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Top C.I.A. Lawyer Sides with Senate Torture Report

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Last night, along with the bill reopening the government, the Senate confirmed Stephen W. Preston, the top lawyer at the C.I.A., to move to the Pentagon to serve in the same role there. The vote slipped by unnoticed by most, but on close inspection, it revealed previously unreleased documents that lift the lid on an unusual standoff between Congress and the Obama Administration's C.I.A. At its core is a bitter disagreement over an apparently devastating, and still secret, report by the Senate Intelligence Committee documenting in detail how the C.I.A.'s brutalization of terror suspects during the Bush years was unnecessary, ineffective, and deceptively sold to Congress, the White House, the Justice Department, and the public. The report threatens to definitively refute former C.I.A. personnel who have defended the program's integrity. But so far, to the consternation of several members of the Intelligence Committee, the Obama Administration, like Bush's before it, is keeping the damning details from public view.

Preston's confirmation became a proxy skirmish in the fight. Obama reportedly hoped to get Preston confirmed before the congressional recess this past summer. Instead, Senator Mark Udall, a Democrat from Colorado, who is a member of both the Senate Select Committee on Intelligence and the Armed Services Committee, put a "hold" on Preston's confirmation until he answered a set of additional, and previously undisclosed, questions. A copy of these seven questions, and Preston's answers, obtained by *The New Yorker* (below), sheds new light on the conflict.

The questions and answers make clear that Udall, who has pushed vigorously for the report's release, voted to confirm Preston only after he believed that the general counsel distanced himself from his own intelligence agency's defiant and defensive stance on the six-thousand-three-hundred page report, which cost forty million dollars to produce. Democrats on the Senate Intelligence Committee, including Chairwoman Dianne Feinstein, are pushing to declassify and publicly release it. But John Brennan, the agency's director, a career C.I.A. officer, and an Obama confidant, is apparently resisting disclosure, and challenging many of the report's conclusions.

On June 27th, the C.I.A. delivered an impassioned rebuttal of the report to the committee. Last month marked the last of numerous meetings between C.I.A. and Intelligence Committee personnel over the disputed report. They did not go well, according to several informed sources. Meanwhile, despite Obama's calls for increased transparency, the White House has apparently

sat on the sidelines, urging the two intransigent sides to work out their differences. Without White House involvement, the standoff is likely to remain a huge battle.

Edward Price, a media spokesman for the C.I.A., said in a statement, "Mr. Preston's answers are fully consistent with the Agency's position and its response to the Senate report on the Rendition, Detention, and Interrogation program. The C.I.A. response noted that the C.I.A. agreed with a number of the Senate study's findings and had taken steps to address shortcomings identified by the report, but it also detailed significant errors in the study." The C.I.A. declined to discuss details, and documents suggest some significant differences between Preston and the agency.

The C.I.A. has defended its record on keeping Congress informed. In contrast, Preston, in his answers to Udall, concedes that, during the Bush years, the C.I.A. "fell well short" of current standards for keeping the congressional oversight committees informed of covert actions, as is required under the 1947 National Security Act.

In fact, Preston admits outright that, contrary to the C.I.A.'s insistence that it did not actively impede congressional oversight of its detention and interrogation program, "briefings to the Committees included inaccurate information related to aspects of the program of express interest to Members."

The contention that the C.I.A. provided inaccurate information to the congressional oversight committees is apparently extensively documented by the report. Udall notes that the report contains a two-hundred-ninety-eight-page section on "C.I.A. Representations on the C.I.A. Interrogation Program and the Effectiveness of the C.I.A.'s Enhanced Interrogation Techniques to Congress."

The C.I.A. described itself as "comfortable" with the Bush White House's policy of informing only the chairman and vice-chairman of the Intelligence Committee about its covert interrogation and detention program, rather than keeping the whole oversight committee informed. According to the Udall document, the agency has defended the practice, saying, "We disagree with the Study's contention that limiting access is tantamount to impeding oversight." Preston, however, states:

> Had the Executive understood and discharged its congressional reporting obligations as we have in my experience since 2009, I do not believe that the briefings on a program of this nature, magnitude, and duration would have continued on a limited, leadership only basis.

In addition, Preston acknowledges that, in the past, the C.I.A. inadequately informed the Justice Department about the full nature of its interrogation and detention program. "C.I.A.'s efforts fell well short of our current practices when it comes to providing information relevant to [the Office of Legal Counsel]'s legal analysis," Preston writes.

Preston also distances himself from the C.I.A.'s argument that it is impossible to know whether alternatives to brutal interrogations would have produced information that was as good, if not better. According to the Udall document, the C.I.A. has argued in its rebuttal to the Senate report

that it is "unknowable whether, without enhanced techniques, C.I.A. or non-C.I.A. interrogators could have acquired the same information from those detainees."

However, Preston, in his answers to Udall, agrees with the Senate report's finding that it is sometimes possible to determine that there were other ways that the C.I.A. could have obtained the same information, without tormenting detainees. Evidently, the report recounts numerous instances in which ordinary legal methods would have produced the same intelligence that was gained through brutalization. Preston, in his answers to Udall, acknowledges that:

> I agree that it may be possible to make a determination as to whether information… was "otherwise unavailable."

The argument is important because the Senate report evidently asserts that there were instances when the C.I.A. claimed to have gotten information because of torture when, in fact, it got it years after the fact, or could have obtained it through other means. Yet the C.I.A. has maintained that such arguments are "inherently speculative." The distinction has legal implications because, during the Bush years, the C.I.A. defended its use of psychological and physical cruelty by arguing that there was no other way to obtain the intelligence it was seeking.

Preston wrote that the Agency's response to the Senate report "does not defend the historical policy decision to use enhanced interrogation techniques as part of the former program. In submitting the response, moreover, Director Brennan made clear his view that enhanced interrogation techniques are not an appropriate method to obtain intelligence and his agreement with the President's decision to ban their use. My views are exactly the same as Director Brennan's in both respects."

Other glimpses of friction between Congress and the C.I.A. are visible. For instance, it appears that, although Udall requested that Brennan get briefed by the staff that spent years working on the report, and therefore knows its contents intimately, instead, the C.I.A. director has met with and discussed the report with the ranking members of the Senate Intelligence Committee, who have more clout, but probably less detailed familiarity with it.

In an e-mail to *The New Yorker* explaining why he sent Preston the seven additional questions, Udall said that he had "concerns" regarding the C.I.A.'s "recent engagement with the congressional oversight process."

Udall explained that he was troubled that Preston, in his Senate confirmation hearing in June, had described the C.I.A.'s response to the committee's report as "appropriate." If Preston had shared the C.I.A.'s position on the report, Udall said, "it would have been hard for me to support his nomination to lead the legal department at the Department of Defense." Preston's answers, however, reassured him that that was not the case.

Preston may have won over Udall, but the senator remains dissatisfied with the C.I.A. "My views of the C.I.A.'s response remain unchanged," Udall wrote. "As I told John Brennan during his confirmation hearing, acknowledging the flaws of the C.I.A.'s detention and interrogation program is essential for the C.I.A.'s long-term institutional integrity—as well as for the legitimacy of ongoing sensitive programs. At this point, I do not believe the C.I.A. has

sufficiently acknowledged the flaws that the committee has meticulously detailed with thirty-five-thousand footnotes in six-thousand-three-hundred pages."

Udall also reiterated his demand to "declassify as much of the committee's report as possible." He added, "Without the right amount of sunshine, some of the problems documented in the study—to include problems that I believe still exist today—will remain uncorrected. The American people have the right to know what the government has done on their behalf."