U.S. Department of Justice
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September 5, 2014

Mr. Jason Leopold

Re: AG/12-01312 (F)
DAG/12-01313 (F)
OLA/12-01314 (F)

Dear Mr. Leopold:

This is a final response to your Freedom of Information Act (FOIA) request dated and received in this Office on August 13, 2012, in which you requested (1) specific records the Department of Justice provided to members of Congress or any member of the Obama administration concerning the use of unmanned aerial vehicles, commonly referred to as "drones," for purposes of lethal force against terrorist targets in other countries, and (2) correspondence from members of Congress to the Department concerning the legal rationale regarding the use of drones against terrorist targets from January 2010 to the present. This response is made on behalf of the Offices of the Attorney General, Deputy Attorney General and Legislative Affairs.

By letter dated August 22, 2014, we provided you with our third interim release, and informed you that we were continuing to process one remaining document which required consultation with other Offices. Our review of this document is now complete, and I have determined that this document can be released with excisions made pursuant to Exemptions 1 and 3 of the FOIA, 5 U.S.C. § 552(b)(1), (b)(3). In this instance, Exemption 1 pertains to information that is properly classified in the interest of national security pursuant to Section 1.4(c) of Executive Order 13526. Exemption 3 pertains to information exempted from release by statute, in this instance the National Security Act, 50 U.S.C. § 403-1(i)(1), and the CIA Act, 50 U.S.C. § 403g. None of this information is appropriate for discretionary disclosure. Lastly, please be advised that this final production is a different document than the unclassified draft Department of Justice white paper produced on February 8, 2013.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2006 & Supp. IV 2013). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

Although I am aware that your request is the subject of ongoing litigation and that administrative appeals are not ordinarily acted on in such situations, I am required by statute and regulation to inform you of your right to file an administrative appeal.

Sincerely,

Douglas R. Hibbard
Senior Advisor, IR Staff

Enclosure

DEPARTMENT OF JUSTICE WHITE PAPER

May 25, 2011

Legality of a Lethal Operation by the Central Intelligence Agency Against a U.S. Citizen (b)(1) (b)(3)

This white paper sets forth the legal basis upon which the Central Intelligence Agency ("CIA") could use lethal force in Yemen against a United States citizen who senior officials reasonably determined was a senior leader of al-Qaida or an associated force of al-Qaida. Furthermore, (b)(1) (b)(3) 18 U.S.C. § 1119(b), which criminalizes the murder abroad of a United States national by another U.S. national, does not prohibit such use of lethal force. The text and legislative history of the relevant statutes, precedents of the Office of Legal Counsel ("OLC"), and ordinary principles of statutory construction support the conclusion that section 1119 imposes no bar to operations against a senior leader of al-Qaida or an associated force who nevertheless is a U.S. citizen. Section 1119(b) bars only "unlawful" killings (cross-referencing 18 U.S.C. §§ 1111, 1112, 1113), and, in light of the circumstances outlined below, the killing would not be "unlawful" because it would fall within the traditional justification for conduct undertaken pursuant to "public authority." Here, the authority to use lethal force in national self-defense, as recognized by congressional enactments, would make this kind of operation lawful, and section 1119 would not be violated. (b)(1) (b)(3)

Nor would such an operation violate either 18 U.S.C. § 956(a)—which makes it a crime to conspire within the jurisdiction of the United States "to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States" if any conspirator acts within the United States to effect any object of the conspiracy—or the War Crimes Act, 18 U.S.C. § 2441. Finally, an operation, under the circumstances outlined below, would not transgress any possible constitutional limitations—a conclusion that is also relevant to the judgment that a CIA operation would be performed pursuant to public authority and thus would not violate either section 1119(b) or section 956(a).[1] (b)(1) (b)(3)

[1] This white paper addresses exclusively the use of force abroad, in the circumstances described herein. It does not address legal issues that the use of force in different circumstances or in any nation other than Yemen might present. (b)(1) (b)(3)

(b)(1)
(b)(3)

I.

A.

(b)(1)
(b)(3)

Furthermore, according to the CIA, although there may be no occasion for surrender in light of the means by which such an operation would be carried out, the CIA would prefer to capture this target, and if a potential target offers to surrender, such surrender would be accepted, if feasible. This would include any targets in Yemen, although the CIA assesses that a capture in Yemen would not be feasible at this time. *See infra* at 20-21. The CIA has further represented that this sort of operation would not be undertaken in a perfidious or treacherous manner.

(b)(1)
(b)(3)

(b)(1)
(b)(3)

Finally, any U.S. citizen targeted in such an operation would be an individual with an operational and senior leadership role in al-Qaida or one of its associated forces. Moreover, the individual would be one who had previously participated in operational planning for attempted attacks on the United States and who has expressed interest in conducting additional terrorist attacks in the United States.

(b)(1)
(b)(3)

B.

(b)(1)
(b)(3)

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II.

Subsection 1119(b) of title 18 provides that "[a] person who, being a national of the United States, kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished as provided under sections 1111, 1112, and 1113." 18 U.S.C. § 1119(b).[4] In light of the nature of the operation described above, and the fact that its target would be a "national of the United States" who is outside the United States, it might be suggested that section 1119(b) would prohibit such an operation. Section 1119, however, bars only unlawful killings, and the United States' use of lethal force in national self-defense is not an unlawful killing. Section 1119 is best construed to incorporate the public authority justification, which can render lethal action carried out by a governmental official lawful in some circumstances, and this public authority justification would apply to such a CIA operation.

(b)(1)
(b)(3)

A.

Although section 1119(b) refers only to the "punish[ments]" provided under sections 1111, 1112, and 1113, courts have construed section 1119(b) to incorporate the substantive elements of those cross-referenced provisions of title 18. *See, e.g.*, *United States v. Wharton*, 320 F.3d 526, 533 (5th Cir. 2003); *United States v. White*, 51 F. Supp. 2d 1008, 1013-14 (E.D. Ca. 1997). Section 1111 of title 18 sets forth criminal penalties for "murder," and provides that "[m]urder is the unlawful killing of a human being with malice aforethought." *Id.* § 1111(a). Section 1112 similarly provides criminal sanctions for "manslaughter," and states that "[m]anslaughter is the unlawful killing of a human being without malice." *Id.* § 1112. Section

[4] *See also* 18 U.S.C. § 1119(a) (providing that "national of the United States" has the meaning stated in section 101(a)(22) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(22)). (U)

1113 provides criminal penalties for "attempts to commit murder or manslaughter." *Id.* § 1113. It is therefore clear that section 1119(b) bars only "unlawful killings."[5] (U)

This limitation on section 1119(b)'s scope is significant, as the legislative history to the underlying offenses that the section incorporates makes clear. The provisions section 1119(b) incorporates derive from sections 273 and 274 of the Act of March 4, 1909, ch. 321, 35 Stat. 1088, 1143. The 1909 Act codified and amended the penal laws of the United States. Section 273 of the enactment defined murder as "the unlawful killing of a human being with malice aforethought," and section 274 defined manslaughter as "the unlawful killing of a human being without malice." 35 Stat. 1143.[6] In 1948, Congress codified the federal murder and manslaughter provisions at sections 1111 and 1112 of title 18 and retained the definitions of murder and manslaughter in nearly identical form, *see* Act of June 25, 1948, ch. 645, 62 Stat. 683, 756, including the references to "unlawful killing" that remain in the statutes today—references that track similar formulations in some state murder statutes.[7] (U)

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[5] Section 1119 itself also expressly imposes various procedural limitations on prosecution. Subsection 1119(c)(1) requires that any prosecution be authorized in writing by the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, and precludes the approval of such an action "if prosecution has been previously undertaken by a foreign country for the same conduct." In addition, subsection 1119(c)(2) provides that "[n]o prosecution shall be approved under this section unless the Attorney General, in consultation with the Secretary of State, determines that the conduct took place in a country in which the person is no longer present, and the country lacks the ability to lawfully secure the person's return"—a determination that "is not subject to judicial review," *id.* (U)

[6] A 1908 joint congressional committee report on the Act explained that "[u]nder existing law [i.e., prior to the 1909 Act], there [had been] no statutory definition of the crimes of murder or manslaughter." Report by the Special Joint Comm. on the Revision of the Laws, Revision and Codification of the Laws, Etc., H.R. Rep. No. 2, 60th Cong., 1st Sess., at 12 (Jan. 6, 1908) ("Joint Committee Report"). The 1878 edition of the Revised Statutes, however, did contain a definition for manslaughter (but not murder): "Every person who, within any of the places or upon any of the waters [within the exclusive jurisdiction of the United States] unlawfully and willfully, but without malice, strikes, stabs, wounds, or shoots at, otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury such other person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter." Revised Statutes § 5341 (1878 ed.) (quoted in *United States v. Alexander*, 471 F.2d 923, 944-45 n.54 (D.C. Cir. 1972)). With respect to murder, the 1908 report noted that the legislation "enlarges the common-law definition, and is similar in terms to the statutes defining murder in a large majority of the States." Joint Committee Report at 24; *see also Revision of the Penal Laws: Hearings on S. 2982 Before the Senate as a Whole*, 60th Cong., 1st Sess. 1184, 1185 (1908) (statement of Senator Heyburn) (same). With respect to manslaughter, the report stated that "[w]hat is said with respect to [the murder provision] is true as to this section, manslaughter being defined and classified in language similar to that to be found in the statutes of a large majority of the States." Joint Committee Report at 24. (U)

[7] *See, e.g.*, Cal. Penal Code § 187(a) (West 2009) ("Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."); Fla. Stat. § 782.04(1)(a) (West 2009) (including "unlawful killing of a human being" as an element of murder); Idaho Code Ann. § 18-4001 (West 2009) ("Murder is the unlawful killing of a human being"); Nev. Rev. Stat. Ann. § 200.010 (West 2008) (including "unlawful killing of a human being" as an element of murder); R. I. Gen. Laws § 11-23-1 (West 2008) ("The unlawful killing of a human being with malice aforethought is murder."); Tenn. Code Ann. § 39-13-201 (West 2009) ("Criminal homicide is the unlawful killing of another person"). Such statutes, in turn, reflect the view often expressed in the common law of murder that the crime requires an "unlawful" killing. *See, e.g.*, Edward Coke, *The Third Part of the Institutes of Laws of England* 47 (London, W. Clarke & Sons 1809) ("Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature *in rerum natura* under the king's peace, with malice fore-thought, either expressed by the party, or implied by law, so as the party wounded, or hurt, &c. die of the wound, or hurt, &c. within a year and a day after the same."); 4 William Blackstone, *Commentaries on the*

As this legislative history indicates, guidance as to the meaning of what constitutes an "unlawful killing" in sections 1111 and 1112—and thus for purposes of section 1119(b)—can be found in the historical understandings of murder and manslaughter. That history shows that states have long recognized justifications and excuses to statutes criminalizing "unlawful" killings.[8] One state court, for example, in construing that state's murder statute explained that "the word 'unlawful' is a term of art" that "connotes a homicide with the absence of factors of excuse or justification," *People v. Frye*, 10 Cal. Rptr. 2d 217, 221 (Cal. App. 1992). That court further explained that the factors of excuse or justification in question include those that have traditionally been recognized. *Id.* at 221 n.2. Other authorities support the same conclusion. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684, 685 (1975) (requirement of "unlawful" killing in Maine murder statute meant that killing was "neither justifiable nor excusable"); *cf. also* Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 56 (3d ed. 1982) ("Innocent homicide is of two kinds, (1) justifiable and (2) excusable."). Accordingly, section 1119 does not proscribe killings covered by a justification traditionally recognized, such as under the common law or state and federal murder statutes. *See White*, 51 F. Supp. 2d at 1013 ("Congress did not intend [section 1119] to criminalize justifiable or excusable killings."). (U)

B.

Before one such recognized justification—the justification of "public authority"—can be analyzed in the context of a potential CIA operation, it is necessary to explain why section 1119(b) incorporates that particular justification. (b)(1) (b)(3)

The public authority justification, generally understood, is well-accepted, and it is clear it may be available even in cases where the particular criminal statute at issue does not expressly refer to a public authority justification.[9] Prosecutions where such a "public authority"

Laws of England 195 (Oxford 1769) (same); *see also A Digest of Opinions of the Judge Advocates General of the Army* 1074 n.3 (1912) ("Murder, at common law, is the unlawful killing by a person of sound memory and discretion, of any reasonable creature in being and under the peace of the State, which malice aforethought either express or implied") (internal quotation marks omitted). (U)

[8] The same is true with respect to other statutes, including federal laws, that modify a prohibited act other than murder or manslaughter with the term "unlawfully." *See, e.g., Territory v. Gonzales*, 89 P. 250, 252 (N.M. Terr. 1907) (construing the term "unlawful" in statute criminalizing assault with a deadly weapon as "clearly equivalent" to "without excuse or justification"). For example, 18 U.S.C. § 2339C makes it unlawful, *inter alia*, to "unlawfully and willfully provide[] or collect[] funds" with the intention that they be used (or knowledge they are to be used) to carry out an act that is an offense within certain specified treaties, or to engage in certain other terrorist acts. The legislative history of section 2339C makes clear that "[t]he term 'unlawfully' is intended to embody common law defenses." H.R. Rep. No. 107-307, at 12 (2001). Similarly, the Uniform Code of Military Justice makes it unlawful for members of the armed forces to, "without justification or excuse, unlawfully kill[] a human being" under certain specified circumstances. 10 U.S.C. § 918. Notwithstanding that the statute already expressly requires lack of justification or excuse, it is the longstanding view of the armed forces that "[k]illing a human being is *unlawful*" for purposes of this provision "when done without justification or excuse." Manual for Courts-Martial United States (2008 ed.) at IV-63, art. 118, comment (c)(1) (emphasis added). (U)

[9] Where a federal criminal statute incorporates the public authority justification, and the government conduct at issue is within the scope of that justification, there is no need to examine whether the criminal prohibition has been repealed, impliedly or otherwise, by some other statute that might potentially authorize the governmental

justification is invoked are understandably rare, *see* American Law Institute, Model Penal Code and Commentaries § 3.03 Comment 1, at 24 (1985); *cf. Visa Fraud Investigation*, 8 Op. O.L.C. 284, 285 n.2, 286 (1984), and thus there is little case law in which courts have analyzed the scope of the justification with respect to the conduct of government officials.[10] Nonetheless, discussions in the leading treatises and in the Model Penal Code demonstrate its legitimacy. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* § 10.2(b), at 135 (2d ed. 2003); Perkins & Boyce, *Criminal Law* at 1093 ("Deeds which otherwise would be criminal, such as taking or destroying property, taking hold of a person by force and against his will, placing him in confinement, or even taking his life, are not crimes if done with proper public authority."); *see also* Model Penal Code § 3.03(1)(a), (d), (e), at 22-23 (proposing codification of justification where conduct is "required or authorized by," inter alia, "the law defining the duties or functions of a public officer . . ."; "the law governing the armed services or the lawful conduct of war"; or "any other provision of law imposing a public duty"); National Comm'n on Reform of Federal Criminal Laws, A Proposed New Federal Criminal Code § 602(1) ("Conduct engaged in by a public servant in the course of his official duties is justified when it is required or authorized by law."). And OLC has invoked analogous rationales when it has analyzed whether Congress intended a particular criminal statute to prohibit specific conduct that otherwise falls within a government agency's authorities.[11] (U)

The public authority justification does not excuse all conduct of public officials from all criminal prohibitions. The legislature may design some criminal prohibitions to place bounds on the kinds of governmental conduct that can be authorized by the Executive. Or the legislature may enact a criminal prohibition in order to delimit the scope of the conduct that the legislature

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conduct, including by the authorizing statute that might supply the predicate for the assertion of the public authority justification itself. Rather, in such cases, the criminal prohibition simply does not apply to the particular governmental conduct at issue in the first instance because Congress intended that prohibition to be qualified by the public authority justification that it incorporates. Conversely, where another statute expressly authorizes the government to engage in the *specific* conduct in question, then there would be no need to invoke the more general public authority justification doctrine, because in such a case the legislature itself has, in effect, carved out a specific exception permitting the executive to do what the legislature has otherwise generally forbidden. Such a circumstance is not addressed in this white paper. (U)

[10] The question of a "public authority" justification is much more frequently litigated in cases where a private party charged with a crime interposes the defense that he relied upon authority that a public official allegedly conferred upon him to engage in the challenged conduct. *See generally* United States Attorneys' Manual tit. 9, Criminal Resource Manual § 2055 (describing and discussing three different such defenses of "governmental authority"); National Comm'n on Reform of Federal Criminal Laws, A Proposed New Federal Criminal Code § 602(2); Model Penal Code § 3.03(3)(b); *see also United States v. Fulcher*, 250 F.3d 244, 253 (4th Cir. 2001); *United States v. Rosenthal*, 793 F.2d 1214, 1235-36 (11th Cir. 1986); *United States v. Duggan*, 743 F.2d 59, 83-84 (2d Cir. 1984); Fed. R. Crim. P. 12.3 (requiring defendant to notify government if he intends to invoke such a public authority defense). Such cases are not addressed in this white paper, and the discussion of the "public authority" justification is limited to the question of whether a particular criminal law applies to specific conduct undertaken by *government agencies* pursuant to their authorities. (U)

[11] *See, e.g., Visa Fraud Investigation*, 8 Op. O.L.C. at 287-88 (concluding that civil statute prohibiting issuance of visa to an alien known to be ineligible did not prohibit State Department from issuing such a visa where "necessary" to facilitate important Immigration and Naturalization Service undercover operation carried out in a "reasonable" fashion).

