leading human intelligence efforts by coordinating and setting standards across the entire community. In addition, the agency is and will remain the principal provider of analysis to the president and his senior advisers. It also leads the community's open source activities through its Open Source Center, which is an invaluable effort to informs community analysis and help guide the activities of the rest of the IC. In a word, CIA remains -- even after the Intelligence Reform Act -- "central" to American intelligence.

But this very centrality makes reforming CIA, in light of new challenges and new structures, an especially delicate and important task. The agency must be transformed without slowing the high tempo under which it already operates to counter today's threats.

CIA must continue to adapt to new intelligence targets, a process under way in large part to the leadership of George Tenet and, John McLaughlin and Porter Goss; and CIA must carefully adjust its operations, analysis, and overall focus in relation to the rest of the community because of the new structure, while still keeping its eye on the ball -- intelligence targets like proliferation, and Iran, and North Korea, not to mention the primary focus of disrupting al Qaeda and other terrorists.

The key to success for both the community -- the intelligence community -- and for CIA is an agency that is capable of executing its assigned tasks and cooperative with the rest of the intelligence community. CIA must pursue its objectives relentlessly and effectively while also fitting in seamlessly with an integrated American intelligence community. Picture CIA's role in the community like a top player on a football team -- critical, but part of an integrated whole that must function together if the team is going to win. And as I've said elsewhere, even top players need to focus on the scoreboard, not on their individual achievements.

Now, Mr. Chairman, let me be more specific about the vision I would have for CIA, if I am confirmed.

First, I will begin with the collection of human intelligence. If confirmed as director, I'd reaffirm CIA's proud culture of risk-taking and excellence, particularly through the increased use of non- traditional operational platforms, a greater focus on the development of language skills, and the inculcation of what I'll call for shorthand an expeditionary mentality. We need our weight on our front foot, not on our back foot. We need to be field-centric, not headquarters-centric.

Now, I strongly believe that the men and women of CIA already want to take risks to collect the intelligence we need to keep America safe. I view it as the director's job to ensure that those operators have the right incentives, the right support, the right top cover, and the right leadership to take those risks. My job, frankly, is to set the conditions for success.

Now, if confirmed, I'd also focus significant attention on my responsibilities as national HUMINT manager. Now, I've got some experience in this type of role. As director of NSA I was the national SIGINT manager, the national manager for signals intelligence.

And in that role, I often partnered with CIA to enable sensitive collection.

Now, as I did with SIGINT, signals intelligence, as director of NSA, I would use this important new authority, the national HUMINT manager, to enhance the standards of tradecraft in human intelligence collection across the community. The CIA's skills in human intelligence collection makes it especially well-suited to lead. As director and as national HUMINT manager, I'd expect more from our human intelligence partners, those in the Department of Defense and at the FBI and other agencies -- more both in terms of their cooperation with one another and also in terms of the quality of their tradecraft. Here again, we welcome additional players on the field, but they must work together as a team.

Now second, and on par with human intelligence collection, the CIA must remain the U.S. government's "center of excellence" for independent all-source analysis. If confirmed as director, I would set as a top priority working to reinforce the DI's -- the director of Intelligence's -- tradition of autonomy and objectivity, with a particular focus on developing hard-edged assessments. I would emphasize simply getting it right more often, but with a tolerance for ambiguity and dissent manifested in a real clarity about our judgments, especially clarity in our confidence in our judgments. We must be transparent in what we know, what we assess to be true and, frankly, what we just don't know.

"Red cell" alternative analysis, "red cell" alternative evaluations are a rich source of thought-provoking estimates, and they should be a part, an integral part, of our analysis.

And -- and I believe this to be very important -- we must also set aside talent and energy to look at the long view and not just be chasing our version of the current news cycle.

Now, in this regard, about analysis, I take very seriously the lessons from your joint inquiry with the House Intel Committee, your inquiry into the prewar intelligence on Iraq WMD, the 9/11 commission, the Silberman-Robb commission, as well as a whole bunch of internal intelligence community studies on what's worked and what's not worked in the past.

Ultimately, we have to get analysis right, for, in the end, it's the analytic product that appears before the president, his senior advisers, military commanders and you.

Let me be very clear. Intelligence works at that nexus of policy-making, that nexus between the world as it is and the world we are working to create. Now, many things can legitimately shape a policymaker's work, his views and his actions.

Intelligence, however, must create the left- and right-hand boundaries that form the reality within which decisions must be made.

Let me make one final, critical point about analysis. When it comes to that phrase we've become very familiar with, "Speaking truth to power," I will indeed lead CIA analysts by example. I will -- as I expect every analyst will -- always give our nation's leaders our best analytic judgment.

Now third, beyond CIA's HUMINT and analytic activities, CIA's science and technology efforts already provide focused, flexible and high-quality R&D across the intel spectrum. If I'm confirmed, I'd focus the Directorate of Science and Technology on research and development programs aimed at enhancing CIA core functions -- collection and analysis. I'd also work to more tightly integrate CIA's S&T into broader community efforts to increase payoffs from cooperative and integrated research and development.

Support also matters. As director of NSA, I experienced firsthand the operational costs of outdated and crumbling infrastructure. Most specifically, I would dramatically upgrade the entire CIA information technology infrastructure to bring it into line with the expectations we should have in the first decade of the 21st century.

Now, in addition to those four areas, which I think the committee knows, Mr. Chairman, form the four major directorates out at the agency, there are two "cross cutting" functions on which I would also focus, if confirmed.

To begin, I'd focus significant attention, under the direction of Ambassador Negroponte, the DNI, on the handling of intelligence relationships with foreign partners. As this committee well knows, these relationships are of the utmost importance for our security, especially in the context of the fight against those terrorists who seek to do us harm. These sensitive relationships have to be handled with great care and attention, and I would, if confirmed, regard this responsibility as a top priority. International terrorism cannot be defeated

without international cooperation. And let me repeat that prevailing in the war on terror is and will remain CIA's primary objective.

For the same reason, I'd push for greater information sharing within the United States, among the intelligence community and with other federal, state, local and tribal entities. There are a lot of players out there on this one: the DNI, the program manager for the information sharing environment, the intel community's chief information officer, other agencies like FBI and the Department of Homeland Security.

CIA has an important role to play in ensuring that intelligence information is shared with those who need it. When I was at NSA, I focused my efforts to make sure that all of our customers had the information they needed to make good decisions. In fact, my mantra, when I was at Fort Meade, was that users should have access to information at the earliest possible moment and in the rawest possible form where value from its sharing could actually be obtained.

That's exactly the approach I would use, if confirmed, at the CIA.

In my view, both of these initiatives working with foreign partners and information-sharing within the U.S. require that we change our paradigm from one that operates on what I've called a transactional basis of exchange -- they ask, we provide -- in favor of a premise of common knowledge, commonly shared or information accessed. That would entail opening up more data and more databases to other intel community agencies as well as trusted foreign partners, restricting the use of what I think's an overused originator-controlled caveat, and fundamentally embracing more of a risk management approach to the sharing of information.

Finally, Mr. Chairman, everything I've said today matters little without the people, the great men and women of the CIA whom, if confirmed, I would happily join, but also the people of this great nation. Respectfully, senators, I believe that the American intelligence business has too much become the football in American political discourse. Over the past few years, the intelligence community and the CIA have taken an inordinate number of hits, some of them fair, many of them not. There have been failures, but there have also been many great successes. Now I promise you, we'll do our lessons learned studies, and I will keep you, I will keep this committee and your counterpart

in the House fully informed on what we learn. But I also believe it's time to move past what seems to me to be an endless picking apart of the archaeology of every past intelligence success or failure.

CIA officers dedicated their all to serving their country honorably and well deserve recognition of their efforts, and they also deserve not to have every action analyzed, second-guessed and criticized on the front pages of the morning paper. Accountability is one thing and a very valuable thing, and we will have it. But true accountability is not served by inaccurate, harmful or illegal public disclosures. I will draw a clear line between what we owe the American public by way of openness and what must remain secret in order for us to continue to do our job.

CIA needs to get out of the news as source or subject and focus on protecting the American people by acquiring secrets and providing high-quality all-source analysis. Internally, I would regard it as a leading part of my job to affirm and strengthen the excellence and pride and the commitment of CIA's workforce. And in return, I vow that, if confirmed, we at CIA will dedicate ourselves to strengthening the American public's confidence and trust in the CIA and re- establishing the agency's "social contract" with the American people, to whom we are ultimately accountable. The best way to strengthen the trust of the American people is to earn it by obeying the law and by showing what is best about this country.

Now, as we do our work, we're going to have difficult choices to make, and I expect that not everyone will agree 100 percent of the time, but I would redouble our efforts to act consistent with both the law and a broader sense of American ideals. And while the bulk of the agency's work must, in order to be effective, remain secret, fighting this "long war" on the terrorists who seek to do us harm requires that the American people and you, their elected representatives, know that the CIA is protecting them effective, and in a way consistent with the core values of our nation.

I did that at NSA, and if confirmed, will do that at the Central Intelligence Agency.

In that regard, I view it as particularly important that the director of CIA have an open and honest relationship with congressional committees such as yours, so that the American people will know that their elected representatives are

conducting oversight effectively. I would also look to the members of the committee who have been briefed and who have acknowledged the appropriateness of activities to say so when selected leaks, accusations, and inaccuracies distort the public's picture of legitimate intelligence activities. We owe this to the American people and we owe it to the men and women of CIA.

Mr. Chairman, I hope that I've given the members of the committee a sense of where I would lead the agency, if I am confirmed. I thank you for your time, and dare I say, I look forward to answering the questions I know the members have.

SEN. ROBERTS: I wish to inform the members that we have about two or three minutes left on a vote. We will have intermittent votes throughout the day. We are going to have a very short recess. I urge members to return as soon as possible, and we will then proceed to questions.

The committee stands in recess subject to call of the chair. (Sounds gavel.)

(Recess.)

SEN. ROBERTS: (Sounds gavel.) The committee will come to order.

The committee will now proceed to questions. Each member will be recognized in the order of their arrival. For the first round, each member will be granted 20 minutes. We will continue in open session as long as necessary.

Additionally, for the information of members and the nominee, we will endeavor to take a short lunch break at the appropriate time. In addition, we are not going to have any further recesses. We will endeavor to keep the committee running. And I know all members have questions to ask and time is of the essence.

General, do you agree to appear before the committee here or in other venues, when invited?

GEN. HAYDEN: Yes, sir.

SEN. ROBERTS: Do you agree to send Central Intelligence Agency officials to appear before the committee and designated staff, when invited?

GEN. HAYDEN: Absolutely, yes, sir.

SEN. ROBERTS: Do you agree to provide documents or any material requested by the committee in order for it to carry out its oversight and its legislative responsibilities?

GEN. HAYDEN: Yes, sir.

SEN. ROBERTS: Will you ensure that the Central Intelligence Agency provides such material to the committee, when requested?

GEN. HAYDEN: Yes, sir.

SEN. ROBERTS: General, there's an interesting commentary in your opening statement about the endless picking apart of the archaeology of past intelligence failures, and that CIA officers deserve not to have every action analyzed, second-guessed and criticized in the newspapers.

And I agree that it is time to look forward, not in the rear-view mirror. And I agree that the press it not the place to air these kind of grievances, whether those grievances originate from outside or inside the agency.

But it is important to be clear: not having your actions second-guessed is something that is earned, not deserved.

After the Iraq WMD failure, the inquiry that was conducted by this committee and approved with a 17-to-nothing vote, that proved without question we had an egregious intelligence failure, this committee simply cannot accept intelligence assessments at face value.

We have learned -- and when I say "we," I'm talking about every member of this committee -- when we have hearings and when we have briefings, we ask the analyst or we ask whoever is testifying, "What do you know? What don't you know? What is the difference?" And then the extra kicker is, "What do you think?" And we scrub it.

Now, I believe it is necessary for the committee to rigorously examine the CIA's judgments about Iran, about North Korea, about China, about terrorism and proliferation as we work together, to ensure that there is not another failure like the Iraq WMD failure.

General, the Iraq WMD failure wasn't a failure only because the ultimate assessments were wrong. We both know that you can have a good analytical tradecraft and still get it wrong. Nobody bats a thousand in the intelligence world, but the Iraq WMD failure was due in large part to a terribly flawed tradecraft.

General, as CIA director, what steps will you take to improve the agency's analytical tradecraft?

GEN. HAYDEN: Senator, that's -- as I said in my opening statement, that's up there on the top rung. I mean, ultimately, we're -- everything that CIA or any part of the intel community meets the rest of the world is in its analytic judgments. Collection and science and technology support are behind the screen with that analytic judgment. And so it is the pass-fail grade for CIA, for the DI, for the intelligence community.

We've already begun to do some things, and here, I think, my role would be to make sure these changes are under way and then to reinforce success.

Two or three quickly come to mind. One is something that you've already suggested, and that's almost -- that's vigorous transparency in what we know, what we assess and what we know we don't know, and to say that very, very clearly, so as not to give a policymaker or a military commander, any decision-maker false confidence.

The second, I think, is a higher tolerance for ambiguity between ourselves and between ourselves and our customers. Now, this is going to require the customer to have a little higher tolerance for ambiguity as well. He or she is just going to have to be a little less -- in a little less comfortable place when an analysis comes out that is truly transparent in terms of our confidence in -- different layers of confidence, levels of confidence in different parts of our judgment.

There's got to be a little more running room, too, for "he said, she said" inside the analysis; that dissenting views aren't, I guess, abstracted out of the piece, you know, where you just kind of move it to the next level of abstraction and underlying disagreements are hidden, and that dissenting views aren't hidden by a footnote or other kind of obfuscations.

We really have begun to do that. In my current job I get to see the briefing that goes forward every day, and there is a difference in its texture and a difference in its tenor. As I

said before, Senator, that's a pass-fail grade. Everything else is designed to support that final analytic judgment.

SEN. ROBERTS: Well, the CIA is clearly working, as you've indicated, to regain the trust of the policymakers and its customers. And I'm not trying to perjure the dedication and the hard work that our men and women of the CIA do, risking their lives on behalf of our country. The men and women in the field, I think, are doing an excellent job, the rank and file. The agency has made improvements, particularly in analysis. But the best way for the CIA to earn trust is to give analysts across the community the information they need to perform sound analysis and to encourage collectors to take any and all necessary risks so they can collect the needed information. And I believe these actions are also the best way to restore the CIA's sense of pride, a goal that both you and I and, obviously, the folks down at the CIA share.

General, in your assessment, is the CIA taking the risk necessary to get the analysts the intelligence they need to provide policymakers with sound analysis?

GEN. HAYDEN: Senator, that's one of the areas, as I suggested in my opening statement, that I really want to take a very close look at. And I don't know how to answer your question, is it doing enough. That's going to be some level of discovery learning for me. But let me tell you what it is I think I do know about this.

We had the same dilemma at NSA. There was always the risk that the more transparent you are, the more you may reveal and thereby compromise sources and methods. The same dynamic at Langley. At NSA it's a little easier, maybe, to start pushing against the shoulders of the envelope here and get a little more risk-embracing, because if NSA oversteps and got a little too bold in sharing, at the end of the day what they lose is a frequency. If CIA gets a little too bold in sharing, at the end of the day there could be real personal tragedy involved.

And so although the approaches will be similar, I do understand that the protection of human sources might be a bit different than the protection of signal intelligence sources.

All that said, Senator -- I mean, I think the agency itself would admit that it is among the more conservative elements of the community in terms of sharing information. There are good reasons for that, as I've just suggested. But just as we did at

NSA, when we held our premises up to the light, when we looked at things carefully, we found that we actually had a lot more freedom of action than perhaps our rogue procedures would suggest. That's the approach I'd take at the agency. It'll be careful, but we'll be moving forward.

SEN. ROBERTS: The comment I would make in response to the first question that I asked you is that it appeared to most of us on the committee, certainly to the chairman, that the 2002 National Intelligence Estimate became more or less of an assumption train, in part based on what was known after the first Gulf War. I believe that it was David Kay who indicated after the first Gulf War that Saddam Hussein was 18 months away of having a missile delivery capability that was nuclear, obviously within range of Israel. And everybody thought at that particular time and scratched their head because that estimate was not 18 months. It was much longer than that, and said, "Well, we're certainly not going to let that happen again." And so the assumption was, of course, we have to err on the side of national security and security of that region.

Now, having said that, most of the other intelligence agencies, if not all around the world, were on the same assumption train. The inspectors came in, and the inspectors were asked or forced to leave. Virtually everybody -- members of Congress, people in the administration, other intelligence agencies all throughout the world -- assumed that Saddam Hussein would reconstitute his weapons of mass destruction. I think he probably thought he had the weapons of mass destruction. Anybody that would go in to see him and tell him he didn't probably wouldn't go out. I think many in the military thought -- different generals -- this particular unit of the Republican Guard had the WMD, and thus did not.

But, as we saw upon closer inspection, as the committee worked through very diligently, interviewing over 250 analysts, we found out exactly what you said, that there were dissenting views, that there were caveats, and added together, it did provide a picture that was most troubling, and that's about the nicest way I can put it.

So what I'm asking you again -- and you've already answered this -- will you put those dissenting views, those caveats, that frank discussion of wait a minute, let's take a closer look, so that they are at least on the assumption train?

I don't know where they would be -- in the middle of the train, front of the train. You might want to put them at the front of the train, not the caboose. Don't let the caboose go. So we don't get into this kind of failure which we just simply could not afford.

Would you have any comment?

GEN. HAYDEN: Yes, sir. I couldn't agree with you more. And you're right about the analysis. We just took too much for granted. We didn't challenge our basic assumptions. Now, as you point out, there's historical reasons for that. In a sense, it's understandable. I'm not trying to excuse it, but there is an historical background to it. That should teach us an awful lot about taking assumptions for granted and letting them stand without challenge and without -- well, just simply looking and seeing, can I put these pieces together in a different way.

I think we're doing that. If we're not doing it enough, we'll certainly do more of it. That's precisely what it is we have to give to the nation's policymakers.

Senator, one more thought, though. You know, all of this is shrouded in ambiguity. If these were known facts, you wouldn't be coming to us for them. And so we'll do our best to tell you what we know and why we think it, and where we're doubtful and where we don't know. But I think everyone has to understand the limits of the art here, the limits of the science. Again, if this were all known, we wouldn't be having the discussion.

SEN. ROBERTS: I'm going to add one more question before I turn to Senator Bond. You made the comment in regards to information sharing -- Senator Rockefeller and I have been pushing a concept called information access; i.e., if you're into "information sharing," somebody owns it, then they make a decision as to whether to share it or not. Now, I'm not going back to the not so thrilling days of yesteryear where we looked at the intelligence community as basically a whole series of stovepipes with information, with one agency very difficult to share information with another. And we just afford that.

And I think we've made great steps, more especially with the National Counterterrorism Threat Center. But you've indicated some concern in regards to sources, methods, lives. Could you amplify a little bit on that, because we have been pushing information access, full access to the entire intelligence

community as we work together jointly now to protect America, as opposed to information sharing.?

GEN. HAYDEN: Yes, sir. That's what I was trying to suggest in my opening statement, that we really have -- and I mean this -- on a transaction level, they ask, we respond. Within the American intelligence community, we're world class. I mean, we really are good at that. And so when you go out and talk to someone about sharing, they can pull out these statistics about the number of requests and the speed of the response, and so on. And in a different world, that would probably be very satisfying news. But no matter how well you do that, that transactional basis, you're not going to get to the agility we need to fight the current war.

It can't be in an ask-respond mode. That simply will not work. So we have to move to a world in which there is common information commonly shared. Now that's a challenge because -- there are no foreign trade craft and sources and methods concerns, but I think the line we've got now is -- well, my premise is the line's too conservative, and that'll be my attitude if confirmed and if I got to the agency.

SEN. ROBERTS: I appreciate that very much. In the second round, I may touch upon that need for agility, i.e. hot pursuit, given the threats that we face today.

Senator Bond.

SEN. CHRISTOPHER BOND (R-MO): Thank you very much, Mr. Chairman, and welcome, General Hayden. There are many questions that should be asked of you about your views on where the CIA goes and your qualifications, but I think there's been enough discussion that perhaps we should clarify a few points based on your previously role with the president's terrorist surveillance program. So let's just get this on the record so everybody will understand.

Are you a lawyer?

GEN. HAYDEN: No, sir. (Laughs.)

SEN. BOND: Congratulations. Did your lawyers at the NSA tell you the program was legal? Do they still maintain it's legal?

GEN. HAYDEN: Yes, sir, they did, and they still do.

SEN. BOND: How about the Department of Justice lawyers, the White House, legal guidance? The program was legal?

GEN. HAYDEN: Yes, sir. All of that was consistent.

SEN. BOND: Did you ever personally believe the program was illegal?

GEN. HAYDEN: No, sir.

SEN. BOND: Did you believe that your primary responsibility as director of NSA was to execute a program that your NSA lawyers, the Justice Department lawyers and White House officials all told you it was legal and that you were ordered to carry it out by the president of the United States?

GEN. HAYDEN: Sir, when I had to make this personal decision in early October, 2001 -- and it was a personal decision -- the math was pretty straight forward. I could not not do this.

SEN. BOND: It seems to me that if there are questions that people wish to raise about the legality of the program or its structure, those would most appropriately be addressed to the attorney general or other representative of the legal staff of the executive branch.

The next question I think is very troubling because of so many aspersions, assertions, characterizations and mischaracterizations. You addressed at the National Press Club the fact that the president has said this is designed to listen in on terrorist programs coming from overseas; this is to intercept al Qaeda communications into or out of the United States.

Could you explain for us the controls that you have to make sure that somebody doesn't listen in on a domestic political opponent or listen in on a neighbor or listen in on a business rival or listen in on the media?

You've explained that. Could -- I think, for the record, could you tell how this program is controlled to make sure it stays with the boundaries that the president outlined, the Constitution and the statutes require?

GEN. HAYDEN: Yes, sir. And in fact the way you've framed it is the way I think about it. There are kind of three pillars that need to be in place for this to be appropriate.

One it is, it has to be inherently lawful. And as you suggested, others are far more expert than I.

The second is that it's done in a way that it's effective, and the third, that it's done just the way it's been authorized. And I think your question deals with that last pillar.

SEN. BOND: Right.

GEN. HAYDEN: What we did was have a very strict oversight regime. The phrase we use for the phenomenon you were describing is called "targeting." The targeting decisions are made by the people in the U.S. government most knowledgeable about al Qaeda, al Qaeda communications, al Qaeda's tactics, techniques, procedures. It's gotten close oversight. It has senior-level review. But it comes out of the expertise of the best folks in the National Security Agency. I don't make those decisions. The director of SIGINT out there doesn't make those decisions. Those decisions are made at the program level and at the level of our counterterrorism officer.

They're targeted on al Qaeda. There is a probable cause standard. Every targeting is documented. There is a literal target folder that explains the rationale and the answers to the questions on a very lengthy checklist as to why this particular number we believe to be associated with the enemy.

SEN. BOND: And these are reviewed by -- who reviews these? What's the review process?

GEN. HAYDEN: There have been several layers of review. There's obviously a management review just internal to the system.

SEN. BOND: Right.

GEN. HAYDEN: The NSA inspector general is well read into the program and does routine inspections -- I mean, literally pulling folders, examining the logic train, talking to the analyst to see if the decisions were correct, are warranted by the evidence in the folder.

That's also been conducted by the Department of Justice. They've done the same thing. They've looked at the folders. And to the best of my knowledge, the folks out there are batting a thousand. No one has said that there has been a targeting decision made that wasn't well- founded in a probable cause standard.

SEN. BOND: Is there a possibility that somebody could sneak in a request for something that isn't an al Qaeda communication?

GEN. HAYDEN: I don't know how that could survive in the culture of the National Security Agency, Senator. It's a very disciplined workforce.

SEN. BOND: What if an analyst or somebody who is engaged in -- directly engaged at the lowest level decided to pick up some information on somebody who was out of favor or didn't like. How would that be caught?

GEN. HAYDEN: Senator, actually -- I mean, I recognize the sensitivity of the program, what we're talking about here, but actually that would be a problem in any activity of the National Security Agency --

SEN. BOND: So this is --

GEN. HAYDEN: -- (inaudible) -- targeting.

SEN. BOND: This is not a program -- a problem that is specific to the president's program. Any time you have an NSA --

GEN. HAYDEN: Right. Any time you have the agency working --

SEN. BOND: -- you have the ability.

GEN. HAYDEN: Of course.

SEN. BOND: And the question is, what do you do to make sure that everybody stays within the guidelines?

GEN. HAYDEN: The entire agency, its general counsel, its IG, I mean, that's what it's built to do, to do that kind of oversight.

SEN. BOND: And what if they get out of line?

GEN. HAYDEN: Well, number one, no evidence whatsoever they've gotten out of line in this program. In the history of the agency there have been, you know, I'll say small number of examples like that. Those are detected through the normal processes -- IG inspections and so on -- and action is taken.

SEN. BOND: I was at the agency and I saw the extensive oversight. I also heard on early morning radio somebody who'd

been employed at NSA for 20 or 25 years call in and he was asked good questions by the morning show host. And I believe his reply was, when they asked him why he couldn't do that, he said because he didn't want to spend 10 to 15 years in prison.

GEN. HAYDEN: Sure.

SEN. BOND: Is this the kind of penalty that would ensue if somebody did that?

GEN. HAYDEN: Sir, I can remember the training I got there and continued throughout my six years at the agency. And this training is recurring. It must happen on a recurring basis for everyone there, and during the training, everyone is reminded these are criminal, not civil statutes.

SEN. BOND: So what would your response be to the general accusations that tens of millions of Americans are at risk from having -- from having their privacy exposed in these communications?

GEN. HAYDEN: Senator, the folks at NSA didn't need me to prod them on. But let me tell you what I told them when we launched the program. This is the morning of 6 October in our big conference room -- about 80, 90 folks in there -- and I was explaining what the president had authorized, and I end up by saying, "And we're going to do exactly what he said, and not one photon or one electron more." And I think that's what we've done.

SEN. BOND: You've mentioned briefly about the impact of leaks on this program and other classified programs. What has happened, in your view, to our intelligence capability as a result of the leaks and disclosure of our activities?

GEN. HAYDEN: Senator, it's difficult to quantify. I mean, there are so many variables that affect our ability to move against the enemy, but I can't give you a statistic. But I can't help but think that revelations like this have an effect on the enemy.

Now, this program will continue to be successful, all right? But there'll be an effect here. I mean, you can actually see this -- and now I'm speaking globally about disclosures of our tactics, techniques, procedures, sources and methods. It's almost Darwinian. The more we put out there, the more we're going to kill and capture dumb terrorists.

SEN. BOND: (Chuckles.) Because the smart ones will know how to avoid it?

GEN. HAYDEN: Yes, sir.

SEN. BOND: I think Porter Goss in this room in February said the damage to our intelligence capability has been very severe.

GEN. HAYDEN: Yes, sir.

SEN. BOND: And is that a fact?

GEN. HAYDEN: Oh, yes, sir. I mean, you're talking beyond NSA, beyond signals intelligence, the whole panoply. There is easily documented evidence as to that --

SEN. BOND: Going back to the NSA, I gather that there are some folks who really would like to see this program shut down. They may be phrasing it in various terms, but I suspect that there are some who say it ought to be shut down. What would happen to our ability to identify and disrupt a planned al Qaeda attack in the United States, were that to happen?

GEN. HAYDEN: Sir, we've -- my personal view and the reason I accepted this in October 2001 is my responsibility to help defend the nation. The folks who run this program, I think, believe and correctly believe -- they make a substantial contribution to the safety of the Republic. I went out to see them at the height of the first furball about this, and, you know, they're doing their jobs, but it was a difficult time. But the only emotion they expressed to me was they wanted to be able to continue to do their work. You know, their fear was not for themselves or that they had done anything wrong, but that they wanted to be able to continue to do what it is they had been doing.

Now, that's a better judgment than mine, all right? These are the folks who feel it, with that tactile sense for what they do and what they affect.

SEN. BOND: All right. Let me move on to the things that really should be the focus of this.

HUMINT is obviously the chief responsibility of CIA.

You have been a SIGINT man for most of your career. What will be your priorities, how will you adjust to HUMINT, and what areas

are the greatest need in our human intelligence-gathering capacities?

GEN. HAYDEN: Sir, just one clarification for the record. I've actually been a HUMINTer. I was an attache behind the Iron Curtain for a couple of years during the Cold War, and that's kind of in the center of the lane for human intelligence.

SEN. BOND: All right.

GEN. HAYDEN: I actually have more HUMINT experience going to CIA than I had SIGINT experience before I arrived at -- before I arrived at NSA.

Now, with regard to looking forward, two games going on simultaneously, and both equally important. One is inside the agency, you know, dealing with CIA HUMINT, helping it become all that the nation needs it to be and, as I suggested earlier, more non- traditional cover, more non-traditional platforms, more risk-taking. And, Senator, I need to be honest, this would be reinforcing efforts already under way.

The other game is over here in the broader community. And I think it's singularly significant that Ambassador Negroponte made the director of CIA the national HUMINT manager. There are other folks out there on the field playing this game -- DOD, the FBI, other agencies -- and both of them are bulking up in terms of their capabilities. This is a real opportunity to do this really well on a scale we've not been able to do before. And so I think there's got to be an equal amount of effort in that community role as well.

SEN. BOND: Yesterday at the Defense appropriations hearing, Secretary Rumsfeld assured us that there's total complete working interoperability and cooperation between the Department of Defense and the CIA and other agencies in human intelligence. Has that been achieved, or is that a work in process, a goal towards which we are working? And what do you think really about the relationships between the FBI, NSA, Department of Defense in the clandestine service?

GEN. HAYDEN: Yes, sir. I think -- I think it's best described as a process that needs to be continually managed. You've got folks out there, quite legitimately, but for slightly different purposes, they should be using common tradecraft, they should be using common standards, they should be using the same standards to validate a source, they should be using the same language in

the same format when they make reports. Those are the things that the national HUMINT manager should ensure.

I know there's been a great deal of comment and concern about recent DOD activity and how it might bump into traditional CIA activity. I can tell you, in preparation for this, I've asked that question for the folks who were trying to get me ready for the hearing. Frankly, I got a better news story than I had anticipated.

SEN. BOND: We're most -- this committee is most interested in that, so please tell us, what's the story?

GEN. HAYDEN: Yes, sir. They talked about the MOU that had been signed between DOD and the CIA in terms of how to coordinate and deconflict HUMINT activity is actually working. When there have been frictions, it's come about more out of inexperience than malice. And that we need to continue to move along those lines.

I know it's an important question for the committee, important question for --

SEN. BOND: We'll pursue that later on this afternoon.

GEN. HAYDEN: Yes, sir.

SEN. BOND: But can you, in unclassified discussion, what's the -- the military's desire to expand human intelligence and get into areas of covert action, what -- to the extent you can discuss it here, what is the proper responsibility between the Department of Defense human intelligence operations and Central Intelligence Agency human intelligence operations?

GEN. HAYDEN: Yes, sir.

SEN. BOND: Is there -- is there a bright line or --

GEN. HAYDEN: Actually, I think that's what it is we're trying to do, is to create a bright line.

And I think maybe the reality is that what DOD is doing under Title 10 authorities and what CIA does under Title 50 -- actually, where that line should be drawn, they get kind of merged, so that the actions are actually on the ground, in reality, indistinguishable, even though their sources of tasking and sources of authority come from different places. All right.

That's where we need to manage this. That's where this needs to be done well.

Let me explain this in -- more in terms of opportunity than of danger, even though, you know, clearly we've got to do this right. I think it's -- a fair case can be made that in several theaters of war right now -- Iraq, Afghanistan -- that the CIA has picked up a large burden and done it very well -- a burden that is many times in direct support of U.S. military forces. To have DOD step up to those kinds of responsibilities doesn't seem to me to be a bad thing. And if that frees up CIA activity to go back towards the more traditional CIA realm of strategic intelligence, there's a happy marriage to be made here, Senator.

