

**Senate Armed Services Committee
Questions for the Record for the
Honorable Stephen W. Preston, CIA General Counsel,
Nominated to be the General Counsel of the Department of Defense
August 9, 2013**

Senator Mark Udall

Our great nation is based on a system of checks and balances. I believe that it is essential that the Congress be able to exercise appropriate oversight of executive branch agencies and that agencies appropriately respond to congressional requests. Most executive branch agencies work hard to provide Congress with the information needed to conduct effective oversight. It is important that such best practices be replicated throughout the government. Likewise, it is essential that such practices as unacceptable responses to congressional requests and oversight do not spread to other agencies.

As you know, I have concerns regarding the CIA's recent engagement with the congressional oversight process, to include periods of time during which you have served as General Counsel of the CIA. In your testimony to the Senate Armed Services Committee, you stated that you believed the CIA's response to the Senate Select Committee on Intelligence's *Study on the CIA Detention and Interrogation Program* (the *Committee Study*) was "appropriate," and that you accepted the conclusions of the CIA response. You also stated that you had some involvement in the CIA's response, noting, "For my part, I don't believe there's anything legally objectionable. That's the determination I need to make."

In responding to the questions below, I note the following:

I strongly agree that it is essential that the Congress be able to exercise appropriate oversight of Executive branch agencies and that agencies appropriately respond to congressional requests. Doing a better job of congressional notification and ensuring the proper provision of information concerning covert action and other intelligence activities to the Intelligence Committees has been a top priority of the Directors under which I have served, starting with Director Panetta, and one that I have fully supported. As I stated at this Committee's hearing on my nomination, if confirmed, I will be fully committed to ensuring that the Armed Services Committees are kept properly informed in furtherance of their critical oversight responsibilities vis-à-vis the Department of Defense.

My role with respect to the Agency's response to the SSCI's study is perhaps best understood in the context of my broader role as General Counsel of the CIA. For the past four-plus years, my highest priority as General Counsel has been working to ensure that the Agency is and remains in full compliance with all applicable law in the conduct of intelligence activities, with particular attention to ongoing counterterrorism programs. With respect to the former detention and interrogation program, which was ended by Executive Order prior to my arrival, the primary focus of the Office of General Counsel during my tenure has been on supporting the work of the

Department of Justice and the SSCI in their respective reviews of the former program, with particular emphasis on the document production process, as well as supporting the U.S. Government's efforts to criminally prosecute terrorist detainees.

The preparation of Agency comments following receipt of the SSCI report was undertaken at the direction of the Acting Director and performed by a team of senior career officers. The product of their work was ultimately submitted to the Director, via the Deputy Director, for approval. My involvement in this process was limited. I did not personally participate in the team's formulation of substantive comments, nor did I independently review the factual basis for their findings and conclusions. I reviewed the comments, with particular attention to the recommendations, and made suggestions, chiefly as to presentation, in hopes of enhancing the utility of the comments, to the Agency and the Committee, in the discussion between them that would follow. My role was principally one of advising the Director and the Deputy Director as they considered how best to engage with the Committee in light of its report and, of critical importance, how to improve the Agency's conduct and oversight of other sensitive programs going forward.

In its response, the Agency confirmed its agreement with a number of the study's conclusions, acknowledged shortcomings, and set forth Director-approved remedial measures to address them. The response 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. Insofar as the Agency's response also identifies areas of disagreement with the SSCI's study, I see the response not as a rebuttal to the study or any kind of counter-report, but as comments on the study for the Committee's consideration as it seeks to ensure an accurate record of the former detention and interrogation program. In my view, as previously indicated, the preparation of comments by Agency officers and the Director's submission of such comments for the Committee's consideration was a lawful and appropriate step in the ongoing dialogue between CIA and its congressional overseers. There is now underway an important discussion between the Agency and the Committee – between the Director and Committee leadership, and between the respective staff members most familiar with the facts. I am prepared to abide the outcome of that process.