has otherwise authorized the Executive to undertake pursuant to another statute.[12] But the recognition that a federal criminal statute may incorporate the public authority justification reflects the fact that it would not make sense to attribute to Congress the intent with respect to each of its criminal statutes to prohibit all covered activities undertaken by public officials in the legitimate exercise of their otherwise lawful authorities, even if Congress has clearly intended to make those same actions a crime when committed by persons who are not acting pursuant to such public authority. In some instances, therefore, the better view of a criminal prohibition may well be that Congress meant to distinguish those persons who are acting pursuant to public authority, at least in some circumstances, from those who are not, even if the statute by terms does not make that distinction express. *Cf. Nardone v. United States*, 302 U.S. 379, 384 (1937) (federal criminal statutes should be construed to exclude authorized conduct of public officers where such a reading "would work obvious absurdity as, for example, the application of a speed law to a policeman pursuing a criminal or the driver of a fire engine responding to an alarm").[13] (U)

Here, in the case of a federal murder statute, there is no general bar to applying the public authority justification to criminal prohibition. For example, with respect to prohibitions on the unlawful use of deadly force, the Model Penal Code recommended that legislatures should make the public authority (or "public duty") justification available, though only where the use of such force is covered by a more particular justification (such as defense of others or the use of deadly force by law enforcement), where the use of such force "is otherwise expressly authorized by law," or where such force "occurs in the lawful conduct of war." Model Penal Code § 3.03(2)(b), at 22; *see also id.* Comment 3, at 26. Some states proceeded to adopt the Model Penal Code recommendation.[14] Other states, although not adopting that precise formulation, have enacted specific statutes dealing with the question of when public officials are justified in using deadly force, which often prescribe that an officer acting in the performance of his official duties must reasonably have believed that such force was "necessary."[15] Other states have more broadly provided that the public authority defense is available where the government officer engages in a "reasonable exercise" of his official functions.[16] There is, however, no federal

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[12] *See, e.g., Nardone v. United States*, 302 U.S. 379, 384 (1937) (government wiretapping was proscribed by federal statute). (U)

[13] Each potentially applicable statute must be carefully and separately examined to discern Congress's intent in this respect—such as whether it imposes a less qualified limitation than section 1119 imposes. *See generally, e.g., United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148 (1994); *Application of Neutrality Act to Official Government Activities*, 8 Op. O.L.C. 58 (1984). (U)

[14] *See, e.g.*, Neb. Rev. Stat. § 28-1408(2)(b); Pa. C.S.A. § 504(b)(2); Tex. Penal Code tit. 2, § 9.21(c). (U)

[15] *See, e.g.*, Ariz. Rev. Stat. § 13-410.C; Maine Rev. Stat. Ann. tit. 17, § 102.2. (U)

[16] *See, e.g.*, Ala. Stat. § 13A-3-22; N.Y. Penal Law § 35.05(1); LaFave, *Substantive Criminal Law* § 10.2(b), at 135 n.15; *see also* Robinson, *Criminal Law Defenses* § 149(a), at 215 (proposing that the defense should be available only if the actor engages in the authorized conduct "when and to the extent necessary to protect or further the interest protected or furthered by the grant of authority" and where it "is reasonable in relation to the gravity of the harms or evils threatened and the importance of the interests to be furthered by such exercise of authority"); *id.* § 149(c), at 218-20. (U)

statute that is analogous, and neither section 1119 nor any of the incorporated title 18 provisions setting forth the substantive elements of the section 1119(b) offense, provide any express guidance as to the existence or scope of this justification. (U)

Against this background, the touchstone for the analysis of whether section 1119 incorporates not only justifications generally, but also the public authority justification in particular, is the legislative intent underlying this criminal statute. Here, the statute should be read to exclude from its prohibitory scope killings that are encompassed by traditional justifications, which include the public authority justification. There are no indications that Congress had a contrary intention. Nothing in the text or legislative history of sections 1111-1113 of title 18 suggests that Congress intended to exclude the established public authority justification from those that Congress otherwise must be understood to have imported through the use of the modifier "unlawful" in those statutes (which, as explained above, establish the substantive scope of section 1119(b)).[17] Nor is there anything in the text or legislative history of section 1119 itself to suggest that Congress intended to abrogate or otherwise affect the availability under that statute of this traditional justification for killings. On the contrary, the relevant legislative materials indicate that in enacting section 1119 Congress was merely closing a gap in a field dealing with entirely different kinds of conduct than that at issue here. (U)

The origin of section 1119 was a bill entitled the "Murder of United States Nationals Act of 1991," which Senator Thurmond introduced during the 102d Congress in response to the murder of an American in South Korea who had been teaching at a private school there. *See* 137 Cong. Rec. 8675-77 (1991) (statement of Sen. Thurmond). Shortly after the murder, another American teacher at the school accused a former colleague (who was also a U.S. citizen) of having committed the murder, and also confessed to helping the former colleague cover up the crime. The teacher who confessed was convicted in a South Korean court of destroying evidence and aiding the escape of a criminal suspect, but the individual she accused of murder had returned to the United States before the confession. *Id.* at 8675. The United States did not have an extradition treaty with South Korea that would have facilitated prosecution of the alleged murderer and therefore, under then-existing law, "the Federal Government ha[d] no jurisdiction to prosecute a person residing in the United States who ha[d] murdered an American abroad except in limited circumstances, such as a terrorist murder or the murder of a Federal official." *Id.* (U)

To close the "loophole under Federal law which permits persons who murder Americans in certain foreign countries to go punished," *id.*, the Thurmond bill would have added a new section to title 18 providing that "[w]hoever kills or attempts to kill a national of the United States while such national is outside the United States but within the jurisdiction of another country shall be punished as provided under sections 1111, 1112, and 1113 of this title." S. 861, 102d Cong. (1991) (incorporated in S. 1241, 102d Cong. §§ 3201-03 (1991)). The proposal also

[17] The argument that the use of the term "unlawful" supports the conclusion that section 1119 incorporates the public authority justification does not suggest that the absence of such a term would require a contrary conclusion regarding the intended application of a criminal statute to otherwise authorized government conduct in other cases. Each statute must be considered on its own terms to determine the relevant congressional intent. *See supra* note 13. (U)

contained a separate provision amending the procedures for extradition "to provide the executive branch with the necessary authority, in the absence of an extradition treaty, to surrender to foreign governments those who commit violent crimes against U.S. nationals." 137 Cong. Rec. 8676 (1991) (statement of Sen. Thurmond) (discussing S. 861, 102d Cong., § 3).[18] The Thurmond proposal was incorporated into an omnibus crime bill that both the House and Senate passed, but that bill did not become law. (U)

In the 103d Congress, a revised version of the Thurmond bill was included as part of the Violent Crime Control and Law Enforcement Act of 1994. H.R. 3355 § 60009, 103d Cong. (1994). The new legislation differed from the previous bill in two key respects. First, it prescribed criminal jurisdiction only where both the perpetrator and the victim were U.S. nationals, whereas the original Thurmond bill would have extended jurisdiction to all instances in which the victim was a U.S. national (based on so-called "passive personality" jurisdiction[19]). Second, the revised legislation did not include the separate provision from the earlier Thurmond legislation that would have amended the procedures for extradition. Congress enacted the revised legislation in 1994 as part of Public Law No. 103-322, and it was codified as section 1119 of title 18. *See* Pub. L. No. 103-322, § 60009, 108 Stat. 1796, 1972 (1994). (U)

Thus, section 1119 was designed to close a jurisdictional loophole—exposed by a murder that had been committed abroad by a private individual—to ensure the possibility of prosecuting U.S. nationals who murdered other U.S. nationals in certain foreign countries that lacked the ability to lawfully secure the perpetrator's appearance at trial. This loophole had nothing to do with the sort of CIA counterterrorism operation at issue here. Indeed, prior to the enactment of section 1119, the only federal statute expressly making it a crime to kill U.S. nationals abroad, at least outside the special and maritime jurisdiction of the United States, reflected what appears to have been a particular concern with protection of Americans from terrorist attacks. *See* 18 U.S.C. § 2332(a), (d) (criminalizing unlawful killings of U.S. nationals abroad where the Attorney General or his subordinate certifies that the "offense was intended to coerce, intimidate, or retaliate against a government or a civilian population").[20] It therefore would be anomalous to now read section 1119's closing of a limited jurisdictional gap as having been intended to jettison important applications of the established public authority justification, particularly in light of the statute's incorporation of substantive offenses codified in statutory

(b)(3)

[18] The Thurmond proposal also contained procedural limitations on prosecution virtually identical to those that Congress ultimately enacted and codified at 18 U.S.C. § 1119(c). *See* S. 861, 102d Cong. § 2. (U)

[19] *See* Geoffrey R. Watson, *The Passive Personality Principle*, 28 Tex. Int'l L.J. 1, 13 (1993); 137 Cong. Rec. 8677 (1991) (letter for Senator Ernest F. Hollings, from Janet G. Mullins, Assistant Secretary, Legislative Affairs, U.S. State Department (Dec. 26, 1989), submitted for the record during floor debate on the Thurmond bill) (S4752) ("The United States has generally taken the position that the exercise of extraterritorial criminal jurisdiction based solely on the nationality of the victim interferes unduly with the application of local law by local authorities."). (U)

[20] Courts have interpreted other federal homicide statutes to apply extraterritorially despite the absence of an express provision for extraterritorial application. *See, e.g.*, 18 U.S.C. § 1114 (criminalizing unlawful killings of federal officers and employees); *United States v. Al Kassar*, 582 F. Supp. 2d 488, 497 (S.D.N.Y. 2008) (construing 18 U.S.C. § 1114 to apply extraterritorially). (U)

provisions that from all indications were intended to incorporate recognized justifications and excuses. (U)

It is true that here the target may be a U.S. citizen. Nevertheless, U.S. citizenship does not provide a basis for concluding that section 1119 would fail to incorporate the established public authority justification for a killing in this case. As explained above, section 1119 incorporates the federal murder and manslaughter statutes, and thus its prohibition extends only to "unlawful" killings, 18 U.S.C. §§ 1111, 1112, a category that was intended to include, from all of the evidence of legislative intent, only those killings that may not be permissible in light of traditional justifications for such action. At the time the predecessor versions of sections 1111 and 1112 were enacted, it was understood that killings undertaken in accord with the public authority justification were not "unlawful" because they were justified. There is no indication that, because section 1119(b) proscribes the unlawful killing abroad of U.S. nationals by U.S. nationals, it silently incorporated all justifications for killings *except* that public authority justification.

(b)(1)
(b)(3)

III.

Given that section 1119 incorporates the public authority justification, the next question is whether a potential CIA operation would be encompassed by that justification and, in particular, whether that justification would apply even when the target is a United States citizen. The analysis leads to the conclusion that it would—a conclusion that depends in part on the further determination that this kind of operation would accord with any potential constitutional protections of a United States citizen in these circumstances (*see infra* part VI). In reaching this conclusion, this white paper does not address other circumstances involving different facts. The facts addressed here would be sufficient to establish the justification, whether or not any particular fact is necessary to the conclusion.[21]

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(b)(3)

A.

The frame of reference here is that the United States is currently in the midst of an armed conflict, *see* Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224, § 2(a) (2001), and the public authority justification would encompass an operation such as this one were it conducted by the military consistent with the laws of war. As one legal commentator has explained by example, "if a soldier intentionally kills an enemy combatant in time of war and within the rules of warfare, he is not guilty of murder," whereas, for example, if that soldier intentionally kills a prisoner of war—a violation of the laws of war—"then he commits murder." 2 LaFave, *Substantive Criminal Law* § 10.2(c), at 136; *see also State v. Gut*, 13 Minn. 341, 357 (1868) ("That it is legal to kill an alien enemy in the heat and exercise of war, is undeniable; but to kill such an enemy after he laid down his arms, and especially when he is confined in prison, is murder."); Perkins & Boyce, *Criminal Law* at 1093 ("Even in time of war an alien enemy may not be killed needlessly after he has been disarmed and securely

[21] In light of the conclusion that section 1119 and the statutes it cross-references incorporate this justification, and that the justification would cover an operation of the sort discussed here, this discussion does not address whether other grounds might exist for concluding that such an operation would be lawful. (TS//NF)

imprisoned").[22] Moreover, without invoking the public authority justification by terms, OLC has relied on the same notion in an opinion addressing the intended scope of a federal criminal statute that concerned the use of possibly lethal force. *See United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking*, 18 Op. O.L.C. 148, 164 (1994) ("*Shoot Down Opinion*") (concluding that the Aircraft Sabotage Act of 1984, 18 U.S.C. § 32(b)(2), which prohibits the willful destruction of a civil aircraft and otherwise applies to U.S. government conduct, should not be construed to have "the surprising and almost certainly unintended effect of criminalizing actions by military personnel that are lawful under international law and the laws of armed conflict"). (b)(1) (b)(3)

As explained above, an operation of this sort would be targeted at a senior leader of al-Qaida or its associated forces who participated in operational planning for attempted attacks on the United States on behalf of such forces and who continues to plan such attacks. *See supra* at 2. Such an individual would have engaged in conduct bringing him within the scope of the AUMF. Any military operation against such a person, therefore, would be carried out against someone who is within the core of individuals against whom Congress has authorized the use of necessary and appropriate force. (TS//NF)

This sort of operation would also be consistent with the laws of war applicable to a non-international armed conflict[23] if carried out by military personnel. Any military member

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[22] *Cf. Public Committee Against Torture in Israel v. Government of Israel*, HCJ 769/02 ¶ 19, 46 I.L.M. 375, 382 (Israel Supreme Court sitting as the High Court of Justice, 2006) ("When soldiers of the Israel Defense Forces act pursuant to the laws of armed conflict, they are acting 'by law', and they have a good justification defense [to criminal culpability]. However, if they act contrary to the laws of armed conflict they may be, *inter alia*, criminally liable for their actions."); *Calley v. Callaway*, 519 F.2d 184, 193 (5th Cir. 1975) ("an order to kill unresisting Vietnamese would be an illegal order, and . . . if [the defendant] knew the order was illegal or should have known it was illegal, obedience to an order was not a legal defense"). (U)

[23] The rules of non-international armed conflict are relevant because the Supreme Court has held that the United States is engaged in a non-international armed conflict with al-Qaida. *Hamdan v. Rumsfeld* 548 U.S. 557, 628-31 (2006). Although an operation of the kind discussed here would occur in Yemen, a location that is far from the most active theater of combat between the United States and al-Qaida, that does not affect the conclusion. There appears to be no authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location can never be part of the original armed conflict—and thus subject to the laws of war governing that conflict—unless and until the hostilities become sufficiently intensive and protracted within that new location. Nor is there any obvious reason why that more categorical, nation-specific rule should govern in a non-international armed conflict. Rather, the determination of whether a particular operation would be part of an ongoing armed conflict for purposes of international law requires consideration of the particular facts and circumstances present in each case.

Here, any potential operation would target a senior leader of al-Qaida or its associated forces. Moreover, such an operation would be conducted in Yemen, where a co-belligerent of al-Qaida, engaged in hostilities against the United States as part of the same comprehensive armed conflict and in league with the principal enemy, has a significant and organized presence, and from which it is conducting terrorist training in an organized manner and has executed and is planning to execute attacks against the United States. Finally, the target of such an operation would be someone continuously planning attacks from that Yemeni base of operations against the United States, as the conflict with al-Qaida continues. These facts in combination support the judgment that this sort of operation in Yemen would be conducted as part of the non-international armed conflict between the United States and al-Qaida. (TS//NF)

responsible for such a strike would likely have an obligation to abort a strike if he or she concluded that civilian casualties would be disproportionate or that such a strike would in any other respect violate the laws of war. *See* Chairman of the Joint Chiefs of Staff, Instruction 5810.01D, *Implementation of the DoD Law of War Program* ¶ 4.a. at 1 (Apr. 30, 2010) ("It is DOD policy that . . . [m]embers of the DOD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."). Moreover, the targeted nature of this sort of operation would help to ensure that it would comply with the principle of distinction. *See, e.g.*, United States Air Force, *Targeting*, Air Force Doctrine Document 2-1.9, at 88 (June 8, 2006) (explaining that the "four fundamental principles that are inherent to all targeting decisions" are military necessity, humanity (the avoidance of unnecessary suffering), proportionality, and distinction). Further, while such an operation would be conducted without warning, it would not violate the prohibitions on treachery and perfidy—which are addressed to conduct involving a breach of confidence by the assailant. *See, e.g.*, Hague Convention IV, Annex, art. 23(b), 36 Stat. at 2301-02 ("[I]t is especially forbidden . . . to kill or wound treacherously individuals belonging to the hostile nation or army"); *cf. also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 37(1) (prohibiting the killing, injuring or capture of an adversary in an international armed conflict by resort to acts "inviting the confidence of [the] adversary. . . with intent to betray that confidence," including feigning a desire to negotiate under truce or flag of surrender; feigning incapacitation; and feigning noncombatant status).[24]

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(b)(3)

In light of all these circumstances, a military operation against the sort of individual described above would comply with international law, including the laws of war applicable to this armed conflict, and would fall within Congress's authorization to use "necessary and appropriate force" against al-Qaida. Consequently, the potential attack, if conducted under military authority in the manner described, should be understood to constitute the lawful conduct of war and thus to be encompassed by the public authority justification.

(b)(1)
(b)(3)

B.

Given the assessment that an analogous operation carried out pursuant to the AUMF would fall within the scope of the public authority justification, there is no reason to reach a

[24] Although the United States is not a party to the First Protocol, the State Department has announced that "we support the principle that individual combatants not kill, injure, or capture enemy personnel by resort to perfidy." Remarks of Michael J. Matheson, Deputy Legal Adviser, Department of State, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. of Int'l L. & Pol'y 415, 425 (1987). (U)

different conclusion for a CIA operation.[25] As discussed above, such an operation would consist of an attack against an operational leader of an enemy force, as part of the United States's ongoing non-international armed conflict with al-Qaida.