SEN. BOND: I recently read a book on the CIA's role -- a novel or a book on the CIA's role in Afghanistan. And according to the former CIA man who wrote it, the CIA was the one who did it and did all the important things, and the Department of Defense did not step up at the appropriate time. Have you had an opportunity to review the general operations of the CIA in Afghanistan and the interaction with the Department of Defense there?

GEN. HAYDEN: No, sir, I've not looked at it in detail.

SEN. BOND: All right. We'll talk about that later.

Probably the final question -- there was some objection within the agency to the DNI sending two dozen CT analysts to the National Counterterrorism Center as part of the lanes in the road. Do you think that the objections from within the agency were justified? And to what extent should the NCTC be engaged in the all-source terrorism analysis? To what extent should the CIA do the same?

GEN. HAYDEN: Sir, it's a complicated question. But truth in lending -- obviously I agree with it, because that's what I was trying to do in my current job as Ambassador Negroponte's deputy.

This is actually what I was trying to refer to in my opening remarks when I talked about, you know, conforming the shape of the CIA to meet the new intelligence structure, which you have all legislated, while still sustaining high ops tempo current CIA operations. I mean, that's that dilemma right there.

Briefly -- and perhaps in a later round or this afternoon, Senator, we can get into more detail -- here's what I see the

challenge is. All right. Right now, and in a really good, in a really powerful sense, a lot of the engines of American intelligence are attached to today's very successful operational activities; and that the fact that the Director Goss and the president and others can say that some significant percentage -- and it's a big number -- of that organization that attacked us in 2001 has been killed or captured is a product of all of that focus.

But this is a long war, and it's not just going to be won with heat, blast and fragmentation. It is fundamentally a war of ideas. And we have to skew our intelligence to support the other elements of national power as well. That's the tough decision -- how best to allocate our resources and then apportion it organizationally, so you keep up this high ops tempo that has al Qaeda on its back foot right now, while still underpinning all the other efforts of the U.S. government that over the long term -- over the long term -- cuts the production rate of those who want to kill us and those who hate us, rather than simply dealing with those who already have that view.

SEN. BOND: Thank you very much, General.

SEN. ROBERTS: Senator Levin.

SEN. LEVIN: Thank you, Mr. Chairman.

General, in an answer to one of the pre-hearing questions of the committee, you indicated that your role in developing the NSA's program that we've discussed here was to explain what was technically possible in a surveillance program. And my question is this: After you explain presumably to the administration what was technically possible, did you design the specific program or was the specific program designed elsewhere and delivered to you?

GEN. HAYDEN: Senator, it's going to take a minute to explain, but I think you'd want a complete answer on this. Let me give you the narrative as to what was happening at that time.

As I briefed the committee in closed session, I took certain actions right after the attack within my authority as director, and I informed Director Tenet, I informed this committee, and I informed the House committee as well. And after discussion with the administration, Director Tenet came back to me and said, is there anything more you can do? And I said, not within my current authorities, and he invited me to come down and talk to

the administration about what more could be done and the three ovals of the Venn Diagram, as I described it, were what was technologically possible, what was operationally relevant, and what would be lawful. And what -- where we would work would be in that space where all three of those ovals intersected.

As I said to Senator Bond, my role is here's technologically possible, and if we can pull that off, here's where I think the operational relevance would be. And there was -- there then followed a discussion as to why or how we could make that possible. I was issued an order on the 4th of October that laid out the underpinnings for what I described --

SEN. LEVIN: So you participated in the design of the specific program?

GEN. HAYDEN: Yes, I think that's fair, Senator, yeah. I think that's right.

SEN. LEVIN: Now, if press reports are true, that phone calls of tens of millions of Americans, who are not suspected of anything, but nonetheless, those records are maintained in a government database, would you not agree that if that press report is accurate, that there's at least a privacy concern there, whether or not one concludes that security interests outweigh the privacy concerns.

GEN. HAYDEN: Well, Senator, I mean, from the very beginning, we knew that this was a serious issue, and that the steps we were taking, although convinced of their lawfulness, we were taking them in a regime that was different from the regime that existed on 10th September. I actually told the workforce not for the special program but the NSA workforce, on the 13th of September.

I gave an address to an empty room, but we beamed it throughout our entire enterprise, about free peoples always having to decide the balance of security and their liberties, and that we through our tradition have always planted our banner way down here on the end of the spectrum toward security. And then I told the workforce -- and this has actually been quoted elsewhere -- I told the workforce there are going to be a lot of pressures to push that banner down toward security, and our job at NSA was to keep America free by making Americans feel safe again. So this balance between security and liberty was foremost in our mind.

SEN. LEVIN: Does that mean your answer to my question is yes?

GEN. HAYDEN: Senator, I understand there are privacy concerns involved in all of this. There's privacy concerns involved in the routine activities of NSA.

SEN. LEVIN: But would you say there are privacy concerns involved in this program?

GEN. HAYDEN: I could certainly understand why someone would be concerned about this.

SEN. LEVIN: But that's not my question, General. It's a direct question.

GEN. HAYDEN: Sure.

SEN. LEVIN: In your judgment, are there privacy --

GEN. HAYDEN: You want me to say yes --

SEN. LEVIN: No, I want you to say whatever you believe.

GEN. HAYDEN: Yes, sir, and here's what I believe. Clearly, the privacy of American citizens is a concern constantly. And it's a concern in this program, it's a concern in everything we've done.

SEN. LEVIN: All right. That's a little different from the Press Club statement, where basically you said the only privacy concern is involved in international phone calls.

GEN. HAYDEN: No, sir, I don't think it's different. I was very clear in what I said there. I was very careful with my language. I mean --

SEN. LEVIN: Is that the only privacy concern in this program, international phone calls?

GEN. HAYDEN: Senator, I don't know how to answer your question. I've just answered that there are privacy concerns with everything that we do, of course. We always balance privacy and security, and we do it within the law.

SEN. LEVIN: The only privacy concern, though, in this program, relate to international phone calls?

GEN. HAYDEN: Senator, what I was talking about in January at the Press Club was what -- the program that the president had confirmed. It was the program --

SEN. LEVIN: That he had confirmed publicly?

GEN. HAYDEN: Yes, sir, that he'd confirmed publicly. And I said --

SEN. LEVIN: Is that the whole program?

GEN. HAYDEN: Senator, I'm not at liberty to talk about that in open session.

SEN. LEVIN: I'm not asking you what the program is. I'm just simply saying, is what the president described publicly the whole program?

GEN. HAYDEN: Senator, all I'm at liberty to say in this session is what I was talking about, and I literally explicitly said this at the Press Club, I'm talking about the program the president discussed in mid-December.

SEN. LEVIN: And you're not able to tell us whether what the president described is the whole program.

GEN. HAYDEN: No, sir, not in open session. I am delighted to go into great detail in closed session.

SEN. LEVIN: Thank you.

The NSA program that The New York Times in March -- on March 14th reported about, said that NSA lawyers, while you were the director of the agency, opposed the vice president's efforts to authorize the NSA to, quote, "intercept purely domestic telephone calls." Is that story accurate?

GEN. HAYDEN: I could recognize a thin vein of my experience inside the story, but I would not characterize how you described the Times' story as being accurate. And I can give you a few more notes on that, Senator.

SEN. LEVIN: But where there differences between the NSA --

GEN. HAYDEN: No.

SEN. LEVIN: -- and the Vice President's Office about what the desirable scope of this program was?

GEN. HAYDEN: No, sir. There were discussions about what we could do. Our intent all along in my discussions was to do what it is the program does as described -- one end of these calls always being foreign. And as we went forward, we attempted to make it very clear that that's all we were doing and that's all we were authorized to do.

SEN. LEVIN: All right. So there were no differences of opinion between your office and the -- between the NSA and the --

GEN. HAYDEN: There were -- there were no arguments, no push back, no "we want to"; no, "we won't.' None of that, no, sir.

SEN. LEVIN: Thank you, General.

What was the view of NSA lawyers on the argument that was made by the administration that the authorization for use of military force, which was passed by the Congress, authorized this program? Did your people agree with that?

GEN. HAYDEN: I'd ask you to ask them directly for their detail --

SEN. LEVIN: But you know whether they --

GEN. HAYDEN: No -- no, sir. I'll continue. There's more to be said. But when I talked to the NSA lawyers, most of my personal dialogue with them, they were very comfortable with the Article II arguments and the president's inherent authorities.

SEN. LEVIN: Does that mean that they were not comfortable with the argument that --

GEN. HAYDEN: I wouldn't say that. But when they came to me and we discussed its lawfulness, our discussion anchored itself on Article II.

SEN. LEVIN: And they made no comment about the authority which was argued by some coming from the authorization of military force?

GEN. HAYDEN: Not strongly one way or the other. It was Article II.

SEN. LEVIN: During the confirmation hearings of Porter Goss, I asked him whether or not he would correct the public statement of a policymaker if that public statement went beyond the intelligence. And here's what Mr. Goss said: "If I were confronted with that kind of a hypothetical, where I felt that a policymaker was getting beyond what the intelligence said, I think I would advise the person involved. I do believe that would be a case that would put me into action, if I were confirmed, yes, sir."

Do you agree with Porter Goss?

GEN. HAYDEN: Yes, sir, I think that's a pretty good statement.

SEN. LEVIN: Now, an independent review for the CIA, conducted by a panel led by Richard Kerr, former deputy director of the CIA, said the following -- this relates to the intelligence prior to the Iraq war -- "Requests for reporting and analysis of Iraq's links to al Qaeda were steady and heavy in the period leading up to the war, creating significant pressure on the intelligence community to find evidence that supported a connection."

Did you agree with Mr. Kerr?

GEN. HAYDEN: Sir, I -- as director, we did have a -- NSA, as director of NSA, we did have a series of inquiries about this potential connection between al Qaeda and the Iraqi government, yes, sir.

SEN. LEVIN: Now, prior to the war, the undersecretary of Defense for policy, Mr. Feith, established an intelligence analysis cell within his policy office at the Defense Department. While the intelligence community was consistently dubious about links between Iraq and al Qaeda, Mr. Feith produced an alternative analysis asserting that there was a strong connection.

Were you comfortable with Mr. Feith's office approach to intelligence analysis?

GEN. HAYDEN: No, sir, I wasn't. And I wasn't aware of a lot of the activity going on, you know, when it was contemporaneous with running up to the war. No, sir, I wasn't comfortable.

SEN. LEVIN: In our meeting in our SSCI office, you indicated -- well, what were you uncomfortable about? Let me --

GEN. HAYDEN: Well, there are a couple of things. And thank you for the opportunity to elaborate, because these aren't simple issues. As I tried to say in my statement, there are a lot of things that animate and inform a policymaker's judgment, and intelligence is one of them, and, you know, world view and -- there are a whole bunch of other things that are very legitimate. The role of intelligence -- I'd try to say it here by metaphor because it's the best way I can describe it -- though is you've got to draw the left- and the right- hand boundaries. It's -- the tether to your analysis can't be so long, so stretched that it gets out of those left- and right-hand boundaries.

Now, with regard to this particular case, it is possible, Senator, if you want to drill down on an issue and just get laser beam focus and exhaust every possible, every possible ounce of evidence, you can build up a pretty strong body of data, all right? But you have to know what you're doing. All right? I got three great kids, but if you tell me, "Go out and find all the bad things they've done, Hayden," I could build you a pretty good dossier and you'd think they were pretty bad people because that's what I was looking for and that's what I built up. That'd be very wrong, okay? That would be inaccurate. That would be misleading.

It's one thing to drill down -- and it's legitimate to drill down -- and that was a real big and real important question.

But at the end of the day when you draw your analysis, you have to recognize that you've really laser-beam focused on one particular data set, and you have to put that factor into the equation before you start drawing macro judgments.

SEN. LEVIN: You, in my office, discussed, I think, a very interesting approach, which is the difference between starting with a conclusion and trying to prove it and instead starting with digging into all the facts and seeing where they take you.

Would you just describe for us that difference, and why you feel, I think, that that related to the difference between what intelligence should be and what some people were doing, including at the FISA office.

GEN. HAYDEN: Yes, sir. And I actually think I prefaced that with both of these are legitimate forms are reasoning, that you've got -- and the product of, you know, 18 years of Catholic education -- I know a lot about deductive reasoning here.

There's an approach to the world in which you begin with first principles, and then you work your way down to specifics. And then there's an inductive approach to the world in which you start out there with all the data and work yourself up to general principles. They are both legitimate. But the only one I'm allowed to do is induction.

SEN. LEVIN: Allowed to do as an intelligence --

GEN. HAYDEN: As an intelligence officer is induction.

And so -- now, what happens when induction meets deduction, Senator? Well, that's my left- and right-hand boundaries metaphor.

SEN. LEVIN: Now, I believe that you actually placed a disclaimer on NSA reporting relative to any links between al Qaeda and Saddam Hussein. And it was apparently following the repeated inquiries from the FISA office. Would you just tell us what that disclaimer was?

GEN. HAYDEN: Yes, sir.

SIGINT neither confirms nor denies -- and let me stop at that point in the sentence so we can say safely on the side of unclassified. SIGINT neither confirms nor denies -- and then we finish the sentence based upon the question that was asked, and then we provided the data, sir.

SEN. LEVIN: Now, I think that you've commented on this before, and I may have missed it. And if so, you can just rely on your previous comment.

But there's been press reports that you had some disagreements with Secretary Rumsfeld and Undersecretary Cambone with respect to the reform legislation that we were looking at relating to DNI and other intelligence-related matters.

Can you tell us whether or not that is accurate, there were disagreements between you and the Defense secretary? Because some people say you're just going to be the instrument of the Defense secretary.

And if those reports are right, this would be an example where you disagreed with the Defense secretary, who -- after all, you wear a uniform and he is the secretary of Defense. Are those reports accurate?

GEN. HAYDEN: Sir, let me recharacterize them. The secretary and I did discuss this. I think it's what diplomats would call that frank and wide-ranging exchange of views. He treated me with respect.

A couple of footnotes just to put some texture to this. I then testified in closed session to the HPSCI on different aspects of the pending legislation. It was unclassified testimony even though the session was closed. DOD put my testimony on their website, NSA didn't. And so, you know, that to me was a pretty telling -- pretty telling step, that, you know, this was an open exchange of views.

It's been a little bit mischaracterized, too. I did not say move those big three-letter muscular agencies outside of DOD. My solution was something like the Founding Fathers', you know? Enumerated powers. You know, don't get bollixed around writing a theory of federalism, just write down what you want the federal government to do. My view was you needed to write down what authorities that DNI had over NSA, NGA and NRO. The fact that they stayed inside the Department of Defense was actually pretty uninteresting, as long as you had these enumerated powers that Ambassador Negroponte now has -- money, tasking, policy, personnel, classification.

SEN. LEVIN: Is it fair to say that on some of those issues there were differences between you and Secretary Rumsfeld?

GEN. HAYDEN: Yes, sir.

SEN. LEVIN: General, there's been a great deal of debate over the treatment of detainees. Do we have one set of rules now that governs the interrogation of detainees regardless of who is doing the interrogating and regardless of where the interrogations take place?

GEN. HAYDEN: Senator, I'll go into more detail on this this afternoon, but I do have some things I'd like to say in open session. Obviously, we're going to follow the law. We're going to respect all of America's international responsibilities.

In the Detainee Treatment Act, the language is quite clear. It talks about all prisoners of war under the control of the Department of Defense being handled in a way consistent with the Army Field Manual, and then a separate section of the law that requires all agencies of the U.S. government to handle detainees, wherever they may be located, in a way that is not

cruel, inhumane or degrading. And that's the formula that we will follow.

SEN. LEVIN: And the CIA is bound by that formula?

GEN. HAYDEN: All agencies of the U.S. government are bound by that formula, yes, sir.

SEN. LEVIN: And by definition --

GEN. HAYDEN: By definition --

SEN. LEVIN: -- the CIA is included in that.

GEN. HAYDEN: -- any agency. Yes, sir.

SEN. LEVIN: And so that means -- or let me ask you, rather than putting words in your mouth. Does that mean that the CIA and its personnel and contractors are required to comply at all times in all locations in the same manner as military personnel with the following laws -- or treaties: A, the Geneva Conventions?

GEN. HAYDEN: Senator, again let me refer you to the language in the Detainee Treatment Act, which actually does make a distinction between prisoners of war under the effective control of the Department of Defense and a second broader description that applies throughout the rest of the government about cruel, inhuman and degrading.

SEN. LEVIN: Are you unable, then, to answer that question?

GEN. HAYDEN: No, I'm not -- no, sir, I'm not.

SEN. LEVIN: Then what about the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment?

GEN. HAYDEN: Yes, sir. All parts, all agencies of the U.S. government will respect our international obligations.

SEN. LEVIN: Including that one?

GEN. HAYDEN: Sir.

SEN. LEVIN: The Detainee Treatment Act of 2005 you just described.

GEN. HAYDEN: Right. Yes, sir, absolutely consistent with that.

Sir, can I put a footnote on the previous one?

SEN. LEVIN: Sure.

GEN. HAYDEN: You know, obviously with the reservations that have been stipulated by the U.S. government in the ratification of that treaty.

SEN. LEVIN: Finally, the Army Field Manual on Intelligence Interrogation.

GEN. HAYDEN: The Army Field Manual, as the Detainee Treatment Act clearly points out, specifically applies to prisoners under the effective control of the Department of Defense.

SEN. LEVIN: And therefore you're -- the CIA you do not believe is bound by that language.

GEN. HAYDEN: Again, the legislation does not explicitly or implicitly, I believe, bind anyone beyond the Department of Defense, Senator.

SEN. LEVIN: I think my time is up. Thank you very much.

GEN. HAYDEN: Thank you, Senator.

SEN. ROBERTS: Senator DeWine.

SEN. MICHAEL DEWINE (R-OH): Mr. Chairman, thank you very much.

General, welcome.

GEN. HAYDEN: Thank you, sir.

SEN. DEWINE: Good to be with you today.

General, in 2002 the Senate and House issued a report on its joint inquiry into the intelligence community activities before and after the terrorist attacks of September 11th. In that report, I had additional comments to the report, and I raised several issues that I believe, frankly, are still valid today, and I'd like to spend some time talking about those comments. I want to ask you whether, as director of the CIA, you have plans to address them.

When I wrote in my additional comments, what I wrote in those comments and what I still believe to be true today is that we

are facing a broken corporate culture at the CIA. Too many of our clandestine officers work under official cover, which is of limited use today in getting close to organizations like al Qaeda.

The CIA's Directorate of Operations have struggled to transform itself after the Cold War, including taking better advantage of nonofficial cover or NOC operations. Often this is because the tradecraft required to support nonofficial cover operations is so much more difficult and elaborate than what is required for official cover.

To the extent that the Directorate of Operations is engaging in nonofficial cover operations, these have been damaged, in my opinion, by half-hearted operational security measures and underutilization by CIA's management. I believe that to truly advance our intelligence collection capabilities against the hard targets, like terrorist groups, proliferation networks and rogue states, we need to make smarter and better use of nonofficial cover capabilities. It may be that to do this, we need to put these kinds of operations simply outside of the Directorate of Operations.

General, you're a former director of NSA. You've spent now a year as DNA's principal deputy, and you are before us today to be confirmed as the next director of CIA. You certainly know the issues as well as any person does.

I'd like to ask you a few questions. First, do you agree that we could make still better use of nonofficial cover operations? Do you agree that we need to be more creative and risk-taking in how we construct and use nonofficial cover? And am I right to be concerned that nonofficial cover operations have not been given the resources and attention that they need to be given to truly be successful? Are you prepared to give a NOC operation to support and resources they need to truly succeed even if that means further separation and perhaps, perhaps general, even bring them in to a new agency separate from the mainstream of the Directorate of Operations.

GEN. HAYDEN: Senator, I remember your language in the 2002 report.

SEN. DEWINE: Well, I'm glad you do. Very few people do, but I appreciate you do.

GEN. HAYDEN: (Laughs.) Yes, sir.

On your first two questions, on the value of it and the need to invest more in it, absolutely yes on both accounts. I think the record will show that the agency's done that. I take your point, and that's a challenge to the agency. Clearly, there's not done that third step what you suggested, you essentially, I think, concluded that the culture of the agency was such that this baby will be strangled in the crib by the traditional way of doing business under embassy cover.

I got to go find that out because, clearly, we have not done what you suggested might be a course of action, which is a separate entity, a separate agency that -- but I think according to your language would actually draw in nonofficial cover folks from beyond the NSA or beyond the CIA into this new structure. That clearly has not been done.

Here's the dilemma: We've faced it; we've created the National Security Branch inside the FBI. It's the same question. Can you do something that new, that different inside the existing culture, or do you have to just make this clean break, which, I think you'd admit, would be disruptive, but are the facts such that you have to make that clean break. Clearly, the folks who preceded me there haven't made that decision yet.

Senator, I need to find out how well we're doing and come back and tell you.

SEN. DEWINE: General, I think you framed the issue perfectly, and I appreciate your response. We trust when you're in there you're going to make that decision one way or the other because that is the question, whether it can be done that way or it can be -- has to be done by breaking the mold and done an entirely different way, but it has to be done.

SEN. DEWINE: And we have to move --

GEN. HAYDEN: Yes, sir.

SEN. DEWINE: -- and we have to move quickly.

GEN. HAYDEN: Yes, sir. That's right.

SEN. DEWINE: And so, you know, you have to be the agent of change. You have to move, you have to break the culture one way or the other.

In that light, let me ask a question. A lot has been written in the press about your plans to have Steve Kappes serve as your deputy director at the CIA. Mr. Kappes by all accounts did a great job in the director of operations, but his successes there are really in the traditional mold. He was successful in working under official cover, running and managing traditional operations. He was successful as a member and a leader of the traditional corporate culture at the CIA.

What does it tell us that you're putting him in this position? And can he move this agency or help you move this agency into new areas?

GEN. HAYDEN: Yes, sir. I need to be careful here not to be presumptuous of my confirmation --

SEN. DEWINE: We understand, sir. We understand.

GEN. HAYDEN: And I know Ambassador Negroponte did mention Steve's name at a press opportunity a week or so ago.

I know Steve pretty well, have the highest regard for him. When I did the Rolodex check around the community about Steve, when I first became aware that I may be coming to this job -- which was not too long ago, Senator -- they were almost universally positive that this is a guy who knows the business.

I don't -- I don't know enough of Steve's personal history to refute some of your concerns. But let me offer a couple of additional thoughts, Senator.

SEN. DEWINE: And, you know, I'm very complimentary of him.

GEN. HAYDEN: Yeah, no. I know. I know.

SEN. DEWINE: I mean, you know, you just -- you look at someone's background and you say what have been his assets, and what were his strengths. And it doesn't mean he can't move in a new direction.

GEN. HAYDEN: Right. And let me tell you my thought process on that. I did this at NSA; at NSA I brought back a retiree -- Bill Black. And I brought Bill back as a change agent. Imagine the antibody, Senator, for somebody like me. I mean, the phrase -- I don't know what it is at CIA, but the phrase at NSA when describing the guy in the 8th floor office is "the current director." All right? (Chuckles.) You get a lot more authority

when the workforce doesn't think it's amateur hour on the top floor. You get a lot more authority when you've got somebody welded to your hip whom everybody unarguably respects as someone who knows the business. My sense is, with someone like Steve at my side, the ability to make hard turns is increased, not decreased.

SEN. DEWINE: I respect your answer.

Let me ask you another question in this regard before I move on. In your written statement you talk about expecting more from HUMINT collectors at DOD and the FBI. But I don't think I saw it in the written statement any mention about the CIA itself. I think you already answered this, but I want to make sure it's on the record. Do you also expect more from the director of operations?

GEN. HAYDEN: Absolutely. I actually parsed into two boxes in the statement, Senator. One is internal -- the CIA's got to actually get bigger and do more and do better. But there's also that other role where CIA -- the director of CIA has now been given responsibility for human intelligence across the government.

SEN. DEWINE: General, let's turn to the question about access of information. Another concern I wrote about in 2002, and which I still have concern about, is the need to improve information access for analysts throughout the entire intelligence community.

Information access -- that is, making sure that the analysts across the community get access to all that data that they are cleared to see. It's really been a major focus of the chairman, a major focus of this committee.

In 2002, in my comments, I wrote that we needed to look at ways to do this such as by using technology like multilevel security capabilities. I believe we need to develop systems that allow analysts to get to information quickly, easily and with the confidence that they are seeing everything that they are permitted to see. Technology should not be the obstacle to achieving this, and we have the technology today.

For example, the National Air and Space Intelligence Center in Dayton, Ohio, has developed on its own over the past few years a multilevel access system called SAVANT -- which is used by their allsource analysts, analysts who hold different levels of clearance -- to gain appropriate access to information of

various -- varying classification levels in different databases. NASIC developed their software with investments of a few million dollars. They developed their systems themselves, and they did this in a short period of time, so we know that this type technology is really feasible. We know that it can be done.

If you compare what NASIC has done to the situation at the National Counterterrorism Center, it's a little scary. Our chairman likes to point out that when he visits the National Counterterrorism Center, he sees sitting under the desk of each of the analysts an amazing collection of eight or nine different computers, each with different connections back to the 28 different networks our intelligence community maintains. The chairman calls this the baling wire approach to bringing together our intelligence data. To me, it's more like we have duct-taped our systems together. Surely, we can do better than this.

But the obstacle I think here is policy. Intelligence community policies continue to work against information access and protect more parochial interests of various agencies in the community, such as the CIA and NSA.

I saw that you talked about this issue in your written statement. I appreciate that. You wrote that you would strongly push for greater information sharing. I saw you cited some of your own work at NSA as proof of your commitment to this goal.

So let me ask you if you could talk for a moment in the time I have remaining about your commitment to information access. You're, of course, the former director of NSA. You're about to be the next director of CIA. These agencies, quite candidly, I don't believe, have a great record when it comes to implementing information access. I know you're doing better, but I think we have a ways to go. Talk to me a little bit about what NASIC has done, the SAVANT program -- where can the CIA go in this area? How can we change the thinking at the CIA? The technology, I think, is clearly there.

GEN. HAYDEN: Senator, you're right. It's not a question of technology. It's -- the impediments are by and large policy. And sure, you've got to make sure the technology works and you've got to hold it to a standard and it's got to perform at the standard. But fundamentally, these are questions of policy.

In the current post, with the DNI, we've actually taken some steps forward in this regard, and perhaps this afternoon I can

elaborate on that a bit as to some things we have done. But I can tell you in open session, you just have to will it. I mean, you're not going to get everyone saying, oh, yeah, this is good and it's okay. You're not going to get everyone to agree. In many ways you just have to make the decision and move forward. And we've done that on two or three things I'd really be happy to share with you this afternoon.

Now, I need to be careful. As I said earlier, you know, human intelligence sources are a bit more fragile -- I mean that literally -- than other kinds of sources, and that has to be respected. But as we did at NSA, I think that the way ahead is you hold all the premises up to the light. Senator, there was an instance in NSA when we were trying to go forward and do something, and someone said, "You can't do that, there are several polices against it." And it took me a while of getting those kinds of briefings to then say, "Whose policies?" And they were mine. They were under my control. So they were changeable. They weren't, you know, handed down to us from Mount Sinai.

SEN. DEWINE: General, I appreciate --

GEN. HAYDEN: (Inaudible) -- changes.

SEN. DEWINE: -- your answer. Just one final comment before I turn it back to the chairman.

This committee has spent a lot of time looking at what happened after September 11th. We've looked at a lot of problems and the challenges of the intelligence community. It seems to me one of the biggest challenges is to make sure that every consumer, every person who needs to know, every analyst who needs to know information gets that information in a timely manner. It's so simple to state, but it's so hard, many times, to implement. And, you know, your dedication to making sure that that happens and we change the culture, we drive through that culture -- the technology is there, and we just simply have, have to do it.

GEN. HAYDEN: Yes, sir.

SEN. DEWINE: And I appreciate it. Thank you very much.

Thanks, Mr. Chairman.

SEN. ROBERTS: Senator Wyden.

SEN. RON WYDEN (D-OR): Thank you, Mr. Chairman.

General, good morning --

GEN. HAYDEN: Good morning, Senator.

SEN. WYDEN: -- to you and your family. And Mrs. Hayden, you'll be interested to know your husband went into considerable detail about how much you two love to go to those Steelers games together, so I know y'all are very devoted to family. And we're glad you're here.

General, like millions of Americans, I deeply respect the men and women who wear the uniform of the United States. Every day our military risks life and limb to protect our freedom, demonstrating qualities -- like accepting personal responsibility -- that are America at its best. Here on the Senate Intelligence Committee, I've supported our national security at a time of war by voting to give you the tools needed to relentlessly fight the terrorists while maintaining vigilance over the rights of our citizens.

Those votes I've cast fund a number of top-secret programs that have to be kept under wraps because America cannot vanquish its enemies by telegraphing our punches.

Now, in return for keeping most of the vital work of this committee secret, federal law, the National Security Act of 1947, stipulates -- and I quote here -- you "keep the congressional Intelligence Committees fully and currently informed of all intelligence activities other than a covert action."

It is with regret that I conclude that you and the Bush administration have not done so. Despite yesterday's last-minute briefing, for years -- years, General -- you and the Bush administration have not kept the committee fully and currently informed of all appropriate intelligence activities. Until just yesterday, for example, for some time now, only two Democratic senators -- present this morning -- were allowed by the Bush administration to be briefed on all these matters that are all over our newspapers.

These failures, in my view, have put the American people in a difficult spot. Because the committee hasn't been kept informed, because of these revelations in the newspapers, now we have many of our citizens -- law-abiding, patriotic Americans who want to strike the balance between fighting terrorism and protecting liberty -- now they're questioning their government's words.

So let me turn to my questions.

GEN. HAYDEN: Sure.

SEN. WYDEN: In your opening statement, you said that under your leadership the CIA would act according to American values. So we're not talking about a law here, but we're talking about values.

For me, values are about following the law and doing what you say you're going to do. When it comes to values, credibility is at the top of my list.

Now, General, having evaluated your words, I now have a difficult time with your credibility. And let me be specific.

On the wiretapping program, in 2001 you were told by the president's lawyers that you had authority to listen to Americans' phone calls. But a year later, in 2002, you testified that you had no authority to listen to Americans' phone calls in the United States unless you had enough evidence for a warrant.

But you have since admitted you were wiretapping Americans.

Let me give you another example. After you admitted you were wiretapping Americans, you said on six separate occasions the program was limited to domestic-to-international calls. Now the press is reporting that the NSA has amassed this huge database that we've been discussing today, of domestic calls.

So, with all due respect, General, I can't tell now if you've simply said one thing and done another, or whether you have just parsed your words like a lawyer to intentionally mislead the public.

What's to say that if you're confirmed to head the CIA, we won't go through exactly this kind of drill with you over there?

GEN. HAYDEN: Well, Senator, you're going to have to make a judgment on my character. And let me talk a little bit about the incidents that you brought up.

The first one, I believe, is testimony in front of the combined HPSCI and SSCI, the joint inquiry commission on the attacks of 9/11. And in my prepared remarks, I was trying to be very careful because we were talking not in closed session in front of the whole committee, but in front of the whole committee in

totally open session. I believe -- and I haven't looked at those remarks for a couple of months now -- I believe I began them by saying that I had been forthcoming in closed sessions with the committee. Now, you may quibble that I've been forthcoming in closed sessions with some of my information with the leadership of the committee or with the entire committee. But that the language of the statute you referred to earlier does allow for limited briefings in certain circumstances. And I know they'll probably be questions on what are those legitimate circumstances.