Views on the Responsibilities of Government Agencies to Respond to Congressional Oversight Requests—CIA Response to the Senate Select Committee on Intelligence

1. As you know, on December 14, 2012, the Senate Select Committee on Intelligence provided a nearly 6,300-page *Study on the CIA Detention and Interrogation Program* to the CIA and other agencies for “review and comment.” The CIA's response was requested by February 15, 2013. The Committee did not receive the CIA's response until June 27, 2013. During this more than six-month period, Committee Members repeatedly requested that CIA personnel meet with the Committee staff to discuss the *Committee Study*. The CIA declined all requests to meet with its oversight committee on this matter. In your previous response to questions on your role in the CIA's response to the *Committee Study*, you stated: “My role

was principally one of advising the Director and the Deputy Director as they considered how best to engage with the Committee in light of its report and, of critical importance, how to improve the Agency's conduct and oversight of other sensitive programs going forward."

- a. Please elaborate on your specific role in the CIA's decision to decline to meet or communicate with the Members and staff of the CIA's oversight committee on this matter of "critical importance" for more than six months. Did you object to the CIA's decision not to meet with the Committee or its staff? Do you believe this decision was reasonable and appropriate given the "critical importance" of the matter and the repeated requests by multiple Members of the Committee for CIA personnel to meet with Committee staff?
- b. If confirmed as General Counsel of the Department of Defense, will you ensure, to the best of your ability, that the Department will communicate and meet with the Senate Armed Services Committee Members and its staff in a timely and reasonable manner?

The SSCI's study was formally adopted by the Committee and provided to the Agency for response in December 2012. At that point, the Agency undertook to review the study and prepare comments for the Committee's consideration. Agency leadership determined that it would be most productive to review the report and digest its findings and conclusions before trying to reengage with the Committee in the nature of a substantive response. As any comments on the SSCI's study would not be the Agency's considered response unless and until such comments were reviewed and adopted by the Director, Agency leadership also determined that it would be premature and potentially counterproductive to have substantive discussions at a staff level prior to that time. In my view, leadership's judgment in this regard was not unreasonable.

The process took longer than the 60 days originally allotted by the Committee for the Agency's response. This was due in part to the volume of the report, but also to the change in leadership at the Agency, with the nomination and confirmation of a new Director in the first quarter of this year. The Acting Director sought to keep Committee leadership apprised of the Agency's progress and, on at least one occasion during the process, met with the Chairman and Vice Chairman to foreshadow the Agency's preliminary views thus far developed. Following his appointment, the Director also sought to keep Committee leadership apprised of the Agency's progress, and he and the Deputy Director met with Committee leadership in June to walk through the Agency's response to the SSCI's study. As agreed at that meeting, extensive staff-level meetings ensued, and those discussions continue.

If confirmed, I will certainly do everything in my power to ensure that the Department of Defense communicates and meets with Senate Armed Services Committee Members and staff in a timely and reasonable manner. As noted above, I have fully supported efforts to ensure the proper provision of information to the Intelligence Committees, and, if confirmed, I will be fully committed to such efforts with respect to the Armed Services Committees. This would include communicating and meeting with this Committee on a timely and reasonable basis.

CIA Response to the Senate Select Committee on Intelligence

2. In your testimony to the Senate Armed Services Committee, you stated that you believed the CIA's response to the Senate Select Committee on Intelligence's *Study on the CIA Detention and Interrogation Program* was "appropriate." The CIA response largely responds to a small summary portion of the *Committee Study*, not to the material in the 300-page Executive Summary, or to the larger 6,300-page document. CIA personnel have confirmed that when the CIA response makes an affirmative statement about what the CIA believes is *not* in the *Committee Study*, the CIA response is merely referencing bullet points in a short 50-page section of the *Committee Study* that precedes the Executive Summary, not the larger *Committee Study* or its full Executive Summary. CIA personnel have further relayed that no one person at the CIA has read the full 6,300-page *Committee Study*.
 - a. Given Director Brennan's statement at his Senate confirmation hearing that he looked forward "to reading the entire 6000-page volume, because it is of such gravity and importance;" the additional four months beyond the February 15, 2013, deadline the CIA took to respond to the *Committee Study*; as well as Director Brennan's testimony to the House Permanent Select Committee on Intelligence that the CIA was taking the extra time to provide a thorough response, do you believe it was appropriate for the CIA to largely respond only to a small section of the *Committee Study* that precedes the Executive Summary?