(b)(1)
(b)(3)

Finally, the CIA—[redacted] would conduct an operation of this sort in a manner that accords with the rules of international humanitarian law governing this armed conflict. *See supra* at 2, 4-5.[26]

(b)(1)
(b)(3)

[25] The potential restrictions imposed by two other criminal laws—18 U.S.C. §§ 956(a) and 2441—are addressed in Parts IV and V of this white paper. Part VI explains why the Constitution would impose no bar to a potential CIA operation under these circumstances, based on the facts outlined above. (U)

[26] [redacted] If the killing by a member of the armed forces would comply with the law of war and otherwise be lawful, actions of CIA officials facilitating that killing should also not be unlawful. *See, e.g.*, *Shoot Down Opinion* at 165 n.35 ("[O]ne cannot be prosecuted for aiding and abetting the commission of an act that is not itself a crime.") (citing *Shuttlesworth v. City of Birmingham*, 373 U.S. 262 (1963)).

(b)(1)
(b)(3)

Nor does the fact that CIA personnel would be involved in this sort of lethal operation itself cause it to violate the laws of war. It is true that CIA personnel, by virtue of their not being part of the armed forces, would not enjoy the immunity from prosecution under the domestic law of the countries in which they act for their conduct in targeting and killing enemy forces in compliance with the laws of war—an immunity that the armed forces enjoy by virtue of their status. *See* Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* ¶ 71, at 22 (United Nations Human Rights Council, Fourteenth Session, Agenda Item 3, May 28, 2010); *see also* Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 31 (2004) ("*Conduct of Hostilities*"). Nevertheless, lethal activities conducted in accord with the laws of war, and undertaken in the course of lawfully authorized hostilities, do not violate *the laws of war* by virtue of the fact that they are carried out in part by government actors who are not entitled to the combatant's privilege. The contrary view "arises . . . from a fundamental confusion between acts punishable under international law and acts with respect to which international law affords no protection." Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerillas, and Saboteurs*, 28 Brit. Y.B. Int'l L. 323, 342 (1951) ("the law of nations has not ventured to require of states that they . . . refrain from the use of secret agents or that these activities upon the part of their military forces or civilian population be punished"). *Accord* Yoram Dinstein, *The Distinction Between Unlawful Combatants and War Criminals*, in *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* 103-16 (Y. Dinstein ed., 1989). Statements in the Supreme Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942), are sometimes cited for the contrary view. *See, e.g.*, *id.* at 36 n.12 (suggesting that passing through enemy lines in order to commit "any hostile act" while not in uniform "renders the offender liable to trial for violation of the laws of war"); *id.* at 31 (enemies who come secretly through the lines for purposes of waging war by destruction of life or property "without uniform" not only are "generally not to be entitled to the status of prisoners of war," but also "to be offenders against the law of war subject to trial and punishment by military tribunals"). Because the Court in *Quirin* focused on conduct taken behind enemy lines, it is not clear whether the Court in these passages intended to refer only to conduct that would constitute perfidy or treachery. To the extent the Court meant to suggest more broadly that any hostile acts performed by unprivileged belligerents are *for that reason* violations of the laws of war, the authorities the Court cited (the Lieber Code and Colonel Winthrop's military law treatise) do not provide clear support. *See* John C. Dehn, *The* Hamdan *Case and the Application of a Municipal Offense*, 7 J. Int'l Crim. J. 63, 73-

Nothing in the text or legislative history of section 1119 indicates that Congress intended to criminalize such an operation. Section 1119 incorporates the traditional public authority justification, and did not impose any special limitation on the scope of that justification. As explained above, *supra* at 10-12, the legislative history of that criminal prohibition revealed Congress's intent to close a jurisdictional loophole that would have hindered prosecutions of murders carried out by private persons abroad. It offers no indication that Congress intended to prohibit the targeting of an enemy leader during an armed conflict in a manner that would accord with the laws of war when performed by a duly authorized government agency. Nor does it indicate that Congress, in closing the identified loophole, meant to place a limitation on the CIA that would not apply to the armed forces.

(b)(1)
(b)(3)

Thus, just as Congress would not have intended section 1119 to bar a military attack on the sort of individual described above, neither would it have intended the provision to prohibit an attack on the same target, in the same authorized conflict and in similar compliance with the laws of war, carried out by the CIA in accord with

(b)(1)
(b)(3)

Finally, there is no basis in prior OLC precedent for reaching a different conclusion. Outside the context of the use of deadly force, OLC has had occasion to address whether particular criminal statutes should be construed to criminalize otherwise authorized government activities, notwithstanding the absence of an express exception to that effect. OLC's opinions on

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79 (2009); *see also* Baxter, *So-Called "Unprivileged Belligerency,"* 28 Brit. Y.B. Int'l L. at 339-40; Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 Chi. J. Int'l L. 511, 521 n.45 (2005); W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 Chic. J. Int'l L. 493, 510-11 n.31 (2003). DoD's current Manual for Military Commissions, however, does not endorse the view that the commission of an unprivileged belligerent act, without more, constitutes a violation of the international law of war. *See* Manual for Military Commissions, Part IV, § 5(13), Comment, at IV-11 (2010 ed., Apr. 27, 2010) (murder or infliction of serious bodily injury "committed while the accused did not meet the requirements of privileged belligerency" can be tried by a military commission "even if such conduct does not violate the international law of war").

(b)(1)
(b)(3)

[27] As one example, the Senate Report pointed to the Department of Justice's conclusion that the Neutrality Act, 18 U.S.C. § 960, prohibits conduct by private parties but is not applicable to the CIA and other government agencies. *Id.* The Senate Report assumed that the Department's conclusion about the Neutrality Act was premised on the assertion that in the case of government agencies, there is an "absence of the mens rea necessary to the offense." *Id.* In fact, however, the Department's conclusion about that Act was not based on questions of mens rea, but instead on a careful analysis demonstrating that Congress did not intend the Act, despite its words of general applicability, to apply to the activities of government officials acting within the course and scope of their duties as officers of the United States. *See Application of Neutrality Act to Official Government Activities*, 8 Op. O.L.C. 58 (1984) (U)

such questions have not directly invoked the public authority justification, but they have engaged in the same basic, context-specific inquiry concerning whether Congress intended the criminal statute at issue to prohibit government activities in circumstances where the same conduct would be unlawful if performed by a private person. OLC concluded in one such opinion that a statutory prohibition on granting visas to aliens in sham marriages, 8 U.S.C. § 1201(g)(3), would not prohibit granting such a visa as part of an undercover operation. *Visa Fraud Investigation*, 8 Op. O.L.C. at 284. OLC explained that courts have recognized that it may be lawful for law enforcement agents to disregard otherwise applicable laws "when taking action that is necessary to attain the permissible law enforcement objective, when the action is carried out in a reasonable fashion." *Id.* at 287. The issuance of an otherwise unlawful visa that was necessary for the undercover operation to proceed, done in circumstances—"for a limited purpose and under close supervision"—that were "reasonable," did not violate the federal statute. *Id.* at 288. Given the combination of circumstances concerning such an operation, it plainly would meet this standard. *See also infra* at 19-22 (explaining that a CIA operation under the proposed circumstances would comply with constitutional due process and the Fourth Amendment's "reasonableness" test for the use of deadly force). (b)(1) (b)(3)

Accordingly, the combination of circumstances present here supports the judgment that a CIA operation of this sort would be encompassed by the public authority justification. Such an operation, therefore, would not result in an "unlawful" killing under section 1111 and thus would not violate section 1119.

IV. (b)(1) (b)(3)

For similar reasons, CIA operation of the kind discussed here would not violate another federal criminal statute dealing with "murder" abroad, 18 U.S.C. § 956(a). That law makes it a crime to conspire within the jurisdiction of the United States "to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States" if any conspirator acts within the United States to effect any object of the conspiracy. (TSANF)

Like section 1119(b), section 956(a) bars only unlawful killings, and the United States' use of lethal force in national self-defense is not an unlawful killing. Section 956(a) incorporates by reference the understanding of "murder" in section 1111 of title 18. For reasons explained earlier in this white paper, *see supra* at 5-7, section 956(a) thus incorporates the traditional public authority justification that section 1111 recognizes. A CIA operation, on the facts outlined above, would be covered by that justification. Nor does Congress's reference in section 956(a) to "the special maritime and territorial jurisdiction of the United States" reflect an intent to transform such a killing into a "murder" in these circumstances—notwithstanding that the analysis of the applicability of the public authority justification is limited for present purposes to operations conducted abroad. A contrary conclusion would require attributing to Congress the surprising intention of criminalizing through section 956(a) an otherwise lawful killing of an enemy leader that another statute specifically prohibiting the murder of U.S. nationals abroad does not prohibit. (b)(1) (b)(3)

The legislative history of section 956(a) further confirms the conclusion that that statute should not be so construed. When the provision was first introduced in the Senate in 1995, its sponsors addressed and rejected the notion that the conspiracy prohibited by that section would apply to "duly authorized" actions undertaken on behalf of the federal government. Senator Biden introduced the provision at the behest of the President, as part of a larger package of anti-terrorism legislation. *See* 141 Cong. Rec. 4491 (1995) (statement of Sen. Biden). He explained that the provision was designed to "fill[] a void in the law," because section 956 at the time prohibited only U.S.-based conspiracies to commit certain property crimes abroad, and did not address crimes against persons. *Id.* at 4506. The amendment was designed to cover an offense "committed by terrorists" and was "intended to ensure that the government is able to punish those persons who use the United States as a base in which to plot such a crime to be carried out outside the jurisdiction of the United States." *Id.* Notably, the sponsors of the new legislation deliberately declined to place the new offense either within chapter 19 of title 18, which is devoted to "Conspiracy," or within chapter 51, which collects "Homicide" offenses (including those established in sections 1111, 1112, 1113 and 1119). Instead, as Senator Biden explained, "[s]ection 956 is contained in chapter 45 of title 18, United States Code, relating to interference with the foreign relations of the United States," and thus was intended to "cover[] those individuals who, without appropriate governmental authorization, engage in prohibited conduct that is harmful to the foreign relations of the United States." *Id.* at 4507. Because, as Senator Biden explained, the provision was designed, like other provisions of chapter 45, to prevent private interference with U.S. foreign relations, "[i]t is not intended to apply to duly authorized actions undertaken on behalf of the United States Government." *Id.*; *see also* 8 Op. O.L.C. 58 (1984) (concluding that section 5 of the Neutrality Act, 18 U.S.C. § 960, which is also in chapter 45 and which forbids the planning of, or participation in, military or naval expeditions to be carried on from the United States against a foreign state with which the United States is at peace, prohibits only persons acting in their private capacity from engaging in such conduct, and does not proscribe activities undertaken by government officials acting within the course and scope of their duties as United States officers). Senator Daschle expressed this same understanding when he introduced the identical provision in a different version of the anti-terrorism legislation a few months later. *See* 141 Cong. Rec. 11,960 (1995) (statement of Sen. Daschle). Congress enacted the new section 956(a) the following year, as part of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, tit. VII, § 704(a), 110 Stat. 1214, 1294-95 (1996). The legislative history appears to contain nothing to contradict the construction of section 956(a) described by Senators Biden and Daschle. (U)

Accordingly, section 956(a) would not prohibit an operation of the kind discussed here.

(b)(1)
(b)(3) V.

The War Crimes Act, 18 U.S.C. § 2441, which makes it a federal crime for a member of the Armed Forces or a national of the United States to "commit[] a war crime." *Id.* § 2441(a). Subsection 2441(c) defines a "war crime" for purposes of the statute to mean any conduct (i) that is defined as a grave breach in any of the Geneva Conventions (or any Geneva protocol to which the U.S. is a party); (ii) that is prohibited by four specified articles of the Fourth Hague Convention of 1907, (iii) that is a "grave breach" of Common Article 3 of the Geneva

Conventions (as defined elsewhere in section 2441) when committed "in the context of and in association with an armed conflict not of an international character"; or (iv) that is a willful killing or infliction of serious injury in violation of the 1996 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices. Of these, the only subsection potentially applicable here is that dealing with Common Article 3 of the Geneva Conventions.[28] (U)

In defining what conduct constitutes a "grave breach" of Common Article 3 for purposes of the War Crimes Act, subsection 2441(d) includes "murder," described in pertinent part as "[t]he act of a person who intentionally kills, or conspires or attempts to kill . . . one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause." 18 U.S.C. § 2441(d)(1)(D). This language derives from Common Article 3(1) itself, which prohibits certain acts (including murder) against "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed '*hors de combat*' by sickness, wounds, detention, or any other cause." *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955], art. 3(1), 6 U.S.T. 3316, 3318-20. Although Common Article 3 is most commonly applied with respect to persons within a belligerent party's control, such as detainees, the language of the article is not so limited—it protects all "[p]ersons taking no active part in the hostilities" in an armed conflict not of an international character. (U)

Whatever might be the outer bounds of this category of covered persons, it could not encompass an individual of the sort considered here. Common Article 3 does not alter the fundamental law-of-war principle concerning a belligerent party's right in an armed conflict to target individuals who are part of an enemy's armed forces. The language of Common Article 3 "makes clear that members of such armed forces [of both the state and non-state parties to the conflict] . . . are considered as 'taking no active part in the hostilities' only once they have disengaged from their fighting function ('have laid down their arms') or are placed *hors de combat*, mere suspension of combat is insufficient." International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 28 (2009); *cf. also id.* at 34 ("individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function," in which case they can be deemed to be members of a non-state armed group subject to continuous targeting); *accord Gherebi v. Obama*, 609 F. Supp. 2d 43, 65 (D.D.C. 2009) ("the fact that 'members of armed forces who have laid down their arms and those placed *hors de combat*' are not 'taking [an] active part in the hostilities' necessarily implies that 'members of armed forces' who have not surrendered or been incapacitated are 'taking [an] active part in the hostilities' simply by virtue of their membership in those armed forces"); *id.* at 67 ("Common Article 3 is not a suicide pact; it does not provide a free pass for the members of an enemy's armed forces to go to or fro as they please so long as, for example, shots are not fired, bombs are not exploded, and places are not hijacked'). An

[28] An operation of the kind in question here would not involve conduct covered by the Land Mine Protocol. And the articles of the Geneva Conventions to which the United States is currently a party *other than* Common Article 3, as well as the relevant provisions of the Annex to the Fourth Hague Convention, apply by their terms only to armed conflicts between two or more of the parties to the Conventions. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955], art. 2, 6 U.S.T. 3316, 3406. (TS/NF)

active, high-level leader of an enemy force who is continually involved in planning and recruiting for terrorist attacks, can on that basis fairly be said to be taking "an active part in hostilities." Accordingly, targeting him in the circumstances discussed here would not violate Common Article 3 and therefore would not violate the War Crimes Act.

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(b)(3)

VI.

Although (as explained above) this sort of CIA operation would not violate sections 1119(b), 956(a) and 2441 of title 18 of the U.S. Code, the fact that such an operation may target a U.S. citizen could raise distinct questions under the Constitution. Nevertheless, on the facts outlined above, the Constitution would not preclude such a lethal action because of a target's U.S. citizenship.

(b)(1)
(b)(3)

The Fifth Amendment's Due Process Clause, as well as the Fourth Amendment, likely protects a U.S. citizen in some respects even while he is abroad. *See Reid v. Covert*, 354 U.S. 1, 5-6 (1957) (plurality opinion); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269-70 (1990); *see also In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 157, 170 n.7 (2d Cir. 2008). The fact that a central figure in al-Qaida or its associated forces is a U.S. citizen, however, does not give that person constitutional immunity from attack. This conclusion finds support in Supreme Court case law addressing whether the military may constitutionally use certain types of military force against a U.S. citizen who is a part of enemy forces. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 521-24 (2004) (plurality opinion); *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942)).

(b)(1)
(b)(3)

In *Hamdi*, a plurality of the Supreme Court used the *Mathews v. Eldridge* balancing test to analyze the Fifth Amendment due process rights of a U.S. citizen captured on the battlefield in Afghanistan and detained in the United States who wished to challenge the government's assertion that he was a part of enemy forces, explaining that "the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." 542 U.S. at 529 (plurality opinion) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Under this balancing test, at least in circumstances where the highest officers in the Intelligence Community have reviewed the factual basis for a lethal operation, and where the CIA has reviewed, and found infeasible, an operation to capture a targeted individual instead of killing him and continues to monitor whether changed circumstances would permit such an alternative, the Constitution does not require the government to provide further process to the U.S. person before using lethal force against him. *See Hamdi*, 542 U.S. at 534 (plurality opinion) ("[t]he parties agree that initial captures on the battlefield need not receive the process we discuss here; that process is due only when the determination is made to continue to hold those who have been seized"). On the battlefield, the Government's interests and burdens preclude offering a process to judge whether a detainee is truly an enemy combatant.

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As explained above, such an operation would be carried out against an individual a decision-maker could reasonably decide poses a "continued" and "imminent"

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threat to the United States. Moreover, the CIA has represented that it would capture rather than target such an individual if feasible, but that such a capture operation in Yemen would be infeasible at this time.

(b)(1)
(b)(3)

Cf., e.g., Public Committee Against Torture in Israel v. Government of Israel, HCJ 769/02 ¶ 40, 46 I.L.M. 375, 394 (Israel Supreme Court sitting as the High Court of Justice, 2006) (although arrest, investigation and trial "might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place," such alternatives "are not means which can always be used," either because they are impossible or because they involve a great risk to the lives of soldiers).