If anyone in the U.S. government should be empathetic to the dilemma of someone in the position I was in, it should be members of this committee who have classified knowledge flitting around their left and right lobes every time they go out to make a public statement. You cannot avoid, in your responsibilities, talking about Iran or talking about Iraq or talking about terrorist surveillance. But you have classified knowledge. And your challenge and your responsibility is to give your audience at that moment the fullest, most complete, most honest rendition you can give them, knowing that you are prevented by law from telling them everything you know.

That's what I did when I was speaking in front of the National Press Club. I chose my words very carefully because I knew that some day I would be having this conversation. I chose my words very carefully because I wanted to be honest with the people I was addressing -- and it wasn't that handful of folks downtown, it was looking into the cameras and talking to the American people.

I bounded my remarks by the program that the president had described in his December radio address. It was the program that was being publicly discussed. And at key points, key points in my remarks, I pointedly and consciously downshifted the language I was using.

When I was talking about a drift net over Lackawanna or Freemont or other cities, I switched from the word "communications" to the much more specific and unarguably accurate conversation. And I went on in the speech and later in my question and answer period to say we do not use the content of communications to decide which communications we want to study the content of. In other words, when we look at the content of the communications, everything between "hello" and "good bye" we had already established a probable cause standard -- right to a probable cause standard that we had reason to believe that that

communication, one or both of those communicants were associated with al Qaeda.

Senator, I was as full and open as I possibly could be. In addition, my natural instincts, which I think all of you have seen, is to be as full and open as law and policy allow when I'm talking to you as well. Anyone who's gotten a briefing on the terrorist surveillance program from me, and up until yesterday, that was everybody who had ever gotten a briefing on a terrorist surveillance program, I would be shocked if they thought I was hiding anything. There was only one purpose in my briefing, and that was to make sure that everyone who is getting that briefing fully understood what NSA was doing.

Now, Senator, I know you and other members of the committee have concerns that we've gone from two to five to seven to the full committee. I understand that. I told you in my opening remarks what my instincts were in terms of briefing the full committee. There's a very crude airmen's metaphor that talks about if you want people with the craft, you got to put them on the manifest.

SEN. WYDEN: General --

GEN. HAYDEN: Let me just make one more remark. Okay? And so my personal commitment is to be as open as possible. I cannot commit, Senator, to resolving the inherent stresses between Article I and Article II of the Constitution that were intentionally put in there by the Founding Fathers.

SEN. WYDEN: General, I'm focused just on the public record, and I'm going to go out and try now to dissect what you have just said and compare it to those other statements.

GEN. HAYDEN: Yes, sir.

SEN. WYDEN: Let me give you a very quick example.

GEN. HAYDEN: Okay.

SEN. WYDEN: The Trailblazer Program. As you know, I'm committed to be careful about discussing this in public, sensitive information technology program.

GEN. HAYDEN: Right.

SEN. WYDEN: But, as you know, I asked you about this in open session when you were up to be deputy of DNI. I went back and

looked at the record, and you said, "Senator Wyden, we are overachieving on that program." Those were your words. I opened up the Newsweek Magazine this week and there are quoted again -- just out of a news report -- reports that there's a billion dollars worth of software laying around; people who have decades of experience saying -- I think there quote was -- "a complete and abject failure."

And so I ask you again, I'm concerned about a pattern where you say one thing in these open kind of hearings, and then I and others have got to get a good clipping service to try to figure out what independent people are saying and then to reconcile them.

So were you accurate when you came in an open session to say that the Trailblazer Program was overachieving?

GEN. HAYDEN: Senator, the open session you're referring to, was that last year during the confirmation?

SEN. WYDEN: Yes.

GEN. HAYDEN: Okay. Thank you.

Senator, I will promise you, I will go back and read my words. What my memory tells me I said was that a lot of the failure in the Trailblazer Program was in the fact we were trying to overachieve. We were throwing deep, and we should have been throwing short passes, if you want to use a metaphor; and that a lot of the failure was, we were trying to do too much all at once.

We should have been less grandiose, not gone for moon shots, and been tighter in, more specific, looking at concrete results closer in, rather than overachieving by reaching too far. My memory is, that's what I was describing.

I can't ever think of my saying we were overachieving in Trailblazer. That was a tough program, Senator.

SEN. WYDEN: Those were your words, General. And again, I question, using your words, open session, whether we have got, on that particular program, the level of forthcoming statements that is warranted. And to me, this is a pattern and something that has made me ask these questions about credibility.

Now, to move on to the next area, for 200 years our government has operated on the proposition that the people must have some sort of independent check on the government. Americans want to trust their leaders, but they also want checks and balances to ensure, in this area in particular, we fight terrorism and protect liberty. I think Ronald Reagan got it right. He said we've got to verify as well as trust.

Where is the independent check, General, the independent check that can be verified on these programs that the newspapers are reporting on?

GEN. HAYDEN: Yeah, the verification regime, as I said earlier, Senator, was very tight. And admittedly an awful lot of the hands-on verification was from close in. It was the general counsel at NSA. It was the inspector general at NSA --

SEN. WYDEN: Is that independent oversight when the general counsel at NSA is what passes judgment?

GEN. HAYDEN: Well --

SEN. WYDEN: All of these people here -- and most of us were kept completely in the dark until yesterday -- have election certificates, General.

GEN. HAYDEN: It was --

SEN. WYDEN: That, it seems to me, is at least some kind of independent force. And I'd like you to tell me what is the independent verification of these programs that is in the newspaper.

GEN. HAYDEN: Yes, sir. And beyond that, there was the over-the-shoulder performed over the NSA oversight regime by the Department of Justice.

Beyond that, within weeks of the program starting, we began a series of briefings to the senior leadership of the Senate Select Committee and the House Permanent Select Committee on Intelligence. I think the first briefing occurred within a couple of weeks of the launching of the program, and within two months of the launching of the program, we had our second briefing, so that the leadership of the committee understood what we were doing. And those briefings were as forthcoming as I could possibly make them.

And there were no restrictions. Let me make that very clear. I mean, no one was telling me what of the program I can share with the leadership of the committee. That was entirely within my control.

In fact, when we gave the briefings, the other people in the room saw the slides for the first time when the chairman and the senior member were seeing the slides for the first time.

And my only purpose, Senator, was to make sure that this second branch of government knew what it was we were doing.

I actually told the folks who were putting the briefing together for me to make it in-your-face. I don't want anyone coming out of this one, two or even five years later to say, "Oh, I got some sort of briefing, but I had no idea." And so I was, frankly, personally very aggressive in making sure this branch of government knew what we were doing.

SEN. WYDEN: General, what you're talking about, what you've described is essentially in-house verification, unilateral verification. You've talked about how NSA counsels give you advice, the Justice Department gives you advice. You say you told a handful of people on this committee.

The fact is, the 1947 law that says all of us are to know about non- covert activities wasn't complied with. And I don't think that's independent verification.

Now, in 2002, General, you said to the joint 9/11 inquiry -- and I'll quote here -- "We as a country readdressed the standards under which surveillances are conducted, the type of data NSA is permitted to collect and the rules under which NSA retains and disseminates information. You said, and I quote, "`We' need to get it right." You said, and I quote, "`We' have to find the right balance." Now, I've looked very hard, General, and respectfully, I can't locate any "we" that was involved in any of these efforts that you've suggested. Certainly there wasn't any "we" that worked together on the ground rules for the program that the USA Today says you set up.

So it seems to me whatever you and the administration have done with respect to these programs -- and as you know, I can't even talk about what I learned yesterday -- whatever was done, you did it unilaterally. And as far as I'm aware, we as a country weren't part of any effort to set the standards in these programs, and most of the members of this committee were kept in

the dark and weren't part of any informed debate about these programs.

So, General, who is the "we" that you have been citing?

GEN. HAYDEN: Senator, again, I briefed the leadership of this committee and the House committee. I briefed the chief judges -- chief judge of the relevant federal court.

The passage you're referring to I remember very -- very clearly. It was an exchange I had with Senator DeWine, and we were talking about the balance between security and liberty. And I probably got a little too feisty and said something on the lines of, "Senator, I don't need to be reminded how many Arabic linguists we need at NSA. I got that. What I really need is to understand and for you to help me to understand where the American people draw the line between liberty and security."

Senator, I believed that then, I believe it now. I used all the tools I had available to me to inform the other two branches of government exactly what NSA was doing. I believed in its lawfulness. And after these briefings, which I think numbered 13 up to the time that the New York times story came out in December, I never left the room thinking I had to do anything differently.

And I -- Senator --

SEN. WYDEN: General --

GEN. HAYDEN: These are hard issues. Senator Levin asked me, are there privacy concerns? I said of course there are privacy concerns. But I'm fairly -- I'm very comfortable with what the agency did and what I did personally to inform those people responsible for oversight.

SEN. WYDEN: I want to stick to the public record. A handful of senators were informed they weren't even allowed to talk to other senators. One of the senators who was informed raised questions about it. That doesn't strike me as a "we" inclusive discussion of where we're going in this country.

General, if we had not read about the warrantless wiretapping program in The New York Times last December, would 14 of the 16 members of this Senate Intelligence Committee ever heard about this program in a way consistent with national security?

GEN. HAYDEN: Senator, I simply have no way of answering that question. I don't know.

SEN. WYDEN: Let me ask you about a couple of other areas. I believe I have a few remaining moments.

SEN. ROBERTS: Actually, the senator is incorrect. His time has expired. But you certainly are free to pursue them in a second round.

I would like to make it very clear that I was briefed on all 13 occasions, along with the vice chairman and the leadership of the Congress. You might think we're not independent. I am independent. And I asked very tough questions, and they were answered to my satisfaction by the general and other members of the briefing team. Others did as well.

If you'll hold just for a moment.

(Pause.)

It is my recollection of the 13 briefings with the very independent leadership, in a bipartisan way, after asking tough questions, that nobody ever left the room that did not have an opportunity to ask further questions and to have the general follow up with an individual briefing, if they so desired. And indicated at that time that they were, if not comfortable, thought the program was legal, very impressed with the program, and thank the Lord that we had the program to prevent any further terrorist attack.

That precedent started with President Carter, President Reagan, President Bush, President Clinton, and the current president, based on two members of the Intelligence Committee and two members of the Intelligence Committee on the other side of the Hill, basically, and the leadership. That was held closely. There's always a tug and pull by statute and otherwise, according to the 1947 National Security Act in regards to the obligation of the executive to inform the legislative. The worry, of course, was in regard to if that briefing is expanded to a great many members, about the possibility of leaks. I personally do not believe in my own judgment that members leak that much, although I know when some leak happens, always staff is blamed.

But having said that, in this particular instance, I want to tell the senator from Oregon that I felt that I was acting

independently, asked tough questions, and they were answered to my satisfaction. I obviously cannot speak for the other members, but it is my recollection that that was the case.

We then move from 2 to 5, and then from 5 to 7, because of my belief that the more people that were read into the operations of the program, the more supportive they would be, for very obvious reasons. We have a program -- a capability, as I like to say it -- to stop terrorist attacks when terrorist attacks are being planned. I think that is so obvious that it hardly bears repeating. And now we have the full committee.

And so the independent check on what you are doing in regards to this capability is us. Now, it took a while for us to get here from here. But during those days under previous presidents we did not have this kind of threat, which is unique, very unique, and we did not have this capability. So things have changed -- rightly so. So now the full committee will be the independent check in regards to what you're doing.

Senator --

SEN. WYDEN: Mr. Chairman, since you have launched this extensive discussion, can I have about 30 seconds to respond?

SEN. ROBERTS: You have 30 seconds precisely.

SEN. WYDEN: I have enormous respect for you, as you know. I'm only concerned --

SEN. ROBERTS: Did all this happen because Pittsburgh beat Seattle in the Super Bowl, or what? (Laughter.)

SEN. WYDEN: I'm only concerned that the 1947 law that stipulates that the congressional intelligence committees be fully informed, as was done even back in the Cold War, be followed.

And, General, just so you'll know, on a little bit of humor. In my morning newspaper, a gentlemen named Abraham Wagner, who is a former National Security Council staffer, said -- and he issued a strong statement of support for you -- he said, our committee -- "They ought to smack him with a frying pan over the head and make sure he won't do it again" with respect to these limited briefings in terms of this committee and making sure we're following the 1947 law.

Thank you, Mr. Chairman.

SEN. ROBERTS: Well, the law also provides a limited briefing in regards to the judgment of the president in regards to national security matters, and obviously anything that would endanger sources and methods and lives.

I think we have exhausted this issue to the satisfaction of the committee -- or least I hope so.

Senator -- where are we here? Senator Feinstein.

SEN. DIANNE FEINSTEIN (D-CA): Thank you --

SEN. ROBERTS: I might add, if we have a vote, we're going to break for lunch, and then if we do not have a vote, it is my intent -- or I beg your pardon. Senator Snowe. That's the second time that I have made an error. Senator Snowe, I owe you my deepest apology. You were here before this hearing opened up. And so you are now recognized.

Senator Feinstein, I apologize to you. It was the chair's mistake.

Senator Snowe is recognized.

SEN. OLYMPIA SNOWE (R-ME): Thank you. Thank you, Mr. Chairman.

And I want to welcome you, General Hayden, to the committee, and congratulate you on your nomination as director of the CIA. And I also want to extend my appreciation to you for your more than 30 years of service to this country. You've certainly --

GEN. HAYDEN: Thank you.

SEN. SNOWE: Yes. You've certainly been a person of the highest integrity and you've had a distinguished career.

In thinking about all the issues that we're confronting today with respect to the agency that you've been nominated for, that you'll be leading an agency that has been, as you mentioned in your opening statement, plagued by problems at the very same time that our nation is confronting a great set of challenges. You'll be taking the reins at the CIA not only for a tumultuous time for this country, but also for the CIA itself. And your leadership is going to be so essential in reasserting the role of the agency in becoming a preeminent authority on intelligence gathering and analysis, and as the overall intelligence capability is solidified, as we did under the law.

Your confirmation comes at a time when we would be doing far more than just simply filling a position, because the CIA is now central not only to our national security, but ever more so in the post- September 11th environment in identifying shadowy and elusive threats. And so your leadership will require changing the status quo in order to avoid the intelligence failures of the past.

Also, as you mentioned in your opening statement about facing the multiple challenges -- not only in restructuring and re-establishing the agency's core missions, but also in restoring the morale, low morale among the dedicated CIA personnel, but also in synchronizing the gears of our nation's human intelligence collection capability. Moreover, the CIA is also facing not only the major internal reorganizations, but also facing territorial turf grabs from the Department of Defense in areas that has and continues to be congressionally mandated domain for the CIA.

And that concerns me -- the encroachment by the department -- because not only does it present potential conflicts, but it also is potentially going to divert resources from the CIA's ability to craft its overall strategic mission for developing the strategic intelligence that's so essential to anticipating and deterring the threats of the future.

So, General Hayden, I think it's going to be critical, as you look forward, to explain to this committee why -- how you intend to implement your reforms, what your vision is going to be, and particularly in grappling with the encroachments and the bureaucratic expansion by the Department of Defense, which obviously is going to be problematic. It already has.

In addition, I also would like to have you address some of the issues regarding the NSA and the wiretapping program and the phone data collection that was initiated and conducted during your tenure. It obviously has raised some fundamental concerns. I sought to serve on this committee because of my 10 years previously in serving in the House of Representatives as the ranking member of the subcommittee that oversaw terrorism, and I vigorously fought for anti-terrorism measures; in fact, got the first information-sharing measure passed following the first World Trade Center bombing in 1993.

I don't think anybody disputes the urgency of the ultimate goal of fighting terrorism. I think there is no dispute about it, and there is no contest on that very question.

I think the real issue is how we can best accomplish that goal and -- together within the constitutional framework of constitutional rights of privacy and freedom.

And this is the major challenge. As we heard the debate here earlier with the chairman and Senator Wyden, the goal cannot be accomplished without ensuring that we uphold the systems of checks and balances, to be absolutely sure that they're respected, upheld and applied.

The founding of our country was predicated on those principles. I happen to believe that with the programs in question that the Congress was really never really consulted or informed in a manner that we could truly perform our oversight role as co-equal branches of government, not to mention, I happen to believe, required by law.

And frankly, if it was good enough yesterday to be briefed as the Senate Intelligence Committee, as the full committee, and the House Intelligence Committee, then why wasn't it good enough to brief the full committees five years ago?

The essence of what we have in responsibilities is having a vigorous checks-and-balance system. And I know that you mentioned the Gang of Eight, but the Gang of Eight was not in the position to have staff, to hold hearings, to examine the issues. It was really a one- way briefing. There was nothing more that they could do with the information, other than objecting to each other or to the administration, to you, to the president, whatever. And I think that that, in and of itself, I think, undermines our ability to perform the roles that we're required to do.

In this time in the global war on terror, the executive and the legislative branches must work together if we're going to engender confidence. Otherwise, to -- really to ensure that the real checks and balances exist. To do otherwise, I think, breeds corrosive mistrust and distrust. It does not serve the interests of the people.

And so if there was a time about marshalling our forces across the branches of government and across the political aisle, it is now. And I think the time is to be able to work together on those issues that imperil our nation.

And so with that, I would like to ask you about the notification to the Gang of Eight, because this is central to the issues that

you will be facing if confirmed as the director of CIA, because you'll still have opportunities and decisions to be made within the agency and whom to brief --

GEN. HAYDEN: Right.

SEN. SNOWE: -- whether it's a limited group that is basically handcuffed in its ability to do and perform the checks and balances. It's not enough for the executive branch to brief among themselves, among all agencies. There has to be a give-and-take in this process. And that's, in essence, what it's all about.

And so the notification to a very limited group -- they could do nothing much with that information, essentially -- is not the kind of checks and balances that I think our Founding Fathers had in mind.

So I would like to ask you what was your disposition about the whole notification process at that point when this program was created and designed by you, as the director. Did you advocate to notify the full House and Senate committees? And what will be your disposition in the future, if confirmed as director, about notifying full committees or more limited groups with respect to these issues? Because there are other programs that obviously -- that you'll be in a position to determine who should be notified.

GEN. HAYDEN: Yes, ma'am. Really, really important questions and critical issues.

Without getting into what should be privileged communications, let me describe the view -- September, October 2001 -- as you recall, technologically feasible, operationally relevant, what would be lawful.

One of the contributions that I gave to the conversation was congressional notification. When we were discussing this, I literally said in our small group, "Look, I've got a workforce out there that remembers the mid-1970s." And forgive me for a poor sports metaphor here, but the line I used is, since about 1975, this agency's had a permanent one-ball, two-strike count against it, and we don't take many close pitches.

And so it was important to me that we brief the oversight bodies. I was delighted that the decision was made to do that almost before we got the program under way. I've forgotten the

specific dates, but the first briefing was in September -- I'm sorry, that's not right. It was in October of 2001, and the program didn't get under way until October 6. And we had a second briefing with the leadership of the HPSCI and SSCI before I think it was by the 2nd of November -- within about 30 days. So I was very, very pleased that that had been done.

Ma'am, I don't claim to be a constitutional lawyer, and I made quick reference to the inherent tensions between Article I and II. But again, it was very important for me that we briefed the leadership. If there was to be a dialogue beyond that as to who should be briefed and so on, my view certainly was I could be open to anyone after a decision was made to conduct that briefing. And I know many of you have seen these briefings, and I have -- and I will still stand by I have been very open.

SEN. SNOWE: I don't have any doubt about that. I think it's important that we don't utilize this as a common practice because it's my understanding about the Gang of 8 that it's generally rare extraordinary circumstances. Obviously, in the instances of covert operations --

GEN. HAYDEN: Right. Right. It is specifically applied by statute.

SEN. SNOWE: Yes. And I just think it's very important because I think it's unfortunate where we are today. You know, whether we're discussing legalities and, you know, and illegalities about the program, what it's all about, in essence, it undermines all of our authority, and you know, we have a collective wisdom and experience on the House and Senate Intelligence Committee of more than 150 years of experience. It seems to me that we could build upon, you know and enhance our capabilities in working together as legislative and executive branches to do what is -- all is in our interest and the indisputable ultimate goal of fighting terrorism.

I don't think that there's any question about that; it's how you best do it. We know the president has power, power that's exercised and the checks and balances that he utilized, and that's where we come in in performing vigorous oversight. It's not just a one-way street here, and I just want to encourage you because the days ahead are going to be challenging --

GEN. HAYDEN: Oh, yes.

SEN. SNOWE: -- and certainly with this agency and the reorganization. And I make that point because I think it's fundamentally important. There's so much that each member -- and in this branch of government, we're not adversaries, we're allies in the war on terror, and we should be able to make that work. We might have differences, but that's not the issue. It's the issue of how do we build a stronger platform from which to make sure America is safe, and that should be a bipartisan -- that should be both branches of government endeavor. And so I hope that we can accomplish that.

I would like to go on to the whole issue of DOD and CIA coordination because I think it's a fundamental issue, and I know there are many issues there.

GEN. HAYDEN: Right.

SEN. SNOWE: And I'd like to get your thoughts on how you're going to exhibit the kind of independent leadership with particularly the Department of Defense. Because as they further expand and encroach in areas and expanding their clandestine forces, paying informants, gathering deeper and deeper into human intelligence, I think that this is going to be a serious -- potentially contest if the CIA does not regain its ground and reclaim its lost territory.

Now, I know you have said that it's a blurring of functions. The Pentagon said well, we had to fill in the vacuum where the CIA could not.

I would like you to tell the committee, General Hayden, as to how you think you will go about exhibiting and demonstrating the kind of leadership that's going to be essential to regaining the core missions of the CIA.

GEN. HAYDEN: Yes, ma'am. And if I could, I'd like to put a few more details on my answer in the afternoon session, where I can make some increased distinctions. But I think I can discuss it at some length right now.

First of all, you know, you welcome more players on the team. That's good news. Now, the players have to play the team and they got to know how to play the sport. Those are the responsibilities of the national HUMINT manager. There's an MOU in place. The word I get from the current leadership at the CIA is it's working pretty well and the trend lines are positive. But that has to be -- as I told before, that's a process to be

nurtured, not a solution to be made and put on a shelf. That's got to be managed constantly over time.

Here's where the rub comes, ma'am. DOD, operating from Title X authorities, what the secretary will quite legitimately call inherent military activities -- and you'll see Dr. Cambone describing it that way, all right -- conducts activities that to the naked eye don't look any different than what a case officer in CIA would be doing under authorities that come out of Title 50 of the U.S. Code. And frankly, you probably shouldn't worry about that distinction, and certainly the environment in which we're working isn't going to make the distinction that, well, these are Title 10 guys and these are Title 50.

And so one thing we have to do is, number one, be witting to everything that is going on; deconflict everything that is going on; and when there is confliction, elevate it to the appropriate level almost immediately so that it's resolved. And then when the activity is known and deconflicted and coordinated, that the activity, no matter what its legal roots -- Title 10 or Title 50 -- is conducted according to standards, standards of tradecraft and standards of law.

I don't see that -- I don't see that responsibility falling on anyone except the national HUMINT manager. So whether it's being done by FBI, whether it's being done by combatant command, whether it's being done by the Defense HUMINT Service or by CIA, it's got to be done well and right.

SEN. SNOWE: Well, will that memorandum -- your memorandum of agreement between DOD on this question in outlining the issues, I mean is there going to be a clear delineation?

GEN. HAYDEN: The responsibilities are quite clear. It's -- as I suggested earlier, we run into trouble when people don't follow it. And more often than not, that's out of ignorance rather than malice. So there's still work to be done.

SEN. SNOWE: Well, I know you mentioned that it would be done on a step-by-step basis. And I'm concerned about the incrementalism of that --

GEN. HAYDEN: Sure.

SEN. SNOWE: -- as the DOD is very aggressive in filling the void or the vacuum in developing this, you know, parallel intelligence structure.

And --

GEN. HAYDEN: Yes, ma'am. There's an analog to that in SIGINT. There are signals intelligence activities inside the Army, inside the Navy, inside the Air Force. As director of NSA, I had responsibility that those were done legally and done well. I think there's a parallel here that, you know, we don't have to refuse the additional assistance, but that there's a role to be played so it's done lawfully and orderly and it's deconflicted.

SEN. SNOWE: Well, you were mentioning the undersecretary of Defense for intelligence, Dr. Cambone, and I understand the DOD issued a directive last fall regarding requiring the concurrence from Dr. Cambone before any personnel could be transferred.

GEN. HAYDEN: On -- between -- between --

SEN. SNOWE: Between the Department of Defense to any of the integration centers, for example, or any other joint efforts under the Office of the Director of National Intelligence.

GEN. HAYDEN: Yes, ma'am. Your staff's done good homework.

And our view at the Office of the Director of National Intelligence is that those people who are on NIP -- National Intelligence Program -- billets are effectively under the control of the Director of National Intelligence. And your legislation allowed the DNI to move, what, up to 100 billets in the first year of a new center. Now, we can do that with healthy regard to the DOD personnel system, but I think the ambassador intends to exercise his authorities.

SEN. SNOWE: You even acknowledged that there was discrepancies by saying there is genuine overlap regarding the authorization of personnel moves that will have to be resolved one step at a time.

Director Negroponte noted before Congress there's been an open conflict with the Pentagon over at least one issue, and that was personnel. He went on to raise the issue with Congress by subtly saying, I don't mean to invite help, but one area that the intelligence community is working on now is the area of personnel. I think what is even more disconcerting is that the director indicated and characterized the situation by saying, we look at those people as intelligence people, and Secretary Rumsfeld certainly looks at those as DOD folks.

So I find it troubling, at at time which the department is really moving very aggressively and pursuing a parallel track and a parallel operation when it comes to intelligence, and you describe it as a genuine overlap. How do you intend to resolve this overlap?

GEN. HAYDEN: Actually, ma'am, that wasn't the ambassador saying that; that was me. (Chuckles.)

SEN. SNOWE: That was you?

GEN. HAYDEN: Yes, ma'am. And as I said earlier when we talked about the law, rather than sitting in Philadelphia and articulating a theory of federalism, the folks just wrote down the powers they wanted a federal government to have. That's what you did for the DNI.

And so I think this is just -- just a question of exercising those powers. And I think the ambassador's view -- certainly my view -- is, you know, that -- that billets -- individuals funded in the National Intelligence Program are first and foremost under the DNI. For those things, you have given the DNI control.

SEN. SNOWE: Finally, in the New York Times recently there was an article that I think has captured the essence of my concerns, and others' as well, about how the CIA hasn't been able to develop the strategic intelligence -- and which is a crucial issue, because obviously we need to -- you now, and obviously you mentioned in your own remarks about having to be governed by, you know, the daily news and responding to those issues rather than having a chance to see the forest for the trees and looking at the big picture and anticipating the threats of the future.

I mean, that's what this is all about. And how do you intend to reposition the CIA in that respect? Because I think that that is a very essential and significant capability that must be vested within the CIA. We need to have it geared towards that goal.

GEN. HAYDEN: Yes, ma'am. And there are some pernicious influences out there right now. I mean, just the public news cycle, the CNN cycle, puts pressure on the community not to allow decision- makers to be surprised. We're in a war, and the opstempo of the war -- in Afghanistan, in Iraq, a global war on terrorism -- I mean, just sucks energy into doing something in the here and now. It will require a greater deal of discipline

to pull resources and psychic energy away from that and focus it on something that's important but not urgent.

And that's why I put that comment in my remarks. And it actually came into the draft late, after some folks had looked at it and said, "You need to make that commitment as well, that you need to pull some people off for the long view, for the deep view." Otherwise, we will appear to be successful but will be endlessly surprised.

SEN. ROBERTS: The senator's time has expired.

SEN. SNOWE: Thank you, General Hayden. Thank you, Mr. Chairman.

SEN. ROBERTS: Senator Feinstein.

And let me announce at this particular time that following Senator Feinstein's questions, we will break for lunch. We will resume the committee hearing at 1:30. That should give people approximately 40 minutes for lunch. And that the order will be Senator Hatch, Senator Warner, Senator Hagel, Senator Feingold, Senator Chambliss, Senator Mikulski, Senator Lott and Senator Bayh.

Senator Feinstein.

SEN. DIANNE FEINSTEIN (D-CA): Thank you very much, Mr. Chairman.

I'd just like to say at the onset that I very much agree with Senator Snowe's opening comments, and I'm very pleased that she made them.

I'd like to note that I drafted and proposed for inclusion in the intelligence authorization bill an amendment which would amend the National Security Act's requirements to increase reporting requirements to Congress. Staff from all our members have this proposal, and I intend to move it wherever I can to get it done. Essentially it would state that briefing the committee means all members of the committee, which is the current intent, we believe; and that in very rare cases where only certain members are briefed, all members get a summary, so at the very least, everyone can assess the legality and advisability of the action and carry out our oversight responsibility; and that an intelligence activity is not considered authorized until this briefing takes place.

So I'd like to ask you to take a look at that, if I might.

General, I was very impressed with your opening statement. I think you have the "vision thing," as they say, right. I think what you want to do for the agency is the correct thing to do. So that's all good.

I want to just ask you this one question about it. Would you make a commitment to this committee that all of the top officers of this agency will be intelligence professionals?

GEN. HAYDEN: Ma'am, obviously the answer is yes. I'm just parsing off the question to make sure I understand all the ramifications, because, frankly, at NSA, one of the things we did, and had some success, was to bring some folks in from the outside to do things that weren't inherently intelligence. But I understand --

SEN. FEINSTEIN: I think you understand what I'm saying.

GEN. HAYDEN: Yes, sir -- yes, ma'am. Yeah, within that confine, yes, ma'am.

SEN. FEINSTEIN: I appreciate -- I appreciate that commitment.

Now, I also believe that Americans want to be protected. I know there are no citizens in any major city that want to see another attack. And I happen to believe that there are people that want to do us grievous injury, if not kill us. So the only tool there really is to stop something is intelligence. And that's where I think the issues become very thorny. And in my questions, I want to try to sort a few of them out.

GEN. HAYDEN: Sure. Yes, ma'am.

SEN. FEINSTEIN: What was your role in the initiation of the program at issue, the terrorist surveillance program?

GEN. HAYDEN: Sure, ma'am. I had done some things, as I briefed the committee, told this committee, the House counterpart, told Director Tenet. I was asked by Direct Tenet, could you do more? I said not within current law. He says, well, what could you do more? And I put it together with, as I said, technologically possible, operationally relevant, now the question of lawfulness. So I described where we had stopped our expansion of activities because of the current legal structure under which we were operating.

SEN. FEINSTEIN: Did individuals in the White House push for a broader and further-reaching surveillance program, including purely domestic calls without warrant --

GEN. HAYDEN: No -- no, ma'am.

SEN. FEINSTEIN: -- as was reported in last Sunday's New York Times?

GEN. HAYDEN: Yeah -- yes, I understand. And I will give you just a touch more granularity in the closed session. But in open session, these were all discussions. Our views -- NSA views were highly regarded, and there was never an argument over that issue.

SEN. FEINSTEIN: Thank you.

What legal guidance did you seek and review before initiating the surveillance program? If this committee doesn't have copies -- and we don't -- of the legal opinions, may we receive them, please?

GEN. HAYDEN: Ma'am, I will take your question. I have not read the Justice legal opinion as well, but what I was assured by the signature of the attorney general on the first order and by the opinion of the White House Counsel and the judgments from the Office of Legal Counsel in Justice was that this was lawful and was within the president's authority. I then brought the question to NSA lawyers -- three guys whose judgment I trust; three guys who have advised me and who have told me not to do things in the past -- and laid out the questions. And they came back with a real comfort level that this was within the president's authority.

SEN. FEINSTEIN: Did they put anything writing?

GEN. HAYDEN: No, and I did not ask for it. I asked them just to look at the authorization, and then come back and tell me. But in our discussion -- I think Senator Levin asked this earlier -- in our discussion, although they didn't rule out other underpinnings for the president's authorization, they talked to me about Article II.

