

THE CONSTITUTION PROJECT



*Safeguarding Liberty, Justice & the Rule of Law*

## LIFT THE VEIL OF SECRECY ON TARGETED KILLING

THE CONSTITUTION PROJECT'S  
LIBERTY AND SECURITY COMMITTEE

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## **LIFT THE VEIL OF SECRECY ON TARGETED KILLING**

According to a recent report from the Council on Foreign Relations, the United States has used unmanned drones to conduct over 400 lethal strikes against certain terrorism suspects in the context of the conflict against al Qaeda and its associated forces.<sup>1</sup> At least one American citizen has been targeted, and at least three American citizens<sup>2</sup> are among the estimated several thousand people who have been killed.<sup>3</sup>

High-level government officials have spoken in general terms about the executive branch's "targeted killing" program, and the program has been the subject of much popular speculation and (partially informed) debate. Yet most of the legal analysis upon which the executive branch relies to justify targeted killing, as well as the rules that have been developed to govern the program's operation, remain cloaked in secrecy. That is unacceptable. "In a democracy that rests on the rule of law, a policy of targeted killing demands *public* authority, *public* debate, and *public* accountability."<sup>4</sup>

Over the past several years the Obama administration has developed operative rules and procedures to guide targeted killings, but has done so behind closed doors.<sup>5</sup> Both Congress and the American people have repeatedly – and rightly – called for more transparency into the program to little avail. Members of the Senate Select Committee on Intelligence (SSCI) have long sought the actual legal opinions that analyze the scope of the president's targeted killing authority – particularly with respect to American citizens.<sup>6</sup> According to reports, the president has only provided the committee with four of the opinions drafted by lawyers from the Office of Legal Counsel (OLC). Even then, the president limited the Committee's access by refusing to permit SSCI Members to retain copies of these documents or to share them with committee staff.

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<sup>1</sup> Micah Zenko, *Reforming U.S. Drone Strike Policy*, Council Special Report No. 65, Council on Foreign Relations Center for Preventive Action, at 8 (January 2013), [i.cfr.org/content/publications/attachments/Drones\\_CSR65.pdf](http://i.cfr.org/content/publications/attachments/Drones_CSR65.pdf).

<sup>2</sup> *New York Times Co. v. U.S. Dep't of Justice*, 2013 U.S. Dist. LEXIS 979, at \*5-6 (S.D.N.Y. January 3, 2013) (corrected opinion granting the government's motion for summary judgment and denying plaintiffs' cross motion for summary judgment).

<sup>3</sup> INTERNATIONAL HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC AT STANFORD LAW SCHOOL AND GLOBAL JUSTICE CLINIC AT NYU SCHOOL OF LAW, *LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN (2012)* ("LIVING UNDER DRONES") at 43-54 (analyzing sources of aggregate drone strike data), <http://livingunderdrones.org/report/>. The authors found most reliable the data published by *The Bureau of Investigative Journalism* (TBIJ), a U.K. based journalism non-profit. As of February 22, 2013, TBIJ estimated that between 2966 and 4855 people have been killed by drone strikes in Pakistan, Yemen and Somalia combined, <http://www.thebureauinvestigates.com/category/projects/drone-data/>. Other organizations' estimates are lower, but do not appear to include the same range of data. See *LIVING UNDER DRONES* at 43-54.

<sup>4</sup> David Cole, *It's Time to Stop Killing in Secret*, New York Review of Books Blog, November 28, 2012, <http://www.nybooks.com/blogs/nyrblog/2012/nov/28/its-time-stop-killing-secret/>.

<sup>5</sup> Greg Miller, Ellen Nakashima & Karen DeYoung, *CIA drone strikes will get pass in counterterrorism 'playbook,' officials say*, Washington Post, January 19, 2013, [http://articles.washingtonpost.com/2013-01-19/world/36474007\\_1\\_drone-strikes-cia-director-playbook](http://articles.washingtonpost.com/2013-01-19/world/36474007_1_drone-strikes-cia-director-playbook).