(b)(1)
(b)(3)

Although in the "circumstances of war," as the *Hamdi* plurality observed, "the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process . . . is very real," 542 U.S. at 530, the plurality also recognized that "the realities of combat" render certain uses of force "necessary and appropriate," including against U.S. citizens who have become part of enemy forces—and that "due process analysis need not blink at those realities," *id.* at 531. Thus, at least where, as here, the target's activities pose a "continued and imminent threat of violence or death" to U.S. persons, the highest officers in the Intelligence Community have reviewed the factual basis for a lethal operation, and a capture operation would be infeasible—and where the CIA continues to monitor whether changed circumstances would permit such an alternative—the "realities of combat" and the weight of the government's interest in using an authorized means of lethal force against this enemy are such that the Constitution would not require the government to provide further process to the U.S. person before using such force. *Cf. Hamdi* 542 U.S. at 535 (noting that the Court "accord[s] the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of war, and . . . the scope of that discretion necessarily is wide") (plurality opinion). (b)(1) (b)(3)

Similarly, even assuming that the Fourth Amendment provides some protection to a U.S. person abroad who is part of al-Qaida and that the sort of operation discussed here would result in a "seizure" within the meaning of that Amendment, such a lethal operation would not violate the Fourth Amendment. The Supreme Court has made clear that the constitutionality of a seizure is determined by "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (internal quotation marks omitted); *accord Scott v. Harris*, 550 U.S. 372, 383 (2007). Even in domestic law enforcement operations, the Court has noted that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Garner*, 471 U.S. at 11. Thus, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm,

deadly force may be used if necessary to prevent escape and if, where feasible, some warning has been given." *Id.* at 11-12. (b)(1) (b)(3)

The Fourth Amendment "reasonableness" test is situation-dependent. *Cf. Scott*, 550 U.S. at 382 (*Garner* "did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force'"). What would constitute a reasonable use of lethal force for purposes of domestic law enforcement operations will be very different from what would be reasonable in the situation discussed here. At least where high-level government officials have determined that a capture operation overseas is infeasible and that the targeted person is part of a dangerous enemy force and is engaged in activities that pose a continued and imminent threat to U.S. persons or interests
the use of lethal force would not violate the Fourth Amendment. Here, the intrusion on any Fourth Amendment interests would be outweighed by "the importance of the governmental interests [that] justify the intrusion," *Garner*, 471 U.S. at 8, based on the facts outlined above (b)(1) (b)(3)

(b)(1)
(b)(3)

From: Magner, Tara (Judiciary-Dem)
To: Weich, Ron (OLA); Agrast, Mark D. (OLA)
CC: Park, Chan (Judiciary-Dem)
Sent: 3/4/2012 3:55:44 PM
Subject: AG speech tomorrow

Good afternoon. Can you tell us any more about the speech tomorrow, ideally before it is delivered, so we can brief the Chairman? Thanks. Tara

Holder expected to explain rationale for targeting U.S. citizens abroad

By Sari Horwitz and Peter Finn, Sunday, March 4, 2:46 PM

Attorney General Eric H. Holder Jr. is expected Monday to provide the most detailed explanation yet of the Obama administration's secret decision-making leading up to the targeted killing of a U.S. citizen last year in Yemen.

Holder's speech Monday afternoon at Northwestern Law School in Chicago is the result of months of internal Obama administration deliberations over how much can be made public about the decisions leading up to the strike.

The Justice Department wrote a still-classified memo that provided the legal rationale for the targeting of American-born Anwar al-Awlaki that also included intelligence material about his operational role within al-Qaeda's affiliates in Yemen.

Holder is expected to say that the killing of Awlaki was legal under the 2001 congressional authorization of the use of military force and that the United States, acting in self-defense, is not limited to traditional battlefields in pursuit of terrorists who present an imminent threat, including U.S. citizens, according to an official briefed on the speech. The official would only discuss the address on the condition of anonymity because it will not be released until shortly before Holder speaks.

Awlaki, a U.S. citizen born in New Mexico, was the chief of external operations for al-Qaeda's affiliate in Yemen, which has attempted a number of terrorist attacks on the United States, according to administration officials. He had been placed on "kill lists" compiled by the CIA and and the military's Joint Special Operations Command. Awlaki was killed in September in Yemen in a joint CIA-JSOC drone operation.

The Awlaki operation was carried out after the administration requested and received an opinion from the Justice Department's Office of Legal Counsel saying that targeting and killing U.S. citizens overseas was legal under domestic and international law.

Senior Obama administration officials, including John O. Brennan, the president's counterterrorism adviser and Harold Koh, the State Department legal adviser, have given speeches that offered a broad rationale for U.S. drone attacks on individuals in al-Qaeda and associated forces.

On Feb. 22, Pentagon General Counsel Jeh Johnson gave a speech at Yale Law School, saying that the targeted killing of those suspected of engaging in terrorist activities against the United States, including U.S. citizens, is justified and legal. He did not mention Awlaki by name or the secret CIA drone program.

Monday will be the first time that the country's chief law enforcement official discusses the legal justification for the targeted killing of a U.S. citizen. His remarks will be included in what administration officials are calling a major national security speech. The speech may not mention Awlaki by name, but it is expected to provide a more detailed explanation of the Justice Department's reasoning.

Within the administration, there was some reluctance on the part of the intelligence community to engage with the subject at all publicly. But others argued that the killing of an American citizen by the U.S. government was such an extraordinary event that there had to be some public accounting.

Holder's much-anticipated speech will also outline the Obama administration's approach to counterterrorism and the rule of law, according to an individual familiar with the address. Holder will discuss the broad new waivers that President Obama issued last week that allow U.S. law enforcement agencies to retain custody of al-Qaeda terrorism suspects rather than turn them over to the military.

Holder will also highlight the success of the civilian court system in the prosecutions and convictions of suspected terrorists. One case he will cite as an example is the "underwear bomber," Umar Farouk Abdulmutallab, the Nigerian who tried to bring down a U.S. commercial flight on Christmas Day 2009 by detonating a bomb hidden in his underwear. He was sentenced to life in prison last month.

Abdulmutallab was arrested by federal law enforcement agents, given his Miranda rights within an hour and processed through the civilian criminal justice system. Some Republican critics argued that Abdulmutallab should never have been advised of his rights to counsel and that the administration should have considered turning him over to the military to continue his interrogation.

But administration officials said they got the intelligence they needed from him immediately and later he provided further details on al-Qaeda in the Arabian peninsula. Some of that, including Awlaki's operational role, was revealed at Abdulmutallab's sentencing.

Prosecutors said Abdulmutallab was acting on the orders of Awlaki, which may have been a critical factor in the legal reasoning in the classified Justice memo justifying his killing.

Holder will also discuss the debate over whether terrorist suspects should be tried in federal criminal courts or military commissions. The administration argues that military commissions are appropriate for a small and select group of cases, but that they should have the ability to transfer some suspects at Guantanamo Bay, Cuba, to the U.S. for trial. Congress, however, has blocked such prosecutions.

From:	Levine, Doug (OLA)
To:	'Ross, Halley (Judiciary-Dem)'
CC:	Appelbaum, Judy (OLA); Agrast, Mark D. (OLA); Burton, Faith (OLA)
Sent:	6/6/2012 4:44:06 PM
Subject:	Responses to QFRs from November 2011 oversight hearing
Attachments:	06-06-12 Attachments to Ltr transmitting responses to QFRs for AG Holder from 11-08-11 hearing re Oversight of DOJ.pdf; 06-06-12 Ltr transmitting responses to QFRs for AG Holder from 11-08-11 hearing re Oversight of DOJ.pdf

Halley,

As discussed, attached please find responses to questions from the record arising from the Attorney General's appearance before the Committee last November. The first document contains the responses and the second attachment contains the attachments referenced in the responses. Not Responsive

Not Responsive

If you have trouble opening either document please give me a call at the number listed below.

Doug

Doug Levine
Office of Legislative Affairs
U.S. Department of Justice
(202) 514-2113 Office | (b) (6) Cell

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

JUN 06 2012

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Attorney General Eric Holder before the Committee on November 8, 2011.

We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

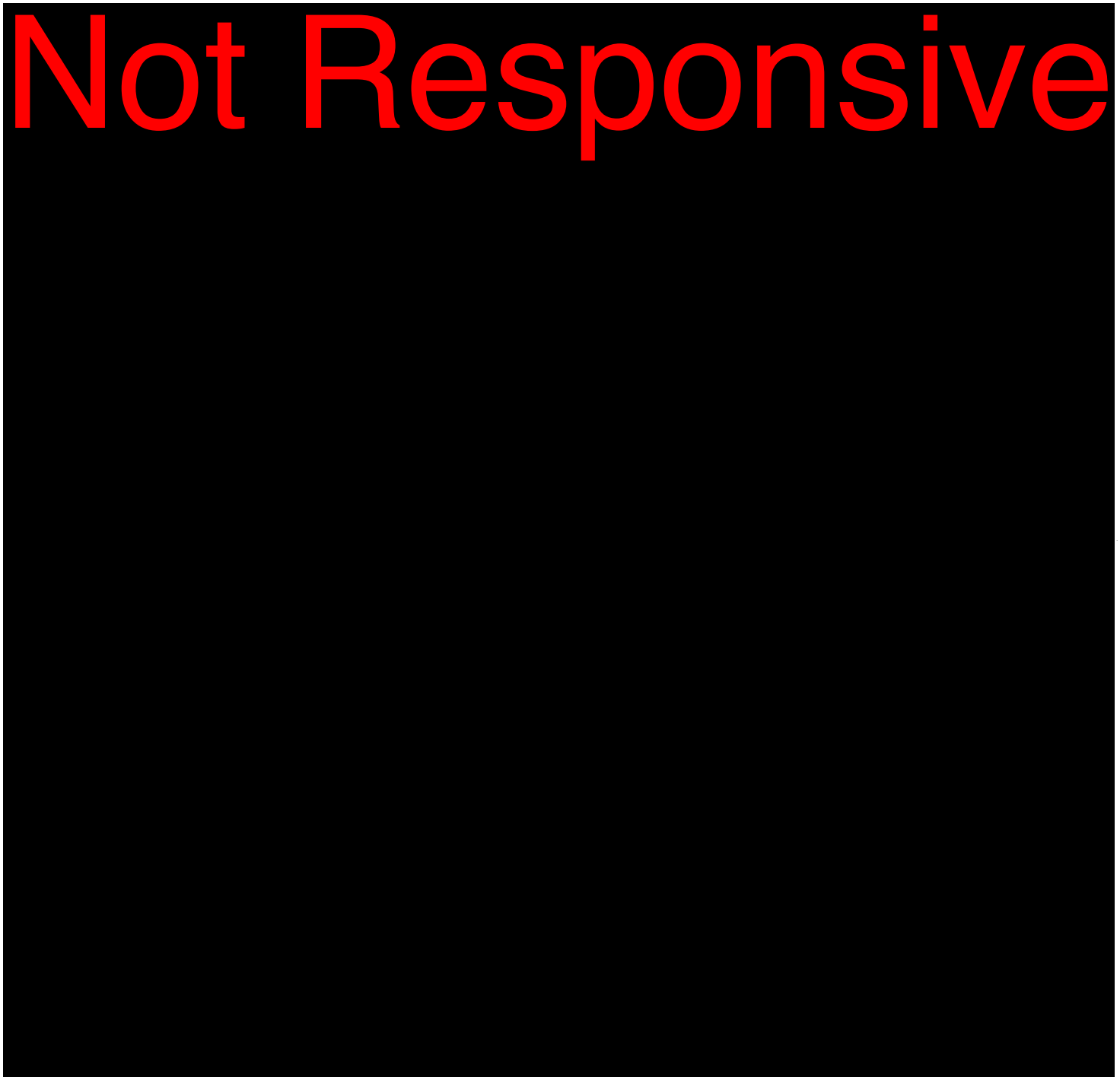
Judith C. Appelbaum
Acting Assistant Attorney General

Enclosure

cc: The Honorable Charles Grassley
Ranking Member

Questions for the Record
Attorney General Eric H. Holder, Jr.
Committee on the Judiciary
United States Senate
November 8, 2011

QUESTIONS POSED BY SENATOR WHITEHOUSE



Memo Issued by Office of Legal Counsel Regarding Anwar al-Awlaqi

29. **Eliminating a terrorist threat certainly helps to ensure the safety of the American people. Engaging those threats on the battlefield is a byproduct of our continued war on terrorism. However, I want to confirm that when we encounter an American terrorist overseas, we have the legal authority to conduct operations that specifically target American citizens even when they are engaged in terrorist activity. I understand there is an obvious balance between fighting the war on terrorism and protecting the Constitutional rights of American citizens. Therefore, I want to understand the legal rationale behind the Department of Justice's opinion that essentially authorized the U.S. military to target an American citizen.**

I recently wrote to you regarding Anwar al-Awlaqi, an American born citizen, a senior leader, recruiter, and motivator with the Islamist militant group al-Qaeda. I asked for a copy of the secret memorandum issued by Department's Office of Legal Counsel (OLC) that allegedly authorized the operation which resulted in the death of Anwar al-Awlaqi. I also offered to make appropriate arrangements if the memo was classified.

Will you commit today to providing me and this committee a copy of the OLC Memo that addressed the operation targeting Anwar al-Awlaqi? If not, why not?

Response:

The Department, when responding to requests on this topic, has not addressed the question whether there is an Office of Legal Counsel opinion in this area. The Department understands the Committee's interest in the legal issues, and will, to the extent possible, work with the Committee to assist in the process of answering questions that its members have in an appropriate setting.

Not Responsive

From: Buchwald, Mike (Intelligence)
To: Agrast, Mark D. (OLA)
Sent: 6/21/2012 7:44:58 PM
Subject: RE: DOJ White Paper re: targeted killing

Mark,
Sorry to bug you again, but I just wanted to check in and see if you had any update or could at least let me know when you think DOJ will be able to come to a decision on providing the Unclassified White Paper to SSCI Members. She reviewed the document today and we're discussing this issue again with her tomorrow.
Thanks very much,
Mike

From: Buchwald, Mike (Intelligence)
Sent: Wednesday, June 20, 2012 7:49 PM
To: 'Agrast, Mark D. (OLA)'; Simpson, Tammi (OLA); Grannis, D (Intelligence)
Cc: Healey, C (Intelligence); Losick, Eric (Intelligence)
Subject: DOJ White Paper re: targeted killing
Importance: High

Mark,
Sorry to pile on with another request, but we just saw that Sen. Leahy has provided a DOJ White Paper to all Judiciary Committee Members titled, ""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." Sen. Leahy has asked the Members to keep this document "committee confidential" because the Administration does not want to make the document public.
Can you please send us the White Paper ASAP so we can distribute it to SSCI Members with the same understanding – that it not be made public?
As you know, several Members on this Committee have been calling for this legal analysis to be made public for some time now, including the Chairman (for an example of her involvement on the issue, please see the partial transcript of the White House Press Briefing from October 12, 2011 below).

Thanks very much,
Mike
202-224-1774 (direct)

White House Press Briefing Wednesday, October 12, 2011

QUESTION: Jay, the New York Times reported Sunday on a memo that the Justice Department gave the White House authorizing the assassination of Anwar al-Awlaki.

Can you confirm the existence of the memo? And will it be released, as Senator Feinstein has requested?

CARNEY: As you know, I -- I'm not going to discuss matters of that nature.

I can simply say as a general matter of fact that Mr. Awlaki was an operational leader of Al Qaida in the Arabian Peninsula. He was directly involved in plots to perform terror that would have resulted in terrorist acts against the United States.

And it is -- I think it's important to remember that when we assess this overall question.

From: Agrast, Mark D. (OLA) [mailto:Mark.D.Agrast@usdoj.gov]
Sent: Wednesday, June 20, 2012 2:49 PM
To: Buchwald, Mike (Intelligence); Simpson, Tammi (OLA)

Cc: Healey, C (Intelligence); Losick, Eric (Intelligence)
Subject: RE: DOJ Filing in ACLU FOIA lawsuit re: drones

Mike,

A public filing will be made with the court at some point this evening, and we will be happy to provide it to you.

Mark

From: Buchwald, Mike (Intelligence) [mailto:Mike_Buchwald@ssci.senate.gov]
Sent: Wednesday, June 20, 2012 2:21 PM
To: Agrast, Mark D. (OLA); Simpson, Tammi (OLA)
Cc: Healey, C (Intelligence); Losick, Eric (Intelligence)
Subject: DOJ Filing in ACLU FOIA lawsuit re: drones

Hi Mark and Tammi,
Can you please send us the DOJ filing on drones that we understand will be made today in the ACLU FOIA case?
We just met with Bob Litt on another topic, but he gave us a small preview of the issue and confirmed something would be filed today.
Can you please send it to us as soon as possible so we can alert Sen. Feinstein and the rest of the Members of the Cmte what will be made public?
Thanks,
Mike

http://www.guardian.co.uk/world/2012/jun/20/drone-strikes-targeted-killings-case

Drone strikes: activists seek to lift lid on open secret of targeted killings

Court deadline arrives in freedom of information campaign to make Obama administration provide details of programme

Karen McVeigh

guardian.co.uk, Tuesday 19 June 2012 20.33 EDT

The CIA's covert targeted killing programme will come under fresh scrutiny on Wednesday, the deadline for Barack Obama's administration to respond to a lawsuit over the agency's refusal to confirm or deny its existence.
The federal lawsuit is part of a three-year battle by lawyers from the American Civil Liberties Union for details of the drone programme, one of the US government's most important security operations in the war against al-Qaida.
Under a Freedom of Information Act (FOIA) request filed in 2010, ACLU seeks the legal memo underlying the killing programme, the basis for drone strikes that have killed American citizens and the process by which individuals are placed on a kill list.
The administration has until Wednesday to produce papers in the suit, filed in New York, to either hand over the requested documents or to explain why they are being held. ACLU hopes it will be the first formal acknowledgment of the programme. If so the CIA would then have to respond to ACLU's FOIA request.
US drone strikes have been credited by the administration with having badly damaged al-Qaida in places like Pakistan and Yemen, but are widely criticised by rights groups over civilian killings and the secrecy that makes it impossible to determine casualty figures and whether they are military or civilians.
Over recent months government officials including Eric Holder, the attorney general, and even Obama himself have spoken publicly about drone strikes.
The US justice department has launched an investigation into the leaks.
News coverage has included a lengthy New York Times article in May that detailed Obama's role in how the "kill list" is drawn up and signed off.

But in court government lawyers continue to claim that no official has ever formally acknowledged the drones and that there might not even be a drone programme. Such was the response to a recent related ACLU lawsuit in Washington DC.

Steven Aftergood, director of the Federation of American Scientists' project on government secrecy, said the administration's current position was untenable. "Right now the government's position is a legal fiction. In other words it has taken a position that no one finds credible. It is hard to say how it can be sustained."

