

United States Senate

WASHINGTON, DC 20510

November 26, 2013

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

Dear Attorney General Holder:

Thank you for providing us and the other members of the Senate Select Committee on Intelligence with access to the Department of Justice legal opinions regarding the deliberate killing of Americans in the course of counterterrorism operations. These opinions appear to be largely consistent with classified and unclassified information that the Intelligence Committee has previously been provided, in terms of both the legal analysis and the operational details that they contain.

Having carefully reviewed the matter, we believe that the decision to use lethal force against Anwar al-Aulaqi was a legitimate use of the authority granted to the President. As the President noted in his May 2013 speech at the National Defense University, Mr. al-Aulaqi clearly made a conscious decision to join an organized fighting force that was (and is) engaged in planning and carrying out attacks against the United States, including the 2009 Christmas Day bombing and the 2010 cargo plane plot. By taking on a leadership role in this organization, involving himself in ongoing operational planning against the United States, and demonstrating the capacity and intent to carry out these operations, he made himself a legitimate target for military action. Additionally, while the US government did not publicly acknowledge that it was attempting to kill Mr. al-Aulaqi, this fact was nonetheless widely reported in US and international media. This disclosure served as the modern equivalent of a wanted poster, and if Mr. al-Aulaqi had been a wrongly targeted innocent man he could have turned himself in and cleared his name. Additionally, alternative reasonable means to apprehend Mr. al-Aulaqi or otherwise deal with the threat that he posed do not appear to have been available. Finally, based on what we have seen and been told, lethal force appears to have been used against Mr. al-Aulaqi in a manner consistent with applicable international law.

At the same time, however, we have also concluded that the limits and boundaries of the President's power to authorize the deliberate killing of Americans need to be laid out with much greater specificity. It is extremely important for both Congress and the public to have a full understanding of what the executive branch thinks the President's authorities are, so that lawmakers and the American people can decide whether these authorities are subject to adequate limits and safeguards.

In particular, we believe that the Executive Branch needs to explain exactly how much evidence it believes the President needs to determine that a particular American is a legitimate target for military action. Additionally, we believe the Executive Branch

should explain the requirement that a targeted individual represent an “imminent” threat, and the requirement that targeted individuals should only be killed if their capture is “infeasible,” in more detail as well. And while you have clarified that these authorities cannot be used inside the United States, absent extraordinary circumstances such as the Pearl Harbor attack, it is unclear to us what other geographic boundaries, if any, exist for this authority. We also believe the Executive Branch needs to clarify whether all lethal counterterrorism operations to date have been carried out pursuant to the 2001 Authorization to Use Military Force, or whether any have been based solely on the President’s own authorities.

Furthermore, there is a critical need for additional clarity as to how the Bill of Rights’ due process protections apply in this context. The President has said that it would not be constitutional for the US government to target and kill an American without due process, and your 2012 speech at Northwestern University addressed this question by making apparent reference to three Supreme Court cases. However, none of these cases specifically addressed the government’s ability to kill Americans without trial, and we believe that both the rules that are being derived from these cases and the rationale for applying them to targeted killings away from traditional battlefields need to be articulated with much more detail.

In our view, the answers to these questions need to be shared not just with the congressional intelligence committees, but with the rest of Congress and the public as well. The House and Senate Intelligence Committees can provide oversight of secret operations, but we do not believe that it is appropriate for the Executive Branch to rely on secret laws and standards. The United States’ playbook for combatting terrorism will sometimes include sections that are secret, but the rulebook that the United States follows should always be available to the American public. We are encouraged that you and the President seem to share this view, and we look forward to engaging with the Administration to ensure that both Congress and the American people have an adequate understanding of these authorities. As we see it, every American has the right to know when their government believes it is allowed to kill them.

Finally, we note that over the past two and a half years the Intelligence Committee has made numerous requests to see additional legal opinions regarding targeted killings away from active war zones, which address other aspects of the subject beyond the targeting of Americans. We ask that you ensure that this analysis is provided to Congress as well, and, to the maximum extent possible, to the public, since we believe that the Executive Branch should be as open and transparent about the rules for targeted killings as possible. We also ask that you support Section 321 of the FY14 Intelligence Authorization Bill, which requires that the Attorney General provide the congressional intelligence committees a listing of every opinion of the Office of Legal Counsel (OLC) of the Department of Justice that has been provided to an element of the IC. Providing a list of

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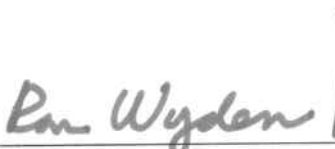
documents to the intelligence oversight committees should not be a difficult decision, so we look forward to your support on that provision.

We have seen that the government officials who carry out targeted killings are sincere in their desire to avoid harming civilians, but we also believe that the Executive Branch should do more to explain its process for determining who is a civilian and who is not, as well as what rules exist for the protection of civilians, and what methods are used to identify civilian casualties in areas where on-the-ground after action reviews are not possible. This would give the American public and our close allies the opportunity to evaluate these standards based on a clear understanding of the facts, instead of forcing them to make judgments based on vague and sometimes misleading press accounts.

The United States is currently setting precedents for 21st century warfare that many other nations will eventually follow. We know that this Administration agrees that it is important to ensure that American military force is used as precisely and responsibly as possible, based on the recognition that this is the best way to protect the United States and the best way to protect civilians around the world. Increasing transparency about the rules that America follows when using military force would make the US government more accountable to the public, and allow the public to insist on improvements where appropriate. It would also increase America's ability to hold other countries accountable for following international standards that this Administration has worked hard to uphold. And, it would increase the likelihood that other countries will adhere to these standards in the future.

Thank you for your attention to this extremely important matter. We recognize that many of the questions that we are asking are difficult, but their importance cannot be overstated. This is why we are pressing you and the rest of the Obama Administration to answer them now, rather than leaving them to be resolved at some unspecified point in the future. We look forward to working with you and the rest of the Administration on this issue in the months ahead.

Sincerely,



Ron Wyden
United States Senator



Mark Udall
United States Senator



Martin Heinrich
United States Senator