<sup>6</sup> Feinstein Statement on Intelligence Committee Oversight of Targeted Killings (February 13, 2013), <http://www.feinstein.senate.gov/public/index.cfm/2013/2/feinstein-statement-on-intelligence-committee-oversight-of-targeted-killings>; January 14, 2013 Letter from Senator Ron Wyden to John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, <http://www.wyden.senate.gov/download/letter-to-brennan>; February 4, 2013 Letter from Ten U.S. Senators to President Barack Obama, <http://www.wyden.senate.gov/download/letter-to-president-obama-seeking-legal-opinions>.

For the president to withhold information from Congress regarding a program that Congress must fund, or to direct how Congress may use information to which it is entitled, violates constitutional principles of checks and balances. Similarly, the Department of Justice (DOJ) continues to fight tooth and nail in litigation under the Freedom of Information Act that seeks the public release of those opinions and other targeted killing records, refusing even to acknowledge the program's existence.<sup>7</sup>

On February 4, 2013, NBC News made public a DOJ white paper entitled "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force."<sup>8</sup> The white paper adds some details to the limited disclosures made in previous public speeches by former State Department Legal Advisor Harold Koh,<sup>9</sup> Attorney General Eric Holder,<sup>10</sup> and CIA director-nominee (then-counterterrorism advisor to the president) John O. Brennan<sup>11</sup> that broadly outlined the targeted killing program. However, the leaked white paper is no substitute for the operative legal and policy analyses.<sup>12</sup> Indeed, the white paper is woefully inadequate to answer fundamental legal, ethical, and constitutional questions about when, if ever, it can be lawful for the government to engage in targeted killing. What level of proof is necessary to place somebody on the "kill list?" What procedural protections are in place to minimize the risk of false positives? Is anyone charged with making the case for keeping a putative target *off* the list? When, if ever, does the president have the authority to order that an individual, who is not presently engaged in an attack against the United States, may be killed rather than captured? How do government officials determine that the threat an individual poses is sufficiently "imminent" to justify a decision to target rather than seek to capture? Does the president claim the power to engage in targeted killing on U.S. soil? Does the president ever have the right to kill American citizens without acknowledging that he has done so? Or, does due process forbid the secret killing of one's own citizens?

President Obama entered office promising an unprecedented level of openness in government. In a January 2009 memorandum to executive branch departments and agencies, he explained that government should be both *transparent*, because "[t]ransparency promotes accountability and provides information for citizens about what their Government is doing," and *participatory*, because "[p]ublic engagement enhances the Government's effectiveness and improves the quality

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<sup>7</sup> *ACLU v. CIA*, No. 11-5320 (D.C. Cir.) DE 1420243 (Letter dated February 13, 2013 from DOJ to the Court disputing that the CIA has officially acknowledged interest or involvement in the use of drones for targeted killing), [http://www.aclu.org/files/assets/cia\\_response\\_to\\_letter.pdf](http://www.aclu.org/files/assets/cia_response_to_letter.pdf).

<sup>8</sup> *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qaida or an Associated Force*, [http://www.lawfareblog.com/wp-content/uploads/2013/02/020413\\_DOJ\\_White\\_Paper.pdf](http://www.lawfareblog.com/wp-content/uploads/2013/02/020413_DOJ_White_Paper.pdf).

<sup>9</sup> Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Keynote Address at the Annual Meeting of the American Society of International Law: *The Obama Administration and International Law* (March 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm>.

<sup>10</sup> Eric Holder, Attorney General, Remarks at Northwestern University Law School (March 5, 2012), <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

<sup>11</sup> John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Prepared Remarks at the Woodrow Wilson International Center for Scholars: *The Ethics and Efficacy of the President's Counterterrorism Strategy* (April 30, 2012), <http://www.lawfareblog.com/wp-content/uploads/2012/04/WilsonCenterFinalPrepared1.pdf>.