The CIA's stance on the issue is based on a 35-year-old judicial doctrine called Glomar, which allows government agencies to respond to requests under FOIA by refusing to confirm or deny that the records exist. It was named after a now-famous ship called the Hughes Glomar Explorer, which the CIA used in the early 1970s to salvage a sunken Soviet submarine. When the LA Times exposed the operation the agency attempted to suppress related FOIA requests, arguing that there were circumstances in which it was impossible for them even to acknowledge the existence of records without revealing facts that the government had a right to withhold.

Aftergood said the Glomar doctrine was no longer appropriate. "That was a unique, unprecedented and one-time effort," he said. "It was not a recurring programme that expands over many years and I think that's a clue to why the current position is unsustainable. The CIA did not fly one drone over one target one time, but repeatedly over years. For that reason alone the Glomar claim is inappropriate and the position untenable."

There are a number of different positions the government could take on Wednesday. It could revoke the invocation of Glomar and say, yes there is a drone programme, but then say that everything about it is classified. It could revoke Glomar and release something but not everything. Or it could continue to invoke Glomar and release nothing. It could also revoke Glomar and release everything ACLU has requested, but no one thinks this is likely.

If it continued to invoke Glomar the court may either yield to the government's position or "because of the public debate it may say 'This is ridiculous' and reject the Glomar claim and say you have to process the claim under FOIA", Aftergood said.

Lawyers at ACLU believe the government is ready to move on the issue. They point to a legal letter to the judge requesting an extension in the case. It states the request comes from Holder himself and that "given the significance of the matters presented in this case, the government's position is being deliberated at the highest level of the executive branch".

"There's only one issue" said Jameel Jaffer, the director of ACLU's Centre for Democracy. "There's nothing to discuss at a higher level except whether to acknowledge a programme they've already discussed many times."

Jaffer admits he has no idea what might happen. "They may not release anything at all, they might continue to say it's a secret. It's possible but it's absurd. On the one hand there's extraordinary public interest in the drone programme. On the other hand they recently filed a legal brief claiming it's too secret even to acknowledge. It surprised me that they were willing to say that to the appeals court in DC.

"Everyone recognised now that the programme will be an important aspect of President Obama's legacy. He ought to be thinking about this not in terms of short-term political considerations but in terms of how the programme will be viewed by history."

In the past secrecy over the drone programme had been due to diplomacy – for instance, to admit to foreign governments that military action in sovereign territory was taking place would be "awkward or worse", Aftergood said. But now the secret is out and "everyone believes it to be true".

He was sceptical there would be any release of information but said he would like to see the CIA's drone programme moved out of the category of covert action. "I would like to see them put everything on the table. To say 'What we're doing is part of the war on al-Qaida, that has been authorised as part of the authorisation of military force.' The programme ought to be normalised and disclosed and debated.

"To pretend that it doesn't exist seems like an act of bad faith. It's an attempt to forestall a controversy that is taking place anyway. The CIA has been hiding behind a pretence of secrecy. It should drop the pretence."

Mike Buchwald
Counsel and Designee to Chairman Dianne Feinstein
Senate Select Committee on Intelligence
211 Hart Office Building
Washington D.C. 20510
(202) 224-1700

From: Agrast, Mark D. (OLA)
To: 'Sawyer, Heather'; Weich, Ron (OLA)
CC: Apelbaum, Perry; Lachmann, David; Vassar, Bobby
Sent: 1/18/2012 7:13:29 PM
Subject: RE: Letter re: Authority for Targeted Killing

Heather,

Thanks very much.

Best,

Mark

From: Sawyer, Heather [mailto:Heather.Sawyer@mail.house.gov]
Sent: Wednesday, January 18, 2012 5:38 PM
To: Agrast, Mark D. (OLA); Weich, Ron (OLA)
Cc: Apelbaum, Perry; Lachmann, David; Vassar, Bobby
Subject: Letter re: Authority for Targeted Killing

Mark/Ron,

I've attached a letter from Reps. Conyers, Nadler, and Scott following-up on their requests to review the OLC memo explaining the legal authority for the lethal targeting of Anwar al-Awlaki or for a classified briefing on this issue. They also urge the Administration to provide a public explanation, in line with the President's pledge of greater accountability and transparency and to ensure continued public support for the President's counterterrorism efforts.

Please give me a call if you have any questions. Best,

Heather

Heather C. Sawyer
Minority Counsel
House Judiciary Committee
Subcommittee on Constitution
B-336 Rayburn HOB
(202) 225-6906 (phone)
(202) 225-1845 (fax)

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

TOP SECRET//CODEWORD//NOFORN
UNCLASSIFIED WHEN SEPARATED FROM CLASSIFIED ENCLOSURE

October 11, 2011

The Honorable Mike Rogers
Chairman
The Honorable C.A. "Dutch" Ruppersberger
Ranking Minority Member
Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Rogers and Ranking Member Ruppersberger:

In response to the Chairman's request, we are pleased to transmit a document prepared by the Department of Justice containing a detailed analysis of the legal basis of a particular classified program. This document is classified at the Top Secret/CODEWORD level.

Because this document contains highly classified information, it is being provided for review by Committee Members and appropriately-cleared staff, and will be delivered in accordance with our usual practice regarding such materials.

We hope that this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this, or any other matter.

Sincerely,

Ronald Weich
Assistant Attorney General

Enclosure

TOP SECRET//CODEWORD//NOFORN
UNCLASSIFIED WHEN SEPARATED FROM CLASSIFIED ENCLOSURE

From:	Agrast, Mark D. (OLA)
To:	Michael Allen (Michael.Allen@mail.house.gov)
Sent:	6/22/2012 4:55:36 PM
Subject:	White paper - EXTENDED 222.69 KB
Attachments:	MimosaStub.html

Michael,

As we discussed, we would appreciate your making this document available to members of the committee. Although not classified, it is not intended for public dissemination. We would therefore appreciate your treating it with all appropriate care.

Best,

Mark

Mark David Agrast

Deputy Assistant Attorney General

Office of Legislative Affairs

U.S. DEPARTMENT OF JUSTICE

Robert F. Kennedy Main Justice Building

950 Pennsylvania Avenue, N.W., Room 1607

Washington, D.C. 20530-0001

202.514.2141 main | 202.305.7851 direct | 202.514.4482 fax

Unclassified email: mark.d.agrast@usdoj.gov

SIPR: mark.agrast@usdoj.sgov.gov

JWICS: mark.agrast@doj.ic.gov

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

October 5, 2011

Via Electronic Communication

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Attorney General Holder:

On September 30, 2011, it was reported that Anwar al-Awlaqi was killed in an operation conducted by the United States in Yemen. According to media accounts, the operation was conducted following the issuance of a secret memorandum issued by the Department of Justice authorizing the targeted killing of a U.S. citizen abroad. The published accounts include details provided by "administration officials" and describe the memorandum as the product of a review of legal issues raised by targeting and killing a U.S. citizen.

As the Ranking Member of the Committee on the Judiciary, I request that you provide a copy of the memorandum described in press accounts to the Committee for review. This document should be made available, along with any other corresponding, related, or derivative memoranda that were prepared as part of drafting the memorandum. The memorandum should be made available in an unredacted manner. Should the memorandum be classified, please alert my staff so appropriate procedures can be followed to transmit the document.

Thank you for your cooperation and attention to this important matter. I would appreciate your response, including the requested memorandum, no later than October 21, 2011.

Sincerely,

Charles E. Grassley
Ranking Member

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

October 5, 2011

The Honorable Eric H. Holder Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Dear Mr. Attorney General:

On September 30, 2011, it was reported that Anwar al-Awlaqi was killed in an operation conducted by the United States in Yemen. According to media accounts, the operation was conducted following the issuance of a secret memorandum issued by the Department of Justice authorizing the targeted killing of a U.S. citizen abroad. The published accounts include details provided by "administration officials" and describe the memorandum as the product of a review of legal issues raised by targeting and killing a U.S. citizen.

Please provide an unredacted copy of the memorandum described in press accounts. Should the memorandum be classified, please alert my staff so appropriate procedures can be followed.

Thank you for your cooperation and attention to this important matter.

Sincerely,

PATRICK LEAHY
Chairman

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951
http://www.house.gov/judiciary

January 18, 2012

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Dear Attorney General Holder:

We are following up on our request to the Department of Justice to provide us with a copy of any memoranda setting forth the legal and factual justifications for the targeted killing of Anwar al-Awlaki or to otherwise brief us on this matter. We initiated our request following reports that the Department's Office of Legal Counsel wrote a "secret memorandum" authorizing the lethal targeting of this United States citizen. See, e.g., Peter Finn, *Secret U.S. memo sanctioned killing of Aulaqi*, Washington Post, Sept. 30, 2011. To our dismay, the Department has not yet confirmed whether it will comply with our request.

We understand that this matter involves classified information and implicates national security concerns, but these are not valid reasons to refuse to provide the requested information to Members of Congress. The Administration reportedly undertook a careful analysis of its legal obligations and the relevant facts before concluding that it's action was lawful and appropriate. Reviewing these legal and factual justifications falls squarely within the House Judiciary Committee's jurisdiction as the extrajudicial killing of a United States citizen implicates serious constitutional and other legal considerations. Our Committee has a long line of instances where we have been provided classified briefings involving classified matters.

President Obama has pledged greater oversight and accountability to congressional committees as a means of preventing threats to the rule of law, which is particularly important here given the lack of judicial oversight for this type of executive branch conduct. The

Administration sought and obtained dismissal of a lawsuit brought by Anwar al-Awlaki's father, who sought judicial review of the decision to target his son. *See Al-Aulaqi v. Obama*, 727 F.Supp. 2d 1 (2010). Judge Bates granted the Administration's motion to dismiss that suit, finding, among other things, that the case raised a non-justiciable political question, with the policy choices and determinations at issue in the case best left "to the halls of Congress or the confines of the Executive Branch." *Id.* at 44 (internal quotation marks omitted). Having successfully fought to foreclose court review, we believe it is incumbent on the Administration to accede to the oversight of congressional committees proffered to the court as a constitutionally mandated alternative to judicial review. The information that we seek is essential for any congressional oversight, and continued delay in responding to our request – and certainly any outright refusal to provide us with this information or an appropriate briefing – is inconsistent with the Administration's arguments to the court and its commitment to executive branch accountability. It also erodes public confidence that the rule of law is being respected by America's leaders.

We therefore respectfully request that the Department schedule a time for us to review the relevant memoranda or to be briefed on this matter as soon as possible, with appropriate safeguards to protect classified information. We would also appreciate confirmation of whether other Members of Congress have been briefed on this issue and, if so, what legal memoranda or opinions were reviewed, and when those briefings took place.

In addition to providing the opportunity for congressional oversight that we have requested, we also urge the Department to provide a public analysis – by, for example, redacting existing memoranda or opinions or preparing an appropriate white paper – that would allow for informed public debate over the use of lethal targeting as a counterterrorism measure. President Obama rightly has criticized the prior Administration for using secret legal memoranda to justify unlawful surveillance and the torture and mistreatment of terror suspects. The President must recognize that there is now considerable public dismay and criticism over what appears to be similar secrecy here. *See, e.g.*, Washington Post, *Administration should do more to defend the Awlaki strike*, October 7, 2011. We urge the Department to take steps to address these concerns by providing to the public the legal principles and process that support the use of lethal targeting. Doing so will honor the President's commitment to greater accountability and transparency, and will help maintain public support for the Administration's counterterrorism efforts.

Given the importance of this issue, we look forward to a response at your earliest convenience.

Sincerely,

John Conyers, Jr.
Member of Congress

Jerrold Nadler
Member of Congress

Robert C. "Bobby" Scott
Member of Congress

cc: Hon. Lamar Smith

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951
http://www.house.gov/judiciary

May 21, 2012

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Dear Attorney General Holder:

We write to follow-up on our previous request for information regarding the Administration's legal and factual justifications for the targeted killing of Anwar al-Awlaki. We initiated our request in October 2011, following press reports of a secret memo authorizing the lethal targeting of this United States citizen, and followed up by letter to you dated January 18, 2012. We have not received any response to our requests.

In the meantime, you and John Brennan, Assistant to the President for Homeland Security and Counterterrorism, have outlined the Administration's legal and ethical justifications for the use of lethal force in public speeches. We welcome the public acknowledgment of the use of drone strikes to target terror suspects in various countries and the effort to outline the legal principles and process that the Administration uses to identify specific individuals for lethal targeting outside of a "hot" battlefield. As we noted in our January 18, 2012 letter, informing the public honors the President's commitment to greater accountability and transparency. Thank you for taking steps to enable a more informed and robust public debate regarding the use of lethal targeting as a counterterrorism measure.

However, these speeches do not obviate the need for the Department to respond to us directly and to provide the requested documents or briefing. They also do not fully acknowledge or explain the Administration's drone program. Both you and Mr. Brennan spoke to the process and justification for identifying and targeting specific individuals, with Mr. Brennan further emphasizing that – before a strike is carried out – there must be a "high degree of confidence" that "the individual being targeted is indeed the terrorist we are pursuing" and that innocent civilians will not be injured or killed. These statements do not mention or account for "signature" strikes, which apparently allow drone strikes even when the identity of those who could be killed is not known. The Washington Post reported that the President approved the increased use of signature strikes in Yemen five days before Mr. Brennan's speech, in which he

did not mention this increased use of signature strikes. See, e.g., Greg Miller, *White House approves broader Yemen drone campaign*, Washington Post, April 25, 2012; *Brennan speech is first Obama acknowledgment of use of armed drones*, Washington Post, April 30, 2012. It is not clear why and how the legal and ethical justifications and process for identifying and targeting specific individuals – who are shown to be members of al-Qa'ida or an associated force and an imminent threat to the United States – apply to signature strikes. How, for example, does the Administration ensure that the targets are legitimate terrorist targets and not insurgents who have no dispute with the United States?

We therefore ask that, in addition to the documents requested in our January 18, 2012 letter (i.e., memoranda or opinions regarding the targeting of Anwar al-Awlaki), the Department provide us with copies of all memoranda or opinions that provide a legal or factual justification for the Administration's drone program, including its use of "signature" strikes, or to otherwise brief us on this.

As we noted in our January letter, we understand that this involves classified information and implicates national security concerns. These are not valid reasons to refuse to provide the requested information. You and Mr. Brennan noted in your public speeches that certain Members of Congress – described by Mr. Brennan as "appropriate members of Congress and the committees who have oversight of our counterterrorism programs" – are engaged in an ongoing dialogue with the Administration regarding its use of drone strikes. The fact that the Administration may be sharing information with other Members or Committees does not excuse its failure to respond to our requests. Extrajudicial killing implicates serious constitutional and other legal considerations. You and Mr. Brennan acknowledge this in your public speeches, citing to our nation's founding document as a source of your alleged authority as well as a limitation on it. As the Ranking Members of the House Judiciary Committee and its Subcommittees on Constitution and Crime, we have the responsibility and right to a complete explanation of the Administration's program and the legal and factual justifications for it.

Given the importance of this issue, we look forward to a response at your earliest convenience.

Sincerely,

John Conyers, Jr.
Ranking Member

Jerrold Nadler
Ranking Member,
Subcommittee on the
Constitution

Robert C. "Bobby" Scott
Ranking Member,
Subcommittee on Crime,
Terrorism and Homeland
Security

cc: Chairman Lamar Smith, House Committee on the Judiciary

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

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December 4, 2012

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Dear Attorney General Holder:

We are following up on our prior requests that the Department of Justice provide copies of any memoranda setting forth the legal and factual justifications for the targeted killing of Anwar al-Awlaki and the Administration's broader use of unmanned aerial aircraft ("drones") to conduct airstrikes against terrorist targets. We requested information regarding the Administration's use of "personality" strikes where a specific individual has been identified and targeted as well as the use of "signature" strikes where, according to press reports, a strike is authorized based on patterns of behavior in an area but where the identity of those who could be killed is not known. *See* Letter from John Conyers, Jr. et al. to Hon. Eric H. Holder, Jr., U.S. Att'y Gen. (May 21, 2012). In addition to requesting this material or a briefing for ourselves, we also asked the Department to provide a public analysis – suggesting, for example, a white paper – to increase transparency and accountability and allow for informed public debate over the use of lethal targeting as a counterterrorism measure.

On June 22, 2012, the Department provided us with a copy of a Department of Justice White Paper titled "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." That document, which is marked as "Draft November 8, 2011," sets forth the legal framework for considering the circumstances in which a particular, identifiable United States Citizen may be targeted. In transmitting that document to us, the Department acknowledged that this white paper is not classified, but took the position that it is not intended for public dissemination.

We appreciate the Department's transmission of the white paper, which fleshes out the legal points outlined in public speeches by you and by John Brennan, Assistant to the President for Homeland Security and Counterterrorism, and represents a positive step in responding to our prior requests for information. Unfortunately, while providing some additional information, the paper does not fully satisfy our prior requests or fulfill our ongoing need for information that

allows us to conduct meaningful congressional oversight. We therefore ask that you provide the following information.

First, given the fact that the paper that we received is marked as a draft, we are interested in knowing whether the paper has been revised or finalized. If so, please provide copies of any revised or finalized versions.

Second, while the white paper explains the legal framework for a particular circumstance – namely, where the Administration has identified a particular U.S. citizen who is a senior operational leader of al-Qa'ida – it does not explain the Administration's broader use of drone strikes including, for example, its alleged use of "signature" strikes. As we noted in our May 21, 2012 letter, it is not clear why and how the legal and ethical justifications and process for identifying and targeting specific individuals would apply to signature strikes. We therefore reiterate our request for copies of all memoranda or opinions that provide a legal or factual justification for the Administration's broader drone program, including its use of "signature strikes," or to otherwise brief us on this.

