

Statement of The Constitution Project

Submitted to the Senate Judiciary Committee Subcommittee on the Constitution, Civil Rights and Human Rights in Connection with the April 23, 2013 Hearing Titled “Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing”

April 22, 2013

The Constitution Project (TCP) submits this statement to urge Congress to continue to press the Obama administration for more transparency around U.S. targeted killing policies and practices. Targeted killing presents fundamental legal, ethical, and constitutional questions that concern us all. Our constitutional system of checks and balances requires that such policies and practices be subject to careful oversight by Congress and consideration and debate by an informed public. Neither is possible when the rules and standards by which the executive branch operates remain secret.

The Constitution Project is a nonpartisan organization that promotes and defends constitutional safeguards. TCP brings together legal and policy experts from across the political spectrum to promote consensus solutions to pressing constitutional issues.

On February 23, 2013, TCP’s Liberty and Security Committee issued a statement titled *Lift the Veil of Secrecy on Targeted Killing*.¹ The Liberty and Security Committee, formed in the aftermath of the terrorist attacks of 9/11, works to ensure that our government protects both our national security and our civil liberties. Signed by 24 policy and legal experts, former government officials, former military and intelligence personnel, and prominent academics, *Lift the Veil of Secrecy* calls on the President to:

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

¹ Hereinafter *Lift the Veil of Secrecy*. The full statement is attached as an Appendix.

authority to tell Members of Congress not to share information with their staff, and Members of Congress should insist that the executive branch share such information.²

We understand that members of the Judiciary Committee have been provided with *some* of the OLC opinions that analyze lethal targeting operations, in particular those that relate to American citizen targets.³ That is a step in the right direction and we appreciate Committee members' efforts to pry loose those documents. But Congress deserves, and should demand, more. At a minimum, the administration should turn over *all* memoranda that reflect its operative interpretations of law and rules concerning the lethal targeting of *any* person, as well as the legal criteria for identifying targets.⁴

That same information should also be disclosed to the American public, with redactions only where necessary to protect properly classified information. "In a democracy that rests on the rule of law, a policy of targeted killing demands *public* authority, *public* debate, and *public* accountability."⁵

Open government should not be a partisan issue. TCP's Liberty and Security Committee is co-chaired by David Cole, a Georgetown law professor and the legal affairs correspondent for the Nation, and David Keene, former chairman of the American Conservative Union. In a March 14, 2013 *Los Angeles Times* op-ed, they wrote:

There may not be much that can unite conservatives and liberals these days, but a commitment to transparent government should be something we can all agree on. ... There is simply no legitimate reason to withhold from the American people the legal rules and standards under which our government operates, particularly when asserting the power to take human life.⁶

Not only does the call to shed light on targeted killing policies and practices cross party lines, it also finds support among former intelligence officials. According to two such officials who are also Liberty and Security Committee members who joined in *Lift the Veil of Secrecy*:

We have a significant stake in open government, both as former intelligence officials and as public citizens. We understand from experience the government's need to keep certain information secret. Intelligence officers whose work is critical to our national security couldn't do their jobs if properly classified information, such as intelligence sources and methods and sensitive operational details, were open to the public. Yet we

² *Id.*

³ We understand this to be the same information provided previously to the Senate Select Committee on Intelligence, and most recently to the House Judiciary Committee.

⁴ This includes the operative law, rules and criteria for the reported practice of so-called "signature" strikes.

⁵ David Cole, *It's Time to Stop Killing in Secret*, New York Review of Books Blog, November 28, 2012, <http://www.nybooks.com/blogs/nyrblog/2012/nov/28/its-time-stop-killing-secret/>.

⁶ David Cole and David Keene, *Secrets No President Should Keep*, Los Angeles Times, March 14, 2013, <http://articles.latimes.com/2013/mar/14/opinion/la-oe-0314-cole-transparency-drone-obama-20130314>.

also believe that when the cloak of secrecy extends too far – as it has with the targeted killing program and the previous “enhanced interrogation” program – both our democracy and our security suffer.

...

