

STEPHEN PRESTON: COVERT OPERATIONS DON'T NEED OLC APPROVAL

Jane Mayer has obtained a set of questions Mark Udall made CIA General Counsel Stephen Preston answer before he would release a hold on the latter's confirmation as DOD General Counsel. They address CIA's response to the Senate Intelligence Committee torture report. I will have more to say about these answers later (see also this post from Katherine Hawkins).

But for now I want to point to one of the few questions Preston really didn't answer. While the non-answer is not at all surprising, it does have implications far beyond torture.

Udall noted,

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."

The comment does two things.

First, it confirms CIA tortured before John Yoo authored memos authorizing that torture.

That confirmation is news, though we've long known it to be true.

But it also reflects CIA's view that the legality of specific torture techniques did not stem from OLC review and authorization of them.

Udall asked Preston,

Please state whether you agree with this

legal determination and explain your legal reasoning.

To which Preston responded,

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.

Preston doesn't actually say whether he agrees with the Agency's legal determination or not, which was, after all Udall's question. Which gets him out of answering Udall's question about his legal reasoning.

But Preston has, for all intents and purposes, already answered that question in his speech last year on CIA's use of lethal force. In it, he laid out what was required for the use of lethal force (he doesn't say it, but this includes lethal force against an American citizen) to be legal under US law.

Let's start with the first box:
Authority to Act under U.S. Law.

First, we would confirm that the contemplated activity is authorized by the President in the exercise of his powers under Article II of the U.S. Constitution, for example, the President's responsibility as Chief Executive and Commander-in-Chief to protect the country from an imminent threat of violent attack.

[snip]

In addition, we would make sure that the contemplated activity is authorized by

the President in accordance with the covert action procedures of the National Security Act of 1947, such that Congress is properly notified by means of a Presidential Finding.

As I've noted elsewhere, Preston doesn't even acknowledge the National Security Act's requirement that covert actions be legal under US law.

His speech makes it clear he agrees with the CIA's response on torture. The CIA doesn't need OLC approval for covert operations (which torture was during its early years), the implication seems clear, because the only thing needed to make covert operations legal is Presidential authorization with adequate Congressional notice.

This is a stance that most discussions on drones and torture miss. The CIA doesn't believe it needs OLC memos – whether authorizing belly slaps or the assassination of Anwar al-Awlaki. It may consider it prudent to have OLC authorization in hand, mind you. But it does not believe such authorization gives covert operations any more legal sanction than simply the President's authorization.