Third, while outlining the legal justifications for a particular type of strike, the paper also does not explain the process by which the Administration determines that legal and strategic prerequisites have been met before a strike is authorized. Mr. Brennan outlined that process in his April 30, 2012 public address at the Woodrow Wilson International Center for Scholars, noting that the Administration would "look to institutionalize our approach more formally so that the high standards we set for ourselves endure over time, including as an example for other nations that pursue these [the use of advanced technology for lethal targeting] capabilities." Recent press reports also indicate that the Administration has been developing explicit rules to govern lethal targeting of terrorists. *See, e.g.,* Scott Shane, *Election Spurred a Move to Codify U.S. Drone Policy*, NY Times, Nov. 24, 2012. Given the increased use of unmanned drone strikes, and the Administration's acknowledgement that future administrations and other countries are likely to look to the standards and processes that this Administration has employed, a clear and complete understanding of the processes as well as the legal principles for the entire program is critical. We therefore request that you brief us on the status and substance of any proposed rules and your plans for making such rules public, a step that we believe essential to ensuring that appropriate standards are established to guide this and other nations going forward.

Finally, we also ask that you publicly release the Department of Justice White Paper titled "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." The paper does not contain classified information and public release of this analysis would be a valuable continuation of the Administration's efforts – illustrated by your and Mr. Brennan's public remarks – toward honoring the President's commitment to greater accountability and transparency.

We look forward to a response at your earliest convenience.

Sincerely,

John Conyers, Jr.
Ranking Member

Jerrold Nadler
Ranking Member
Subcommittee on the
Constitution

Robert C. "Bobby" Scott
Ranking Member
Subcommittee on
Crime, Terrorism and
Homeland Security

cc: The Honorable Lamar Smith, Chairman, House Committee on the Judiciary

TED POE
2ND DISTRICT, TEXAS

COMMITTEES:
FOREIGN AFFAIRS
JUDICIARY
FOUNDER OF CONGRESSIONAL
VICTIM'S RIGHTS CAUCUS

Congress of the United States
House of Representatives

Washington, DC 20515–4302
December 19, 2012

The Honorable Eric H. Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Holder,

In the years since the September 11th attacks, the United States has conducted attacks using Unmanned Aerial Vehicles in many locations around the world. Some reports indicate that in Pakistan alone from June 2004 to September 2012, drone strikes have killed between 2,570 and 3,337 people including 474 to 884 civilians, and 176 children.

Clear answers have not yet been given to the American public by the Administration as to the specific legal justifications for the targeted use of drones abroad, especially when it comes to the targeted killings of Americans. It is important for the American public to fully understand the legal authority for these government actions. We request that you answer the following questions:

1. Is it your legal opinion that the President does not need congressional authorization under the War Powers Act to conduct drone strikes abroad?

2. Does your legal opinion change if their use is part of an operation that continues for more than 60 days?

3. Where is the legal authority for the President (or US intelligence agencies acting under his direction) to target and kill a US Citizen abroad?

4. If the President has the legal authority to target U.S. citizens located abroad, what limitations do you see on this power, if any? Specifically, in what instances is such action legally justified under American law and in what instances would it not be justified?

We appreciate your quick response on this important issue.

Sincerely,

TED POE
Member of Congress

Trey Gowdy
Member of Congress

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Congress of the United States
House of Representatives
Washington, DC 20515–4302

February 8, 2013

The Honorable Eric H. Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Holder,

We write to follow-up on our December 19, 2012 letter (copy attached) and to include additional questions based on the recently released Department of Justice (hereinafter "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."

DOJ's legal analysis provides that a U.S. operation using lethal force in a foreign country against a U.S. Citizen who is a senior operational leader of al-Qa'ida or an associated force would be lawful if a "informed, high level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States."

1. Specifically, which individuals would be classified as "informed, high level" officials having the authority to make this decision?

2. Who specifically makes the determination on whether their intelligence relied on to make this determination is reliable?

3. What groups are classified as an "associated force" of al-Qa'ida?

4. Who specifically determines whether the threat is imminent?

5. Who specifically determines whether capture is feasible?

DOJ's legal analysis continues by holding: "Were the target of a lethal operation a U.S. Citizen who may have rights under the Due Process Clause and the Fourth Amendment, that individual's citizenship would not immunize him from a lethal operation."

1. Does this statement mean that once an "informed high level official" of the U.S. Government determines a U.S. Citizen poses an imminent threat of a violent attack against the United States, that Citizen no longer possesses due process rights under the U.S. Constitution?

2. What if the determination is wrong, and the targeted individual was either not a member of al-Qa'ida or an associated force, or did not pose an imminent threat of violent attack against the United States? Is it in your legal opinion that Due Process rights would once again attach? Would their family have legal recourse? What recourse? And in what forum?

3. Is there legal justification in U.S. case law wherein Due Process rights for U.S. Citizens have been removed in a similar fashion by administration officials without a finding in court?

4. If the 4th, 5th, and 14th Amendments to the United States Constitution allow for the killing of a U.S. Citizen on foreign soil, is the analysis materially different for a U.S. Citizen on American soil who also meets the requirements set forth in the DOJ legal analysis?

5. If the 4th, 5th, 14th and (presumably 8th) Amendments allow for the killing of a U.S. Citizen on foreign soil who meets DOJ guidelines, would the analysis be different for enhanced interrogation techniques should capture be effectuated rather than killing?

We would appreciate a prompt response to these questions, as well as those raised in our December 19, 2012 letter.

Sincerely,

TED POE
Member of Congress (TX-02)

Trey Gowdy
Member of Congress (SC-04)

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Office of the Attorney General
Washington, D. C. 20530

May 22, 2013

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DEPT OF JUSTICE
EXECUTIVE SECRETARIAT

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20530

Dear Mr. Chairman:

Since entering office, the President has made clear his commitment to providing Congress and the American people with as much information as possible about our sensitive counterterrorism operations, consistent with our national security and the proper functioning of the Executive Branch. Doing so is necessary, the President stated in his May 21, 2009 National Archives speech, because it enables the citizens of our democracy to "make informed judgments and hold [their Government] accountable."

In furtherance of this commitment, the Administration has provided an unprecedented level of transparency into how sensitive counterterrorism operations are conducted. Several senior Administration officials, including myself, have taken numerous steps to explain publicly the legal basis for the United States' actions to the American people and the Congress. For example, in March 2012, I delivered an address at Northwestern University Law School discussing certain aspects of the Administration's counterterrorism legal framework. And the Department of Justice and other departments and agencies have continually worked with the appropriate oversight committees in the Congress to ensure that those committees are fully informed of the legal basis for our actions.

The Administration is determined to continue these extensive outreach efforts to communicate with the American people. Indeed, the President reiterated in his State of the Union address earlier this year that he would continue to engage with the Congress about our counterterrorism efforts to ensure that they remain consistent with our laws and values, and become more transparent to the American people and to the world.

To this end, the President has directed me to disclose certain information that until now has been properly classified. You and other Members of your Committee have on numerous occasions expressed a particular interest in the Administration's use of lethal force against U.S. citizens. In light of this fact, I am writing to disclose to you certain information about the number of U.S. citizens who have been killed by U.S. counterterrorism operations outside of areas of active hostilities. Since 2009, the United States, in the conduct of U.S. counterterrorism operations against al-Qa'ida and its

tk63

associated forces outside of areas of active hostilities, has specifically targeted and killed one U.S. citizen, Anwar al-Aulaqi. The United States is further aware of three other U.S. citizens who have been killed in such U.S. counterterrorism operations over that same time period: Samir Khan, 'Abd al-Rahman Anwar al-Aulaqi, and Jude Kenan Mohammed. These individuals were not specifically targeted by the United States.

As I noted in my speech at Northwestern, "it is an unfortunate but undeniable fact" that a "small number" of U.S. citizens "have decided to commit violent attacks against their own country from abroad." Based on generations-old legal principles and Supreme Court decisions handed down during World War II, as well as during the current conflict, it is clear and logical that United States citizenship alone does not make such individuals immune from being targeted. Rather, it means that the government must take special care and take into account all relevant constitutional considerations, the laws of war, and other law with respect to U.S. citizens – even those who are leading efforts to kill their fellow, innocent Americans. Such considerations allow for the use of lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-Qa'ida or its associated forces, and who is actively engaged in planning to kill Americans, in the following circumstances: (1) the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; (2) capture is not feasible; and (3) the operation would be conducted in a manner consistent with applicable law of war principles.

These conditions should not come as a surprise: the Administration's legal views on this weighty issue have been clear and consistent over time. The analysis in my speech at Northwestern University Law School is entirely consistent with not only the analysis found in the unclassified white paper the Department of Justice provided to your Committee soon after my speech, but also with the classified analysis the Department shared with other congressional committees in May 2011 – months before the operation that resulted in the death of Anwar al-Aulaqi. The analysis in my speech is also entirely consistent with the classified legal advice on this issue the Department of Justice has shared with your Committee more recently. In short, the Administration has demonstrated its commitment to discussing with the Congress and the American people the circumstances in which it could lawfully use lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-Qa'ida or its associated forces, and who is actively engaged in planning to kill Americans.

Anwar al-Aulaqi plainly satisfied all of the conditions I outlined in my speech at Northwestern. Let me be more specific. Al-Aulaqi was a senior operational leader of al-Qa'ida in the Arabian Peninsula (AQAP), the most dangerous regional affiliate of al-Qa'ida and a group that has committed numerous terrorist attacks overseas and attempted multiple times to conduct terrorist attacks against the U.S. homeland. And al-Aulaqi was not just a senior leader of AQAP – he was the group's chief of external operations, intimately involved in detailed planning and putting in place plots against U.S. persons.

In this role, al-Aulaqi repeatedly made clear his intent to attack U.S. persons and his hope that these attacks would take American lives. For example, in a message to

Muslims living in the United States, he noted that he had come "to the conclusion that *jihad* against America is binding upon myself just as it is binding upon every other able Muslim." But it was not al-Aulaqi's words that led the United States to act against him: they only served to demonstrate his intentions and state of mind, that he "pray[ed] that Allah [would] destro[y] America and all its allies." Rather, it was al-Aulaqi's actions – and, in particular, his direct personal involvement in the continued planning and execution of terrorist attacks against the U.S. homeland – that made him a lawful target and led the United States to take action.

For example, when Umar Farouk Abdulmutallab – the individual who attempted to blow up an airplane bound for Detroit on Christmas Day 2009 – went to Yemen in 2009, al-Aulaqi arranged an introduction via text message. Abdulmutallab told U.S. officials that he stayed at al-Aulaqi's house for three days, and then spent two weeks at an AQAP training camp. Al-Aulaqi planned a suicide operation for Abdulmutallab, helped Abdulmutallab draft a statement for a martyrdom video to be shown after the attack, and directed him to take down a U.S. airliner. Al-Aulaqi's last instructions were to blow up the airplane when it was over American soil. Al-Aulaqi also played a key role in the October 2010 plot to detonate explosive devices on two U.S.-bound cargo planes: he not only helped plan and oversee the plot, but was also directly involved in the details of its execution – to the point that he took part in the development and testing of the explosive devices that were placed on the planes. Moreover, information that remains classified to protect sensitive sources and methods evidences al-Aulaqi's involvement in the planning of numerous other plots against U.S. and Western interests and makes clear he was continuing to plot attacks when he was killed.

Based on this information, high-level U.S. government officials appropriately concluded that al-Aulaqi posed a continuing and imminent threat of violent attack against the United States. Before carrying out the operation that killed al-Aulaqi, senior officials also determined, based on a careful evaluation of the circumstances at the time, that it was not feasible to capture al-Aulaqi. In addition, senior officials determined that the operation would be conducted consistent with applicable law of war principles, including the cardinal principles of (1) necessity – the requirement that the target have definite military value; (2) distinction – the idea that only military objectives may be intentionally targeted and that civilians are protected from being intentionally targeted; (3) proportionality – the notion that the anticipated collateral damage of an action cannot be excessive in relation to the anticipated concrete and direct military advantage; and (4) humanity – a principle that requires us to use weapons that will not inflict unnecessary suffering. The operation was also undertaken consistent with Yemeni sovereignty.

While a substantial amount of information indicated that Anwar al-Aulaqi was a senior AQAP leader actively plotting to kill Americans, the decision that he was a lawful target was not taken lightly. The decision to use lethal force is one of the gravest that our government, at every level, can face. The operation to target Anwar al-Aulaqi was thus subjected to an exceptionally rigorous interagency legal review: not only did I and other Department of Justice lawyers conclude after a thorough and searching review that the

operation was lawful, but so too did other departments and agencies within the U.S. government.

The decision to target Anwar al-Aulaqi was additionally subjected to extensive policy review at the highest levels of the U.S. Government, and senior U.S. officials also briefed the appropriate committees of Congress on the possibility of using lethal force against al-Aulaqi. Indeed, the Administration informed the relevant congressional February 2010 – well over a year before the operation in question – and the legal justification was subsequently explained in detail to those committees, well before action was taken against Aulaqi. This extensive outreach is consistent with the Administration's strong and continuing commitment to congressional oversight of our counterterrorism operations – oversight which ensures, as the President stated during his State of the Union address, that our actions are "consistent with our laws and system of checks and balances."

The Supreme Court has long "made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 578, 587 (1952). But the Court's case law and longstanding practice and principle also make clear that the Constitution does not prohibit the Government it establishes from taking action to protect the American people from the threats posed by terrorists who hide in faraway countries and continually plan and launch plots against the U.S. homeland. The decision to target Anwar al-Aulaqi was lawful, it was considered, and it was just.

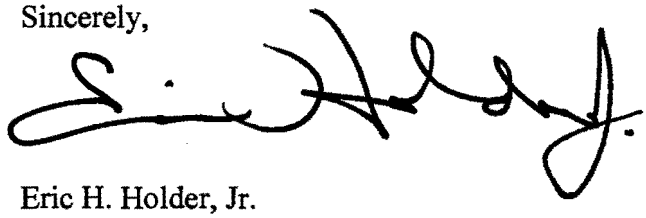
* * * * *

This letter is only one of a number of steps the Administration will be taking to fulfill the President's State of the Union commitment to engage with Congress and the American people on our counterterrorism efforts. This week the President approved and relevant congressional committees will be notified and briefed on a document that institutionalizes the Administration's exacting standards and processes for reviewing and approving operations to capture or use lethal force against terrorist targets outside the United States and areas of active hostilities; these standards and processes are either already in place or are to be transitioned into place. While that document remains classified, it makes clear that a cornerstone of the Administration's policy is one of the principles I noted in my speech at Northwestern: that lethal force should not be used when it is feasible to capture a terrorist suspect. For circumstances in which capture is feasible, the policy outlines standards and procedures to ensure that operations to take into custody a terrorist suspect are conducted in accordance with all applicable law, including the laws of war. When capture is not feasible, the policy provides that lethal force may be used only when a terrorist target poses a continuing, imminent threat to Americans, and when certain other preconditions, including a requirement that no other reasonable alternatives exist to effectively address the threat, are satisfied. And in all circumstances there must be a legal basis for using force against the target. Significantly,

the President will soon be speaking publicly in greater detail about our counterterrorism operations and the legal and policy framework that governs those actions.

I recognize that even after the Administration makes unprecedented disclosures like those contained in this letter, some unanswered questions will remain. I assure you that the President and his national security team are mindful of this Administration's pledge to public accountability for our counterterrorism efforts, and we will continue to give careful consideration to whether and how additional information may be declassified and disclosed to the American people without harming our national security.

Sincerely,



Eric H. Holder, Jr.
Attorney General

cc: Ranking Member Charles Grassley
Chairman Dianne Feinstein
Vice Chairman Saxby Chambliss
Chairman Carl Levin
Ranking Member James Inhofe
Chairman Bob Goodlatte
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Chairman Ed Royce
Ranking Member Eliot Engel
Majority Leader Harry Reid
Minority Leader Mitch McConnell
Speaker John Boehner
Majority Leader Eric Cantor
Minority Leader Nancy Pelosi
Minority Whip Steny Hoyer

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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

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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

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

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510–6275

2012 JAN -4 AM 10:47

December 22, 2011

The Honorable Robert S. Mueller, III
Director
Federal Bureau of Investigation
J. Edgar Hoover Building
935 Pennsylvania Avenue, NW
Washington, DC 20535

Dear Honorable Mueller:

Thank you for your testimony at the Senate Committee on the Judiciary hearing entitled "Oversight of the Federal Bureau of Investigation" on December 14, 2011. Attached are written questions from Committee members. We look forward to including your answers to these questions, along with your hearing testimony, in the formal Committee record.

Please help us complete a timely and accurate hearing record by sending an electronic version of your responses to Halley Ross, Hearing Clerk, Senate Judiciary Committee, at Halley_Ross@judiciary-dem.senate.gov, no later than **January 5, 2012**.

Where circumstances make it impossible to comply with the two-week period provided for submission of answers, witnesses may explain in writing and request an extension of time to reply.

Again, thank you for your participation. If you have any questions, please contact Halley at (202) 224-7703.

Sincerely,

Patrick Leahy

PATRICK LEAHY
Chairman

5

Received DJC 1-3-12

Hearing before the
Senate Committee on the Judiciary
"Oversight of the Federal Bureau of Investigation"
December 14, 2011

Senate Committee on the Judiciary

Hearing on FBI Oversight

December 14, 2011

Questions for the Record From Senator Charles Grassley

To Director Robert Mueller

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(1) Office of Legal Counsel Opinion on Anwar al-Awlaki

On September 30, 2011, it was reported that Anwar al-Awlaki, a U.S. citizen, was killed in an operation conducted by the United States in Yemen. According to media accounts, the operation was conducted following the issuance of a secret memorandum issued by the Department of Justice authorizing the targeted killing of a U.S. citizen abroad. The published accounts include details provided by "administration officials" and describe the memorandum as the product of a review of legal issues raised by targeting and killing a U.S. citizen.

I, along with Chairman Leahy, have requested a copy of this memorandum from the Justice Department. Despite the Administration publicly acknowledging the memorandum's existence to the media, it has not yet been provided to Congress. At the hearing, I asked you about this letter and whether you supported Congress having access to it. You replied that it was not your role in determining whether Congress should have access.

a. Do you agree that Congress has an obligation to conduct oversight of the targeted killing of an American citizen by the United States?
b. Do you agree that, to the extent practicable, decisions as important as the legal authority granting the Government permission to kill an American citizen should be made public? If not, why not?