SEN. FEINSTEIN: Has the administration sought -- or NSA sought Title One warrants from the FISA court for the collection of telephone content? And has it sought Pen Register/Trap & Trace

device approval from the court for the collection of telephone records or transmittal information?

GEN. HAYDEN: Let me give you that answer in closed session. There's just a little -- just a slight discomfort, but I'll be happy to give it to you as soon as get to closed session.

SEN. FEINSTEIN: All right. I will ask it.

GEN. HAYDEN: Yes, ma'am.

SEN. FEINSTEIN: I think it's an important question.

It is my belief that FISA should remain the exclusive authority for all domestic surveillance in the United States. It needs some updating because of the particular situation we're in and the enormous increases in technology since 1978. As you know, I have asked NSA for suggested improvements, both by letter and in person, and I have not received a response. I'm in the process of drafting a bill, and I would appreciate a response on the technical improvements that can be made to FISA.

GEN. HAYDEN: Yes, ma'am. I understand, and I've discussed this with General Alexander. NSA has crafted some views and some language, have -- they have given that to the Department of Justice, because, I mean, in addition to the technology, there are issues of law involved here as well. And that dialogue is ongoing, but I have been assured that it is moving forward, and I will take the urgency of your message back, ma'am. I understand.

SEN. FEINSTEIN: Because, as you know, bills are being marked up in the Judiciary Committee.

GEN. HAYDEN: Yes, ma'am.

SEN. FEINSTEIN: And so there is a time element to this.

GEN. HAYDEN: Yes, ma'am, and I know there are multiple bills out there each trying to move this forward and craft that balance between liberty and security.

SEN. FEINSTEIN: Thank you.

I want to ask you some questions about the Fourth Amendment. I know I don't need to read it for you, but just for the record, let me quote it. "The right of the people to be secure in their

persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized," end quote.

Do you believe the Fourth Amendment contains a probable cause standard?

GEN. HAYDEN: It clearly contains a probable cause standard for warrants to conduct searches. There's the broader phraseology -- and I've actually talked to some of my relatives who are in law school at the moment about the construction of the amendment -- which talks in a broad sense about reasonableness, and then, after the comma, talks about the probable cause standards for warrants.

The approach we've taken at NSA is certainly not discounting at all, ma'am, the probable cause standard and need for probable cause for a warrant. But the standard that is most applicable to the operations of NSA is the standard of reasonableness, you know? Is this reasonable? And I can elaborate a little bit more in closed session.

But, for example -- for example -- if we have a technology, all right? -- that protects American privacy up to point X in the conduct of our normal foreign intelligence mission, it is reasonable, and therefore we are compelled, to use that technology, okay? When technology changes and we can actually protect privacy even more so with the new technology, "reasonable" just changed, and we must go to the better technology for the protection of privacy.

SEN. FEINSTEIN: Well --

GEN. HAYDEN: It's that "reasonableness" debate that informs our judgment.

SEN. FEINSTEIN: Let me ask you, that "reasonable" standard is your standard. It's not necessarily the law, because the Fourth Amendment very specifically states -- in Judiciary we had former FISA judges come before us. They said in effect in their court the probable cause standard was really a reasonable suspicion standard. Now you're creating a different standard, which is to --

GEN. HAYDEN: Well, no, I --

SEN. FEINSTEIN: -- as I understand it, just reasonableness.

GEN. HAYDEN: No, ma'am. And I don't -- I don't -- I don't mean to do that, and the lord knows I don't want to get too deeply into this because --

SEN. FEINSTEIN: Okay.

GEN. HAYDEN: -- I mean, there are serious questions of law with people far more expert than I. But to give an example, all right? Purely illustrative and hypothetical. NSA in the conduct of its foreign intelligence work, all right? -- in the conduct of its foreign intelligence work intercepts a communication from a known terrorist, let's say, in the Middle East, and the other end of that communication is in the United States. There -- one end of that communication involves a protected person, all right? Everything NSA is doing is legal up to that point. It is -- it is targeting the foreign end, it has a legitimate reason for targeting it, and so on, all right? But now, suddenly, we have bumped into the privacy rights of a protected person, okay? And no warrant is involved, okay? We -- we don't go to a court. But through procedures that have been approved by this committee, we must apply a standard to protecting the privacy of that individual.

And so, there are -- we -- we've touched the privacy of a protected person. But there are clear regulations held up to the reasonableness standard of the Fourth Amendment, but not the warrant requirement in the amendment, ma'am.

SEN. FEINSTEIN: Well, I'd like to debate that with you this afternoon, if I might.

GEN. HAYDEN: Sure. Sure.

SEN. FEINSTEIN: Let me move to detention, interrogation and rendition.

GEN. HAYDEN: Yes, ma'am.

SEN. FEINSTEIN: I'm very concerned that the practices, these practices create enormous long-term problems for our country.

They cast shadows on our morality, our dedication to human rights, and they disrupt our relations with key friends and allies.

The administration has stated that when it renders an individual to a third country for detention or interrogation, it obtains diplomatic assurances from that country that the suspect will not be tortured. What steps does the administration take to verify compliance with such assurances after a detainee is rendered or transferred?

GEN. HAYDEN: Yes, ma'am. We -- by law, we're required to make a judgment on the treatment that someone who is transferred to another sovereign power would get. And the legislative history of the law which we're following here, the requirement is -- is a judgement that torture is less rather than more likely in the case involved. Clearly, if we received evidence, indications and so on that that had happened, that would impose additional responsibility on us.

SEN. FEINSTEIN: Well, what United States government officials visit those sites to see if there is such evidence?

GEN. HAYDEN: Ma'am, I -- the true answer is I don't know, and I'd -- I'd be reluctant to try to speculate. I don't know.

SEN. FEINSTEIN: In an interview with Time magazine published on April 12th, Director of National Intelligence John Negroponte said that terrorist suspects held by the CIA in secret prisons are likely to remain incommunicado detention for "as long as the war on terror continues." End quote. As principal deputy to the DNI, is it your policy that individuals may be secretly detained for decades?

GEN. HAYDEN: Ma'am, I know there are -- there has been some broad discussion about this publicly. I know that Secretary Rice has -- has talked about our responsibilities under both U.S. and international law.

Let me give you a full answer, ma'am, and let me give it to you in the closed session. But I would really be happy to answer your question.

SEN. FEINSTEIN: Is there a periodic review of what useful and actionable intelligence can be gathered through interrogations and debriefings of terrorists that have been held with no contact with al Qaeda or other groups for years?

GEN. HAYDEN: Again, a more detailed response in closed session. And let me just hold it for closed, then, and I think I --

SEN. FEINSTEIN: You can't say whether there's a periodic review?

GEN. HAYDEN: Ma'am, obviously we would do things for a purpose, and therefore the intelligence value of any activity we undertake would be a very important factor.

Again, I don't -- I don't want to state or imply things that I should not in open session, so let me just hold it, and I will give you a very detailed answer in the closed session.

SEN. FEINSTEIN: On March 17th, 2005, Director Porter Goss stated to the Senate Armed Services Committee that waterboarding fell into, quote, "an area of what I will call professional interrogation techniques," end quote.

Do you agree with that assessment? Do you agree with Mr. Goss's statement that waterboarding may be acceptable? If not, what steps have been taken, or do you plan to take, to correct the impression that may have been left with agency employees by Mr. Goss's remarks?

GEN. HAYDEN: Yes, ma'am. Again, let me defer that to closed session, and I will be happy to discuss it in some detail.

SEN. FEINSTEIN: Okay. Do you believe that the CIA is legally bound by the federal anti-torture statute and the Detainee Treatment Act adopted last year?

GEN. HAYDEN: Yes, ma'am.

SEN. FEINSTEIN: Does the president's signing statement affect CIA's compliance with this law?

GEN. HAYDEN: Again, ma'am, I don't want to get between Article I and Article II and the inherent tensions between those. But let me answer the question as the potential director of the Central Intelligence Agency. The CIA will obey the laws of the United States and will respond to our treaty obligations.

SEN. FEINSTEIN: Has the agency received new guidance from the Department of Justice concerning acceptable interrogation techniques since the passage of the Detainee Treatment Act?

GEN. HAYDEN: Let me answer that in closed session, ma'am. But again, I'd be delighted to answer it for you.

SEN. FEINSTEIN: The New York Times reported on November 9th, 2005, that in 2004 the CIA inspector general concluded that certain interrogation practices approved after the September 11th attacks did constitute cruel, inhuman, and degrading treatment, as prohibited by the Convention Against Torture. Do you agree with the IG's conclusion? And what corrective measures, if any, have been instituted in response to the IG's findings?

GEN. HAYDEN: Ma'am, again, more detail in closed session. I would have to learn more about the IG's findings. In addition, again, the definitive statement as to what constitutes U.S. law and whether behavior comports or does not comport with U.S. law, I would look to the Department of Justice for guidance.

SEN. FEINSTEIN: Ambassador Negroponte and other intelligence officials have estimated that Iran is some years away from a nuclear weapons capability. How confident are you of these estimates?

GEN. HAYDEN: Again, I'd be happy to give additional detail in closed session. But I do want to say more about this one in open.

Iran is a difficult problem. We call it a hard target. But I think it unfair to compare what it is we believe we know about Iran with what it is we proved to know or not know about Iraq. We have got a great deal of intelligence focused on the target. I would say that that judgment was given somewhere between medium and high confidence, ma'am.

SEN. FEINSTEIN: Given the problems with estimates of Iraqi weapons of mass destruction, how can the American public be confident of the accuracy of estimates regarding Iranian plans and programs?

GEN. HAYDEN: Yes, ma'am, fair question. And, you know, we've got to earn confidence by our performance. We have to earn confidence by our performance. We've learned a lot of lessons on the Iraq WMD study -- many of the lessons you've documented for us.

One key one that I wanted to mention when the chairman was talking about it, the Iraq WMD estimate was essentially worked in a WMD channel. It was absent a regional or cultural context. We are not doing that now.

It was looked at almost square-cornered-wise, mathematically, ma'am, in terms of precursor chemicals or not, precursor equipment or not, absent, I think, a sufficient filter through Iraqi society and what we knew of it.

We're not doing that on Iran. Besides the technical intelligence, there's a much more complex and harder-to-develop field of intelligence that has to be applied as well: How are decisions made in that country Who are making those decisions? What are their real objectives?

SEN. FEINSTEIN: One of the questions answered in writing -- number eight, to be specific -- asked what you thought are the greatest threats to our national security. Your response essentially restated Ambassador Negroponte's testimony before this committee in February. I mean, I don't agree with the ambassador's statement, but do you have any independent or differing views on the threats we face?

GEN. HAYDEN: Well, one sense, your legislation made it very clear that the ambassador sets the priorities. And so, you know, on the face of it, I don't recoil that my priorities look a lot like his.

Five things come to mind. CT, number one, Counterterrorism. Counterproliferation. Iran, East Asia, Korea. And one that over-arches all of them: We can't be surprised again.

SEN. FEINSTEIN: Okay.

Now, let me go to an issue. Many members of Congress are concerned that you're --

SEN. ROBERTS: Senator, I hate to do this, but there is a vote underway. And you will have ample time on a second round, if we can do that.

SEN. FEINSTEIN: Do I have time remaining?

SEN. ROBERTS: Yeah. Can you -- well, no.

SEN. FEINSTEIN: Oh. Okay.

SEN. ROBERTS: But if you can wrap it up in 30 seconds or something like that, that would be helpful.

SEN. FEINSTEIN: Can I just do it quickly?

GEN. HAYDEN: Yes, ma'am.

SEN. FEINSTEIN: This is the uniform, the active-duty presence.

GEN. HAYDEN: Yeah, I understand.

SEN. FEINSTEIN: Have you thought about that? And would you share with us your decision?

GEN. HAYDEN: Sure, my current thinking. The concern that my being in uniform affects my thinking. My life affects my thinking. The fact that I have to decide what tie to put on in the morning doesn't change who I am. One.

Two, chain of command issues, non-existent. I'm not in the chain of command now; I won't be in the chain of command there. I'll respond to Ambassador John Negroponte.

Third, more important, how does my being an active-duty military officer affect my relationship with the CIA workforce? For want of a better term, since we're rushing here, ma'am, can I bond and can they bond with me? That's the one that I think is actually a serious consideration, if I find that this gets in the way of that, and I'll make the right decision.

SEN. FEINSTEIN: Thank you. Thank you very much, I appreciate it.

GEN. HAYDEN: Thank you.

SEN. WYDEN: Mr. Chairman, did you say 1:30?

SEN. ROBERTS: The committee will stand in recess subject to call of the chair, and we will resume the hearing at 1:30. There is a vote right now, and we will take that time for lunch. And so I would encourage all members to come back at 1:30.

GEN. HAYDEN: Thanks, Mr. Chairman.

END.

AFTERNOON SESSION:

SEN. ROBERTS: The committee will come to order.

The committee will proceed with members and their questions on a 20-minute time frame.

And the next senator to be recognized is Senator Hatch.

Senator Hatch.

SEN. ORRIN HATCH (R-UT): Well, General Hayden, there's been some commentary about the fact that you continue to wear the uniform that you have so proudly distinguished over your long I think 35-year career. Certainly you're not the first director of Central Intelligence to wear -- but let me just ask you directly, because I think this needs to be on the record.

Let's say that you've stepped out from your office for a moment and then you return; there are two messages for you. They're marked exactly the same time, these two messages. One is from Ambassador Negroponte, and the other one is from Secretary Rumsfeld. Whose call are you going to return first?

GEN. HAYDEN: Yes, sir, that's pretty straightforward.

SEN. HATCH: That's straightforward.

GEN. HAYDEN: Yes, sir. I work for the ambassador, and so I would return his call.

SEN. HATCH: That's right, you're going to report to Ambassador Negroponte.

GEN. HAYDEN: Yes, sir.

SEN. HATCH: Now let me add the chairman of the Intelligence Committee -- (laughter) --

GEN. HAYDEN: Yes sir, I would set up a conference call. (Laughter.)

SEN. HATCH: On a more serious question, what does your military experience bring to this position, you know, should you be confirmed?

GEN. HAYDEN: Yes, sir. I mean, as you said, I'm proud of my military experience. Actually it's been fairly broad, but if you stop and do the math, there's a big chunk of time -- I actually stopped and did this over the weekend -- more than 20 years in intelligence. And if you look at the career in another way, there's an awful lot of it with an interface to the civilian world -- four years as an ROTC instructor, two years on the National Security Council staff, two years in an embassy behind

the Iron Curtain. So I think, frankly, it's given me a pretty good background in terms of the military aspect that has to do with leadership and management; the intelligence aspect, lots of experience. And working in a civilian environment is not going to be something that's foreign or alien to me.

SEN. HATCH: Thank you. There aren't too many people who can match you. In fact, I don't know of anybody really. There are some pretty good people out there.

I just got this letter that was directed to Speaker Denny Hastert as of yesterday's date, signed by Mr. Negroponte, Director Negroponte. Now this letter says I am responding on behalf of National Security Advisor Stephen Hadley to Ms. Pelosi's May 2nd, 2006, inquiry regarding the classification of the dates, locations, and names of members of Congress who attended briefings on the terrorist surveillance program. Upon closer review of this request, it has been determined that this information can be made available in an unclassified format. The briefings typically occurred at the White House prior to December 17, 2005. After December 17th, briefings occurred at the Capital, NSA or the White House. A copy of the list is enclosed.

You remember those briefings?

GEN. HAYDEN: Yes, sir.

SEN. HATCH: You were there.

GEN. HAYDEN: Yes, sir.

SEN. HATCH: Well, it just said on 25th of October '01, the members of Congress who were briefed at that time were Porter Goss, Nancy Pelosi, Bob Graham, and Richard Shelby.

GEN. HAYDEN: Yes, sir.

SEN. HATCH: Those are the chair and vice-chair of the Senate Intelligence Committee, and of course, Nancy Pelosi was the ranking minority member over there and Porter Goss was then the chair.

GEN. HAYDEN: Yes, sir.

SEN. HATCH: On November 14th, the same four were briefed again. Is that correct?

GEN. HAYDEN: Yes, sir. That's right.

SEN. HATCH: On December 4th, not only were the members of the Intelligence Committee leadership briefed, by the chair of the Senate Appropriations Committee, Daniel K. Inouye, Senator Inouye, and the ranking minority member, Senator Ted Stevens, were briefed. Is that correct?

GEN. HAYDEN: Yes, sir.

SEN. HATCH: On March 5th, you again briefed Porter J. Goss, Nancy Pelosi, and Richard Shelby. In other words, the people who were --

GEN. HAYDEN: Yes, sir.

SEN. HATCH: -- leaders of the intelligence --

GEN. HAYDEN: And Senator Graham couldn't make that meeting so we swept him up a week or two later.

SEN. HATCH: Okay. Well, yeah you did on April 10th; Bob Graham got briefed on the same materials, I take it.

Then on June 12th, Porter Goss and Nancy Pelosi, the chair and the ranking member over in the House were briefed again, right?

GEN. HAYDEN: Yes, sir.

SEN. HATCH: On the 8th of July of '02, the chair and the ranking member, Bob Graham and Richard Shelby, were briefed.

GEN. HAYDEN: Yes, sir.

SEN. HATCH: Okay. On January 29th '03, again the leaders of the two intelligence committees were briefed, Porter J. Goss, Jane Harman, Pat Roberts, and John D. "Jay" Rockefeller IV.

GEN. HAYDEN: Yes, sir.

SEN. HATCH: Okay.

Okay. Then on July 17th '03, Porter Goss, Jane Harman who was then ranking member, Pat Roberts and Jay Rockefeller were again briefed.

GEN. HAYDEN: Yes, sir.

SEN. HATCH: Is that correct?

GEN. HAYDEN: That's right.

SEN. HATCH: Then on March 10th '04, you briefed the speaker of the House, Denny Hastert; the majority leader of the Senate, William Frist -- Bill Frist -- the minority leader of the Senate, Tom Daschle; the minority leader of the House, Nancy Pelosi --

GEN. HAYDEN: Right.

SEN. HATCH: -- the chair and ranking member of the House and the chair and ranking member of the Senate Intelligence Committee, is that correct?

GEN. HAYDEN: Yes, sir.

SEN. HATCH: Then on the 11th of March '04 --

GEN. HAYDEN: Next day.

SEN. HATCH: Yeah, the very next day, you briefed the majority leader of the House. This is all on the warrantless surveillance program. Is that right?

GEN. HAYDEN: Yes, sir.

SEN. HATCH: Okay. Then on the 23rd of September '04, you briefed Peter Hoekstra, who's now the chairman of the House Intelligence Committee.

GEN. HAYDEN: Right.

SEN. HATCH: Then on 3rd of February '05 you briefed Pete Hoekstra, Jane Harman, Pat Roberts, Jay Rockefeller, the leaders of the respective intelligence committees, right?

GEN. HAYDEN: Yes, sir.

SEN. HATCH: Then on the 2nd of March '05, you briefed Harry Reid, the minority leader of the Senate, right?

GEN. HAYDEN: Yes, sir.

SEN. HATCH: And on the 14th of September, again, the leaders of both intelligence committees, Hoekstra, Harman, Roberts and Rockefeller, right?

GEN. HAYDEN: Yes, sir.

SEN. HATCH: I'd just thought I'd get this all on the record because I don't think people realize the extent to which you and the administration have gone to try and inform Congress, even though you've followed the past history where since Jimmy Carter where you did it this way, right?

GEN. HAYDEN: Yes, sir.

SEN. HATCH: On the 11th of January, again, the members of the intelligence committees of both the House and Senate and Speaker Hastert, right?

GEN. HAYDEN: Yes, sir and -- yes, sir, that's right.

SEN. HATCH: And on the 20th of January, Harry Reid, Nancy Pelosi, Pat Roberts and Jane Harman, right?

GEN. HAYDEN: Yes, sir.

SEN. HATCH: On the 11th of February '06, Pat Roberts, our current chairman. On the 16th of February, Denny Hastert and Pete Hoekstra, right?

GEN. HAYDEN: Yes, sir.

SEN. HATCH: On the 28th of February you briefed the chairman of the House Appropriations Committee and the Defense Subcommittee, Bill Young; you briefed the ranking minority member, House Appropriations Committee of the Defense Subcommittee, John Murtha.

GEN. HAYDEN: Yes, sir.

SEN. HATCH: Right?

GEN. HAYDEN: Yes, sir.

SEN. HATCH: On March the 3rd, '06, you then briefed Jay Rockefeller individually, right?

GEN. HAYDEN: Yes, sir.

SEN. HATCH: Okay. Then on March 9th, you briefed the seven members of this subcommittee that was formed.

GEN. HAYDEN: That's right.

SEN. HATCH: Okay. And that included me?

GEN. HAYDEN: Yes, sir.

SEN. HATCH: Okay. And so the names were Roberts, Rockefeller, Hatch, DeWine, Feinstein, Levin and Bond.

Then on the 10th of March, you briefed Senator Bond by himself.

Then on the 13th of March, you briefed Pat Roberts, Dianne Feinstein, and Orrin Hatch, right?

GEN. HAYDEN: Yes.

SEN. HATCH: Okay. On the 14th of March, Mike DeWine, Senator DeWine; on the 27th of March, Carl Levin. Is that correct?

GEN. HAYDEN: Yes, sir.

Sir, I believe these latter ones now include visits to NSA where they --

SEN. HATCH: That's right.

GEN. HAYDEN: -- they visited the agency and had --

SEN. HATCH: In other words, all these people had --

GEN. HAYDEN: -- extensive periods of time --

SEN. HATCH: -- familiarity with --

GEN. HAYDEN: Yes, sir.

SEN. HATCH: -- the warrantless surveillance program, and you made yourself available to answer questions and to make any comments that they desired for you to make --

GEN. HAYDEN: Yes, sir.

SEN. HATCH: -- that were accurate. Okay.

SEN. ROBERTS: Excuse me, Senator, on that last one you may have missed, but the general indicated, that was a trip out to the NSA --

SEN. HATCH: Well, sure.

SEN. ROBERTS: -- so we could actually see how the program worked.

SEN. HATCH: Okay. And then on March 29th, my gosh, you briefed Pete Hoekstra, Jane Harman, John McHugh, Mike Rogers, Mac Thornberry, Heather Wilson, Jo Ann Davis, Rush Holt, Robert E. "Bud" Cramer, Anna Eshoo, and Leonard Boswell, all members of the HPSCI in the House, the Intelligence Committee in the House, right?

GEN. HAYDEN: Yes, sir.

SEN. HATCH: Then on the 7th of April '06, you briefed Hoekstra, McHugh, Rogers, Thornberry, Wilson and Holt again.

GEN. HAYDEN: Yes, sir, I believe that was actually a field trip to NSA for them.

SEN. HATCH: Well, that's fine. But my point is, you were briefing them on this warrantless surveillance program.

GEN. HAYDEN: Yes, sir, that was the subject.

SEN. HATCH: Then on the 28th of April, you briefed Jane Harman, Heather Wilson, and Anna Eshoo, right?

GEN. HAYDEN: Yes, sir. Again, a trip to NSA.

SEN. HATCH: And then finally on May 11th -- and you've had some briefings since, but this is the last I've got -- May 11th, you briefed Bill Young and John Murtha, who were both on the House Appropriations Committee.

GEN. HAYDEN: That's right.

SEN. HATCH: That sounds to me like you made a real effort to try and help member of Congress to be aware of what was going on.

GEN. HAYDEN: Sir, my purpose in the briefing was to be as complete and as accurate as possible.

SEN. HATCH: What's the purpose of this warrantless surveillance? My gosh, are you just doing this because you just want to pry into people's lives?

GEN. HAYDEN: No, sir.

SEN. HATCH: What's the purpose, if you can succinctly tell me that.

GEN. HAYDEN: It's not for the heck of it. We are narrowly focused and drilled on on protecting the nation against al Qaeda and those organizations who are affiliated with al Qaeda.

SEN. HATCH: You wanted to protect American citizens from terrorists all over the world.

GEN. HAYDEN: Yes, sir. Yes, sir. Exactly.

And under this program, we can only touch the information that is provided under this program if we can show the al Qaeda or affiliate connection.

SEN. HATCH: That's right.

GEN. HAYDEN: It's the only purpose for which it's used.

SEN. HATCH: And instead of saying you monitored the calls, what you did -- this program only applied to foreign calls into the country or calls to --

GEN. HAYDEN: In terms --

SEN. HATCH: -- known al Qaeda or suspected al Qaeda people outside of the --

GEN. HAYDEN: Sir in terms of listening or eavesdropping or whatever phrase is used in the public domain -- what we call intercepting the call --

SEN. HATCH: Right.

GEN. HAYDEN: -- what we call the content of the call, the only calls that are touched by this program are those we already believe, a probable cause standard, are affiliated with al Qaeda and one end of which is outside the United States.

SEN. HATCH: Isn't it true that the president had to reauthorize this program every 45 days?

GEN. HAYDEN: On average. It varied depending on schedules and his travel and so on; but on average, about 45 days, yes, sir.

SEN. HATCH: How would you describe the classification of the warrantless surveillance program?

GEN. HAYDEN: It was very closely held. It was for all practical purposes a special access program. We had to read people into the program specifically. We have documentation that --

SEN. HATCH: Do you consider it one of the most serious classified programs --

GEN. HAYDEN: Oh, yes, sir.

SEN. HATCH: -- in the history of the nation?

GEN. HAYDEN: That is fencing it off. I mean, everyone refers to my old agency as the super-secret NSA. This was walled off inside NSA; that's the compartment that it was in.

SEN. HATCH: Okay. So this wasn't just monitoring calls of domestic people; this was monitoring into the country and out of the country to or from suspected affiliates of al Qaeda?

GEN. HAYDEN: That's accurate. That's precisely accurate, Senator.

SEN. HATCH: Now if we had this program let's say a year before 9/11, what effect would it have been on 9/11, do you believe?

GEN. HAYDEN: I have said publicly -- and I can demonstrate in closed session how the physics and the math would work, Senator, but had this been in place prior to the attacks, the two hijackers who were in San Diego, Khalid al-Mihdhar and Nawaf al-Hazmi, almost certainly would have been identified as who they were, what they were, and most importantly, where they were.

SEN. HATCH: Now the media -- Senator Levin said phone calls, but the media has made that sound like you were intercepting phone calls. The fact of the matter is is that -- well, maybe I can't ask that question.

Well, you said you always balance privacy rights and security rights.

GEN. HAYDEN: Yes, sir.

SEN. HATCH: But your major goal here was to protect the American people.

GEN. HAYDEN: Oh, sir, the only goal -- let me narrow it down so it's very, very clear. This activity wasn't even used for any other legitimate foreign intelligence purpose. I mean, there are lots of reasons, lots of things that we need to protect the nation against.

SEN. HATCH: And you have --

GEN. HAYDEN: This extraordinary authority given to us by the president --

SEN. HATCH: Right.

GEN. HAYDEN: -- didn't look left or didn't look right.

SEN. HATCH: And you had --

GEN. HAYDEN: Al Qaeda and affiliates.

I'm sorry.

SEN. HATCH: And you had specific rules and specific restraints, specific guards.

GEN. HAYDEN: Yes, sir.

SEN. HATCH: Okay. Now, the distinguished senator from Oregon said that you admitted you were wiretapping Americans. That's a pretty broad statement --

GEN. HAYDEN: Yes, sir.

SEN. HATCH: -- but it certainly isn't true.

GEN. HAYDEN: Sir, we were intercepting the international calls entering or exiting the United States which we had reason to believe were associate with al Qaeda, is how I would describe it.

SEN. HATCH: If I understand it correctly, when you could, you went to FISA and got the warrants --

GEN. HAYDEN: There were other circumstances in which clearly you wanted more than the coverage of international communications, and under this authorization, you would have to go to the FISA court in order to get a warrant for any additional coverage beyond what this authorization --

SEN. HATCH: And FISA was enacted over 30 years ago.

GEN. HAYDEN: Yes, sir.

SEN. HATCH: And so FISA did not apply to some of the work that you were doing.

GEN. HAYDEN: Well, the way I would describe it, Senator, is that a lot of things have changed since the FISA act was crafted. It was carefully crafted in '78 --

SEN. HATCH: I'm not criticizing.

GEN. HAYDEN: -- it reflects the technology and -- I need to add -- and the threat as we knew it to be in 1978. The technology had changed; the threat had changed. The way I describe it, Senator, is I had two lawful programs in front of me, one authorized by the president, the other one would have been conducted under FISA as currently crafted and implemented. This one gave me this operational capability; this one gave me this operational capability.

SEN. HATCH: You would have no objection if we could find a way of amending FISA so it would accommodate this type of protection for the American people.

GEN. HAYDEN: No, of course not, sir. And again, we've made it clear throughout, though, that we would work to do it in a way that didn't unnecessarily reveal what it was we were doing to our enemies.

SEN. HATCH: Well, knowing what I know about it, I want to commend you because I think you have really protected the American people.

When was the last time we had a major terrorist incident in this country?

GEN. HAYDEN: Well, sir, I would go back four and a half years.

SEN. HATCH: There's no way we can absolutely guarantee that we won't have another one --

GEN. HAYDEN: No, sir.

SEN. HATCH: -- but you're certainly doing everything you know how to do.

GEN. HAYDEN: Well, sir, that was the commitment. Everything under law.

I said earlier in the morning we knew what this was about. Senator Levin asked me earlier if there were privacy concerns, and I said there are privacy concerns with regard to everything the National Security Agency does. I said to the work force, I'll repeat: We're going to keep America free by making Americans feel safe again.

SEN. HATCH: So as I've asked the question about Senator's Wyden's comments, you really weren't wiretapping Americans unless it was essential to the national security interests of this country.

GEN. HAYDEN: Sir, and again, it was international calls and we had already established a predicate that that call would reveal information about al Qaeda.

SEN. HATCH: And you have always been able to monitor foreign --

GEN. HAYDEN: Oh yes, sir.

SEN. HATCH: -- calls? There's never been any question?

GEN. HAYDEN: No. Foreign-to-foreign, and even in many circumstances, I suggested earlier this morning, a targeted foreign number that would happen to call the United States is incidental collection; there are clear rules that are created and approved by this committee that tell us what it is we do with that information.

SEN. HATCH: Now as I understand it, you were not monitoring domestic-to-domestic calls?

GEN. HAYDEN: No, sir.

SEN. HATCH: That was not your purpose?

GEN. HAYDEN: No.

SEN. HATCH: And that was an explicit direction by you and others --

GEN. HAYDEN: Oh yes, sir.

SEN. HATCH: -- not to do that.

GEN. HAYDEN: When we had the original conversations as to what NSA could do further, certainly that's what we talked about.

SEN. HATCH: Okay.

Now, General Hayden, one of the responsibilities of the DNI, as required by the Intelligent Reform and Terrorist and Protection Act of 2004, was to set guidelines for the protection of sources and methods. Now, did you participate in the requirement of the DNI?

GEN. HAYDEN: Oh, yes, sir. We did.

SEN. HATCH: Are these new guidelines in effect for the community and for the CIA?

GEN. HAYDEN: Sir, I do not know if they have been published yet. I'll have to get an answer for you.

SEN. HATCH: All right.

What new approaches will you bring to protecting against illegal public disclosures from the CIA?

GEN. HAYDEN: Sir, I said in my opening comments that we need to get the agency out of the news as source or subject, and both of those are very important. Let me tell you the really negative effects of it. I mean, obviously, there are sources and methods effects, but -- impacts. But you all asked me this morning about analysis and hard- edged analysis. Do you know how hard it is to stop an analyst from pulling his punches if he expects or fears that his work is going to show up in unauthorized, unwanted public discourse in a couple of days or a week?

SEN. HATCH: That's right.

GEN. HAYDEN: You keep the hard edge by keeping it private.

SEN. HATCH: Let me just ask you one last question here. I've got a lot of others, but I think you've answered all of my questions well.