The Agency undertook to review and respond to the SSCI report to the full extent believed possible given its volume and that of the underlying record material, and given very limited time constraints, imposed originally by the Committee's 60-day deadline and, once that was exceeded, by the practical imperative to respond expeditiously following the appointment of a new Director. In light of these circumstances, the Acting Director adopted a team approach, relying on a group of experienced intelligence officers, rather than a single individual, to conduct the review and prepare comments. He deemed it impractical to respond on a line-by-line basis to the 6,300-page report in any reasonable timeframe, so he directed the team to focus on the study's 20 conclusions and conduct a "deep dive" on a substantial portion of the study viewed as the basis for a number of the study's central conclusions. I understand that the members of the team divided up the substantive matters identified and, in the course of formulating their comments, sought to review those portions of the report and underlying record material relating to the subjects as assigned. Accordingly, while the response is organized in terms of and seeks to address the study's conclusions, my understanding is that the review and resulting comments were not confined to the bare statement of conclusions or even the summary volume of the report. To be sure, the Agency's response does not constitute an encyclopedic treatment of the SSCI's study. To the extent that there are matters apparently not addressed and believed to be important to an understanding of the former program, they would be entirely appropriate for discussion in the staff-level meetings currently in progress.

Views on Responsive Document Production Pursuant to Committee Oversight Requests

3. On July 19, 2013, the New York Times reported that the Senate Select Committee on Intelligence's *Study of the CIA Detention and Interrogation Program* "took years to complete and cost more than \$40 million." In your previous response to questions on your role in the CIA's response, you stated: "My role was principally one of advising the Director and the Deputy Director as they considered how best to engage with the Committee in light of its

report and, of critical importance, how to improve the Agency's conduct and oversight of other sensitive programs going forward."

- a. The CIA declined to provide the Senate Select Committee on Intelligence with access to CIA records at the Committee's secure office space in the Hart Senate Office Building. Instead, the CIA insisted that the Committee review documents at a government building in Virginia. Once the CIA produced relevant documents related to the CIA detention and interrogation program, the CIA then insisted that CIA personnel—and private contractors employed by the CIA—review each document multiple times to ensure unrelated documents were not provided to a small number of fully cleared Committee staff. What role did you play in the decision to employ these unnecessary multi-layered review steps that delayed CIA document production to the Committee at significant governmental expense?
- b. During the CIA's document production of more than six million pages of records, the CIA removed several thousand CIA documents that the CIA believed could be subject to executive privilege claims by the President. While the documents represent an admittedly small percentage of the total number of records produced, the documents—deemed responsive—have nonetheless not been provided to the Committee. What role did you, and other members of CIA leadership, play in the decision to withhold these responsive documents from the Committee? Do you believe it is proper for a federal agency to deny the production of responsive documents to a congressional oversight committee for significant periods of time absent an executive privilege claim by the President?
- c. If confirmed as General Counsel of the Department of Defense, will you ensure, to the best of your ability, that the Department will provide responsive documents as requested by the Senate Armed Services Committee absent an executive privilege claim by the President?

During its review of the former detention and interrogation program, the Committee was provided access to highly sensitive CIA materials, including operational cable traffic, internal electronic communications and other information. All told, the Committee was provided access to more than six million pages of materials, some in a large initial production to the Committee in 2009 and the rest in follow-on tranches in response to hundreds of staff requests over the next three years. It is my understanding that the particular arrangements for access – including scope, location and associated limitations – stemmed from discussions between the Agency and the Committee, initially between Director Panetta and the Chairman and then at a staff level over time. While in most instances I was not directly involved, I believe that the judgments underlying these arrangements were made in a good faith effort to provide adequate protection for particularly sensitive national security information, to ensure access to the materials needed by the Committee to perform its oversight function and otherwise to facilitate the review, and to follow conventional document collection/review/production practices as applicable under the circumstances.