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 15, 2012

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of FBI Director Robert Mueller at an oversight hearing before the Committee on December 14, 2011.

We sincerely apologize for the delay and hope that this information is of assistance to the Committee. Please do not hesitate to contact this office if we may provide additional assistance regarding this, or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program there is no objection to submission of this letter.

Sincerely,

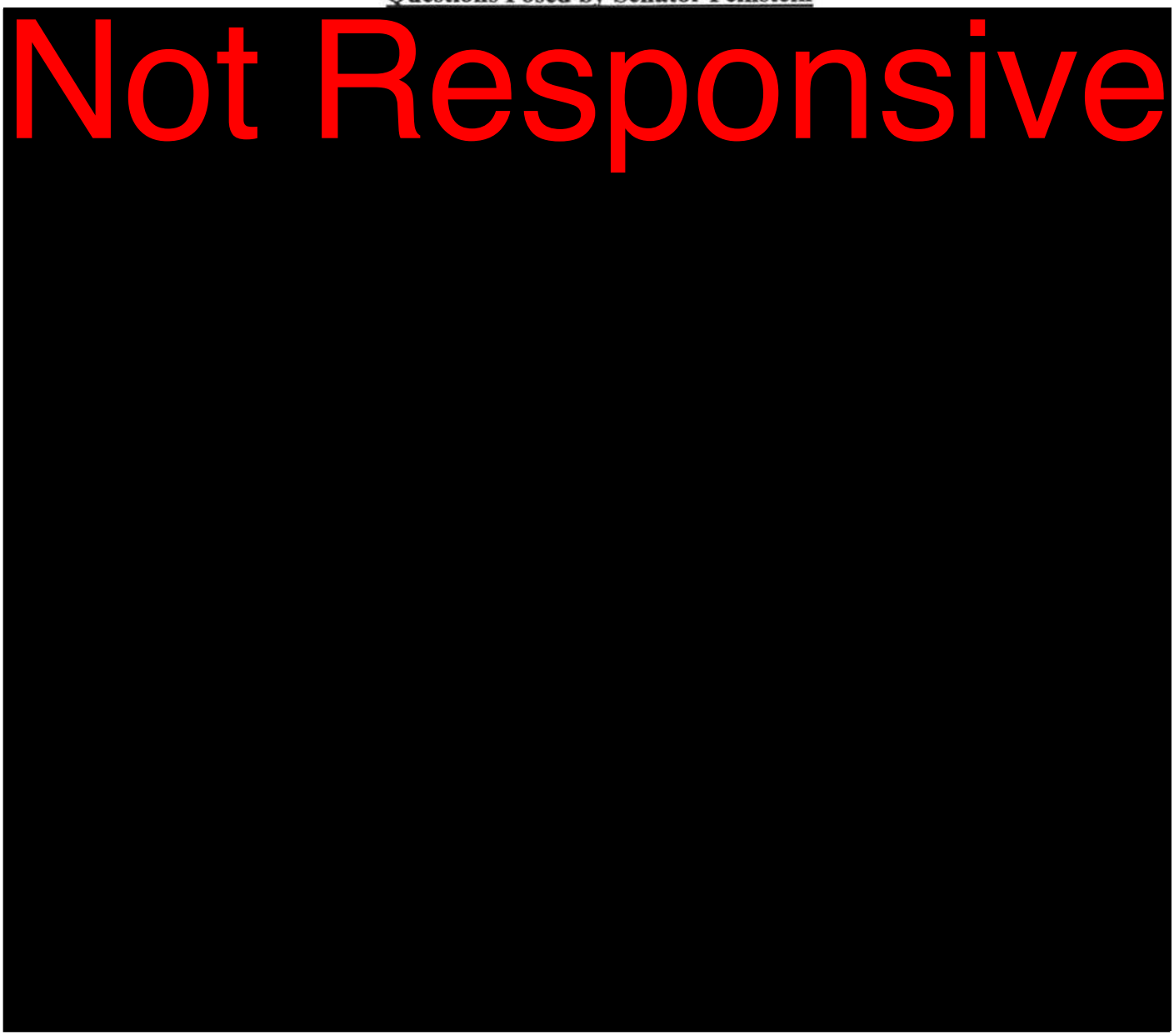
Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable Charles Grassley
Ranking Minority Member

Responses of the Federal Bureau of Investigation
to Questions for the Record
Arising from the December 14, 2011, Hearing Before the
Senate Committee on the Judiciary
Regarding "Oversight of the FBI"

Questions Posed by Senator Feinstein



These responses are current as of 2/24/12

[redacted]
Not Responsive

Questions Posed by Senator Grassley

Office of Legal Counsel Opinion on Anwar al-Awlaki

These responses are current as of 2/24/12

12. On September 30, 2011, it was reported that Anwar al-Awlaki, a U.S. citizen, was killed in an operation conducted by the United States in Yemen. According to media accounts, the operation was conducted following the issuance of a secret memorandum issued by the Department of Justice authorizing the targeted killing of a U.S. citizen abroad. The published accounts include details provided by "administration officials" and describe the memorandum as the product of a review of legal issues raised by targeting and killing a U.S. citizen.

I, along with Chairman Leahy, have requested a copy of this memorandum from the Justice Department. Despite the Administration publicly acknowledging the memorandum's existence to the media, it has not yet been provided to Congress. At the hearing, I asked you about this letter and whether you supported Congress having access to it. You replied that it was not your role in determining whether Congress should have access.

a. Do you agree that Congress has an obligation to conduct oversight of the targeted killing of an American citizen by the United States?

Response:

The FBI's authorities and responsibilities, which are established by statute, do not include determining Congress' obligations.

b. Do you agree that, to the extent practicable, decisions as important as the legal authority granting the Government permission to kill an American citizen should be made public? If not, why not?

Response:

We defer to others in the Administration for response to this inquiry.

2521362
DA

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510–6275

2012 JUN 26 AM 11:05

June 20, 2012

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. Attorney General:

Thank you for your testimony at the Senate Committee on the Judiciary hearing entitled "Oversight of the U.S. Department of Justice" on June 12, 2012. Attached are written questions from Committee members. We look forward to including your answers to these questions, along with your hearing testimony, in the formal Committee record.

Please help us complete a timely and accurate hearing record by sending an electronic version of your responses to Halley Ross, Hearing Clerk, Senate Judiciary Committee, at Halley_Ross@judiciary-dem.senate.gov, no later than **July 4, 2012**.

Where circumstances make it impossible to comply with the two-week period provided for submission of answers, witnesses may explain in writing and request an extension of time to reply.

Again, thank you for your participation. If you have any questions, please contact Halley at (202) 224-7703.

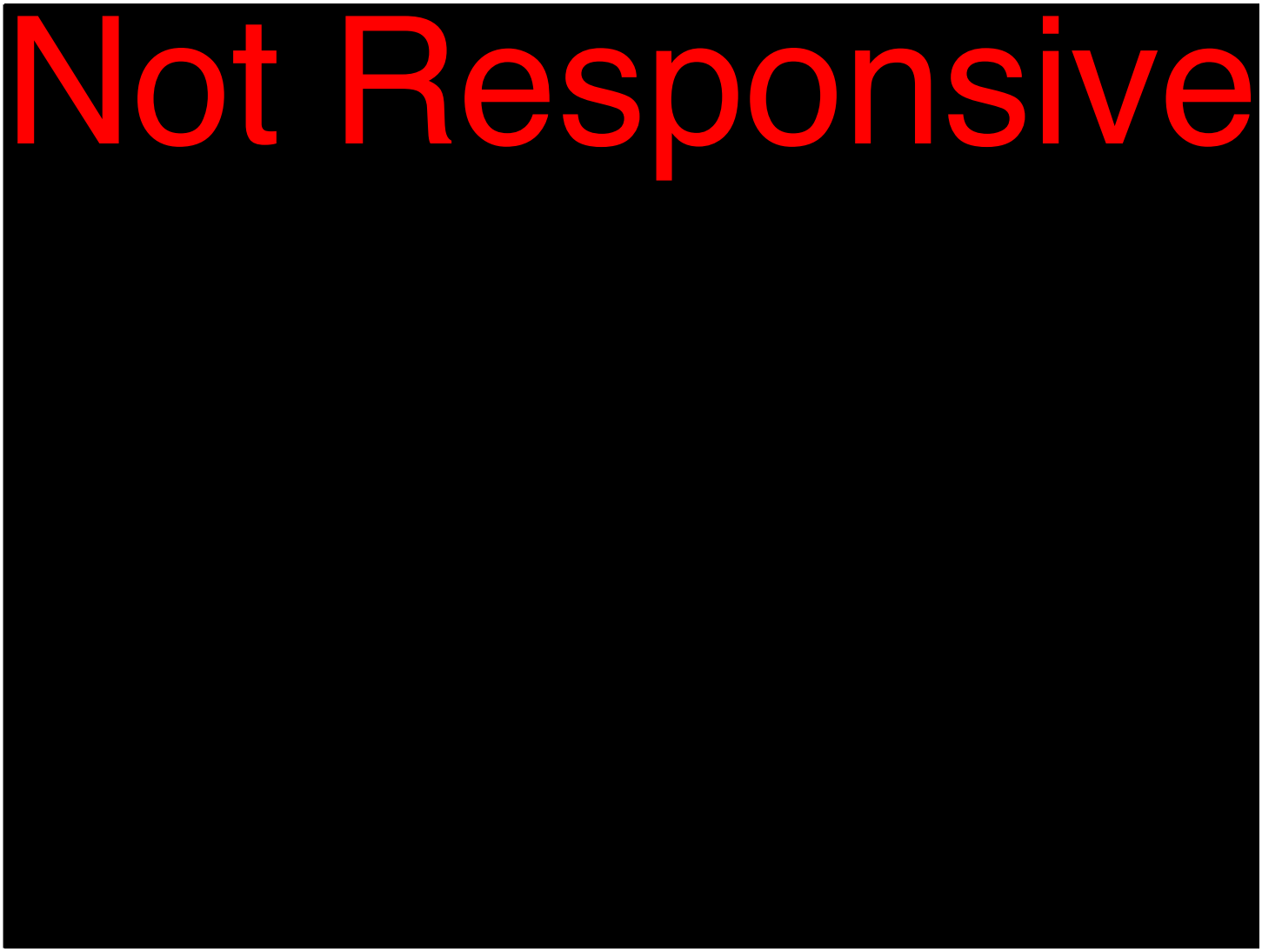
Sincerely,

Patrick Leahy

PATRICK LEAHY
Chairman

8

Reid OCA DOE 6-20-12


Not Responsive

Not Responsive

18. Memo Issued by Office of Legal Counsel Regarding Anwar al-Awlaqi

On September 30, 2011, Anwar al-Awlaqi, a United States citizen, was killed in an operation conducted by the United States in Yemen. It was reported in the media that this targeted killing

followed the issuance of a secret memorandum authored by the Justice Department's Office of Legal Counsel (OLC). On October 5, 2011, I sent a letter to you requesting a copy of any such memorandum, offering to make appropriate arrangements if the memo was classified. I have continually been told that the Justice Department will not confirm the existence of such a memorandum, notwithstanding the fact that the existence of such a memorandum was described to print media.

A. Given the Justice Department is not confirming the existence of the memorandum, is the Department investigating any national security leaks related to this story? If not, why not?
B. If such a memorandum exists, why does the Department continue to refuse to provide it to the Judiciary Committee?

Not Responsive

20. Use of Drones by Law Enforcement

Do any Justice Department entities use or plan to use drones for law enforcement purposes within the United States? Has the Office of Legal Counsel been asked to or issued any memoranda addressing the topic of use of drones by federal, state, local, or tribal domestic law enforcement, administrative, or regulatory agencies? If so, please provide a copy of any memoranda discussing this topic.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 7, 2013

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Attorney General Eric Holder before the Committee on June 12, 2012. We apologize for our delay and hope that this information is of assistance to the Committee. Please note that the Department is currently in litigation with Congress regarding the investigation pertaining to Operation Fast and Furious and, accordingly, we are not able to respond to questions related to that matter.

Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

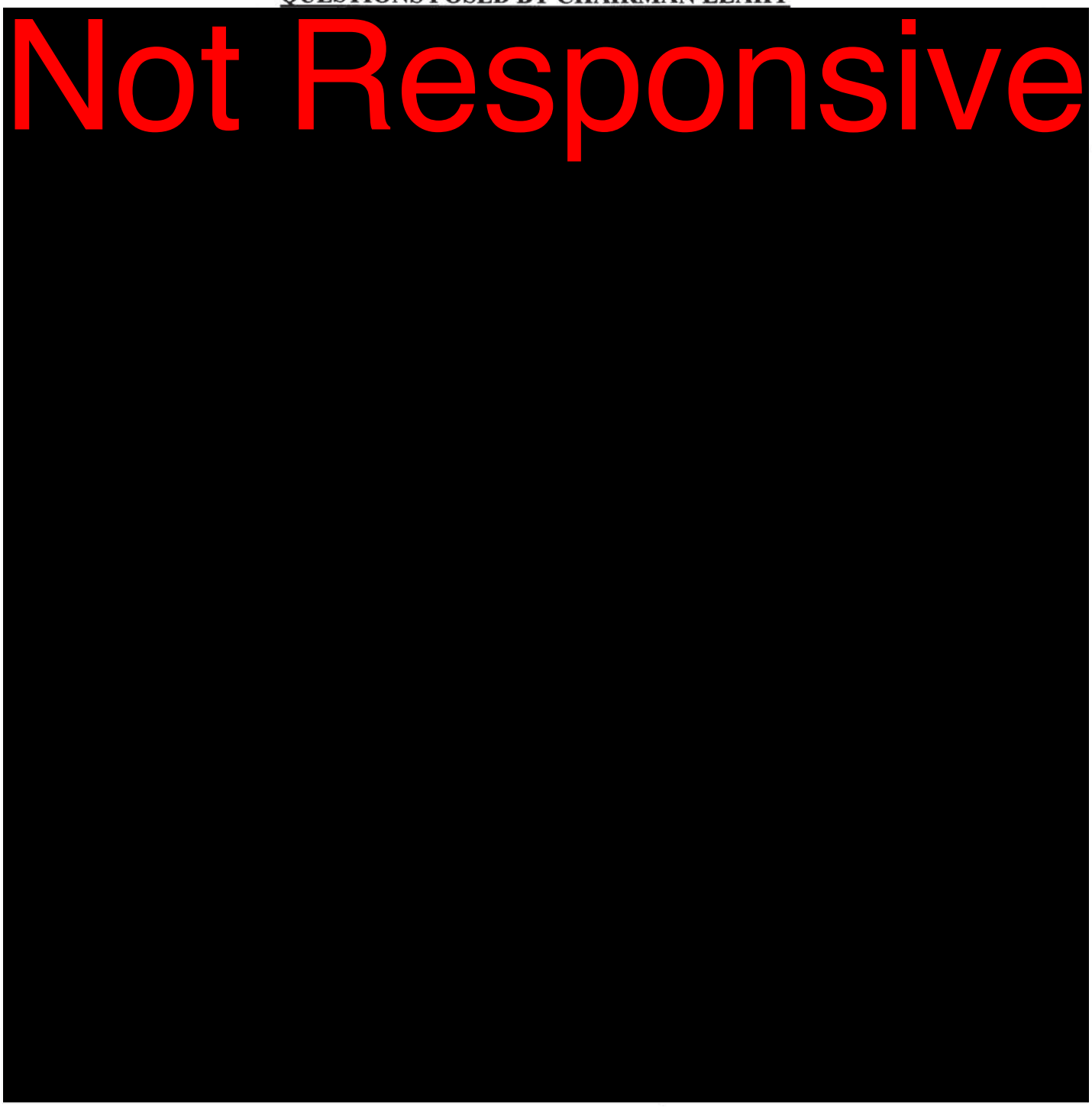
Peter J. Kadzik
Principal Deputy Assistant Attorney General

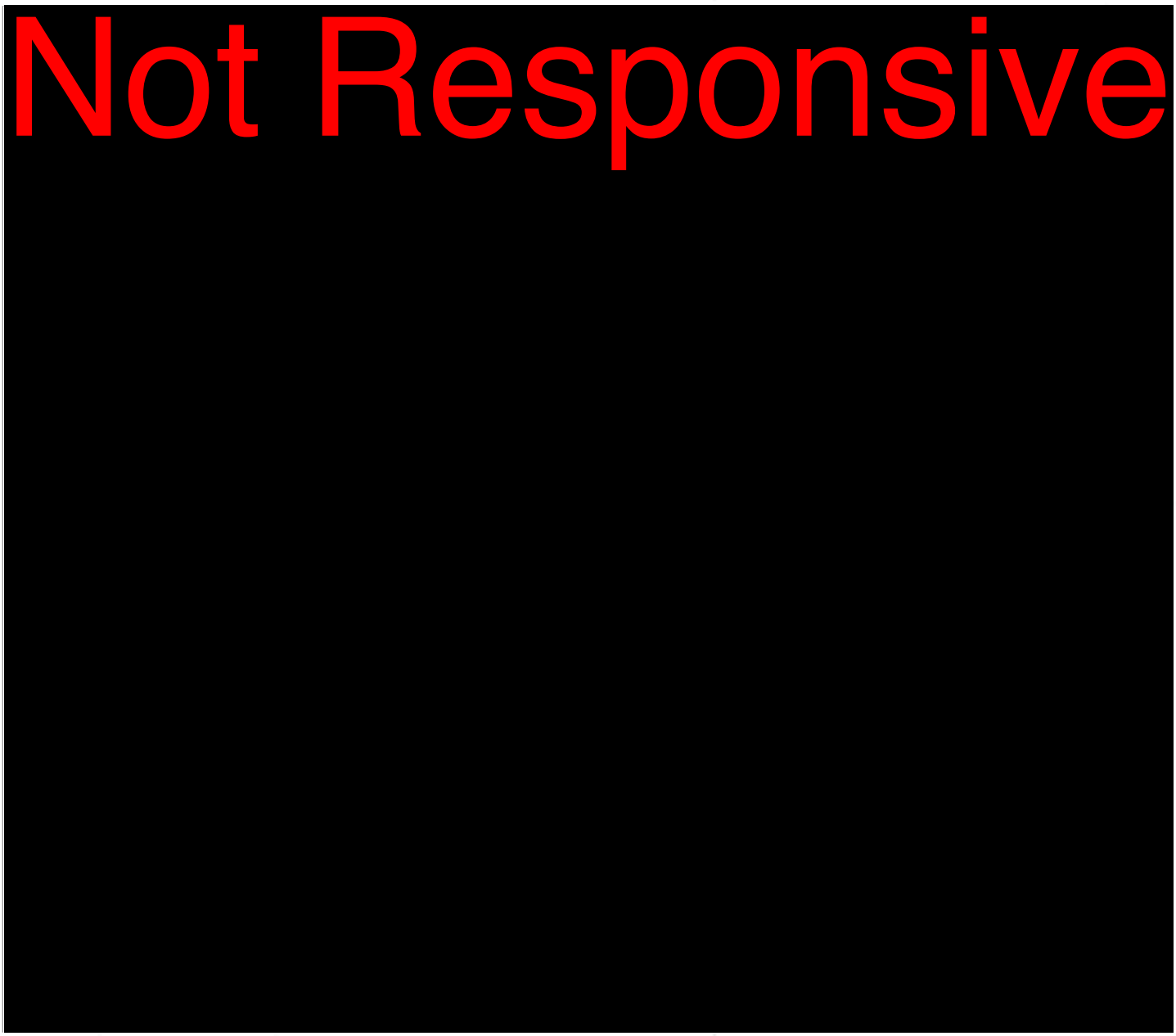
Enclosure

cc: The Honorable Charles Grassley
Ranking Member

Questions for the Record
Attorney General Eric H. Holder, Jr.
Committee on the Judiciary
United States Senate
June 12, 2012

QUESTIONS POSED BY CHAIRMAN LEAHY





Memo Issued by Office of Legal Counsel Regarding Anwar al-Awlaqi

37. On September 30, 2011, Anwar al-Awlaqi, a United States citizen, was killed in an operation conducted by the United States in Yemen. It was reported in the media that this targeted killing followed the issuance of a secret memorandum authored by the Justice Department's Office of Legal Counsel (OLC). On October 5, 2011, I sent a letter to you requesting a copy of any such memorandum, offering to make appropriate arrangements if the memo was classified. I have continually been told that the Justice Department will not confirm the existence of such a memorandum, notwithstanding the fact that the existence of such a memorandum was described to print media.