General Hayden, you've spent enough time in the military to deeply appreciate that the military is a learning organization. When soldiers, Marines, airmen, sailors, Coast Guardsmen are not in combat, they are in training. Even in combat, every engagement is followed by a lessons-learned exercise. When not in combat, the military is constantly studying and training. The military, in short, is a learning organization.

Now, do you believe that the CIA is a learning organization? Should it be? How often should officers be exposed to training and studies? What are the institutions of learning in the CIA, and do you foresee changing them?

GEN. HAYDEN: Yes, sir, a couple of aspects to that. Number one, my experience in DOD has been a blessing because DOD actually has a rotation base and allows folks who are not actually out forward in operations to be put into a training curriculum. And that almost feeds a demand for lessons learned.

Frankly, the intelligence community isn't in that model firmly, yet. And we have got to look at the armed forces and see how they do lessons-learned and embed that in our processes for improvement.

SEN. HATCH: Let me interrupt you for just a second, because in -- and ask you just another one before my time runs out.

In several parts of you testimony you allow that, quote, "lessons-learned," unquote, exercises are distracting or demoralizing, quote, "archeology of picking apart every past intelligence study and success," unquote. Why would the CIA be any different from the military in the sense that you suggest?

GEN. HAYDEN: Oh, no, sir. I'm sorry to interrupt, but I didn't mean we wouldn't do lessons-learned. That is absolutely essential.

SEN. HATCH: No, no, I understand. I'm just giving you a chance to make a --

GEN. HAYDEN: As I said in my opening remarks, there's a downside to being so prominent, so much in the news. And I even allege from time to time we're the political football. And I would ask everyone involved -- this committee and others -- to allow us to focus on the important work and not overdo the retrospectives.

SEN. HATCH: Thank you so much.

Mr. Chairman, I would ask that this letter from Director Negroponte and all of these listed briefings be placed in the record.

SEN. ROBERTS: Without objection.

SEN. ROBERTS: Senator Warner, with your indulgence and my colleagues' intelligence: I misspoke earlier. I'd like to set the record straight, if I might.

I think I indicated that I had been present during the briefing since the inception of the program. Obviously, that is not accurate. I was not chairman until three years ago. I'd like that to be corrected.

But the thought occurs to me as you go down the list of people who were briefed -- I'm just going to mention a few here: Ted Stevens, Dennis Hastert, Nancy Pelosi, Bob Graham, Dick Shelby, Jay Rockefeller, John Murtha, Harry Reid. These are not shrinking violets. These are pretty independent people and they say what is on their mind.

So my question to you is, basically, when you were doing the briefings, did anybody -- it's my recollection, at least, that this did not happen, but I want to rely on yours because there were some there during the earlier times of this program. And I want to ask you this question: Did anybody express real opposition to this program?

GEN. HAYDEN: Sir, again, I don't want to get into private conversations, but to generalize questions asked and answers, concerns raised and addressed -- and I can tell you in my heart of hearts, Senator, I never left those sessions thinking I had to change anything.

SEN. ROBERTS: Well, did anybody say at any particular time that the program ought to be terminated?

GEN. HAYDEN: No, sir.

SEN. ROBERTS: That it was illegal?

GEN. HAYDEN: No, sir.

SEN. ROBERTS: There was, as I recall, a conversation onto the necessity, perhaps, to fix FISA -- if that's not an oxymoron -- to improve FISA, to reform FISA, and that is an ongoing discussion in this committee and in the Judiciary Committee. And my memory is that it was members of Congress who gave you advice not to do that. Is that fair?

GEN. HAYDEN: Sir, that was in the large group in March of 2004, and there were discussions. FISA was considered to be one of the ways ahead. And my memory of the conversation is that there were concerns, I would say almost universally raised, that it would be very difficult to do that and maintain the secrecy, which is one of the advantages of the program.

SEN. ROBERTS: There was in fact during these briefings pretty much a unanimous expression of support. Is that correct?

GEN. HAYDEN: Sir, again, I'm reluctant to characterize members, but again, issues raised and concerns answered, questions answered, we all left knowing we had our jobs to do. And I had no -- I came away with no course corrections.

SEN. ROBERTS: Now, these are the private conversations that went on with the briefings.

GEN. HAYDEN: Yes, sir.

SEN. ROBERTS: Were you surprised at the public statements expressing concern and opposition and other adjectives and adverbs that I won't get into?

GEN. HAYDEN: Sir, I was -- I'm reluctant to comment, Senator. I mean --

SEN. ROBERTS: It seems like there's a little bit of disingenuous double-talk going on here for some reason. And I'll just leave it at that.

Senator Warner.

SEN. JOHN WARNER (R-VA): Thank you, Mr. Chairman.

May I say I think this has been an excellent hearing thus far and the chair and others are to be commended.

General, I have the privilege of knowing you for so many years and worked with you. You have my strongest support and I wish you and your family well. I know how important family support is to our U.S. military. But the people in uniform across this country, both those now serving and those retired, take great pride in seeing one of their own selected to this important post.

GEN. HAYDEN: Thank you.

SEN. WARNER: The fact that you will continue in uniform certainly doesn't in any way, I think, denigrate from your ability. I think it enhances it as you continue your work. People who say that the intelligence should be headed by a civilian are reminded that the DNI is a civilian.

GEN. HAYDEN: Yes, sir.

SEN. WARNER: General, I wakened this morning, as others, listening to the early, early reports on this proceeding. And there was a gent on there -- I think he was with the 9/11 commission -- talking about how the morale at the agency has just hit rock bottom.

Well, I'm proud to say that in my 28 years here in the Senate and five years before that in the Pentagon -- now over 30 years of public service working with the CIA -- and I visit regularly. I've been twice this month, briefings on Afghanistan, Iraq, meeting with Director Goss. I don't find that morale rock bottom.

Do you have any assessment of it?

GEN. HAYDEN: Sir, I would say it's been a difficult time for the agency. Just, you know, go back through the headlines of the past week, month or three months. I do find that the folks in the field -- very highly motivated, operationally focused, and in a way we unfortunately can't describe to the public, some great successes going on.

SEN. WARNER: No question about it. And having had this long association with them, it is clearly one of the most remarkable collection of professionals, dedicated professionals, to be found anywhere in government service. But are there some steps

you feel you're going to have to take when you, hopefully, cross the threshold here in a manner of days?

GEN. HAYDEN: Yes, sir. I mentioned some things with regard to analysis and collection and S&T this morning. I think most important is to just get the agency on an even keel, just settle things down. With all the events, Lord knows, over the past several weeks, it can't be a pleasant experience for the folks out there, despite, as you point out, their continued dedication.

So I actually think, if I'm confirmed and I go out there, I would intend to spend an awful lot of my waking moments for some period of time just getting around and seeing and being --

SEN. WARNER: That's -- I commend you that.

GEN. HAYDEN: -- and be seen.

SEN. WARNER: Stick with that even keel -- for an Air Force general to use that able term.

GEN. HAYDEN: (Laughs.) Yes, sir.

SEN. WARNER: I like the idea of getting around. When I was privileged to serve in the Department of Defense, I used to take a little time almost every week to go to the remote offices --

GEN. HAYDEN: Yes, sir.

SEN. WARNER: -- where the Navy and Marine Corps personnel were and it paid off great dividends. Well, I agree with you. The morale's strong and they're doing their job and they'll continue to do it and you'll provide that strong leadership.

That brings me to the next question -- it's a little tough -- but our national security, as it relates to the executive branch, of course, is the president and his team: the secretaries of State and Defense, Homeland Security, Department of Justice. And then there's the department -- now Department -- DNI -- Negroponte's outfit, of which you will be a part.

And I really think your opening statement was very well done. You paid respect to Porter Goss, which I think was highly deserving. We've all known him, worked with him through the years. The chairman served with him in the House. He and I set up a commission about a dozen years ago at the time when the

Congress was looking at possibly abolishing the CIA. And that commission, I think, successfully re- diverted that action and we're where we are today with a strong CIA.

And you said, in a word, the CIA remains, even after the Intelligence Reform Act, central to American intelligence, and other statements in here which I was very pleased to read. But we cannot lose sight of the fact that -- I was visited by Director Goss in the month of April, by Director Negroponte, just talking general things with him, and then we awaken one morning to this resignation at a time when this country's at war, and one of the major pillars of our security team -- now the director stepping down.

What can you tell us about -- I'm not going into all of the perhaps differences in management style and so forth -- but was there something that the DNI and yourself -- you were the deputy; presumably he shared with you -- felt that wasn't going right? And what steps are you going to take to correct that?

GEN. HAYDEN: Sir, I mean --

SEN. WARNER: I read through your opening statement about all the things you intend to do, but I go to the narrow question: It had to be some actions which said -- (inaudible) -- and the president had to step in and make his decisions.

GEN. HAYDEN: Sir --

SEN. WARNER: What is it when you hit that deck are you going to do that was not being done, in your judgment, either according to law, otherwise?

GEN. HAYDEN: Well, Senator, I mean, Director Goss had a tremendous challenge. He had transformation that everyone's talked about within an agency, and then he had to adjust that agency's relationship with the broader intelligence community. That's really heavy lifting. He was moving along both tracks. And I'm not privy to decisions that were made a few weeks ago and announcements that were made and so on, but was asked by the president, would I be willing to serve as the director. The next Monday, the president made that announcement in the Oval Office. And I said a few words at that time along the lines of standing on the shoulders of those that went before me. I mean, I'm not Porter. I'm different from him. I'll probably end up doing some things differently, but I'm not going out, you know, there repudiating him or what he was trying to do.

Frankly, I just want to look forward, assess the situation and move on.

SEN. WARNER: All right. We need not be concerned because under the Constitution, we are acting on the president's request, your nomination, to fill that vacancy. And we want to rest assured when we do fill that vacancy, whatever omissions -- omissions or otherwise -- were taking place to justify this are corrected. And you assure us that that will be done?

GEN. HAYDEN: Yes, sir.

SEN. WARNER: Perhaps in closed session you can amplify on that.

GEN. HAYDEN: Okay.

SEN. WARNER: The distinguished chairman of the House Armed Services Committee said the following the other day with regard to Iran, and it really caught my eye. And he said there -- the question was, how close is Iran to actually developing a nuclear weapon? I'd say we really don't know. We're getting lots of mixed messages. Obviously, we're getting lots of different messages from their leadership, the stuff they say in public.

Then he went on to say, hey, sometimes it's better to be honest and to say there's a whole lot we don't know about Iran that I wish we did know. As we and the public policymakers need to know what that -- as we are moving forward and as decisions are being made on Iran, we don't have all the information that we'd like to have. Now, I'm not asking you to agree or disagree, but that's a very forceful public statement and acknowledgment.

Yesterday, a group of us had a chance to speak to the DNI and that question was addressed by the DNI. But America's greatly worried about Iran. It poses, in my judgment, the single greatest risk, not just to this country but to a whole region and, indeed, much of the free world.

What can you tell us in open will be some of your initial steps to strengthen that collection of intelligence as it relates to Iran?

GEN. HAYDEN: Yes, sir. And you chose the right word; it's strengthening rather than some sharp departure. The ambassador has appointed a mission manager for Iran, Leslie Ireland. Leslie has that task as her full-time job. And what she's doing is not just inventorying what we're doing as a community, but actually

redirecting our emphasis as a community. And in closed session, I'll give you a few more details, but she's narrowed it down from everything there is to know to four key areas that will best inform American policy. And we're moving additional resources into those areas.

SEN. WARNER: Fine. I just wanted to have the public hear that you're going to put that down as your top priority.

GEN. HAYDEN: Sure.

SEN. WARNER: I misspoke. Of course, Hoekstra is the chairman of the --

GEN. HAYDEN: Oh, yes.

SEN. WARNER: -- House Select Committee on Intelligence.

GEN. HAYDEN: Yes, sir.

SEN. WARNER: Let's turn to another issue, and that is, do you plan to have any significant large numbers of transfer personnel from CIA to the DNI?

GEN. HAYDEN: Sir, the only thing that's on the table -- and I thank you for asking this, because there are a few urban legends out there that need to be scotched. The only thing on the table is a redistribution of our analytic effort with regard to terrorism.

So the stories out there that the DI's going to be dismantled or the DI's going to be moved -- there are not thoughts, let alone plans, to do that. And the amount of movement within the counterterrorism- analytical force is going to be measured in double digits, not triple digits.

SEN. WARNER: In other words, less than 100 people.

GEN. HAYDEN: Oh, yes, sir.

SEN. WARNER: Thank you.

Well, you said in your opening statement, "The CIA must remain the U.S. government's center of excellence for the independent all source analysis," end quote. And I agree with that. Now, my understanding that our distinguished colleague, former colleague Mr. Goss, Porter Goss, was endeavoring to retain a strong

counterterrorism analysis capability internally to the CIA. Do you intend to continue that initiative?

GEN. HAYDEN: Yes, sir. But frankly, that's the friction point that generated your previous question. How much --

SEN. WARNER: This question being his resignation?

GEN. HAYDEN: No, sir. No, not that. With regard to the --

SEN. WARNER: But I know it was an issue.

GEN. HAYDEN: -- moving analysts. Yes, sir, I mean, an issue. It's something we have to resolve. Right now in the Counterterrorism Center at CIA you have a wonderful group of people performing magnificently. By legislation, and I think by logic, the National Counterterrorism Center, however, has been given the task of strategic analysis with regard to terrorism. What we're trying to do is shift our weight -- and this is not going to be a mass migration -- but shift our weight of some analysts from CIA's CTC and some other points around the community so that the NCTC, the National Counterterrorism Center, can do its mandated task and do that without in any way cracking the magnificent synergy we now have between DO and DI inside CIA, with analysts in direct support of operations.

That's the problem, Senator.

SEN. WARNER: That's a very helpful clarification.

And in that context, do you have, I think, only one reporting chain, and that's the DNI? Is that correct?

GEN. HAYDEN: Yes, sir, that is correct.

SEN. WARNER: No other reporting chains to the White House?

GEN. HAYDEN: No other -- I'm sorry?

SEN. WARNER: No other reporting chains directly to the White House.

GEN. HAYDEN: Sir, there is a little bit with regard to the additional activities in the legislation, in terms of all the intelligence functions, is unarguably through Ambassador Negroponte; with a few other things, it's with Ambassador Negroponte. Porter, for example, would be there at the White

House with the ambassador explaining things. It's a comfortable relationship. I don't think there will be any problems.

SEN. WARNER: So there is some -- you have a direct chain through Negroponte?

GEN. HAYDEN: Yes, sir.

SEN. WARNER: And at times you work in conjunction with him.

GEN. HAYDEN: Yes, sir, that's how I would describe it.

SEN. WARNER: And that's a workable situation?

GEN. HAYDEN: Yes, sir. Yes, sir.

SEN. WARNER: On the question of the chiefs of stations, they're remarkable individuals all over the world, and I think most of us who travel make a point of visiting with the chiefs of station on our various trips.

Are the chiefs of station in our embassies abroad representative of the DNI or the director of Central Intelligence?

GEN. HAYDEN: Senator, all the above. We have -- with initiation --

SEN. WARNER: Do they have a dual reporting chain?

GEN. HAYDEN: They do. For community functions they report to the DNI; for agency functions, they report to the director of CIA.

SEN. WARNER: Now that won't pose any problems?

GEN. HAYDEN: It should not; no, sir.

SEN. WARNER: We hope that will be the case.

Now the relations with the Federal Bureau: How many times, Mr. Chairman, did we sit in this room at the time we were working on this new law and addressing this issue?

Now, the Silberman-Robb report, which is a very good report, and I've gone through it, and they have a whole section in here relating to ending the turf war between the bureau, FBI, and the CIA.

Can you bring us up to date on where you are --

GEN. HAYDEN: Yes, sir.

SEN. WARNER: -- in addressing that issue?

GEN. HAYDEN: Number one, we've created the National Security Branch inside the FBI. And the funding and the tasking for that come from the DNI, come from Ambassador Negroponte. So that's one reality that's different since the publishing of the report.

Secondly, the ambassador has assigned to the director of CIA the function of national HUMINT manager. So with regard to training and standards and de-confliction coordination, the national HUMINT manager does have a role to play with human intelligence as conducted by the FBI, and as conducted by the Department of Defense.

SEN. WARNER: Do you have a liaison from the bureau in your office out at the agency?

GEN. HAYDEN: Senator, I'm a little unclear whether he is there or is about to get there as the deputy of the community HUMINT office. The senior there is a Marine two-star, former head of the defense HUMINT service, and the expectation is, if it's not the reality, his deputy will be from the bureau.

SEN. WARNER: I recommended that, because I think that they should have access, a free flow of that information.

Now there was a memorandum entered into in 2005 by Director Goss. Are you familiar with that memorandum?

GEN. HAYDEN: Yes, sir. Is this the one with the bureau or the one with the department?

SEN. WARNER: The bureau.

GEN. HAYDEN: With the bureau, yes, sir.

SEN. WARNER: Do you intend to continue that?

GEN. HAYDEN: Yes, sir.

SEN. WARNER: That covers that subject.

On the question of the national HUMINT manager -- now look here, we had a discussion earlier today about the Army Field Manual, and I and Senator McCain and Senator Graham and others had worked on that issue for some time. We're continuing to work on a regular basis with the Department of Defense as to the promulgation of procedures and so forth.

But there is a question of how the agency intends to, presumably, continue its interrogation process, and indeed perhaps get into detainees. Now if I understand it, earlier in this testimony you said that you fully intend, that is the agency, to comply with the basic standard of not involving in any cruel or inhumane or degrading treatment; I understand that. But there is a whole manual out here guiding the men and women in uniform. Should there not be a companion manual guiding the civilians who will be performing much of the task?

GEN. HAYDEN: Senator, speaking in generalities now, and perhaps --

SEN. WARNER: Yes.

GEN. HAYDEN: -- in more detail in a closed session, absolutely. I mean, one of the key things that -- I use the line in this report about creating the conditions for success in my opening statement. That's one of the conditions for success that anything the agency does -- let me put it that way -- anything the agency does, that the people of the agency understand what is expected of them; that the guidelines are clear; that they meet those standards; and that obviously there are consequences if any of them were unable to meet those standards.

SEN. WARNER: That's clear, but --

GEN. HAYDEN: So it's got to be clear, specific, written, for all the activities.

SEN. WARNER: Understood, but will there be any differences in how these interrogations are --

GEN. HAYDEN: Yes, sir, I don't want to --

SEN. WARNER: -- on the uniform side and the civilian side?

GEN. HAYDEN: Yes, sir. I don't want to go into any great detail here in open session, but just say that even in the Detainee Treatment Act itself, it talks about the Army Field Manual

applying to DOD personnel with regard to detainees under DOD control. The cruel, inhumane, degrading parts of the statute apply to any agency of the government.

So I think even the statute envisions that there may be differences.

SEN. WARNER: All right. Well, we'll be looking at that very carefully, because we will have to explain to our constituents and others --

GEN. HAYDEN: Yes, sir.

SEN. WARNER: -- if in fact there is a significant difference, basis for it.

I happen to be a great champion of the science and technology. I think few people realize that you have a magnificent setup out there that are devising all types of devices to not only do the work of your agency, but they have parallel uses by other departments and agencies. Indeed, some of it may be incorporated in the advancements we're going to take in the border security.

So tell us about the emphasis that you will put on that. I look upon that as one of the four stools of the agency.

GEN. HAYDEN: Yes, sir, absolutely -- a remarkable record of success; maybe enabled by legislation that gives the CIA a bit more freedom of action when it comes to these kinds of things, not quite as -- I don't want to say rule-bound, but let's say administrative- burden-bound. And I need to learn more about it and what their current focus might be. I said in my opening comments, though, job one is that S&T activity supporting two of the other key pillars of the agency, the human collection and the analysis.

SEN. WARNER: All right. Well, I think you -- I'm delighted to hear you'd put emphasis on that.

Lastly, in your statement, you said, quote, "We must set aside the talent and energy to take the long view, and not just chase our version of the current news cycle," end quote.

I agree with that. What steps will you do to impress on the agency the need that? Because you know, these people have followed a course of action which is extraordinary for many years, throughout the history. And you've got to change, I

suppose, some of the old entrenched beliefs and work styles, and this is one of them.

GEN. HAYDEN: Yes, sir. In fact, I actually think it might be worse now than it has been historically, that this is a particular problem with the current age. I mentioned the CNN effect this morning where our customers seem to want us to have the same kind of pace that you get on headline news.

The other aspect is, we're engaged in war in several major theaters, and that's just pulling energy into current operations. I mean, it's understandable; it's legitimate.

So I think left to itself, there will be so much gravitational pull to the close term that you'll really have to expend energy to push the field of view out, and that's what's going to be required.

SEN. WARNER: Good luck.

GEN. HAYDEN: Thank you, sir.

SEN. WARNER: Take care of those people out there.

GEN. HAYDEN: Yes, sir.

SEN. WARNER: I'll be knocking on your door.

GEN. HAYDEN: Yes, sir.

SEN. WARNER: Thank you very much.

SEN. ROBERTS: Senator Hagel.

SEN. CHUCK HAGEL (R-NE): Mr. Chairman, thank you.

General Hayden, welcome.

We are most grateful to you and your family for your almost 40 years of distinguished service to this country, and we look forward to many more years of this same quality of service. And we are not unmindful of the toll it takes on a family. So thank you, and thank you for your family being here today.

I was impressed with your opening statement, General Hayden, because I think it reflects clearly the kind of world that we live in today. It is a world of grand transformations. As you

have cataloged, not only your priorities -- and I'd like to explore some of these points that you made in a little more details as has been done already for the past few hours here today. But I think it encompasses and frames the larger picture of what you will be dealing with as the new CIA director. But also, it pulls, like all of us, from our experiences and our conditioning and our molding and our shaping and the product that we have before us in a four-star Air Force general who is the preeminent intelligence officer in our government. And that accumulation of experience and knowledge and mistakes in judgment has brought you to this point.

It has been my belief, and I think it's reflected in the polls -- people read political polls sometimes with only the politics in mind -- but the polls today in America say to me, General Hayden, that Americans have essentially lost confidence in their government. They've lost confidence in us, those who govern, those who have the privilege and responsibility.

When the president's poll numbers are as low as they are, when the Congress' approval ratings are lower than the president's -- I don't know if that comforts the president or not -- but nonetheless it is beyond politics, because politics is the avenue that we use to arrive at leaders and the shaping of the policy and therefore the direction of a country.

And that's what these poll numbers are telling us, that American has lost confidence in the leadership of this country. We all have some responsibility -- Democrats, Republicans, the White House, all of us.

So I was particularly struck by one of your points in your testimony about an emphasis on trust. And you and I had a very good conversation in my office last Friday about this issue and others. And at a time when I believe we are still reeling from what happened in September 11th, 2001, trying to find that new center of gravity, technology, 21st century threats have overtaken all of our laws. They've overtaken institutions and structures. That's not unusual; it is that way every 50 or 60 years in the world, a dynamic world.

So our task here as policymakers, your task as the new leader of the premier intelligence agency in the world, will be to address these 21st century threats with 21st century structures and solutions. And that was to me very clear in your testimony this morning.

And I'm particularly grateful for that because we do tend to get lost in the morass of the underbrush and the technicalities of leaks and who said what to whom and all the details that actually veer us away from the center of purposefulness -- some consensus of purpose that we strive for all the time here, or we should, to try to govern.

But more to your point, you have a very clear center of purpose in your job in the intelligence agency. And when you -- in response to some of the questions here -- talked about -- if I have it about right -- we will not defeat international terrorism without a very clear relationship with our international terrorism without a very clear relationship with our international partners -- something to that extent.

So let me begin there, because I happen to believe that it is not a matter of how many Marines and infantrymen we can place around the world that will defeat extremism and terrorism and these threats of the 21st century -- proliferation, which I will get to in a moment.

But the core of this, the hub of this, is what you are about and what the intelligence community in our country and the world is about, a seamless network that you mentioned, not only within our community here in the United States but that same kind of seamless network with our international relationships to stop these things before they occur, to start picking them off where it counts, really counts.

And of course, you get into the next outer circle of that which you all have some responsibility for, too, but can't find solutions to all of it, and that is, what causes these kinds of things. What is the underlying cause? Not simple, complicated, despair, poverty, endemic health issues. We know how those accumulate to bring us to the point we are today.

If you could enlarge upon your comments and your testimony and some of the answers you gave here on what you intend to do as the new CIA chief to in fact address a closer relationship with our friends and our allies in knitting together those seamless intelligence networks, as well, as you noted in your testimony, within the intelligence community.

GEN. HAYDEN: Yes, sir.

I think the first requirement is just a sense of focus; I mean, just paying attention to it. I learned in my job at NSA -- and

we have friends around the world -- you pay attention, you spend some time, you understand. There are a lot of allies out there who are not only looking to assist us in the global war on terrorism; in some ways they are looking for -- I don't want to overstate this because it sounds too arrogant -- but they're looking for some sense of leadership, some sense of direction, some sense of direction around which they can organize their own sovereign efforts.

I think you just plain have to pay attention to them, listen to them and understand -- and, although in most cases there will be great disparities of resources and power, to afford them treatment as an equal, some -- some respect. So I think that can be done, I think that's absolutely valuable, and I think our -- our friends and allies would enthusiastically welcome that. And so I'll just try to reinforce what we already have.

Inside -- inside our government, we've probably got two concentric circles to worry about.

One is the intel community itself, and I actually think we've made some good progress there. But as I think it was Senator DeWine mentioned earlier this morning about sharing and technology and it's really policy, and frankly, I think I responded you just have to get on with it. So, then, that's the second.

And then the larger concentric circle is between the intel community and the other parts of the U.S. security establishment -- DOD, especially Homeland Security, the law enforcement aspects of the FBI, and so on. I kept using sports metaphors in my prepared comments, but I really do mean that you have to play team ball here, and that requires everyone to play position and not crowd the ball. You know, the ball will come to you directly; just -- just play your position. And then focus on the scoreboard, not on individual achievement and individual agency or Cabinet-level department.

Sir, I -- Senator, that sounded more like a sermon than a work plan, but -- and that's the approach, and I think a lot of it is -- is attitudinal.

SEN. HAGEL: Well, I happen to believe everything is about attitude.

You might recall that when you were before this committee when we held a confirmation hearing for the current job that you

have, the deputy director of National Intelligence, I asked you about your plans for bolstering the energy, strength, teamwork and culture of excellence in the organizations that make up the intelligence community.

And I want you to address that, if you will. And I know you have alluded to it in your answers to some of the questions today, but specifically, the culture of excellence, that you have used that term -- I happen to agree with that term -- within our intelligence community, within the CIA -- how do you not necessarily resurrect that -- I don't think we've lost that.

GEN. HAYDEN: No.

SEN. HAGEL: But I think it's been tarnished, and there is a corrosive dynamic, and you've alluded to that as a result of many things.

But I want you to also focus on the next generation. What will you particularly be doing to focus on this next generation of CIA leaders that this country and the world is going to need?

GEN. HAYDEN: Yes, sir.

We really have an opportunity here -- in fact, so much of an opportunity that it's a real challenge. We have so many folks at the agency who have fewer than four years' service. They make up -- they now make up a significant portion of the population. So here's a group -- if we pay attention to the lessons learned studies and your WMD review and all the other things, these are folks who, you know -- who are not going to have to "unlearn" something. They'll be coming into this with a tested approach, one that's been improved. So there is the opportunity.

Now, here's the bad news. For every individual in -- I'll use the agency's analytic force and -- I'll just have to use comparisons rather than absolute numbers because of classification -- for every 10 individuals we have in the analytic force with one to four years' service, we only have one with 10 to 14 years' service. We don't have any shop stewards or foremen. We got senior leaders and we got workers, but that middle layer of management is very, very thin.

SEN. BARBARA MIKULSKI (D-MD): Mr. Chairman? Excuse me. Could the general repeat those numbers? I had a hard time hearing those numbers to which --

GEN. HAYDEN: Yes, ma'am. Again, I can't get into the specific numbers because at CIA, unlike NSA, they're classified population numbers.

SEN. MIKULSKI: Sir, could you pull it closer --

GEN. HAYDEN: But for every -- I'm talking about the analysts, all right? -- for every 10 analysts with fewer than four years' service, we only have one experienced analyst between 10 and 14 years of service. So what you end up with, again, is you don't have any shop stewards that should be doing the coaching and mentoring.

SEN. MIKULSKI: Got it. Got it.

GEN. HAYDEN: And so here we have this great opportunity -- a new population, lessons learned -- but the demographics are all wrong, and that's just going to take a lot of work and a lot of energy to turn the advantage into true advantage with this new population.

It's very interesting. This is the youngest analytic workforce in the history of the Central Intelligence Agency. It put more -- in more disappointing language, this is the least experienced analytic workforce in the history of CIA.

SEN. HAGEL: But what a marvelous opportunity, as you note, at a time when the world has changed, is shifting at an incalculable rate. And we're all trying to not just catch up, but stay even. And to have that kind of opportunity to shape and mold these bright, new, young leaders is, to use your point, is a big advantage --

GEN. HAYDEN: Yes, sir.

SEN. HAGEL: -- a huge advantage, and we must not squander that.

GEN. HAYDEN: Sir, if I could just add a point. We weren't able to create that demographic at NSA until after 2001. And although that's a real challenge, it's a lot better than the other challenge, which is you don't have many folks coming through the front door.

SEN. HAGEL: Let me ask a question on -- in fact, you were responding to one of Senator Warner's questions about this -- the National Counterproliferation Center. In light of, for example, the agreement that the president signed with India --

and I was just in India last month and spent some time, as well as Pakistan, with government leaders and private industry leaders. Explain to this committee in your view how this center will impact and help shape future arrangements; not just using the India-U.S. agreement, but proliferation of weapons of mass destruction, I don't have to tell you, no one has to tell you, that that represents really the greatest threat to mankind in the 21st century. So how are we going to use the center?

GEN. HAYDEN: Here are a couple of thoughts I'd share with you that I think will really put this into context. First of all, let me tell you what it's not. It's not NCTC, National Counterterrorism Center, which has its own analytic function and so it's a workforce numbered in the hundreds. These guys are numbered in about 60, 65. They are not a source of independent analysis. They're the mission manager. They're the guys -- Senator, they're the guys on the bridge and not the folks shoveling coal. And so what you've got there with a very experienced senior leadership team is the ability to shape the efforts of the community in a more coherent way -- back to that team ball metaphor - than we've had in the past.

One other additional thought. We've got four mission managers right now. Two are topical, two are geographic. Counterterrorism, counterproliferation; Korea, Iran. Well, you quickly do the math, you're going to have some intersections. And so who's the final word, who's the final word on Iranian WMD? Who's in charge? The Iranian mission manager or the NCPC, counterproliferation mission manager?

Because of what this committee has -- in addition to other sources -- told us about the Iraq analysis, which was, I would say, perhaps culturally deficient and technologically heavy, we've met -- that's a cartoon, and probably unfair to a lot of people, but there's an element of truth in there. Because of what we learned there, at those intersections, it's the area mission manager that gets the final call. So now that's kind of the dynamic that we've set in place for NCPC, Senator.

SEN. HAGEL: Thank you.

Let me get to a point, I believe in a response to a question that Senator Wyden asked you, if I have this about right. You said, quote, "Help me understand where to draw the one between liberty and security." And this was in the broader framework of a line of questioning that we've heard a lot about today -- important, as you have recognized many times.

And I appreciated that statement for many reasons. The chairman just talked a little bit about rewriting the FISA law. I don't think there's anyone who questions that. We do need to give the intelligence community a new framework to work within, assuring that what you and all the professionals are doing, you don't have to go to the attorneys every hour -- Is this legal or not legal? Can we do it, can we not do it? -- but let you do your jobs. That's our responsibility as policymakers to give you that new framework. We're going to need input from you --

GEN. HAYDEN: Right.