With specific reference to documents potentially subject to a claim of executive privilege, as noted in the question, a small percentage of the total number of documents produced was set aside for further review. The Agency has deferred to the White House and has not been substantively involved in subsequent discussions about the disposition of those documents.

If confirmed, I will certainly do everything in my power to ensure that the Department of Defense will provide responsive documents as requested by the Senate Armed Services Committee, and I will consult with the Committee regarding the basis for any good faith delay or denial in providing such documents.

The Provision of Accurate Information by Federal Agencies to the Department of Justice

4. In your previous response to questions on your role in the CIA's response to the Senate Select Committee on Intelligence's *Study of the CIA Detention and Interrogation Program*, you stated that you had some involvement in the CIA's response, noting, "For my part, I don't believe there's anything legally objectionable. That's the determination I need to make." The CIA response states: "we found no evidence that any information was known to be false when it was provided [to the Department of Justice] or that additional or more frequent updates would have altered OLC's key judgments." You have written in response to a question on this matter:

"My understanding is that DOJ did not always have accurate information about the detention and interrogation program in that the actual conduct of that program was not always consistent with the way the program had been described to DOJ. Of particular note, I understand that, in a number of instances, enhanced interrogation techniques, specifically waterboarding, were applied substantially more frequently than previously had been described to DOJ. I cannot say what DOJ would or would not have considered material at the time. I can tell you that, if I were in a comparable situation, I would consider information of this nature to be material."

The information you have referenced above regarding the discrepancies between the actual use of the waterboard and the description of its use that CIA provided to the Department of Justice—while significant and material—was known prior to the *Committee Study*. Volume II of the *Committee Study*, specifically a 128-page section entitled, *CIA Representations to the Department of Justice Related to Intelligence, Effectiveness, and Operation of the Interrogation Program*, details how far more inaccurate information was provided to the Department of Justice.

- a. In light of the critical nature of this subject, please review the *CIA Representations* section (referenced above) of the *Committee Study* and describe your views on whether the factual record as recounted in the *Committee Study* supports the CIA's legal conclusion that accurate, timely and complete information would not have "altered OLC's key judgments."
- b. As noted above, you have stated in your previous response to a Question for the Record that "I cannot say what DOJ would or would not have considered

material at the time. I can tell you that, if I were in a comparable situation, I would consider information of this nature to be material.” After reviewing discrepancies between the factual record and OLC key judgments, do you agree with the CIA’s response that “revisiting its factual representations and updating them as necessary... would not have had a practical impact on the outcome”? Please explain whether your position differs from the CIA’s conclusion that OLC key judgments would not have been altered. For reference, you might review key judgments in the following documents:

- *Memorandum Regarding Interrogation of al Qaeda Operative* (August 1, 2002);
 - Letters from the Department of Justice related to the interrogation of individual detainees, including to the Acting Director of Central Intelligence, dated July 22, 2004; to the CIA Acting General Counsel, dated August 6, 2004; to the CIA Acting General Counsel, dated August 26, 2004; to the CIA Acting General Counsel, dated September 6, 2004; and to the CIA Acting General Counsel, dated September 20, 2004;
 - *Memorandum Regarding Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques That May be Used in the Interrogation of a High Value al Qaeda Detainee* (May 10, 2005);
 - *Memorandum Regarding Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* (May 10, 2005)
 - *Memorandum Regarding Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees* (May 30, 2005)
 - *Memorandum Regarding Application of the Detainee Treatment Act to Conditions of Confinement at Central Intelligence Agency Detention Facilities* (August 31, 2006)
 - *Memorandum Regarding Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees* (July 20, 2007)
- c. The CIA response to the *Committee Study* states: “while it would have been prudent to seek guidance from OLC on the complete range of techniques prior to their use, we disagree with any implication that, absent prior OLC review, the use of the ‘unapproved’ techniques was unlawful or otherwise violated policy.” Please state whether you agree with this legal determination and explain your legal reasoning.
- d. You have stated in your previous response to a Question for the Record that: “While I have been General Counsel of the CIA, the relationship between the Agency and DOJ’s Office of Legal Counsel (OLC) has been characterized by frequent and candid communication concerning the Agency’s sensitive programs, with particular attention to ensuring that the OLC is provided complete and accurate information on which to base its legal advice to the Agency. In addition, the Agency is developing an internal