<sup>12</sup> According to Senator Diane Feinstein, the DOJ White Paper was provided to the Senate Intelligence and Judiciary Committees in June 2012 as a confidential document. See Memorandum from Dianne Feinstein, Senator (February 5, 2013), <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=f02275d9-7638-4613-b90b-3aa8c624eaf8>.

of its decisions.”<sup>13</sup> On April 16, 2009, President Obama, citing again his commitment to transparency and accountability, released the previously secret DOJ memorandums underlying the prior administration’s approach to counterterrorism interrogations because “withholding these memos would only serve to deny facts that have been in the public domain for some time. This could contribute to an inaccurate accounting of the past, and fuel erroneous and inflammatory assumptions about actions taken by the United States.”<sup>14</sup> More recently, the president pledged to better inform the American people of the “constraints” and “legal parameters” of counterterrorism efforts.<sup>15</sup> For the very reasons he has stated repeatedly since taking office, the president must now make good on those assurances. Specifically with respect to the targeted killing program, we urge the president to:

1. Release to the public the actual OLC opinions regarding the scope of the president’s targeted killing authority, and any other operative rules and legal guidance for the targeted killing program. To the extent that any of those documents contains properly classified information, such as the facts of a particular case or intelligence sources and methods, that information should be redacted, but should not prevent release of the documents themselves.
2. Provide comprehensive information to all congressional committees of jurisdiction. Although properly classified information cannot be made public, it should still be shared fully with those committees and their cleared staff. The executive branch does not have the authority to tell Members of Congress not to share information with their staff, and Members of Congress should insist that the executive branch share such information.

The lack of transparency around the targeted killing program is emblematic of a deeply troubling and increasingly pervasive larger problem that has plagued a succession of administrations: “secret law.” The legal rules and standards under which our government operates should not be secret. While counterterrorism tactics and military strategy may be appropriately withheld from public disclosure, the public has a right to know the legal framework within which these and other operations are conducted, including the safeguards in place to protect constitutional and legal rights. While the president must be able to obtain frank and confidential legal advice about how the law may apply in particular circumstances, the governing rules themselves can never be secret. Our Liberty and Security Committee addressed this issue in the fall of 2012 with regard to opinions of the Foreign Intelligence Surveillance Court (FISC). In our [Report on the FISA Amendments Act of 2008](#) we stated that “significant decisions by the FISC should be released even if in redacted form or, at a minimum, summarized in an unclassified report. Although the specific facts showing the justification for surveillance in particular cases may remain classified,

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<sup>13</sup> Memorandum from Barack Obama, President of the United States, to the Heads of Executive Departments and Agencies, <http://www.whitehouse.gov/the-press-office/transparency-and-open-government>.

<sup>14</sup> Statement of Barack Obama, President of the United States, on Release of OLC Memos (April 16, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos](http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos).

<sup>15</sup> Jim Kuhnhenn, *Obama Tackles Drones, Pennies, Guns in Google Chat*, ABC News, Feb. 15, 2013, <http://abcnews.go.com/Politics/wireStory/obama-takes-range-questions-google-chat-18506277>; see also Remarks by the President in the State of the Union Address, February 12, 2013 (“So in the months ahead, I will continue to engage Congress to ensure not only that our targeting, detention and prosecution of terrorists remains consistent with our laws and system of checks and balances, *but that our efforts are even more transparent to the American people and to the world.*”) (emphasis added), <http://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address>.

the standards and analysis being applied by the FISC should be made public.”<sup>16</sup> This same analysis applies to OLC opinions and any other documents that set forth the legal standards under which the executive branch operates.

Our constitutional system of checks and balances demands robust oversight by Congress and consideration and debate by an informed public. Neither is possible when the rules are hidden from Congress and from public view. Sensitive operational and intelligence details may of course remain appropriately classified. But the regime of law and applicable rules that govern national security programs must be made public. Our government’s commitment to transparency must not evaporate the moment that national security concerns are invoked.

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<sup>16</sup> The Constitution Project, Liberty and Security Committee, Report on the FISA Amendments Act of 2008 (September 6, 2012) at 12, [http://constitutionproject.org/pdf/fisaamendmentsactreport\\_9612.pdf](http://constitutionproject.org/pdf/fisaamendmentsactreport_9612.pdf).

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