SEN. HAGEL: -- as to how we best do that, doing exactly what you said, that constant balance of protecting constitutional rights of Americans, as well as protecting the security interests of this country. We've done it pretty well for over 200 years. I think it's one of the most significant policy challenges we have here in this Congress with the president this year. And it has to be done. And we are paying attention to it, but we're going to need some guidance from you.

Here is an opportunity, General Hayden, to lay some of that out, if you care to give us some of your thoughts on how do we rewrite a law that does what you need to do and protects the interests of our country as well?

GEN. HAYDEN: Yes, sir. Let me not get into specifics. If we need to, we can share some ideas in closed session.

A couple of -- let me just say factors bearing on the problem. There are two. One is the nature of the enemy, all right? When FISA was first crafted, it was Cold War. And if you look at the legislative history, I've looked at sometimes and my lawyers at NSA have told me, an awful lot of the language for FISA was drawn from the criminal side of the U.S. Code. So we need to just reassess what is it we're trying to achieve here in a foreign intelligence way, against what kind of threats. And so that would be one approach.

The other one is technology. I've actually said publicly, and I'll just repeat it here, that the reach of FISA, the impact of FISA is well beyond what any of its original crafters could have possibly intended because they could not possibly have known of the dramatic changes in technology.

Again, Senator, just a factor bearing on the problem, not an ironclad solution. It may be that the best way to craft FISA is

in terms of not trying to predict all the changes possible in technology over time, but setting up processes by which those changes can be accommodated to a fairly constant standard of what constitutes privacy, so that when communications change from going out of the air to going into the ground, then all of a sudden the impact of the law is completely different, without any context as to how that affected privacy.

Sorry, that's a little obscure, but --

SEN. HAGEL: No, I get it. And we're going to obviously be calling upon you and your colleagues for more detail.

But let me ask one last question while I've got a couple of seconds. There's been some reference made today -- and you referenced it -- what happened with intelligence and why, and how it was used, misused, leading up to Iraq. And we're not here to replay all that. But here's what I would like to hear.

Because we had some gaps, let's put it that way -- and by the way, I'm not one who blames the intelligence community for the decisions to go to war in Iraq. That's an easy way out, as far as I'm concerned. And there was other contradictory alternative analysis out there; it was within our own government, those who chose to make the decisions they did based on their own selective reading of it. That's not what you said, it's what I said.

I say that because I'd like to hear from you what your ideas are about alternative sources of intelligence analysis so that we don't get ourselves back into invading Iran, not knowing what we're doing or not paying attention to consequences, or whatever else may be down the road here with options for policy makers and the president.

GEN. HAYDEN: Yes, sir. The approach of alternative analysis obviously has great value. We've done that. It's under way. We do see that. Here's the -- here's the magic spot: how do you institutionalize that without destroying it? I mean, once you institutionalize thinking outside the box, it turns to dust in your hand. I think it's more about process and structure. It's more about insisting on considering alternative views rather than boxing off -- this is my alternative view office. It's just simply demanding that.

Look, Senator, this is four-square in our mind now, everybody in the community. We understand. We know when we're good, we know

when we're not so good. Those lessons will have a tendency to wear off as, you know, we age off from the WMD National Intelligence Estimate and so on. The challenge for leadership is not to let that happen, is to -- is to keep that focus on this enriching and challenging aspect of our analysis.

SEN. HAGEL: You're going to be one of America's best CIA directors, General. Thank you.

Mr. Chairman, thank you.

GEN. HAYDEN: Thank you, Senator.

SEN. ROBERTS: Senator Feingold.

SEN. RUSSELL D. FEINGOLD (D-WI): Thank you, Mr. Chairman.

First, General, congratulations on your nomination, on your obvious abilities, your tremendous experience and distinguished career of public service, and also on your manner. I want to say, as one senator, that I find it very easy to work with you and talk with you.

GEN. HAYDEN: Thank you.

SEN. FEINGOLD: And I admire some of the remarks you've made today in candor with regard to Iraq, and some of the comparisons that one might make as we look at the Iran situation, that maybe we will not want to handle it in the same way. So I appreciate all of that.

Before I turn to you, let me just say generally, yesterday, four and a half years after the president authorized a program to wiretap Americans without a warrant and almost five months after the program was revealed in the press, the administration finally began describing the program to this committee. This long overdue briefing, hastily arranged on the eve of this nomination, in my view does not prove enough assurance that the administration's general contempt for congressional oversight has diminished. But Mr. Chairman, it is nonetheless welcome, and I look for more.

Mr. Chairman, I came away from that briefing yesterday more convinced than ever: first, that the program is illegal; and second, that the president misled the country in 2004 before the revelations about this program became public when he said that wiretapping of Americans in this country requires a warrant; and

third, that there was absolutely no reason that the administration could not have told the full committee about the program four and a half years ago, as is required by law.

Now, the question before us today is the nomination for the director of the CIA of General Hayden, who directed and vigorously defended this illegal program. Again, General Hayden is highly experienced, and I have enormous respect for his many years of service. But it is our responsibility to ask what kind of CIA director would he be.

Will General Hayden follow the law, not the law except -- except -- when the president says otherwise? And will General Hayden respect Congress's statutory and constitutional oversight role and not just when the president deems it politically convenient?

Let me be very clear -- and I don't think there's any distance between me and General Hayden on this -- al Qaeda and its affiliates seek to destroy us. We must fight back, and we must join this fight together as a nation. But when the administration ignores the law and refuses to involve Congress, I think it actually distracts us from our enemies and weakens us and weakens what the general and everybody else is trying to do.

Our greatest strength as a nation lies in a few basic principles: that no one is above the law and that no one may operate outside of our constitutional system of checks and balances.

So, General, there are many intelligence matters that cannot be discussed publicly, but I think the American people have a right to know that what they are told publicly is in fact neither inaccurate nor misleading. And Senator Wyden was referring to a couple of statements that you've made in the past that may bear on this.

On October 17, 2002, you told the joint inquiry into the terrorist attacks of September 11th, 2001 that persons inside the United States, quote, "would have protections as what the law defines as a U.S. person, and I would have no authorities to pursue it," unquote. Given that the president had authorized the NSA to wiretap U.S. persons without a FISA warrant, how do you explain this statement?

GEN. HAYDEN: Sir, I'd have to go back and look at the context in which I offered it. It is very clear to me, though, even under the president's authorization, that considerable legal

protections would accrue to a, quote, unquote, "target in the United States affiliated with al Qaeda," that would affect the ability of the NSA to track that target compared to that target being in any other place on Earth outside the United States.

I also said that -- and that was in totally open session, as I recall, and I prefaced my remarks that day by pointing out that I had briefed the committee in more detail and that my remarks that day were necessarily limited.

SEN. FEINGOLD: Well, General, I respect what you just said, but you specifically referred in that session -- I have the transcript here -- to U.S. persons in the context of FISA. In other words, you weren't talking about a different program. You weren't talking about some of the other protections that might be there, and to the American people and to members of Congress, when they're talking about FISA, that means a warrant.

So I'm wondering how you can reconcile that with --

GEN. HAYDEN: Again, Senator, I mean, I knew in my own heart and mind that we were not talking about domestic-to-domestic. If my language could have been more precise, I apologize, but the -- it was not an intent to mislead; it was to describe the limitations under which the agency worked and continued to work inside the United States. I think that was a speech where I talked about Osama bin Laden crossing from Niagara Falls, Ontario to Niagara Falls, New York, and saying in -- all of a sudden U.S. law kicks in, and my freedom of action against him is suddenly very limited, so that even though the president's program would, as we all now know, allow me to catch Osama when he called back to Waziristan, I couldn't catch the call from Buffalo to Pittsburgh.

SEN. FEINGOLD: Now, I appreciate that example, but, General -- and I take you at your word that you did not intentionally mislead, but it was misleading. And I think when you say you had no authority to pursue the target, the average person that knows enough about this would have concluded otherwise. But let me move on.

As you know, there is now a vast body of legal scholarship that says that the warrantless surveillance of Americans violates the FISA law. And of course, you said that your lawyers told you it was legal. But you are an intelligent professional with many years of experience conducting surveillance within FISA, then

one day you're told that FISA doesn't apply, and by the way, don't tell the full Intelligence Committee.

Forget for a moment, General, what the lawyers said. Have you ever had any doubts that when this change in approach was made that there may be a concern about not following FISA?

GEN. HAYDEN: Senator, obviously there were concerns. I mean, I had an agency that, you know, for decades -- well, since the mid-1970s -- had, frankly, played a bit back from the line so as not to get close to anything that got the agency's fingers burned in the Church- Pike era. And so this wasn't done lightly and it wasn't done automatically.

SEN. FEINGOLD: But did you have any doubts about the legality of doing this?

GEN. HAYDEN: Personally, no, I did not. And that was submitted with the conversation with the lawyers I knew best, the lawyers at NSA. It probably would have presented me with a -- with a bit of a dilemma if the NSA lawyers had said, no, we don't think so. But they didn't. And there was no pressure on me. It was, I need to know what you think.

SEN. FEINGOLD: So were you frustrated prior to 9/11 that this kind of authority, which I take it you believe derives from Article II, the president's powers, was not being used; that only FISA was being followed? Do you think that was endangering American national security?

GEN. HAYDEN: Well, actually there was an interesting article today -- yeah, where was it today? In the Baltimore Sun -- that talked about some NSA activities. And without getting into the fine print of the article and confirming or denying anything about it, it talked about discussions at my agency on the millennium weekend as to what we could or could not do inside the United States when we felt we were under great, great threat. And according to the article -- and just staying within the context of that, Senator -- I made some decisions there that made some of our operators unhappy in order to stay within the confines of statute because I had no other legal recourse to do something other than the FISA statute and Executive Order 12333 --

SEN. FEINGOLD: Article II of the Constitution was in place at that time --

GEN. HAYDEN: It was, but --

SEN. FEINGOLD: -- so why didn't you have legal recourse to that?

GEN. HAYDEN: Because the president has not exercised any of his Article II authorities to authorize the agency to do that kind of activity.

SEN. FEINGOLD: Did you urge him to do so?

GEN. HAYDEN: No. We did not at the time. No, sir.

SEN. FEINGOLD: Well, you know --

GEN. HAYDEN: This happened -- this happened very quickly, and --

SEN. FEINGOLD: Well, of course my concern here, naturally, is what is the limit of this Article II power, and where does it leave the role of Congress in this area? And I was struck by your comments that you had had a conversation with Senator DeWine where you talked about earlier -- not today, but an earlier case where you talked about the tension between liberty and security, and what do the American people want.

What I would submit to you, General, is that the American people have expressed what they want through the laws that are on the books now. And there can be helpful discussions, such as the one Senator Hagel just conducted with you, about whether it should change. But at this point, it's the law.

And you know as well as I do that no one and not even the president is above the law. And I want to remind you -- with all respect, General, because I have great respect for you -- that no one can force you to break the law.

GEN. HAYDEN: Sir, I'm well aware of that. And our Uniform Code of Military Justice talks very clearly about the lawfulness of orders in order for the orders to be effective.

SEN. FEINGOLD: Thank you, General.

General, if you're confirmed, there will likely come a moment when the president turns to you and asks whether there is more the CIA can do under the constitutional authority that he's asserted under Article II. What would tell him? Is there more?

GEN. HAYDEN: Well, obviously a hypothetical, but let me just imagine the hypothetical, in which, not unlike the NSA situation, there are additional things that could be done.

Senator, I'd consult my lawyers and my conscience, just as I did in 2001. In this particular case, Senator, I mean, to be very clear -- all right? -- the White House counsel, the attorney general, the Department of Justice's lawyers and my own lawyers at NSA ruled this to be a lawful use of the president's authority.

SEN. FEINGOLD: You're referring back to the wiretapping.

GEN. HAYDEN: Yes, sir. Yes, sir.

SEN. FEINGOLD: I'm asking you whether there are additional things you'd like to see. You just indicated to me, in a helpful response, that prior to 9/11, you thought some things maybe should have been done pursuant to Article II, even though they were not permitted by FISA or perhaps some other statute. Are there other things that you believe now we should be doing that are not covered by statute that would fall into this category?

GEN. HAYDEN: No, sir, none that I'm aware of.

SEN. FEINGOLD: Take another example in this area. The law states that the director of the Central Intelligence Agency shall have no police, subpoena or law enforcement powers or internal security functions. If the president told you that he felt he had power under Article II to override that, would you be bound by the statute, or would you follow the president?

GEN. HAYDEN: Again, Senator, it's a hypothetical, but the statute is clear that unless there was a compelling legal argument as to why that was a legitimate exercise of presidential authority, of course not.

SEN. FEINGOLD: Under this theory, could the CIA conduct convert action inside the United States?

GEN. HAYDEN: Again, Senator, a hypothetical, and I wouldn't even know how to begin to address that. I mean --

SEN. FEINGOLD: I'm just trying to figure out what it is that would limit the president from saying that to you.

And if he gave that order or he made that statement, based on your answers, it seems to me you believe he has that inherent power to do --

GEN. HAYDEN: Oh, no, no, sir. And what I believe is important, but not decisive. There has to be a body of law when people whose responsibility it is to interpret the law for someone, like the position I was in in NSA or, if confirmed, at CIA, who would say that this, indeed, is lawful and a lawful exercise of authority. And like I recommended and was quickly granted in the case in September, October 2001, we informed our oversight body.

SEN. FEINGOLD: I appreciate that answer very much. And I just have to say for the record that the body of law that supports the -- what supports this wiretapping program I think is exceptionally weak compared to the other authorities that have been discussed. But you and I have been --

GEN. HAYDEN: Yes, sir.

SEN. FEINGOLD: -- back and forth on that. But I think it's terribly important to realize because you are acknowledging that you would have an independent obligation to look at whether that law is sufficient to justify the president's claim under Article II.

GEN. HAYDEN: And again, Senator, it's a hypothetical. But you know, four-and-a-half years ago, it was very important to me that the lawyers I knew best personally, that I trusted, and who knew best the National Security Agency were in agreement.

SEN. FEINGOLD: Why wasn't the president's warrantless surveillance program briefed to the full congressional intelligence committees until yesterday?

GEN. HAYDEN: Sir, that was not my decision. I briefed fully to whatever audience was in front of me, and I wouldn't attempt to explain the administration's decision. But it wasn't the decision --

SEN. FEINGOLD: You weren't given any explanation of why the decision was made not to allow it?

GEN. HAYDEN: There were discussions in terms --

SEN. FEINGOLD: What were you told?

GEN. HAYDEN: -- in terms of I believe it's Section 502 and 503 and the phrase "with due regard." And in both of those sections the one that has to do with general intelligence activities and the one that has to do with covert action, in both cases, the paragraphs talked "with due regard to the protection of sources and methods." Beyond that, sir, I --

SEN. FEINGOLD: So it was the sources and methods part that was --

GEN. HAYDEN: There was, I believe, a strong desire to keep this program as close-hold as possible because of its value --

SEN. FEINGOLD: Fair enough.

GEN. HAYDEN: -- while at the same time informing those who needed to be informed.

SEN. FEINGOLD: Fair enough.

On that point, on the sources and methods justification, the National Security Act states that, quote, "nothing" -- nothing -- "in this act shall be construed as authority to withhold information from the congressional intelligence committees on the grounds that providing the information to the congressional intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods." Unquote.

General Hayden, the congressional intelligence committee -- committees -- handle sensitive sources and methods every day.

GEN. HAYDEN: Yes, sir.

SEN. FEINGOLD: What was it about this program that was different, other than the administration knew that it would be politically and legally contentious?

GEN. HAYDEN: Sir, I wouldn't attempt to describe the background to it. I know what the decision was. I was heartened that I was able to brief the senior leadership of both intel committees and the senior leadership of the Congress, and I was heartened that I was able to do it multiple times.

SEN. FEINGOLD: Well, in fairness to you, I got the feeling that you probably did want to tell more people, so I'm going to -- I want to be fair about that. I got that feeling.

But do you see the distinction between sensitive sources and methods which are part of a known program and an entirely new surveillance program whose existence would likely surprise if not outrage many members of Congress? I mean, isn't there a distinction as we look forward in that regard?

GEN. HAYDEN: Sir, I apologize. I don't see the distinction in law. And I do know that practice has been for activities, for example like covert action, that only the senior member and the chairman are briefed.

SEN. FEINGOLD: General, in January you stated that you would, quote, "take no view on the political step of going to Congress for an amendment of the FISA Act," unquote. But the question of seeking a statutory basis for conducting surveillance in this country, in my view is not a political question, it's fundamental to our constitutional system of government.

General, if you saw that our country's statutes did not provide the authority you thought was necessary to combat terrorist organizations, would you seek that authority from Congress?

GEN. HAYDEN: If I had no lawful authority to conduct something that I believed needed to be done to protect the nation, of course I would.

But in this case, Senator -- just to make sure I'm misleading by half, by not being complete -- in this case I believed I did have a lawful authority.

SEN. FEINGOLD: Can you explain to me why it is that we even need to pass laws in Congress in this area that relates to Article II, given the claims that are being made by this administration of its power in this area?

GEN. HAYDEN: Senator, again, if you look at the three pillars on which this program was based -- its lawfulness, its effectiveness, and then the care with which it was carried out -- I'm kind of crew chief for two and three, you know, its effectiveness and the care with which it was carried out. And I think I suggested earlier today the Founding Fathers intentionally put tensions between Article I and Article II, and I don't think I can solve those.

SEN. FEINGOLD: Senator Bond asked you whether under the warrantless surveillance program any Americans had been targeted

who were not associated with al Qaeda. And you replied only that you didn't see how that could occur within the NSA's culture.

The question remains: Has it happened?

GEN. HAYDEN: In each case when NSA has targeted a number under this program, there has been a probable cause standard met in the judgment of our analysts and those who oversee them that there is reason to believe -- a reasonable person with all the facts available to him or her at the time has cause to believe that this communicant is associated with al Qaeda.

SEN. FEINGOLD: That's not my question, and that wasn't Senator Bond's question.

GEN. HAYDEN: Okay.

SEN. FEINGOLD: It's whether it's every happened that any Americans have been targeted who were not associated with al Qaeda, as a matter of fact, has it happened, despite the cautions --

GEN. HAYDEN: Sir, I'll give you detail in closed session, all right? But clearly, I think logic would dictate that if you're using a probable cause standard as opposed to absolute certitude, sometimes you may not be right.

SEN. FEINGOLD: Has there been a thorough and ongoing review of this question?

GEN. HAYDEN: Yes -- oh, yes, sir. Yes, sir.

SEN. FEINGOLD: And will these reviews be submitted to this committee?

GEN. HAYDEN: Sir, I think they're available to the committee during your visits at the agency in response to the questions that you've asked. I think by review you mean what's been targeted, what have been the results, how long is --

SEN. FEINGOLD: Is there -- are there documents that would lay out for us the answer to my earlier question relating to whether people that were not associated with al Qaeda have been trapped in this thing?

GEN. HAYDEN: Well, how long targeting has gone one, why targeting has ceased.

Senator, let me make something very clear, though. Speaking in the abstract a bit, okay? To put someone on targeting under NSA anywhere in the world -- but obviously we're talking about this program -- and at some point end targeting doesn't mean that the first decision was wrong, it just means this was not a lucrative target for communications intelligence.

SEN. FEINGOLD: I respect that, but you know, this is exactly why, it seems to me, that FISA had it right by having some oversight of this under a court. And you obviously are doing everything you can to avoid any mistakes in this area.

GEN. HAYDEN: Yes, sir.

SEN. FEINGOLD: But if the FISA court were involved, we wouldn't have to be discussing this. And based on the comments of Senator Feinstein and others, I still believe that this could be done within that construct, within that statute.

As you know, General, the law allows for congressional notification to be limited to the so-called Gang of Eight only in cases of covert action. Even in those cases, the president must determine that it is essential to meet extraordinary circumstances affecting the vital interests of the United States. In your view, what kind of circumstances would justify failing to notify the full congressional intelligence committees of covert action?

GEN. HAYDEN: Senator, that's -- I'm sorry, could you just say the last part again?

SEN. FEINGOLD: Yeah. An example of a situation that would somehow take the administration or you out of the responsibility of informing the full committee.

GEN. HAYDEN: That was not a covert action?

SEN. FEINGOLD: What kinds of circumstances would justify failing to notify the full Congressional Intelligence Committee of covert action?

GEN. HAYDEN: Senator, I apologize, that's a very difficult question for me to answer. And as I said in my opening comments -- all right? -- this is a long war and it's going to require broad political support over a long period of time.

SEN. FEINGOLD: You can't give me a hypothetical, something that might fit that category, so I could imagine what it would be?

GEN. HAYDEN: Senator, I'm sorry, I just really can't.

SEN. FEINGOLD: Okay.

GEN. HAYDEN: It's a bit beyond my experience level.

SEN. FEINGOLD: Will you notify the full committee after the covert action has begun?

GEN. HAYDEN: Senator, I'd have to refer myself to the laws in terms of who gets notified and when. I do know that there is a requirement for speedy notification, and we, of course, would do that.

SEN. FEINGOLD: Will you provide to the full committee information on all past intelligence activities, including covert action that has been previously provided only to the Gang of Eight?

GEN. HAYDEN: Senator, I'm sorry, I'm just not familiar with the requirements under the law for that.

SEN. FEINGOLD: Mr. Chairman, I would simply ask that you review that question, if you would, and I do request, unless you have --

SEN. ROBERTS: We'll be happy to review it.

SEN. FEINGOLD: -- strong objection, that that be provided.

Thank you, Mr. Chairman.

SEN. ROBERTS: You bet.

Senator Chambliss?

Let me say that we're expecting votes at 4:15, two or three stacked votes. We still have four members under the 20-minute role. It may well be that we'll have to go back to regular order in terms of the time frame for a follow-up on members that wish to continue questioning the general during an open session. I would like to get to a closed session as soon as we can, and I know the general would, as well. And I think a lot of members

have questions that can be better answered in regards to a closed session.

Senator Chambliss?

SEN. SAXBY CHAMBLISS (R-GA): Thank you very much, Mr. Chairman.

General Hayden, having had the privilege of working with you for about the last six years or so in your position at NSA as well as more recently as the deputy at DNI, I want to congratulate you on this appointment and as you enter this next phase of your intelligence career. And I know 35 years ago or so when you joined the military, it was a commitment not just of Mike Hayden, but of his family.

And I'm very pleased to see your family here today continuing in that great support of you as you make your presentation here today.

Now, it's truly a great country we live in when we can have differences of opinion, particularly public differences of opinion, relative to something as sensitive as intelligence. And whether the programs conducted by intelligence agencies are right or wrong, I happen to have a significantly different opinion than some of my colleagues who have expressed disappointment or made statements regarding the programs that have been under your leadership. I happen to think that you've done a very good job, a very professional job, of carrying out your duty as director of the National Security Agency. And I think that I am very comfortable in saying -- and I want to be careful how I say this, but the programs that have been carried out by the professionals that worked under you for the last several years have been carried out very professionally. And it's because of the folks at your agency as well as other folks in the intelligence community that we have not had another domestic attack since September 11. And it's because of your leadership and the folks under you as well as the intelligence community team, General Hayden, that American lives have been saved, both domestically as well as abroad. And I suspect that, knowing the way this town is about leaking things, that maybe some of the good things that are happening will get leaked out, too, one of these days. But that's unfortunate that it seems to be just the sensational and negative things that get leaked.

Now, as you know, General, you and I have discussed your nomination privately on several different occasions, and I have had some concerns relative to your nomination that have

absolutely nothing to do with your qualifications. I went back and I looked at a lot of the history regarding the director of Central Intelligence and whether or not that individual ought to come from the civilian side, or whether they ought to come from the military side. And as you know, this -- this is one major concern that I have had from day one regarding your nomination by the president.

In the original 1947 act, it was pretty clear that Congress intended that this be a civilian agency. But there was no limitation on whether or not the individual as director ought to come from the military side or from the civilian side. But in the act that we passed in 2005 we set up the director of National Intelligence, we also set up a principal deputy position, and we specifically stated in that legislation that not more than one of the individuals serving in the positions specified in this paragraph may be a commissioned officer of the armed forces in active status. That means either you or your position as the deputy, or in your -- the position of the DNI not -- both of them could not be coming from the military side.

In the -- so there was a lot of discussion about that issue, as to whether or not they ought to be a military or a civilian is my point there.

In the bill that we passed out of this committee last year, the report language under Section 421 reads as follows: "The considerations that encourage appointment of a military officer to the position of DNI or PDNI, principal deputy, do not apply to the leadership of the CIA. Indeed, given the CIA's establishment in 1947 as an independent civilian agency with no direct military or law enforcement responsibilities, the committee -- this committee -- does not believe that a similar construct of military leadership is appropriate at the agency, and accordingly, the committee recommends that both the director and the deputy director of the CIA should be appointed from civilian life."

Now, that is the problem that I have been wrestling with, General, and the issue that you and I have had extensive conversations in private about. I also went back and looked just to see what the statute said regarding the differences in the role and mission in the intelligence community on the military side versus the civilian side. And under the 1947 Act, it's not real specific as to the responsibilities, except that it does say in the Act of 1947 that the National Security Agency is

primarily responsible for the conduct of signals intelligence activities.

However, under Executive Order Number 12333, it specifically states that the National Security Agency, whose responsibility shall include establishment and operation of an effective, unified organization for signals intelligence activities -- and it goes on to talk about that -- and the issue relative to the responsibility of the Defense Intelligence Agency is also set forth in Executive Order Number 12333, and it says as follows: "That the DIA's responsibilities shall include collection, production, through tasking and coordination, provision of military and military-related intelligence for the secretary of Defense, the Joint Chiefs and other Defense components."

Now, that's what creates my problem, General. And I just simply want to ask the question and give you the opportunity publicly to tell the American people how you're going to go from 35 years of this military intelligence mindset to heading up an agency, the CIA, that has a different role and function, a role primarily of gathering intelligence from a human intelligence standpoint abroad or outside the United States.

GEN. HAYDEN: Yes, sir.

I guess there is kind of a four-corner matrix here, and let me take each pair.

I think the first issue is national and DOD, all right? I mean, the CIA is a national intelligence organization. And you make the point, quite correctly, that DIA is a Defense intelligence organization.

Now, those lines get blurred, clearly.

I mean DIA actually does a lot of things for Ambassador Negroponte right now. And I already said earlier today CIA is doing an awful lot of tactical things for the Department of Defense. But fundamentally, one's a national agency, one's a defense agency.

Senator, NSA is a national agency. It's on the same line as CIA in terms of its functioning. I know it resides inside the Department of Defense, but its tasking, even under the old law, came from the DCI, not the secretary. And under the new law, you've strengthened Ambassador Negroponte even more in terms of his direct control over NSA.

Defense -- when I was the director of NSA, Defense was our biggest customer, but it wasn't our only customer and it wasn't our most important customer. You know, I feel like I was running a national agency, and that that experience should be able to translate, if I'm confirmed, to my ability to do something at Langley at the CIA.

The other aspect you bring up, Senator, the other pair in this matrix is human intelligence and signals intelligence. And I understand that I spent a lot of time at NSA -- six years. But I do have HUMINT experience. All right? I was an attache. I went through language training for a year in preparation for being an attache. I've crawled in the mud to take pictures of MiG-23s taking off from Bulgarian airfields so I could understand what type and model it was. Had sources. Now, it's an overt collector, not a covert collecter -- but had sources, asked questions, made reports. So I do have a -- I do think I have a sense of that.

And at the NSA job, as Director Tenet -- as George was very fond to point out, there was a convergence between the science and art of SIGINT and the science and art of HUMINT; they were getting very close to one another.

So I actually think I'm not badly prepared. I wouldn't be so arrogant to say, you know, my career has guided me to this job -- not at all. But I don't think I'm badly prepared for this -- running a national agency responsive to the DCI, broad experience in the intelligence community, and answering not tactical military questions throughout my career, but a fair mix of both strategic, operational and tactical.

SEN. CHAMBLISS: The focus at the CIA has got to be on improving our human collection.

GEN. HAYDEN: Yes, sir.

SEN. CHAMBLISS: And you feel comfortable with your intelligence background that you have that you're ready to focus almost purely on HUMINT collection at this point?

GEN. HAYDEN: Yes, sir. I would add -- not meant to correct, but just to be inclusive -- the human collection and the analysis, I think they both have to be dealt with. But in terms of CIA as a collection agency, yes, sir, it's human collection.

SEN. CHAMBLISS: Okay. And let's talk about the analysis just a minute, because the CIA was always intended to be an independent agency. And even under the new structure within the framework of the new organization that we have, all of the agencies still have to be somewhat independent. And you have been the number two guy under the DNI director, Negroponte.

You now are being asked to move over to an agency that sometimes is going to come into conflict with what the DNI may think about the intelligence world.

Now, we've already talked about your relationship with Secretary Rumsfeld. And knowing you like I do and having worked with you, I know that you can be a very independent individual, and that's good. I think you have to be. You're going to have to be even more independent in this position.

Now, I don't know all the ins and outs of what happened, but I do know, just because of what you have said and what I know previously, from conversations with folks within the community over the last couple of weeks, that there was some independence expressed by Director Goss relative to the removal of certain analytical capability out of the CIA over to the NCTC.

Now, when those things happen, are you prepared to face conflicts with the DNI when the situation arises, to sort of stand your ground for the CIA?

GEN. HAYDEN: Yes, sir. Sir, that's a lot better question than the GI heritage and how it will affect things, because I have a great of respect and admiration and a good friendship with Ambassador Negroponte.

But the answer to your question -- of course. I mean, there is no right and wrong in these kinds of scrums.

And you're right. There was a bit of a scrum over counterterrorism analysis, and I went into detail about that an hour or two ago.

You clearly need to represent the interests of your agency, because you've got your lane, and you've got to perform well in your lane. But you also have to understand -- and this doesn't have anything to do with the fact that I'm working for the ambassador now; you can do it when I was director of NSA -- at the end of the day, though, you've got to accept the decision that's best for the community. After having made your points of

view, as long as that boss knows the cost he's imposing on you for your peculiar, unique function, as long as he understands that and has come to the conclusion "Yes, but this decision is better for the overall function of the community as a whole," and then it's time, I think, to get on and do it, and do it well.

SEN. CHAMBLISS: Well, let me tell you why this issue particularly concerns me. I felt all along that the position of DNI -- and I still feel -- that person does not need to be an expert in intelligence. And Ambassador Negroponte is not an expert in intelligence. He has good people around him that are, and you're one of those people. You are an expert in intelligence. And when it comes to knowing what's best for the community, I trust your judgment impeccably. And I certainly hope that he does.

But I know that there are going to be times when that -- the conflict is going to occur, and we're going to know that. From an oversight capacity, it's our responsibility to know that.

GEN. HAYDEN: Yes, sir.

SEN. CHAMBLISS: And we expect you, General, to stand up for what you think is the correct thing to do for the Central Intelligence Agency, because it's at a critical juncture right now.

GEN. HAYDEN: Yes, sir.

SEN. CHAMBLISS: It's an agency that's always been a very stable agency, and here we are with our third director in the last two years. We're coming off of two major intelligence failures that happened on the watch of one of those directors, and we can't afford for that to happen again.

So I know you're independent, I know you can and I assume you will stand up every day for what's right for the agency, but know that we're going to be making sure you do.

There's also another issue that we have discussed within this committee any number of times, and we've seen some recent activity at the agency regarding how the director has dealt with leaks and individuals who may or may not be responsible for leaks at the agency. You've had some experience at NSA. You've had experience as the deputy for the DNI.

What is your -- what is going to be your approach to leaks and those responsible for the leaks at the CIA?

GEN. HAYDEN: Yes, senator, I -- obviously, I know how we all abhor leaks, and there's the usual mantra, "It puts at risk sources and methods" and so on, but beyond that, it really has a corrosive affect on the integrity of the community. You can't expect people to make tough decisions and hard-edged assessments and then have that pushed into public debate in ways it was never intended. And so this is a -- (inaudible) -- problem, and I meant what I said in the opening statement -- CIA out of the news as source or subject, so we can get back to business, back to basics and do what the nation expects us to do.