mechanism for periodically and systematically reviewing OLC opinions regarding sensitive programs to ensure that OLC is informed of any material changes in facts or circumstances.” Please describe your views on the importance of federal agencies conveying and ensuring the OLC is properly informed of relevant information. How will you approach your interactions with the Office of Legal Counsel if confirmed as General Counsel of the Department of Defense?

Departments and agencies rely on OLC for authoritative legal guidance on a variety of difficult and consequential issues in an effort to ensure that their programs and operations are entirely lawful. This system works if and to the extent that OLC is properly informed of the information needed to address the legal issues presented. In my view, this is of fundamental importance. During my tenure as CIA General Counsel, I have worked to ensure that the Agency provides the full range of relevant information to OLC. If confirmed, I will do likewise at the Department of Defense, continuing to engage, in an atmosphere of transparency, with my OLC colleagues.

With reference to the factual representations concerning the former detention and interrogation program, it would be difficult to determine with certainty what information DOJ officials years ago would have regarded as outcome determinative. That notwithstanding, I have reviewed the section of the SSCI’s study (and the other material) identified in the question, and I believe CIA’s efforts fell well short of our current practices when it comes to providing information relevant to OLC’s legal analysis. If CIA had adhered to what we regard as proper practice today, it would have ensured that its representations to OLC on matters relating to the former program were and remained complete and accurate – updated as necessary on a timely basis – as we do today. In sum, I believe timely disclosure of all relevant facts to OLC is a necessary predicate to obtaining its authoritative legal guidance. Providing such disclosure is the current practice of the Agency, and it will certainly be my practice at the Department of Defense, if I am confirmed.

On the particular point raised in (c) of the question, I also agree that CIA should have sought guidance from OLC with regard to the complete range of interrogation techniques prior to their use. I understand the Agency’s response to the SSCI’s study to acknowledge this point, noting only that failure to so engage with OLC did not, in and of itself, render any given technique unlawful.

Responding to Congressional Oversight

5. The CIA response to the Senate Select Committee on Intelligence’s *Study of the CIA Detention and Interrogation Program* states that “We disagree with the *Study*’s conclusion that the Agency actively impeded Congressional oversight of the CIA detention and interrogation program.”
 - a. In light of the critical nature of this subject, and its direct relevance to your nomination, please review the 298-page section in Volume II of the *Committee Study*, entitled, *CIA Representations on the CIA Interrogation Program And the Effectiveness of the CIA’s Enhanced Interrogation Techniques To Congress*, as well as any other appropriate sections, and state whether you concur with the CIA’s response.

- b. The CIA response states that the White House had the “responsibility” for determining whether the CIA would brief the full Committee or only the Chairman and Vice Chairman. The CIA response also notes that “We do not want to suggest that CIA chafed under these restrictions; on the contrary, it undoubtedly was comfortable with them.” Do you believe that the limitations on briefings to the Committee Chairman and Vice Chairman for nearly four and a half years was appropriate, or adhered to the letter or spirit of the *National Security Act of 1947, as amended*, regardless of White House direction at the time?
- c. Based on your review of the aforementioned 298-page section, and other associated sections of the *Committee Study*, do you believe that the briefings provided to the Committee Chairman and Vice Chairman prior to September 6, 2006, fulfilled the CIA’s obligation, under the *National Security Act*, to keep the congressional intelligence committees “fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity”? In your response, please provide your assessment of whether the record indicates that information provided to the Committee Chairman and Vice Chairman was accurate, complete, or timely.
- d. Based on your review of the 298-page section, and other associated sections of the *Committee Study*, do you believe that the briefings provided to the full Committee beginning on September 6, 2006, fulfilled the CIA’s obligation, under the *National Security Act*, to keep the congressional intelligence committees “fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity”? In your response, please address whether information provided to the Committee was accurate, complete, or timely.
- e. To what extent do you view the CIA’s past engagement with the Senate Select Committee on Intelligence on the CIA’s Detention and Interrogation program—as well as the CIA’s most recent response and engagement with the Committee on this matter—as a model for the Department of Defense’s engagement with the Senate Armed Services Committee?