A. Given the Justice Department is not confirming the existence of the memorandum, is the Department investigating any national security leaks related to this story? If not, why not?

Response:

Under longstanding policy, the Department of Justice generally does not publicly confirm or deny the existence of an investigation into any particular matter.

B. If such a memorandum exists, why does the Department continue to refuse to provide it to the Judiciary Committee?

Response:

Without confirming or addressing any particular program or operation, including whether there is an Office of Legal Counsel opinion on the subject addressed in the question, the Department has provided the Judiciary Committee with, and released publicly, a draft white paper that sets forth a legal framework for considering the circumstances in which the U.S. government could conduct a lethal operation directed against a U.S. citizen who is a senior operational leader of Al-Qa'ida or an associated force.

[redacted]
Not Responsive

Use of Drones by Law Enforcement

39. Do any Justice Department entities use or plan to use drones for law enforcement purposes within the United States? Has the Office of Legal Counsel been asked to or issued any memoranda addressing the topic of use of drones by federal, state, local, or tribal domestic law enforcement, administrative, or regulatory agencies? If so, please provide a copy of any memoranda discussing this topic.

Response:

Law enforcement agencies within the Department are exploring the ways in which available new technologies, such as unarmed Unmanned Aircraft Systems (UASs), may increase the effectiveness of our nation's law enforcement and public safety initiatives. Although UASs are a new aviation technology, they remain just one of many types of aircraft from which lawful aviation-based surveillance can be conducted, and the same legal requirements that would apply to fixed and rotary-wing aviation platforms would apply to UASs. Accordingly, any DOJ law enforcement agencies that deploy UASs must comply with all applicable constitutional, statutory, privacy, and case-law requirements, as well as applicable Attorney General Guidelines. For example, in addition to other authorities, FBI's use of UASs must comport with the Attorney General's Guidelines for Domestic FBI Activities and the FBI's own Domestic Investigations and Operations Guide (Section 4, "Privacy and Civil Liberties, and Least Intrusive Methods").

The DEA recently acquired two robotic miniature helicopters with video capabilities (DOD surplus). Neither unit is currently in use. Only after DEA is able to comply with all relevant FAA requirements will testing begin to determine the equipment's capabilities and limitations. Following the testing process, if the DEA decides to use the equipment, DEA will establish a detailed protocol and policies on how and where they can be used. These policies will help to

ensure that DEA operations comply with all constitutional and statutory requirements and protect citizens' civil liberties and privacy rights.

DEA has received information for law enforcement purposes from UASs operated by U.S. Customs and Border Protection in the Southwest border region.

The ATF recently completed a one year research and development (R&D) project of rotary wing UASs; ATF's inventory currently consists of six UASs. As part of a collective department effort, an operational certification of authority (COA) has been submitted to the FAA. The UAS technology will be utilized by ATF for operational reconnaissance/surveillance and crime scene video evidence collection. ATF has drafted Standard Operational Procedures (SOP) for UASs, and the agency is currently amending its official aviation policy to reflect the inclusion of UAS operations. These policies will ensure that ATF operations comply with all constitutional and statutory requirements and DOJ guidelines while protecting citizens' privacy and civil liberty rights. ATF policy will prohibit its UAS inventory to be loaned to any local, state or federal law enforcement agency or used by ATF in furtherance of other agency investigations.

As a general matter, the Department of Justice does not disclose whether the Office of Legal Counsel has been asked to consider particular legal issues, nor does it disclose confidential legal advice provided by OLC. The Department is fully committed, however, to ensuring that any use of UASs by the Department's law enforcement agencies complies fully with all relevant constitutional and statutory requirements.

Not Responsive

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6216

(202) 225–3951
http://www.house.gov/judiciary

June 27, 2012

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear Attorney General Holder,

The Judiciary Committee held a hearing on "Oversight of the Department of Justice" on Thursday, June 7, 2012 at 9:30 a.m. in room 2141 of the Rayburn House Office Building. Thank you for your testimony.

Questions for the record have been submitted to the Committee within five legislative days of the hearing. The questions addressed to you are attached. We will appreciate a full and complete response as they will be included in the official hearing record.

Please submit your written answers to Kelsey Deterding at kelsey.deterding@mail.house.gov or 2138 Rayburn House Office Building, Washington, DC, 20515 by August 8, 2012. If you have any further questions or concerns, please contact Holt Lackey, Chief Oversight and Investigations Counsel, at holt.lackey@mail.house.gov or at 202-225-3951.

Thank you again for your participation in the hearing.

Sincerely,

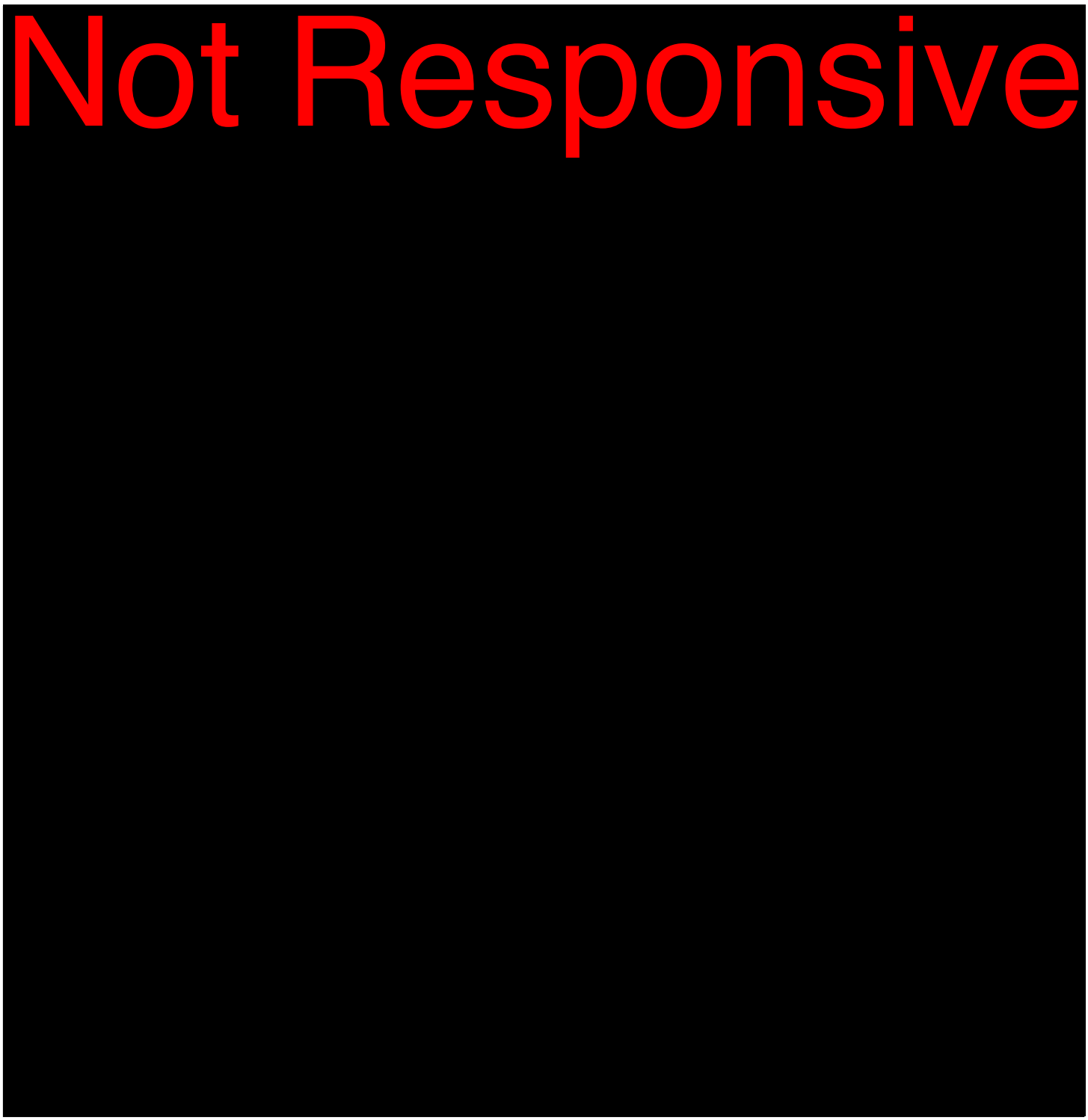
Lamar Smith
Chairman

tk 67

United States House of Representatives

Committee on the Judiciary

Questions for the Record



Not Responsive

4. We have made several requests to you to allow us to review the Office of Legal Counsel memo that reportedly provides the legal justification for the lethal targeting of U.S. citizens who are terror suspects. Your Department has sought dismissal of cases seeking judicial review of lethal targeting by arguing, among other things, that the appropriate check on executive branch conduct here is the Congress and that information is being shared with Congress to make that check a meaningful one. Yet we have yet to get any response to our requests.

   a. Will you commit to providing the memo?

   b. Will you also commit to briefing interested Committee members?

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAY 0 2 2013

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of Attorney General Eric Holder before the Committee on June 7, 2012. We apologize for our delay and hope that this information is of assistance to the Committee. Please note that the Department is currently in litigation with Congress regarding the investigation pertaining to Operation Fast and Furious and, accordingly, we are not able to respond to questions related to that matter.

Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

Peter J. Kadzik
Principal Deputy Assistant Attorney General

Enclosure

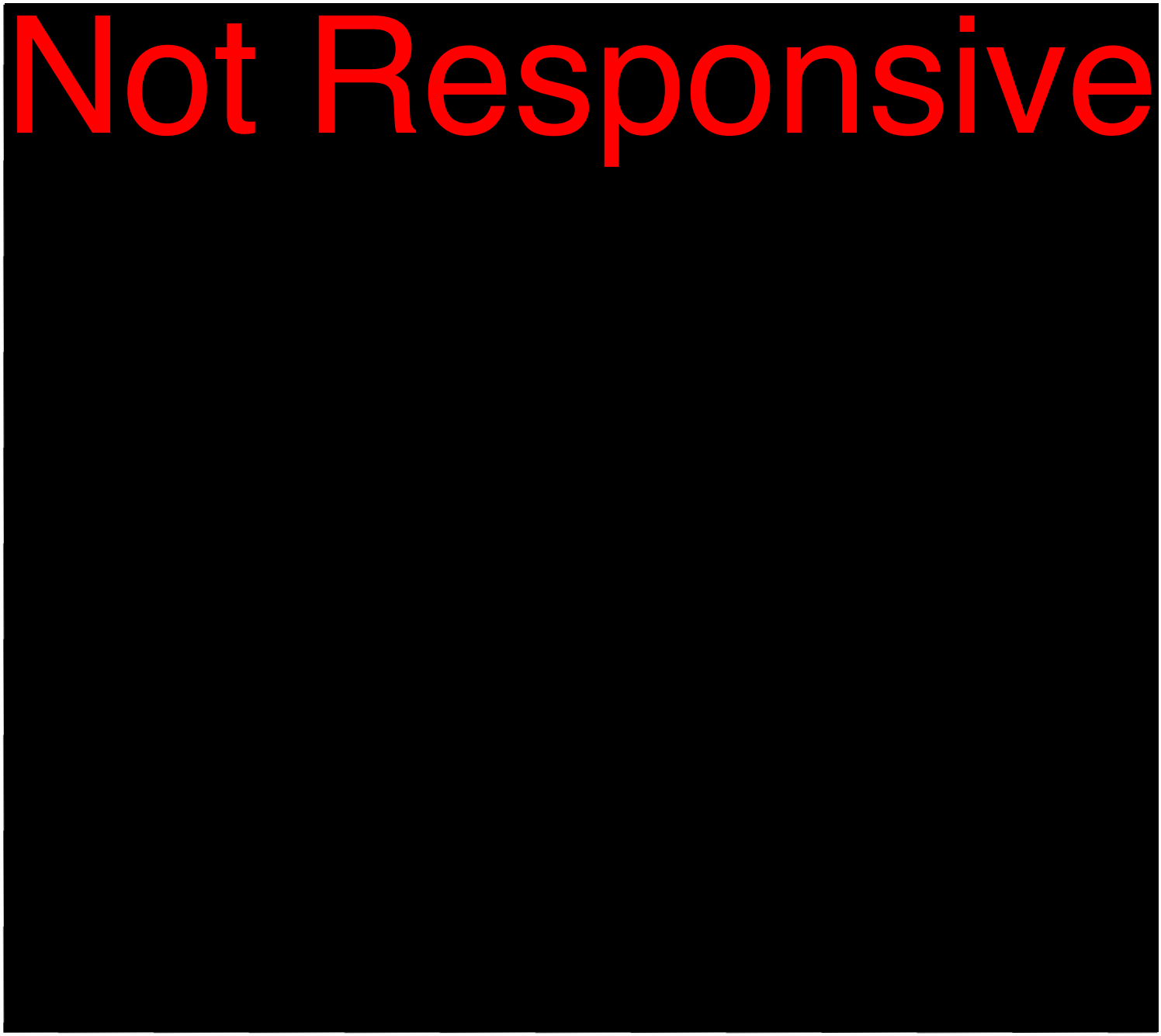
cc: The Honorable John Conyers, Jr.
Ranking Member

tk 67a

Questions for the Record
Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice

Committee on the Judiciary
U.S. House of Representatives

"Oversight of the United States Department of Justice"
June 7, 2012



38. We have made several requests to you to allow us to review the Office of Legal Counsel memo that reportedly provides the legal justification for the lethal targeting of U.S. citizens who are terror suspects. Your Department has sought dismissal of cases seeking judicial review of lethal targeting by arguing, among other things, that the appropriate check on executive branch conduct here is the Congress and that information is being shared with Congress to make that check a meaningful one. Yet we have yet to get any response to our requests.

A. Will you commit to providing the memo?

Response:

As a general matter, the Department of Justice does not disclose confidential legal advice that it has provided. Nonetheless, the Administration has undertaken significant steps to accommodate the interests of the appropriate committees of Congress in the general subject of your question. The Department has provided Members of the Judiciary Committee with, and released publicly, a draft white paper that sets forth a legal framework for considering the circumstances in which the U.S. government could conduct a lethal operation directed against a U.S. citizen who is a senior operational leader of Al-Qa'ida or an associated force. In addition, the Attorney General made a public address at Northwestern University School of Law in March 2012 explaining that

framework, and several other administration officials have also made public remarks to help explain the legal framework that would apply in this area. As the Attorney General indicated in his address, in keeping with the law and our constitutional system of checks and balances, the Executive Branch regularly informs the appropriate members of Congress about our counterterrorism activities, including the applicable legal framework, and would of course follow the same practice where lethal force is used against U.S. citizens. As a general matter, the department or agency that engages in any particular counterterrorism activity is in the best position to explain the legal basis for that activity to its appropriate oversight committee. Consistent with that, it is our understanding that those departments and agencies involved in our nation's counterterrorism efforts regularly keep their appropriate oversight committees informed regarding those activities, including the legal basis for them.

Without confirming or addressing any particular program or operation, the President's recent decision to provide members of the Intelligence and Judiciary Committees with access to classified OLC advice related to the subject of the draft white paper was an extraordinary accommodation in the context of ongoing activities by the Executive Branch. The decision to share the advice on a limited basis was designed to accommodate the interest of those committees in the underlying subject matter of the advice while at the same time seeking to protect the sensitive and deliberative information contained in the documents.

B. Will you also commit to briefing interested Committee members?

Response:

See response to Question 38A, above.