I admire Director Goss for the action he took with regard to this last round of unauthorized disclosures. That is not to say that all circumstances in the future would demand the same kind of response. But you had the same kind of commitment from me that I know you had from him in terms of taking all appropriate and effective action to not leak classified information to those who are not authorized to receive it.

SEN. CHAMBLISS: General, one point that I have continuously made over the last several years regarding the intelligence community and particularly after September 11 was our failure to share information properly. We've made great strides in the sharing of information, but we are still a long ways away from where we need to be.

One thing that was very positive that Director Goss did was, frankly, eliminating some people in positions who tended to encourage information to be held within the agency, so the agency could get the so-called credit for the take down or whatever it may be. We got to get away from that mentality, and I think he's moved us a long ways in the right direction; the same way with Director Mueller at the FBI.

Can you tell us what thoughts you have or what ideas you have about how to improve the information sharing --

GEN. HAYDEN: Sure. And you --

SEN. CHAMBLISS: -- between the folks in the community.

GEN. HAYDEN: Yes, sir. Sorry. You bring up a great point. I mean, the bottom line are results, not credit, and so -- and we wish you to view ourselves as contributing to an overall

national effort. And there are legitimate reasons for make some kinds of information close-hold. Lord knows we've talked about that this afternoon, but they have to be legitimate reasons, and those reasons have to be examined and reexamined almost constantly because you just can't get in the culture habits of: We haven't shared this; therefore, we will not in the future share this.

Senator -- the experience of six years at NSA; it's a constant struggle, but progress can be made. And the most intriguing and satisfying aspect is after you've made what seems like this dramatic break from the past, two or three months later, this new state of being you're in where you're sharing at a different level, it seems like it's been that way for 50 years.

You just have to keep moving that line.

SEN. CHAMBLISS: Lastly, General, Senator Warner is right; as we travel around the world, one of things we do is to try to visit with as many government agents as we can in the field, including CIA personnel. And every time I do it's interesting to hear the reaction of folks, but particularly over the last six months it's been interesting because there's almost been a 180-degree change in attitude that I have seen out there, and it's because Director Goss came in and immediately mandated that agents in the field be risk- takers versus being risk-averse. There has been a tendency to be risk-averse over the last decade, and that's part of the problem that we have talked about publicly and privately relative to our HUMINT capability. And folks join the agency because they're excited about getting in that world. They certainly don't come in the agency to make a lot of money, but they enjoy what they're doing, and the more risk they're asked to take the better they like it. Director Goss is moving in that direction, and I hope you will continue to encourage and mandate our agents in the field to be risk-takers as they gather intelligence.

GEN. HAYDEN: Yes, sir. That would be my intent. Can I add an additional thought to it, Senator?

We talked about two things today that as a practical matter is going to be a challenge to get inside the same box. Everyone has recommended risk-taking, and we've also talked in a healthy dialogue about accountability. And you need both, and clearly you must hold people accountable for wrongdoing. But do you see the leadership challenge in terms of getting both a culture of risk-taking and a culture of accountability in the same place?

There was just a phrase in my opening remarks that said something about top cover for people in order to enable them to be more free to take risks. We'll have both, Senator, but we'll probably have long dialogue with the members of the committee as to how best to balance two things that we both desperately need.

SEN. CHAMBLISS: It's interesting you mention that. I didn't write down but three things you said, and one of them was the right top cover, which is critically important.

Thank you, General.

Thanks, Mr. Chairman.

SEN. ROBERTS: Senator Mikulski.

SEN. BARBARA MIKULSKI (D-MD): Thank you, Mr. Chairman.

And, General Hayden, I want to echo the remarks of my colleagues to welcome not only you, but of course your family -- to Mrs. Hayden and your children who are here and those who aren't. We know that you couldn't do what you've done for the last 35 years without the support of your wife and your children, and we want to express our appreciation to them.

I've known you for more than five years as the director of the National Security Agency and then as the deputy director of the DNI, and know like all that you've really distinguished yourself over these 35 years and your background is impressive.

You bring those old-fashioned blue-collar values, of being a Duquesne man, forgiving you for being a fan of the Steelers, things along those lines, but also from, as you said, willing to be in the mud in Bulgaria to being at the National Security Council.

So today as we listen to your testimony, know that as I sit here to render my independent judgment, when I have to choose on voting for you or not, here and on the floor, I'm going to use five criteria, my questions. And I use them for everyone.

Number one, are you competent? Number two, do you bring personal integrity? Are you independent? Third, a commitment to the Constitution, not to a president, but to the Constitution, and a commitment to the core mission of the department that you are asked to lead.

Clearly, you bring competence. Everything about your background, I think we would agree, you're a brainy guy, you've had years of experience in the field of intelligence. I do believe you're a man of personal integrity and know that what -- your work that you've done, that you've transformed an analog agency to a digital one, you've done certain -- you've concentrated on changing the NSA, being really a big help to having the DNI set up this new agency and so on.

In terms of the independence is one of the areas that I'm going to be asking, because I've known you since 1999 and I've known you as a candid reformer; what I'm concerned about, though, is that the history of when one becomes -- goes to the CIA, they go from being reformers to being cheerleaders, often for an agency.

One of our questions, of course, as we've looked at the warrantless surveillance program, the data mining and others, is in your presentations are you still the candid reformer or have you moved to cheerleader? And these are no fault, but these are there.

And then the other is, given the pressures of being at the CIA, how to retain an independent voice. As I said to you in our private conversations, there are issues that are going to be asked of you in the committee, as Senator Chambliss and others have said, that have nothing to do with you personally. But we've watched what's happened to CIA. I go back to the Clinton years. We had that revolving door, with the fiasco of Woolsley and the disaster of Deutsch, and then in comes George Tenet, who we thought had it together. We had the Cole incident; we had the World Trade Center number one, didn't follow on that; World Trade Center number two, "Slam dunk, Mr. President." Oh.

And then we get Porter Goss. I don't share what's been said here about what a great guy Porter Goss was. I think he brought in partisan hacks and nearly destroyed the agency.

And it's not about saving his face; I worry about saving the nation. So to all who are watching this on C-SPAN, including the bad guys, we want them to know we want to get it right, so that this next director of the CIA is the best we have to offer to be able to protect the nation.

So that's why this very grueling hearing. And we thank you. I know you must be exhausted. We want to acknowledge that. But I want to know why we're all so obsessed, because we watched in two administrations this -- what happens to our directors of

CIA. So this, then, takes me to follow on what Senator Chambliss raised about the military.

In my private conversation with you, I raised even my own concerns about a military person heading it. It's not -- I have great respect for the military, and they have a unique role. But should that person head up the CIA? So let me ask a couple of very specific questions.

If you are confirmed as head of the CIA and remain an active duty officer in the United States armed services, what will be your chain of command, and who is your supervisor?

GEN. HAYDEN: Ma'am, unarguably, I report directly to Ambassador Negroponte, the director of National Intelligence. And that's the only chain of command there is.

SEN. MIKULSKI: And then, is Ambassador Negroponte or whoever is head of the DNI will continue to be, quote, your "supervisor" --

GEN. HAYDEN: Absolutely. Yes, ma'am.

SEN. MIKULSKI: -- in that sense. Are there -- is -- will there be statutory necessity for change? Senator Chambliss cited all kinds of laws: 1947 this, and all --

GEN. HAYDEN: Ma'am, I don't believe there's any requirement for changes in statute if I were to remain --

SEN. MIKULSKI: For you to remain independent.

GEN. HAYDEN: I don't believe so. No, ma'am.

SEN. MIKULSKI: Because as you know, we worry about this power grab coming out of DOD. And this has nothing to do with you. But a lot of us think there's an intel power grab coming out of DOD, and we know you've got to be a team player, but we also don't think you should be subsumed.

Second, given your military career and current position as the deputy at DNI, can you assure the committee that you will remain appropriately independent of both DOD and the office of DNI, meaning the speaking truth to power?

GEN. HAYDEN: Yes, ma'am.

SEN. MIKULSKI: It's what I call the ga-ga factor in the Oval Office. So, it's not most precise term, but it's where you will be mesmerized, wanting to serve a president, whatever, we get this so- called yes-sir-Mr.-Slam-Dunk-President rather than speaking the truth to power, even when it is difficult.

GEN. HAYDEN: Yes, ma'am. You've got my assurances to best of my earthly and human ability that's exactly what I'll -- what I'll do.

I talked a bit in my opening -- opening comments about that nexus of policymaking, and the purpose of intelligence is to draw those left- and right-hand boundaries of the discussion.

SEN. MIKULSKI: And what -- well, I appreciate those answers.

Now, let's go out to the CIA. Let's create a past scenario. I've talked about the slam dunk, Mr. President, but there was something else that happened when this government took one of the most esteemed men in the world and put him before the United Nations and had him make the case for going to a preemptive war in Iraq. Obviously, General Powell, then secretary of State, gave flawed testimony that he himself feels is now a blight on his career. Something terrible happened out there. This is not the forum to dig in or drill down in that. But my question to you: If you were getting General Powell ready to go before the U.N., what would you have done differently, so whatever he did and whatever he said was accurate and truthful and spoke to the world?

GEN. HAYDEN: Yes, ma'am. Right now, in the current job, clearly, you know, White House speeches are cleared for language and, frankly, I'm one. I'm the funnel through which all intelligence community comments go. So it is something not just for Secretary Powell's speech, but for all statements by our public officials. You can feel and sense this absolute commitment to accuracy and clarity in the language. It is -- it is really present and, frankly, I think what we need to do now is just sustain that. Don't let that effect wear off as we go forward in time. We have to be absolutely precise.

SEN. MIKULSKI: But being precise is one thing, and I would agree with that. But here this man came out and he met with the CIA. They showed him all kinds of pictures, gave him all kinds of stuff. Obviously, some of it was enormously selective. Would you have intervened and said, number one, I don't think we ought to go to the U.N.; number two, if we go to the U.N., these pictures

are blurred and they're from, you know, 1989? I'm making it up -- I don't quite remember what the pictures were -- but they were flawed.

GEN. HAYDEN: Well, clearly the conclusions were flawed. I mean, there were items of fact in there, and what went wrong was how we lashed the items of fact together. You may recall we played three intercepts -- three communications intercepts -- from Iraqi military officers during Secretary Powell's presentation. Now, those were all correct, but what we didn't do was to put all those pieces together. The macro analysis didn't get to the right conclusion. As I suggested earlier, it was almost certainly because -- almost certainly because -- we took the data and leaned it against our known assumptions rather than using other or all data and challenging the assumptions that we had. It was a mistake. We've learned from that.

SEN. MIKULSKI: Let's go to your staff.

How will you ensure that CIA analysts provide unvarnished intelligence assessments? And will you personally ensure that CIA analysts presented to -- that whatever analysis CIA presents to policymakers is independent of political considerations or the policy preferences of the customers?

GEN. HAYDEN: Sure. I'm going to say something that's going to sound a little bit foolish, ma'am, but hear me out. I actually think that task is going to be easy. Now, the analytical function -- the getting the analysis right -- that's challenging, that's tradecraft, that takes a lot of time. But I think the other task -- the honesty in the assessment that you talk about -- that's where they are. That's where all analysts are. The job of the director is to make sure nothing gets in the way of that; nothing prevents that from blossoming and presenting itself in their final analyses. So I think that's a natural state. What a director has to do is to make sure nothing interferes with that natural state.

SEN. MIKULSKI: I know -- and I appreciate that answer -- I know in your testimony and answer to your questions you talked about red teams, to be sure that there is alternative analysis, which we didn't have, for example, in the National Intelligence Estimate going into the war in Iraq. But in addition to that, for your employees at CIA, will you have some kind of dissent channel? In other words, where there are employees who really feel strongly and want to offer dissent, that they have a channel to you? I'm concerned that some of these leaks came out

of frustration and temper tantrums. I don't know where those leaks are. I'm sorry about those leaks. I'm sorry about the damage caused those leaks. But what about essentially having both, one, something you might need to hear, or a real safety valve for employees?

GEN. HAYDEN: Sure. I believe there are those channels now. Obviously, I'd need to make sure of that. And if there are, just need to reinforce that they are -- they are to be used. If they aren't, to set them up.

Ma'am, from the NSA experience, we had a pretty freewheeling, open e-mail policy to the director. And that's something that I think worked at Fort Meade and is an -- is an approach I would follow at Langley if I'm confirmed.

SEN. MIKULSKI: Well, I look forward to our ongoing conversations. I raised this with the DNI even for the DNI, and I know that it's under way.

My last question. Others have asked about data mining and the surveillance. We'll talk more about that in closed. But the five years that we've known each other and have talked about privacy versus security and the inherent tension, why didn't you come and ask for reform, either to any member of the committee or the committee, and say this -- gathering from what you've said -- and I don't want to put words in your mouth -- but FISA in some ways is dated, it's klutzy, it has choke points, technology has changed, the threat has changed. Why -- why didn't we get a request for reform --

GEN. HAYDEN: Sure, happy to answer.

SEN. MIKULSKI: -- when all these investigations and commissions went on?

GEN. HAYDEN: Right. To be very candid, ma'am, when it began -- I mean, I did not believe -- still don't believe -- that I was acting unlawfully. I was acting under a lawful authorization.

You recall when I gave -- well, actually, when Keith gave the briefing yesterday --

SEN. MIKULSKI: Well, I know you believe it was lawful, and you cited examples with the five different legal opinions. But then you've consistently said that one of the ways you've operated --

and even in your famous Press Club speech, in the Q&A you indicated a frustration with some aspects of FISA.

GEN. HAYDEN: Right, right.

SEN. MIKULSKI: And again, along the line that I've said -- klutzy, choke points, dated technologically.

GEN. HAYDEN: The phrase I used --

SEN. MIKULSKI: Those are my words.

GEN. HAYDEN: The phrase I used, FISA as currently crafted and currently implemented gives a certain level of operational effectiveness, and here's where we were with the president's authorization.

Number one, beyond the belief we were doing that was lawful.

Secondly, there were -- an attempt to change the legislation was a decision that could not be made by the National Security Agency alone. Clearly, that had to be made more broadly by the administration, including the Department of Justice. There were clear concerns -- which, frankly, I shared -- that attempts to change FISA would reveal important aspects of the program, eliminating key secrets that enabled us to do the kinds of things we were doing to an enemy whom, I'm certain, felt that this space was a safe haven for him.

And finally, in that March 2004 meeting that the chairman and Senator Hatch had mentioned, when we had the senior leadership of the Congress there in addition to the leadership of the two intelligence committees, there was discussion about changes to FISA. And without getting into the details of the conversations, ma'am, there was a powerful and general consensus that an attempt to change the legislation would lead to revelations about the nature of the program and thereby hurt its operational effectiveness.

SEN. MIKULSKI: Well, I'd like to talk more about that when we're in the closed hearing --

GEN. HAYDEN: Sure, sire.

SEN. MIKULSKI: -- particularly what I'll call the klutzy part, the choke point part, et cetera.

GEN. HAYDEN: Sure.

SEN. MIKULSKI: Mr. Chairman, in the interest of time, I yield back what time I might have and look forward to further discussions in the closed.

SEN. ROBERTS: I thank the senator.

Senator Bayh.

SEN. EVAN BAYH (D-IN): Thank you, Mr. Chairman.

General, thank you.

GEN. HAYDEN: Sir.

SEN. BAYH: I'm grateful for your patience today. We've been at this for slightly more than six hours now.

GEN. HAYDEN: It's flown by, Senator. (Laughter.)

SEN. BAYH: (Laughs.) You have a different sense of time than I do, but I admire your cheerfulness in the face of great scrutiny.

I also appreciate your service to our country. You've had a very distinguished career. And we've personally had a good relationship, and I've been grateful to you for being forthcoming and responding to my inquiries from time to time.

I'd like to follow up on two or three lines of inquiry. And let me begin with something that you said in your opening statement about the need to strike the right balance between America's security interests, but also our interests in liberty, the freedoms of this country.

Let's start with the security aspect of that. You had addressed in response to one other senator's question the following: that if this program had been in place before 9/11, in all likelihood two of the hijackers would have been identified. Is that correct?

GEN. HAYDEN: That's right.

SEN. BAYH: Since this program has become operational, have we identified any individuals or networks attempting to attack

America that we would not have known about otherwise without this program?

GEN. HAYDEN: I can guarantee you the would not have known otherwise -- the attempting to attack -- I will not make the claim, Senator, that, you know, we intervened with the sniper on the roof with the round in the chamber kind of thing. But we have located, identified and taken action against people affiliated with al Qaeda, working against the United States, and moving in the direction to threaten the United States.

SEN. BAYH: Well, that takes care of the security part of the balance. I don't think there's a member of this panel who would disagree that if we have a program that could have identified two of the 9/11 hijackers or other individuals who were malevolent and at some point in the process of attempting to harm this country and our citizens, that we shouldn't be intercepting their conversations and doing what we can to stop them. I think we have unanimous agreement on that.

So let me shift to the liberty side, which is where I think most of the --

GEN. HAYDEN: Yes, sir.

SEN. BAYH: -- point of emphasis has been here today and how we go about striking that right balance and giving the American people confidence that we have done so. You've spoken to this a couple of times, too -- and again, I apologize; it's tough being the last questioner after six hours and not being somewhat redundant, so I give you my apologies for that -- but you've spoken a couple of times about the burden of proof -- if that's the right term -- required before we can access communications, conversations, and you've used the phrase "probable cause." And then I think it's equivalent to what a reasonable person would conclude was that they had reason to believe that the subject was affiliated with al Qaeda in some way.

GEN. HAYDEN: Yes,sir.

SEN. BAYH: Is that -- my understanding --

GEN. HAYDEN: That's correct.

SEN. BAYH: Correct.

Let me ask you this question then, General. Isn't that also the same standard that would apply under FISA?

GEN. HAYDEN: Yes, sir.

SEN. BAYH: So why not use FISA, then?

GEN. HAYDEN: I can get into --

SEN. BAYH: Don't you have to meet the same burden of proof no matter what?

GEN. HAYDEN: Yes, sir. I can get into more detail in closed session and point out some additional difficulties.

But that decision is made by someone operationally involved in the problem. And the movement from that decision to coverage is measured in a carefully considered decision and one that meets the standard, one that has its own kind of oversight. The movement from that decision to coverage is measured in minutes, and that is not what happens in --

SEN. BAYH: Can you say that again, General? Which decision is measured in minutes?

GEN. HAYDEN: That the analyst has come to a conclusion, has gone to the appropriate levels of oversight --

SEN. BAYH: There is probable cause to acting on that probable cause.

GEN. HAYDEN: -- and having probable cause, from that decision to coverage is measured in minutes. That is not what happens in the -- let me just say -- FISA as currently crafted and currently implemented.

SEN. BAYH: So it's a question of timeliness and, therefore, efficacy?

GEN. HAYDEN: I would -- I would use efficacy, and there are other aspects that undergird the efficacy point, but I prefer to talk about a bit in closed.

SEN. BAYH: Well, let me get into that a bit without getting into the specifics that would have to be raised in a closed setting. Senator Mikulski was asking about the need to update the FISA statute. And you've responded that that would be difficult to do

without revealing the nature of the program and, therefore, undermining the reason that we would be pursuing those anyway.

GEN. HAYDEN: A position I held very firmly back in March of 2004, Senator. But, you know, things have changed.

SEN. BAYH: Couldn't that have been said when the original FISA statute was drafted as well? I mean, any time we're going to write a law in the criminal justice area, particularly when we get into this, we're sort of saying in some ways what we're doing.

GEN. HAYDEN: I think you're right, but if you look at the world of both threat and technology in which FISA was crafted, the impact of that revelation, I think, is dramatically different when your objective is not a long-term law enforcement or a long-term foreign intelligence stare, but when your objective is merely to detect and prevent actual physical attack.

SEN. BAYH: Well, let me -- I've asked -- well, at some point, General, we're going to need to update this statute. And at some point we're going to need to try and write into law -- and it's going to be for the whole world to see at that point -- where the parameters are and how we're trying to strike the balance, and with all that's been revealed to date.

Here's the point I want to make.

GEN. BAYH: I take your point about all that's been revealed. Yes, sir.

SEN. BAYH: Well, yeah, I know. And here's the point I want to make. The nature of this city, in particular -- and our society, to a certain extent -- is that eventually things tend to come out. Hopefully not the things that, you know, will imperil lives and that sort of thing, but eventually, in broad parameters, things are revealed.

And you and I have discussed this a little bit in private, and I just want to get your on-the-record assessment here for everybody to hear. It's my conviction that it's in your best interest and the agency that you are about to head that -- their best interest -- and this administration's best interest as much as possible to bring this under the operation of a specific statute that the American people can look at and have some confidence that it's being carried out appropriately. The whole Article II authority, which I gather is the -- and I take your

statements at absolute face value, that you believed you were operating legally and you were advised that way by all the lawyers.

And I assume that the basis for that was the Article II powers, the inherent powers of the president to protect the country in time of danger and war.

GEN. HAYDEN: Yes, sir, commander in chief powers.

SEN. BAYH: That power is so nebulous and so broad. One of my colleagues tiptoed up to asking you, and I guess I'll just go ahead and ask it, one of the advantages you bring to his is perhaps that you're not a lawyer.

GEN. HAYDEN: (Chuckles.)

SEN. BAYH: But you are, because of the legal implications of all this, in close consultation with them. So one of my colleagues -- I think it may have been Senator Feingold -- was on the cusp of asking, that power is so broad and general, what would not be authorized under Article II power?

GEN. HAYDEN: Senator, you've correctly characterized me as not being a lawyer. But clearly, clearly Article II does not empower the president to move against -- to do those things that are constitutionally prohibited. And now -- I will punt here very quickly -- but as you then step back down into statute, I know very well arguments are made with regard to statutes and their ability to constrain the president, and do those statutes in and of themselves conflict with the president's inherent authority. And I'll stop there because I know that's where the field of conflict is in terms of limiting or delimiting the president's authorities.

SEN. BAYH: Well, and I don't want to get you off into the legal weeds here. But by definition, the Constitution can't authorize what is unconstitutional.

GEN. HAYDEN: Right. Yes, sir, that's right.

SEN. BAYH: So in this case, the question is did the Constitution authorize the president and the executive branch to do things that a statute, the FISA statute, did not authorize? And the legal advice you got was yes, yes it did. So if --

GEN. HAYDEN: Sir, I need to make very clear, that's an argument that's wholly based in the Article II portion of the argument. In the AUMF -- to use military force -- there's a whole separate series of line of reasoning that I know the attorney general has talked to the Congress about.

SEN. BAYH: Well, what worries a lot of people about this is the whole slippery slope argument, and that while in the present case perhaps it's been reasonably applied, what kind of precedent it is setting for the future, and if the asserted Article II powers can justify activities that would not be authorized under statute. I go back to my question -- and I don't ask you to answer it again -- what -- here's the concern: What would it not authorize? Does it authorize the president to do anything that in his discretion and in the judgment of the people who work for the president is necessary? And then that gets to the whole checks and balances question, and the social contract that you referred to, and your desire -- which I think is understandable -- to keep the agency out of the press. And the problem with that is that when there's not a perceived -- a perception that there is a robust check and balance, well that's when the contract begins to fray, and that's when you end up on the front page. And so it's in your best interest to be as forthcoming as possible.

And then this gets me into the second thing I'd like to explore here. Ordinarily in our society you'd accomplish that check and balance by being as transparent as possible. But in your line of work, that's kind of hard to do. So we make up for that by having judiciary oversight under FISA, or congressional oversight under the authorization of this committee and Congress. And so there's someone else serving as a check and balance because the public themself can't fulfill that role.

And so I get back to the question I was, you know, attempting to ask. I mean, is it your belief that eventually it would be helpful, in your best interest, to try and bring this under an amended FISA statute of some kind so you wouldn't have to rely on as general authority, which leads to all the suspicions, because some people are just going to assume the worst, and it's not in your best interest to have them doing that.

GEN. HAYDEN: Yes, sir. And as I pointed out earlier, there are already actions under way. I know that members here have asked NSA for their technical views, and those views have been exchanged with the Department of Justice. The president's already stated he's willing to discuss bringing this under FISA.

And again, you know, let me just stay agnostic to the legal discussion you and I had with regard to the lawfulness of the president's authority.

As I stated in my opening statement here, this is going to be a long war. And this war -- our activities in this war have to be sustained by a broad national consensus. Anything that would add to that consensus would be of value, Senator.

SEN. BAYH: Let me shift, General, if I could, to something else you said about your belief that the CIA is the gold standard of intelligence and we want it to be exactly that, best the world has to offer. And I'd like to ask you a couple things about what we need to do -- and some of this has been touched upon before -- to improve the quality and the reliability of the intelligence that we've been getting.

And I think Senator Hagel touched upon this, and you said at least one thing in response to him, but I'd like to kind of put it up here once again. And perhaps Senator Mikulski touched upon this, as well.

What specifically can we do to try and prevent the kind of mistakes that were made with regard to the assessments of weapons of mass destruction in Iraq? Do you have anything specifically that we can do? I know we're red-teaming things now. You talked about that a little bit with Senator Hagel. But it's such a tragic thing when you have a war. Senator Mikulski mentioned the secretary of State going before the U.N. and relying upon information that just turns out to not be so.

GEN. HAYDEN: Senator, let me offer this not for in any way of excuse, but maybe just modest mitigation. This is almost a perfect storm. You had a regime that was very secretive, a regime that had cheated and lied before, a regime that had kicked out U.N. inspectors, a regime in which, someone suggested earlier this morning, we had low- balled the estimate with regard to weapons of mass destruction, a regime that was busting sanctions left and right and bringing in dual- use equipment for whatever purposes, and a regime that wanted to act as if it had weapons of mass destruction in order to keep its head held high in the neighborhood. That's a real tough problem. Now, I say that's not an excuse, just modest mitigation.

But the way to do it is challenge assumptions, red-teaming, tolerance for ambiguity, tolerance for dissenting views. Let me give you one more thought that I haven't shared earlier. But I

saw it out at NSA, and I'm going to look for it out at CIA if I'm confirmed and go out there.

When we first got into the grand national debate, "Did he or didn't he?" and when we didn't find the weapons after the invasion and the occupation, I brought our analysts in, NSA. Now, they're not all source, they just do SIGINT. And I said, "Come on, we got five things out there, chem/bio, nukes, missiles and UAVs, give me your confidence level on each one. And they gave me a number. And actually the numbers were pretty high. Nuke was pretty low, about a 3, but the other ones were 5 and above in terms of they thought he had them. As we went further into this -- I had them back them in a month or two later -- their whole tone and demeanor had changed.

There was a lack of confidence. Everything was being marshmallowed to me, a lot of possibles and could haves and maybes and so on. We don't need that, either. We -- you know, there's a sweet spot there. We have put all the rigor in you need to put in. But you're not afraid to call the ball and strike on the black of the plate, on the outside corner, that you actually do make the call. And then it's -- it's a challenge for leadership.

SEN. BAYH: Well, let me address that, too, and I -- it's a question I asked your predecessor in this post -- and here's the question I have. I asked him, and I'll ask you: compared to the quality of the assessments, the reliability of the assessments with regard to weapons of mass destruction in Iraq, how would you clarify our assessments and understanding of the nuclear program in Iran?

GEN. HAYDEN: Yes, sir.

SEN. BAYH: And before you answer that, I then asked him -- and I want you to answer that -- but then I asked -- and he kind of perked up. I said, "Are they more reliable, less reliable or about the same?" And he perked up and he said, "Oh, they're much more reliable." And I said, "Well, really?" I was kind of encouraged by that initially. I said, "Really?" And he said, "Oh, yes." He said, "We're now admitting what we don't know."

GEN. HAYDEN: Yes, sir.

SEN. BAYH: And I paused and I said, "Well, then what you're saying to me is that our assessments are more reliable, but no

more illuminating?" And he said, "Well, yes, that's exactly right."

Well, that, as you know, is ultimately not the place we need to be.

GEN. HAYDEN: Also -- also true.

SEN. BAYH: So those two questions --

GEN. HAYDEN: Right.

SEN. BAYH: -- compare the quality and the accuracy of WMD in Iraq to what we know in Iran, and then what do we need to do to make them actually more illuminating in the long run and not just admitting what we don't know?

GEN. HAYDEN: Yes, sir.

I think -- in open session, let me just say I think our data is better; not night and day better, but our data is better, and our judgments are far more clear. And that's -- I wouldn't throw that one away, that clarity to judgment -- what we know, what we assess, what we don't know is very important -- but a lot more to be done in terms of getting information to be, like you describe, illuminating as well as honest.

SEN. BAYH: One final thing, General.

Some people have suggested -- and I want to ask you about the relationship, at least as you perceive it, between the Central Intelligence Agency and the FBI -- we're working well together and that kind of thing. And then, I'd like to ask you this: Almost every other Western nation has the equivalent of what the British have, MI5. Why are we different?

GEN. HAYDEN: (Laughs.) Yes, sir, I -- in fact, in my --

SEN. BAYH: And should we be different?

GEN. HAYDEN: I don't know that one. In my current job, I actually have a chance to talk about this because creating that National Security Branch inside FBI is one of the very major muscle movements in the new intelligence structure that you all legislated and the ambassador is attempting to carry out. And my usual stump speech goes along the lines of: "And look, that's a domestic intelligence function, but that's okay. There are a lot

of really good functioning democracies out there that have this. You've got CSIS in Canada. You've got BSS or MI5 in Great Britain." Then, I'll usually pause and say, "But we're the only ones who try to put it inside our federal law enforcement agency." That was a decision made -- made by the Congress. I think the decision was that, not unlike the dilemma Senator DeWine brought up this morning, about putting knocks in a -- nonofficial cover folks in a separate agency. That may be theoretically pure, but it is incredibly disruptive.

And so, the decision was made: Let's give this a shot, putting it inside -- put it inside the FBI. That gives you stability. That allows you to borrow from things that already exist, but it also gives you what I would call cultural challenges, making sure this baby gets a chance to grow up to full manhood inside an agency that has been historically somewhat different. That's a -- I won't undercut that at all. That's a challenge. But I have in the current job visited FBI field offices, spent a day at the office in Pittsburgh, spent another day at the office in San Antonio. There's a lot of enthusiasm out there for this mission. I was really heartened to see that. I think CIA has a lot to offer the bureau, in terms of tradecraft and standards and training and so on. And that would certainly be something I would move to effect. I was very heartened that after the president's announcement one of the first persons to call me was Director Mueller.

SEN. BAYH: My final comment, General, is just to revisit what I had said previously. I would encourage you and those that you're working with, as soon as you can, without feeling like you're jeopardizing the efficacy of our efforts to protect the country, try and propose some specific revisions to statute.

GEN. HAYDEN: Sure, yes sir.

SEN. BAYH: I think, too, since this is an area where we can't be terribly transparent, at least then we'll have the judicial oversight function. And also to encourage you to as much as possible have more robust briefings for the committee, as we had last night. You've heard that from some of my other colleagues as well.

GEN. HAYDEN: Oh, yes, sir.

SEN. BAYH: And the reason for that, again, is just finally -- it's in your best interest and the administration's best interest and the country's best interest to not have people feel

as if this is being handled, you know, by surprise or by leak or, in some cases -- and I'm not referring to you or the more senior members of this committee, but too often, it's a game of hide and seek by the administration, sharing as little as possible. And then it's a -- you don't want people assuming the worst. And that too often happens when the oversight -- judicial or congressional -- is not as robust as it might otherwise be. That is what will retain that contract that you care about.

GEN. HAYDEN: Yeah.

SEN. BAYH: And keep you out of the front pages, which I know you'd really love.

GEN. HAYDEN: Thank you.

SEN. BAYH: Thank you, General.