I have reviewed the section of the SSCI’s study identified in the question, and I believe CIA’s efforts in this regard fell well short of our current practices when it comes to congressional reporting. I would not regard them as a model for the Department of Defense’s engagement with this Committee. 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. Moreover, as discussed in the Agency’s response and further explored in the staff-level discussions, briefings to the Committees included inaccurate information related to aspects of the program of express interest to Members. What we regard as proper practice today is driven by faithful application of the National Security Act of 1947. It is also informed by the very high priority the Directors under which I have served have placed on doing a better job of congressional notification and ensuring the proper provision of information concerning covert action and other intelligence activities to the Intelligence Committees. To repeat, I have fully

supported these efforts and, if confirmed, will be fully committed to such efforts with respect to the Armed Services Committees.

Section 331 of the Intelligence Authorization Act

6. The CIA response to the *Committee Study* states that “We disagree with the Study’s contention that limiting access is tantamount to impeding oversight.” To support this conclusion, the CIA response states that the narrative of the *Committee Study* “does not reflect mutually agreed upon past or current practices for handling restricted access programs.” The CIA response continues: “Indeed, the Committee codified, as part of the FY12 Intelligence Authorization Act, the practice of briefing sensitive matters to just the Chairman and Ranking Member [sic], along with notice to the rest of the Committee that their leadership has received such a briefing.”
 - a. Is the statement above a reference to Section 331 (“Notification procedures.”) of the FY10 Intelligence Authorization Act, reported out by the Committee on July 22, 2009, and again, on July 15, 2010? If not, please identify the provision in the FY12 Intelligence Authorization Act to which the CIA response is referring in this statement.
 - b. Please confirm your understanding that the language and intent of that legislation was not to “codify... mutually agreed upon past or current practices,” but rather, as the Committee report states, to provide for the “improvement of notification” by ensuring that, “[i]n the event the DNI or head of an Intelligence Community element does not provide [notification] to the full congressional intelligence committees,” the full committee shall be provided notice of this fact. If this is not your understanding, please provide an explanation for the conflict between the sponsors’ and Committee’s legislative intent to improve full Committee notification and the CIA’s alternative interpretation of this law as expressed in the CIA’s response.

The statement quoted above from the Agency’s response to the SSCI’s study refers to section 331 of the FY10 Intelligence Authorization Act, but I believe the statement was inartfully drawn to the extent that it can be read to suggest that, in enacting this legislation, the Congress or the Committee intended to endorse or embrace the Executive’s practice of limited notification of certain sensitive matters to Committee leadership. My understanding of the legislation is that it makes provision for situations in which the Executive determines to provide notification to fewer than all Committee Members (“If the President determines that ..., the finding may be reported to ...”) and, specifically, puts into law the requirement of notice to all Committee Members of the fact of the limited notification (“In any case where ..., the President shall provide to ...”) As I understand it, such notice to all Committee Members was not the pre-existing practice, but rather was an improvement put into place by the legislation. In short, the requirements of section 331 are as stated in the plain language of the provision, and the legislative intent is as stated in the legislative history of the Act, to include specifically the views expressed by Senator Rockefeller.

