

February 8, 2012

The Honorable Eric Holder  
Attorney General  
United States Department of Justice  
Washington, D.C. 20530

Dear Attorney General Holder:

As you know, I have been concerned for some time about decisions by the Department of Justice to withhold key interpretations of national security law from the public and, in some cases, from Congress. I do not believe that it is appropriate for the US government to rely on secret law, and in my judgment that is exactly what happens when government agencies rely on secret legal interpretations that are hidden from the public or are inconsistent with the public's understanding of what the law allows. One area of particular concern to me is the extent of the President's authority to knowingly kill American citizens in the course of counterterrorism operations.

Senior intelligence officials have said publicly that they have the authority to knowingly use lethal force against Americans in the course of counterterrorism operations, and have indicated that there are secret legal opinions that explain the basis for this authority. Specifically, in early 2010, the Director of National Intelligence told the House Intelligence Committee that the intelligence community "take[s] direct action against terrorists" and added that "if we think that direct action will involve killing an American, we get specific permission to do that."

In February 2011, after making similar requests to other officials, I asked the Director of National Intelligence to provide the legal analysis that explains the intelligence community's understanding of its authority to kill American citizens. The Director indicated that he would have liked to be responsive to my request, but he told me that he did not have the authority to provide formal written opinions of the Department of Justice's Office of Legal Counsel to Congress.

So, as you will remember, I called you in April 2011 and asked you to ensure that the secret Justice Department opinions that apparently outline the official interpretation of this lethal authority were provided to Congress. The Justice Department provided me with some relevant information in May 2011, and I mistakenly believed that this meant that you had agreed to my request. Nine months later, however, the Justice Department still has not fully complied with my original request, and it is increasingly clear that it has no intention of doing so.

Simply put, this situation is unacceptable. For the executive branch to claim that intelligence agencies have the authority to knowingly kill American citizens (subject to publicly unspecified limitations) while at the same time refusing to provide Congress

with any and all legal opinions that delineate the executive branch's understanding of this authority represents an indefensible assertion of executive prerogative, and I expected better from the Obama Administration.

To be clear, I am not suggesting that the President has no authority to act in this area. If American citizens choose to take up arms against the United States during times of war, there can undoubtedly be some circumstances under which the President has the authority to use lethal force against those Americans. For example, there is no question that President Lincoln had the authority to order Union troops to take military action against Confederate forces during the Civil War. However, when the United States is engaged in a military conflict with a terrorist group, whose members do not wear uniforms but instead attempt to blend in with civilian populations in a variety of countries around the world, questions about when the President may use lethal force against Americans whom he believes are part of this enemy force become significantly more complicated. And it is critically important for the public's elected representatives to ensure that these questions are asked and answered in a manner consistent with American laws and American values.

Some of these questions include: 'how much evidence does the President need to decide that a particular American is part of a terrorist group?', 'does the President have to provide individual Americans with an opportunity to surrender before using lethal force against them?', 'is the President's authority to kill Americans based on authorization from Congress or his own authority as Commander-in-Chief?', 'can the President order intelligence agencies to kill an American who is inside the United States?', and 'what other limitations or boundaries apply to this authority?'. Members of Congress need to understand how (or whether) the executive branch has attempted to answer these questions so that they can decide for themselves whether this authority has been properly defined. But it is impossible for elected legislators to understand how the executive branch interprets its own authority if the secret legal opinions that outline the Justice Department's understanding of this authority are withheld from Congress by the Administration.

In my view, the executive branch has an obligation to explain its interpretation of the law not just to Congress, but to the American public as well. So I am encouraged by the recent press reports that indicate that the Administration is preparing to share at least a portion of its legal reasoning with the public. As I have noted before, individual Americans generally do not expect to know every detail about sensitive military and intelligence operations, but voters absolutely have a need and a right to understand the boundaries of what is and is not permitted under the law, so that they can debate what should and should not be legal and ratify or reject decisions that elected officials make on their behalf.

In this case, Americans have a particular right to understand how the US government interprets the statement in the Bill of Rights that no American shall "be deprived of life, liberty, or property, without due process of law" with regard to operations against suspected terrorists. The federal government's official views about the President's authority to kill specific Americans who have not necessarily been convicted of a crime

are not a matter to be settled in secret by a small number of government lawyers. Instead, the government's interpretation of relevant statutory and constitutional protections should be public knowledge, so that they can be publicly debated and understood. Intelligence agencies may sometimes need to conduct secret operations, but they should never be in the position of relying on secret law.

I understand that government officials who choose to rely on secret law almost invariably believe that their decision to do so is justified, and that their secret interpretations of the law would stand up to public scrutiny. But the only way to find out whether this is true is to ensure that this public scrutiny actually takes place. Over the past decade senior officials have relied on a number of secret interpretations that did not stand up to public scrutiny, and you and President Obama have rightly decried the substance of these interpretations as well as their secretive nature.

I'm sure that you believe that the legal analysis regarding the President's authority to kill individual Americans would withstand public and congressional scrutiny better than these past analyses did, and I hope (having not seen all of this analysis) that you are right. But the only way to keep the terrible mistakes of the past from being repeated is to have executive branch officials continually resist the temptation to rely on secret law, and for Congress and the public to continually insist on greater transparency.

So I request, again, that you provide me with any and all legal opinions regarding the authority of the President, or individual intelligence agencies, to kill Americans in the course of counterterrorism operations. I have an obligation to my constituents to review any classified legal opinions that lay out the federal government's official views on this issue, and I will not be satisfied until I have received them. I also urge you to ensure that the Administration's public explanation of how it interprets the President's authorities is as thorough and forthright as possible. I am confident that this can be done in a way that does not reveal sensitive operational details or pre-decisional legal advice, provided there is the will to do so.

On a separate issue, I still have not received your response to the classified letter that Senator Feingold and I sent to you and Secretary Clinton in December 2010. I understand that this letter raised a number of complicated questions, but I think a full year is more than enough time to answer them. Please ask your staff to ensure that I receive a response soon.

Thank you for your attention to these matters. I look forward to your response.

Sincerely,



Ron Wyden  
United States Senator