SEN. ROBERTS: We will now go to record of order for a second round, and by record of order, I mean five minutes. I apologize in that I had already said each person would have 20, but we have scheduled votes, and I would like to at least have an opportunity for ample time for a closed session after those votes, and perhaps even before them, to get started. So we can see how that goes.

We have five: Senator Bond, Senator Levin, Senator Wyden, and Senator Snow. I don't know about Senator DeWine. And so consequently, we will start with Senator Bond.

SEN. WYDEN: Mr. Chairman, parliamentary inquiry.

SEN. ROBERTS: Yes.

SEN. WYDEN: So we're -- many of us thought we were going to have 40 more minutes because that's what we were told last night, that we would have three 20-minute sessions. Now, we're going to have five minutes and that will be it?

SEN. ROBERTS: If the gentleman wishes another five minutes and another five minutes, I will stay with him, and I know the general will, but we will have stacked votes sometime --

SEN. WYDEN: Thank you.

SEN. ROBERTS: -- between 4 and 4:15.

SEN. WYDEN: Very good.

SEN. ROBERTS: And so, consequently, to come after that, the closed session is going to go into about 7:00 or 8:00 tonight, and I don't think -- I think the witness has spent seven hours, and I think if we can be more concise -- if the senator wishes to have an additional five, additional five, I will certainly honor that.

SEN. WYDEN: Very good.

SEN. ROBERTS: Senator Bond.

SEN. CHRISTOPHER S. BOND (R-MO): Thank you very much, Mr. Chairman.

And my sincere thanks to you, General Hayden. You show unbelievable perseverance in staying with it. I support the chairman's idea that we move quickly to get into the closed session because many very important questions have been raised that can be answered only in the closed session.

I want to hit very quickly on the question of whether the CIA should rid itself of community coordinating functions, function and focus solely on clandestine human collection analysis, maybe even the director of operations out of Washington. Can you explain what you believe the proper role should be for the CIA and what you believe are fallacies in the position of those who want to trim down the CIA and make it solely operation-centric?

GEN. HAYDEN: Yes, sir, senator. I've heard the stories out there. In fact, I've been warned that it's caused a bit of nervousness out at Langley that even further drastic changes will be forthcoming. I think the structure out there right now is just fine, you know. And in a theoretical universe, you want to draw boxes in a different way; that's up to anybody to do. But in the practical world, this is what we have. It's functioning, and we ought to take advantage of it, and there's no reason we can't use it the way it's currently constructed. One idea out there is to somehow pull the director of intelligence out of the CIA and just leave the clandestine service behind and tuck the director of intelligence up under the DNI -- all right? -- because he's the one obviously representing the community in the morning intelligence briefings.

As soon as we do that, Senator, we have just created the DCI. We have just gone to a world in which the guy who is running the community is also now going to be responsible for running a large agency. I just don't see the wisdom in that. So I think the structure is about right.

I didn't quite understand one of your earlier comments. I think you were talking about the CIA having some community functions. And on behalf of the DNI, it does have that that national HUMINT manager function, which I think is very critical, and that's the right spot.

SEN. BOND: But I think as one who has sought to give the DNI more power, while I appreciate your willingness to stand up to the DNI and present your views, the question is when the DNI, for example, brings more analysts in to do the community function in the NCTC, things like that is what I believe the DNI should do, if we're to have Ã‚Â–

GEN. HAYDEN: Right.

SEN. BOND: --effective coordination. And I, for one, would look for you to present your viewpoints, but Ã‚Â–

GEN. HAYDEN: Oh, yes.

SEN. BOND: -- but we have had in the past, to be honest, instances where the CIA has been less than forthcoming in dealing with other agencies on areas of mutual interest, and I trust that you will break that down, but the DNI will see that that will happen. I have a couple of administrative things I just want to bring to your attention Ã‚Â–

GEN. HAYDEN: Yes, sir.

SEN. BOND: -- very briefly, three areas. First, I've heard, as I've talked to CIA people around the world, that the less-than-laudable efforts in recruiting and clearing ethnic personnel. In other words, we have to -- when we're sending somebody against a target, it's helpful to have somebody who has a background in that target. And we're not doing -- we may not be doing a good enough job. And I've heard of problems about the administrative support the agency provides its officers.

And finally, the one thing that bedevils all of us -- I have spoken about this with the DNI, I believe when you were there -- the tremendous time lag in getting security clearances. Often

when somebody is into and back out of the agency or perhaps even a confidential or a classified contractor who is doing IT work, for example, from one agency, to another agency, another agency, may have to wait six to nine months for new clearances each time. Those are -- these are administrative problems, but I think are a significant problem. I just want to know if you've got any --

GEN. HAYDEN: I've heard all three of them, Senator, and I have --

SEN. BOND: And I assume that you will -- we can help you work on those.

GEN. HAYDEN: You bet. They're all hard, but they all have to be addressed.

SEN. BOND: They are. None of them are easy. Thank you very much, General Hayden.

Thank you, Mr. Chairman.

GEN. HAYDEN: Senator.

SEN. ROBERTS: Senator Levin.

SENATOR CARL LEVIN (D-MI): Thank you, Mr. Chairman.

General, I want to follow up on the Army Field Manual question that I asked you this morning or that Senator Warner asked you recently, and that had to do with whether or not the -- under the Detainee Treatment Act, there's a requirement to follow the Army Field Manual that applies beyond DOD personnel, and I think your answer was it applies only to DOD personnel.

GEN. HAYDEN: My understanding of the legislation, Senator, is that it explicitly applies to the treatment of personnel under DOD control.

SEN. LEVIN: The language says that it will apply to treatment or technique of interrogation under the effective control of the Department of Defense or under detention in a Department of Defense facility.

GEN. HAYDEN: That's correct. Yes, sir.

SEN. LEVIN: That is your -

GEN. HAYDEN: That's my understanding.

SEN. LEVIN: So it could be CIA interrogation at a Defense Department facility.

GEN. HAYDEN: But the language is very, very explicit. If it's in a DOD facility or under -- I think I said under effective DOD --

SEN. LEVIN: I just want to clarify that.

GEN. HAYDEN: Yes, sir. You're correct.

SEN. LEVIN: On February 5th, you said on Fox News that, quote, "When NSA goes after the content of a communication under this authorization from the president, the NSA has already established its reasons for being interested in that specific communication."

GEN. HAYDEN: Yes, sir.

SEN. LEVIN: That's the probable cause -

GEN. HAYDEN: Yes, sir. And sir, as you pointed out, I was careful to use the word "content."

SEN. LEVIN: Right, and that's what I want to ask you about. Do you use the word "content" in that interview in the way that FISA defines content?

GEN. HAYDEN: No, sir, I do not. I use "content" in the normal usage, in normal discourse -- the conversation itself, everything between "hello" and "goodbye."

SEN. LEVIN: So you don't use the FISA definition -

GEN. HAYDEN: I was not -- in that context, I was not using the FISA definition of content. No, sir.

SEN. LEVIN: And how long does it, on the average, does it take your -- the staff at NSA to reach that point after they get the lead, let's say? In other words, does that normally take a week, two weeks, three weeks for that whole process to get to the point where you say, hey, we think we -- we have probable cause"?

GEN. HAYDEN: Yes, sir. It varies, and -

SEN. LEVIN: What's the range?

GEN. HAYDEN: It's kind of in the range as you just decided -- just discussed. It could be as quick -- and I -- in closed session, I will give you -

SEN. LEVIN: All right.

GEN. HAYDEN: -- specific examples of how quick it is, and that's -

SEN. LEVIN: I'll give you that point.

GEN. HAYDEN: -- in 90 minutes. And in other times it does take a considerable period of time because -- you've been out there and visited, Senator -- there's a lot of due diligence. This is not done randomly.

GEN. HAYDEN: Yes, sir.

SEN. LEVIN: Well --

GEN. HAYDEN: It varies.

SEN. LEVIN: What's the range?

GEN. HAYDEN: It's kind of in the range that you just decided -- just discussed. It could be as quick -- and I -- in closed session, I will give you specific examples of how quick it is.

SEN. LEVIN: All right.

GEN. HAYDEN: And that's 90 minutes -- in 90 minutes.

SEN. LEVIN: Get to that point --

GEN. HAYDEN: And other times it does take a considerable period of time, because -- you've been out there and visited, Senator -- there's a lot of due diligence. This is not done randomly.

SEN. LEVIN: So it could take two, three, four weeks.

GEN. HAYDEN: In some cases, that could --

SEN. LEVIN: Or it could take an hour and a half.

GEN. HAYDEN: Yes, sir. That's right.

SEN. LEVIN: All right. Now, when we chatted in the office, I believe you indicated that in the current circumstances, that there are more terrorists, apparently, being created than are being eliminated. I thought that was a very interesting observation. I wonder if you would just expand that.

GEN. HAYDEN: Yes, sir. I gave a speech in Texas two or three weeks back, when I was very steady in my old job and before all this started to happen. And what I tried to point out -- and this actually ties in to the discussion we just had earlier with Senator Bond about shifting our analytic weight from CTC to NCTC -- an awful lot of our analytic firepower right now is tied up in current operations to kill or capture those who are going to do us harm. And that's wonderful, and there really is a wonderful record of success that the American people will learn about some day.

But this is a broader war -- I actually said in the speech "a war of ideas" -- and the war has got to be fought with all elements of American power. And therefore this shift in weight from CTC and direct support to the DO to NCTC and broader support across the U.S. government and all elements of U.S. power is designed to win the war in the long term.

SEN. LEVIN: But you also indicated to me that at the moment, at least, that you believe there are more terrorists being created than are being eliminated. Is that a fair --

GEN. HAYDEN: Yeah, I would -- I mean, I couldn't pull statistics out and say one is X and the other is Y.

SEN. LEVIN: But just in your judgment --

GEN. HAYDEN: But if you look at the global terrorist threat, in number, it looks as if there are more; in capability, much reduced.

SEN. LEVIN: The executive order governing declassifying national security information establishes a uniform system. It's Executive Order 13292. And it says that an exceptional case -- in some exceptional cases, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases, the information should be declassified. When such questions arise, they shall be referred to the agency head or the senior agency official. That official will determine, as an exercise of discretion, whether the public

interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure.

Are you familiar with that language?

GEN. HAYDEN: Senator, I've not read the EO, but what you've described is a process I'm familiar with.

SEN. LEVIN: And how important would you say it is to follow that process?

GEN. HAYDEN: Senator, I -- you know, I understand the process. That was a process we used with Secretary Powell's speech. George had to call me to clear on the release of the three transcripts that he played in New York.

SEN. LEVIN: Because in a recent letter to me, the Office of DNI wrote that the CIA was not asked to review the classified material that was involved in Scooter Libby's disclosure until nine days after the president authorized that disclosure.

Did you -- were you involved in that?

GEN. HAYDEN: No, sir, I'm not.

SEN. LEVIN: That discussion at all?

GEN. HAYDEN: No. No, sir.

SEN. LEVIN: Do you know why that process of the executive order was not followed?

GEN. HAYDEN: Sir, I -- I'm sorry. I do not.

Senator, could I just add one footnote to this?

SEN. LEVIN: Sure.

GEN. HAYDEN: With the new legislation, we believe that the law -- and this is not quite as clear as it might be -- gives the DNI authority to declassify. If you recall, the Zawahiri-Zarqawi letter that was made public last October, we believe that Ambassador Negroponte would have the authority to release that. But because of the executive order and lack of clarity, we did work with General Alexander and Mike Maples and the other heads of agencies to make sure we had everyone's concurrence.

SEN. LEVIN: My time is up on this round.

Thank you.

SEN. ROBERTS: Senator Wyden.

SEN. WYDEN: Thank you, Mr. Chairman.

General, I want to stay with the credibility issue again. This morning you said that you had never read the Department of Justice memo signing off on the warrantless wiretapping program. That was in response to Senator Feinstein.

GEN. HAYDEN: I do. Yes, sir.

SEN. WYDEN: Then, you also said your lawyers didn't give you anything in writing on the warrantless wiretapping program.

I'm trying to square that with the statements you made at the Press Club that go on and on and on about all you did to make sure that there was a full effort to nail down that this was a legal program. Tell me how you reconcile those two.

GEN. HAYDEN: Sure.

SEN. WYDEN: I mean, nearly everybody I know reads, like, a memo, I mean, at least to try to get started on it, and you said you didn't read a memo. And I compare that to this speech.

So reconcile those two for me.

GEN. HAYDEN: Sure, happily. What I believe I said at the Press Club was that I had an order, you know, signed by the president, passed through the secretary of Defense whose lawfulness was averred to by the attorney general. I knew from personal discussion that the White House Counsel also agreed to its lawfulness, and I also knew that there was an opinion, which I had not seen, that was crafted in the Department of Justice, I believe by OLC at the time, the Office of Legal Counsel, that underpinned the attorney general's opinion.

I then posed the question to NSA lawyers, and, Senator, I -- it's a long time ago -- we may have exchanged paper. I don't have a record of that. But they looked at it and came back serially -- I did it to three, and I did it to three independently -- and they all came back independently believing,

telling me, based on their understanding of the statute, of the Constitution, that this was lawful.

SEN. WYDEN: Now, let me just move on. I have many more examples. I mean, this past winter you were the public relations point man, in effect, for the warrantless wiretapping program; today you say you want to keep the CIA out of the news. I'm going to go through more of those examples in closed session. But let's see if we can get something on the record that will give you, if confirmed, a chance to get off to a strong start in terms of accountability.

Senator Roberts and I, as you know, have pushed for, and that is, to make public, the report done by the inspector general on the activities of the CIA prior to 9/11. I've read it. Obviously I can't go into it here. I think it's very much relevant to making the kinds of changes that deal with a post -- a dangerous post-9/11 world. Will you work with us, if confirmed, to make any appropriate redactions if, you know, necessary, and finally get that report out to the American people and to the families who saw their loved ones murdered?

GEN. HAYDEN: Senator, I absolutely commit to working with you. But let me -- truth in lending here -- talk just for a moment about factors bearing on the problem. It is classified. A declassification of it I think would not be fair without an equal declassification of the rebuttals that were made to the report.

I, frankly, am not all that familiar with it. I have reviewed the section that talked about the DCI's relationship with NSA. And in closed session I can give you my views on that.

And then finally, Senator, I would need to have an honest dialogue with you and the chairman to see, frankly, what effect we're attempting to create by making this public.

SEN. WYDEN: In your testimony today you said, and I quote, "I will draw a clear line between what we owe the American people by way of openness and what must remain secret in order for us to continue to do our jobs as charged." With all due respect, General, who gives you the exclusive authority to make that judgment? Do you mean to say I, in conjunction with this committee, working in a bipartisan way -- and maybe you'd like to amplify it. But the way it's stated is "I will draw a clear line."

GEN. HAYDEN: Senator, could you just read the sentence to me again?

SEN. WYDEN: I'll read it to you. I don't have the exact page in front of me: "I will draw a clear line" ...

GEN. HAYDEN: I have it: "I will draw a clear line between what we owe the American public by way of openness and what must remain secret in order for us to continue doing our jobs as charged." Senator, you and the committee are not on that page. This is a discussion between what was to remain and what could be made public, not unlike what Senator Levin just referred to in Executive Order 13292. Agency heads have an important role to play.

When I went to NSA, NSA didn't say anything about anything. And I found that to be a very unsatisfying place.

And so I moved to try to make more public the agency's activities, putting a more human face on the agency. There is no intent in that sentence, and I don't think it's even implicit, that I'm drawing a line in terms of the dialogue I would have with this committee.

SEN. WYDEN: I would hope not. When you read it, though, it certainly, again, doesn't strike me as something that brings the Congress into a discussion; it sounds like something -- you've arrogated to yourself to make the --

GEN. HAYDEN: No, sir, I didn't mean that at all.

SEN. WYDEN: One last question. I'm pleased to hear that, General. One last question. I see my light is on.

General, I think you know, Senator Lott and I have worked on this in a bipartisan way, that I happen to think there's a huge problem with over-classification of government documents. Both political parties do it. I think it is more for political security than for national security, and I think we need an overhaul, an overhaul of the way government documents are classified. There have been some flagrant abuses. I mean, alcoholic beverage preferences of some, you know, politician or something gets, you know, classified. What is your sense with respect to whether this is a significant concern?

GEN. HAYDEN: Senator, I might argue with you with regard to the cause; you know, political sensitivity and so on. I don't see

that. I do think we overclassify, and I think it's because we got bad habits. We're just in a routine that just elevates information to a higher level.

Senator, can I -- and I know you want to ask me more questions in closed session, but I do want to set the record straight. You quoted me as talking last year during my confirmation hearings as saying, "a personal view now, looking backward, we overachieved," which is a quote you had for me with regard to the Trailblazer program.

In the context of the statement, though, what I was saying was, "We made the strategic decision, with your support, and I think correctly, we'd get out of the mode of building things ourselves." "We're America's information age organization during America's industrial age, but we're not in America's industrial age anymore. We could and should go outside and engage industry in doing this. We could and should go outside and engage industry in doing this. A personal view now, looking back, we overachieved."

And what I was referring to there is we moved too much of this business line out to private industry. We defined our relationship with industry as simply the definition of requirements and then expected industry to come back and deliver something. We learned within Trailblazer, and I go on to say that didn't work.

All right? So when I said we overachieved, believe me, it wasn't about the Trailblazer program. It was in the strategy to rely too fully on industry to come up with a solution on their own, and that didn't work.

SEN. WYDEN: General, my time is up. I'm only going to tell you that I'm looking at it, and when you said then a personal view, now looking back we overachieved, that is wildly different, wildly different than what Newsweek reports in their magazine this week. And of course I can't get into it. And that's why I'm concerned about it. And that is important to this senator because you've described this as one of your signature, you know, issues with respect to information technology.

GEN. HAYDEN: Senator, I repeat: I overachieved -- a phrase I used to say went far too much with industry on this one; we should have had more government participation. I was explaining the failure of Trailblazer. And I get down to the bottom of that page and I would say it's about 60-40, that 60 percent of the

difficulty in the program was just the raw difficulty of the challenge; the other 40 percent were things that were within our control.

SEN. WYDEN: I think the gap between what Newsweek reports this week on the general signature issue and the statement that we overachieved is something, again, that I'm concerned about. And we'll have more to discuss in closed session.

SEN. ROBERTS: Well, maybe we have the good fortune of having a Newsweek reporter in the audience.

Senator Levin.

SEN. CARL LEVIN (D-MI): Thank you, Mr. Chairman.

General, you made reference to a level of confidence assessment that you had asked for from staff at NSA around the time we attacked Iraq in five areas, I believe: nuclear weapons, chemical, biological, UAV and missiles.

GEN. HAYDEN: Yes, sir.

SEN. LEVIN: And then prior -- excuse me. I believe you said that the WMD one got a three and everyone else got a --

GEN. HAYDEN: No, the nuke, nuke.

SEN. LEVIN: -- the nukes got a three and the other ones got a five on a --

GEN. HAYDEN: Right. Five -- yeah, no, above five; sevens, eights -- the --

SEN. LEVIN: -- 10 being --

GEN. HAYDEN: -- the missile one got a 10.

SEN. LEVIN: -- 10 being the most confident in your level of assessment?

GEN. HAYDEN: Yes, sir. Here's the sort of --

SEN. LEVIN: Was -- were these assessments, these levels of confidence asked for before that particular occasion, like back in October during the NIE assessment, where they were --

GEN. HAYDEN: Yes, sir. And let me just -- 45 seconds on the process.

What I asked the folks -- and these are young folks, these are analysts -- I say, "On SIGINT alone -- on SIGINT alone, zero to 10, how confident were you -- on the day we kicked off the war -- how confident were you that he had --" okay?

Nukes was lowest at three, missiles was highest at 10, everything else was five, seven and eight, all right?

SEN. LEVIN: Okay. Had that kind of an assessment been requested during the October NIE or prior to the war?

GEN. HAYDEN: Sir, we -- these were the body of folks that prepared me to go to the National Intelligence Board that George -- NFIB at that time, National Foreign Intelligence Board. I'm the one who raised my hand and voted for the NIE. And frankly --

SEN. LEVIN: I know those are the same folks. But had they given you that kind of a --

GEN. HAYDEN: -- did I have those numbers? No, I did not have those confidence numbers then.

What I had was a body of SIGINT -- a body of SIGINT that ran in this range, Senator: in terms of the conclusions in the NIE, the SIGINT I had ranged from ambiguous to confirmatory.

SEN. LEVIN: I understand. And was there a request of that type made for the assessment about the -- any link between Saddam and al Qaeda?

GEN. HAYDEN: No, sir, because we didn't sign up to that in the estimate or any estimate.

SEN. LEVIN: There have been two public statements -- I want to ask whether you agree with.

One is by -- both by senators that have been briefed on the program. One is by Senator Frist, that the program itself is anonymous in the sense that identifiers, in terms of protecting your privacy, are stripped off. And as you know, the program is voluntary. The participants in that program -- that was public statement number one. Do you agree with that statement of the senator?

GEN. HAYDEN: Senator, I'll be delighted to answer that a little bit later in closed session.

SEN. LEVIN: You won't answer it -- or can't answer it?

GEN. HAYDEN: No, sir. I don't want to answer it in an open session, sir.

SEN. LEVIN: Why is that?

GEN. HAYDEN: I am not in a position to confirm or deny this story that appeared in USA Today.

SEN. LEVIN: No, that's -- I'm talking about Senator Frist's comments on CNN.

GEN. HAYDEN: Yes, sir. But you're asking me to comment on Senator Frist, which would then --

SEN. LEVIN: No, on a statement --

GEN. HAYDEN: I understand. And I'll --

SEN. LEVIN: -- okay. The second one, as a member of this committee said, the president's program uses information collected from phone companies. Are you able to say whether you agree with that?

GEN. HAYDEN: No, sir, I'm not. Not in open session.

SEN. LEVIN: Same reason?

GEN. HAYDEN: Yes, sir.

SEN. LEVIN: The -- are you familiar with the second Bybee memo?

GEN. HAYDEN: Yes, sir.

SEN. LEVIN: You and I have talked about that.

GEN. HAYDEN: Yes, sir, we have.

SEN. LEVIN: Have you read the memo?

GEN. HAYDEN: I went through it over the past several days, sir.

SEN. LEVIN: Okay. Is it your understanding that the second Bybee memo remains operative?

GEN. HAYDEN: I'll get into further detail in the closed session. But in general -- no, let me just take it in closed session, so I can be --

SEN. LEVIN: Even on that question? Even as to whether it remains operative or not?

GEN. HAYDEN: There are additional legal opinions that are offered, and -- but again, to give you the import of those, I would prefer to do that in closed session.

SEN. LEVIN: And we've been denied access -- all the members of the committee, at least -- apparently the leadership -- I take it back. I believe all but perhaps two of us have been denied access to that memo. Do you know whose decision it was to deny us access?

GEN. HAYDEN: Sir, I'm sorry. I really don't know. But I am aware of the circumstances.

SEN. LEVIN: Finally, you've made the statement again here today that your -- in your personal view, had the president's warrantless surveillance program been in operation prior to 9/11, that two of the hijackers -- referring to Midhar and Hazmi -- would have been detected. Now, that's speculation, in my judgment, but nonetheless, that's your speculation.

I have to take -- I have got to point out the following: that the CIA knew that Midhar and Hazmi left Malaysia in January of 2000, with U.S. visas; the CIA knew in March of 2000 that Hazmi was in the United States, soon after leaving Malaysia; those two were never watch list as al Qaeda operatives, although the CIA knew they were operatives; the CIA failed to share critical information about them with the FBI, although asked by the FBI in June of 2001, when the meeting took place between the FBI and the CIA in New York City.

So -- and that's all been set forth in a document which is part of the appendix to the joint inquiry of this committee and the House committee.

So the CIA knew these two guys were here in the United States. It wasn't something you have to speculate about whether or not the technology or whatever would find them.

GEN. HAYDEN: No, no. Yeah --

SEN. LEVIN: Would you agree that there was a significant failure --

GEN. HAYDEN: Oh, yes.

SEN. LEVIN: -- on the part of the CIA to track these --

GEN. HAYDEN: Sir, the record's clear, and we lost lock on these two individuals. All I'm saying is, if this program had been in place, I almost near 1.0 in my confidence that the National Security Agency would have raised its hand and said, "Hey, these two guys are in San Diego."

SEN. LEVIN: The CIA did not raise its hand, although it knew.

GEN. HAYDEN: That's -- sir, I --

SEN. LEVIN: Is that correct? You've read the history.

GEN. HAYDEN: I have read the history. I'm not familiar with what you just said, though, about their being there.

SEN. LEVIN: Well, then I would ask, then, that this be made part of the record and that the general be asked to comment on this for the record. I would also ask for the record, Mr. Chairman, that the letter from the Office of the Director of National Intelligence to me that I referred to in my question to the general, the date being April 27th, 2006, also be made part of the record.

SEN. ROBERTS: Without objection.

SEN. LEVIN: Thank you. And those are my last questions. Thank you.

SEN. ROBERTS: Senator Wyden, do you wish another round?

SEN. WYDEN: I do.

Senator Feingold's here. I think he was ahead of me.

SEN. ROBERTS: I'm sorry. I'm going to --

SEN. FEINGOLD: Mr. Chairman --

SEN. WYDEN: I'm here -- (inaudible). Why don't you go ahead?

SEN. FEINGOLD: Go ahead, if you've got a quick one.

SEN. ROBERTS: No, no, no, no. We're going to go to Feingold.

SEN. FEINGOLD: All right. Thank you, Mr. Chairman. I don't have a lot, but General, thank you.

Several times this morning you've said that warrantless surveillance program could have prevented the 9/11 attack. Did you ever say this in open or closed session to the joint committee or the 9/11 Commission?

GEN. HAYDEN: No, sir. And I need to clarify. I wouldn't have said that. I -- what I -- and if I had, boy, that's badly misspeaking.

What I said was, it would have identified two individuals we knew to be al Qaeda, would have identified them as such, and would have identified them inside the United States.

SEN. FEINGOLD: Did you tell that --

GEN. HAYDEN: Now, what that leaves --

SEN. FEINGOLD: -- did you tell that to either the joint committee or the 9/11 Commission?

GEN. HAYDEN: The four members of the joint committee were aware of the program and its capabilities. I did not brief anyone else or staff and did not brief it to the 9/11 commission at all.

SEN. FEINGOLD: Why not?

GEN. HAYDEN: Because the program was heavily compartmented, and I was not at liberty to discuss it with the committee. I would point out, though, that both committees honed in on this lack of an ability to connect external and internal communications as one of the key failures prior to 9/11.

SEN. FEINGOLD: General Hayden, I want to follow up on your statement to Senator Snowe that DOD takes actions that don't look much different from CIA activities.

What are the respective roles of the DOD and the CIA?

GEN. HAYDEN: Yes, sir, and I'll -- I'm going to speak in just -- slightly in general terms and I can go in more detail later. What we're talking about here is what the Department of Defense calls Operational Preparation of the Environment, OPE. It's the ability of Defense to get into an area and know it prior to the conduct of military operations. An awful lot of those activities -- getting to know an area, preparing the area for future operations -- are, you know, when you're watching them happening, are not, in terms of trade craft or other aspects, recognizably different than collecting human intelligence for a foreign intelligence purpose.

The legal bloodline, though, for this one goes back to Title 10 in inherent military activities. The bloodline for this goes back to Title 50, foreign intelligence activities. But here, in this melee here, they look very much the same. Different authorities; somewhat different purposes; mostly indistinguishable activities. My view is that, as the National HUMINT manager, the director of CIA should strap on the responsibility to make sure that this thing down here, that walks and quacks and talks, like human intelligence, is conducted to the same standards as human intelligence without questioning the secretary's authority to do it or the legal authority under which that authority is drawn.

SEN. FEINGOLD: Does the comparative roles of DOD and CIA vary by country? Does it depend?

GEN. HAYDEN: I guess it would depend, and I mentioned earlier that because of the press of the war -- and this is recent learning for me by talking to the folks at the agency -- they're doing things that are an awful lot more tactical than they have traditionally done. And so in that sense, DOD's stepping up and doing these inherently tactical things. That's good news. It just has to be synchronized.

SEN. FEINGOLD: Well, in terms of this idea of sort of doing this on a case-by-case basis, I mean, it concerns me. I mean, isn't it better to clarify these functions somehow now? In other words, why should our personnel out in the field have to operate under overlapping authorities? And why not try to resolve this now, rather than wait until some critical mission is potentially paralyzed by some kind of interagency conflict?

GEN. HAYDEN: Yes, sir. And that was the purpose of the MOU between Defense and CIA -- oh boy -- late last summer, early last fall. And now we're in the process of implementing that,

making sure it's implemented in all cases. And I said -- and I've talked to the folks at the agency; they actually put a fairly happy face on this. They think this is going well. And they point out that when there are issues, it's largely attributed to inexperience rather than ill intent.

SEN. FEINGOLD: Well, I wish you well with it, because, obviously, rather than -- we don't want people, rather than fighting al Qaeda, to be fighting each other in these situations. I know you want that as much as anybody. And that seems to me to be one of the most important things going forward.

Mr. Chairman, thank you.

And thank you, Senator Wyden.

GEN. HAYDEN: Thank you, Senator.

SEN. ROBERTS: Senator Wyden.

SEN. WYDEN: Thank you, Mr. Chairman.

General, to wrap up --

GEN. HAYDEN: Yes, sir.

SEN. WYDEN: -- my assessment of this is that people in this country see fighting terrorism and protecting privacy as not mutually exclusive; they feel that we can do both. Right now the American people cannot find the checks and balances; they don't know what the truth is, and they're very concerned about what's next.

Tell me, for purposes of my closing up in this public session, what can be done to break this cycle? You know, what we have is an announcement from the government about a program that sounds limited, sounds like it strikes a balance, and then people wait for the next shoe to drop and there are all these revelations in the newspaper.

What, in your view, can be done to break the cycle?

GEN. HAYDEN: Senator, more broadly, without, you know, confining my comments to the terrorist surveillance program, and particularly without commenting or verifying anything that's been in the press --

SEN. WYDEN: General, with -- I only -- I only interrupt you to be humorous. If you want to say "we can be more forthcoming," then we can wrap the topic. (Laughter.)

GEN. HAYDEN: Senator, as I said in my opening comments, all right, it is my belief that I will be as open as possible with this committee. I'll make the caveat, I'm not going to solve the polynomial equation created in Philadelphia in terms of inherent tension between Article I and Article II authority. But my belief is that the way we get the comfort of the American people is by the dialogue I can have with members of this committee, albeit in certain circumstances with the leadership, in other circumstances with the broader committee.

SEN. WYDEN: I will tell you, General, in wrapping up -- because this is really how I want to close -- for months and months, as a member of this committee, I have gotten most of my information about the key program from the newspapers. I don't think that complies with the 1947 statute. I don't think that's what we need to have bipartisanship in intelligence. I don't think that's what we need to really prepare this country for dealing with a dangerous post-9/11 world.

I joke all the time, "I'm only on the Intelligence Committee, what do I know?" And unfortunately -- and this has been the case for, you know, years -- most of this committee has not been privy to getting the information that's so critical.

Senator Hatch, for example, read from that memo a variety of names, and went on for a considerable time. Before that New York Times story came out, as far as I can tell, only eight leadership, you know, positions and two others knew anything at all about what came out in The New York Times. So, I will tell you, when you say you're going to come to the leadership of the committee, I will say for years and years -- and this is a matter of public record -- most of this committee has not been able to get the sensitive information, the information that our constituents ask. And I think that is not how we're going to get effective intelligence oversight for our country.

Thank you for the extra time, Mr. Chairman.

SEN. ROBERTS: (Gavels.) The open part of this hearing is now concluded, and we will move immediately to the closed session.

General, thank you for your patience.

GEN. HAYDEN: Yes, sir.

END.

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