Previous Responses to Questions for the Record

7. You were asked in a previous Question for the Record about the CIA's past representations that information obtained from the CIA's enhanced interrogation techniques was "otherwise unavailable" to the United States Government, and the CIA's response, which states the CIA now believes these representations were "inherently speculative." The CIA response further states, "it is unknowable whether, without enhanced techniques, CIA or non-CIA interrogators could have acquired the same information from those detainees." In your response, you stated, "I understand this to be saying that information was provided by detainees following the application of enhanced interrogation techniques and that it is not possible to know whether the same information would have been obtained had other interrogation methods been used, because there is no way to turn the clock back and question these detainees all over again in a different fashion. In this sense, it is unknowable."
- a. As you know, in its cataloging of intelligence in U.S. government databases, the Committee accepted the CIA's broad definition of information obtained from CIA enhanced interrogation techniques – to include all information a detainee provided during or after CIA enhanced interrogation techniques, even if that information was provided several years after the use of enhanced interrogation techniques – as information derived from the techniques. Instead of speculating on what might have resulted if the CIA had tried to "turn the clock back and question these detainees all over again in a different fashion," the Committee sought to confirm CIA representations that information the CIA claimed was derived from enhanced interrogation techniques was, as the CIA represented, otherwise unavailable to the U.S. government through other intelligence sources.

Referencing the same standard, in a previous response you relayed that "otherwise unavailable" meant "otherwise unavailable to the Agency through other sources." This interpretation of "otherwise unavailable" is consistent with CIA representations to the CIA Office of Inspector General, Congress, and the Department of Justice, among others. For example, see the May 30, 2005, Office of Legal Counsel Memorandum, which describes CIA representations on effectiveness and the need to obtain "otherwise unavailable intelligence" to protect the nation.

Using the term "otherwise unavailable," as you stated, "otherwise unavailable to the Agency through other sources," which is consistent with past CIA representations, do you agree that a review of intelligence community records could determine whether information the CIA claims resulted from enhanced interrogation techniques was either "otherwise unavailable," or previously available "to the Agency through other sources"?

For purposes of this question, I understand "otherwise unavailable" to focus not on whether conventional interrogation techniques would have produced information different from that obtained following application of enhanced interrogation techniques, but on whether the information obtained was in fact available from sources other than the detainee subjected to such enhanced techniques. Understood in this way, I agree that it may be possible to make a determination as to whether information obtained following application of enhanced interrogation techniques was "otherwise unavailable," depending of course on the state and

content of the record. My understanding is that differing views of the record in this regard are being discussed in the staff-level meetings currently in progress.

Attachment: Intelligence Authorization Act of Fiscal Year 2010

ADDITIONAL VIEWS OF SENATOR ROCKEFELLER

The Congressional notification provisions in the bill that we are reporting out today constitute an important improvement over the status quo. They require that the congressional intelligence committees and the President establish written procedures regarding the details of notification processes and expectations; that the President provide written notice about intelligence activities and covert actions, including changes in covert action findings and the legal authority under which an intelligence activity or a covert action is or will be conducted; that the President provide written reasons for limiting access to notifications to less than the full committee; and that the President maintain records of all notifications, including names of Members briefed and dates of the briefings.

I support these provisions because I expect that they will go a long way toward correcting past deficiencies. However, I believe that additional clarity is needed regarding whether or not the full committee will be aware of three critical facts in circumstances of less-than-full-committee notifications: (1) the fact that such a limited access notification has occurred, (2) the general subject of the limited notification, and (3) the reasons for limiting access.

There are situations in which a limited notification is appropriate and even necessary, but those situations are rare. Congressional notification procedures—and practices—should reflect that rarity. Most importantly, they should prevent limited notification from impeding the committees' oversight responsibilities, because effective congressional oversight of intelligence activities is critical to the national security interests of the United States.

As Senator Snowe and I noted in our additional views to the Committee's July 22, 2009 report of an earlier version of this bill, the Committee has supported clarity on these matters in four consecutive intelligence authorization bills. I will continue to work with my colleagues in establishing written notification procedures that resolve any ambiguities in favor of full committee awareness.

The Congressional notification provisions in the bill that we are reporting out today are a good first step—but only a first step.

JOHN D. ROCKEFELLER, IV.