When the rules are clear, officials carrying out national security policies can do so with confidence that they are acting within the bounds of the law. The government can build the public support necessary to sustain such programs over time.⁷

Excessive government secrecy has been recognized as a threat to the very roots of our democracy and the legitimacy of those who govern. There is no way to know if the President is executing the laws faithfully, as the Constitution requires, if the operative rules and procedures he is following remain hidden behind closed doors. The executive branch has a constitutional obligation to disclose the information Congress needs to fulfill its oversight function and the American public needs to effectively evaluate the actions of its political leaders. Should the President continue to refuse to fulfill that obligation in the targeted killing context, we urge Congress to use the powers at its disposal to compel increased transparency.

Scott Roehm
Policy Counsel
The Constitution Project
1200 18th Street, NW
Suite 1000
Washington, DC 20036
202-580-6930

⁷ Mary McCarthy and Paul Pillar, *Shedding Light on Targeted Killing Program*, the Washington Times, March 15, 2013, <http://www.washingtontimes.com/news/2013/mar/15/mccarthy-and-pillar-shedding-light-targeted-killin/>.

THE CONSTITUTION PROJECT



Safeguarding Liberty, Justice & the Rule of Law

LIFT THE VEIL OF SECRECY ON TARGETED KILLING

THE CONSTITUTION PROJECT'S
LIBERTY AND SECURITY COMMITTEE

February 25, 2013

The Constitution Project

1200 18th Street NW

Suite 1000

Washington, DC 20036

202.580.6920 (tel)

202.580.6929 (fax)

info@constitutionproject.org

www.constitutionproject.org

LIFT THE VEIL OF SECRECY ON TARGETED KILLING

According to a recent report from the Council on Foreign Relations, the United States has used unmanned drones to conduct over 400 lethal strikes against certain terrorism suspects in the context of the conflict against al Qaeda and its associated forces.¹ At least one American citizen has been targeted, and at least three American citizens² are among the estimated several thousand people who have been killed.³

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

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

¹ Micah Zenko, *Reforming U.S. Drone Strike Policy*, Council Special Report No. 65, Council on Foreign Relations Center for Preventive Action, at 8 (January 2013), i.cfr.org/content/publications/attachments/Drones_CSR65.pdf.

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

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

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

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

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

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

On February 4, 2013, NBC News made public a DOJ white paper entitled "Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida or An Associated Force."⁸ The white paper adds some details to the limited disclosures made in previous public speeches by former State Department Legal Advisor Harold Koh,⁹ Attorney General Eric Holder,¹⁰ and CIA director-nominee (then-counterterrorism advisor to the president) John O. Brennan¹¹ that broadly outlined the targeted killing program. However, the leaked white paper is no substitute for the operative legal and policy analyses.¹² Indeed, the white paper is woefully inadequate to answer fundamental legal, ethical, and constitutional questions about when, if ever, it can be lawful for the government to engage in targeted killing. What level of proof is necessary to place somebody on the "kill list?" What procedural protections are in place to minimize the risk of false positives? Is anyone charged with making the case for keeping a putative target *off* the list? When, if ever, does the president have the authority to order that an individual, who is not presently engaged in an attack against the United States, may be killed rather than captured? How do government officials determine that the threat an individual poses is sufficiently "imminent" to justify a decision to target rather than seek to capture? Does the president claim the power to engage in targeted killing on U.S. soil? Does the president ever have the right to kill American citizens without acknowledging that he has done so? Or, does due process forbid the secret killing of one's own citizens?

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

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

⁸ *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qaida or an Associated Force*, http://www.lawfareblog.com/wp-content/uploads/2013/02/020413_DOJ_White_Paper.pdf.

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

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

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

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

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

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

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

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

¹⁴ Statement of Barack Obama, President of the United States, on Release of OLC Memos (April 16, 2009), http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos.

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

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

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

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

**MEMBERS OF THE CONSTITUTION PROJECT'S
LIBERTY AND SECURITY COMMITTEE**
Who Endorse Lifting the Veil of Secrecy on Targeted Killing*

CO-CHAIRS:

David Cole, Professor of Law, Georgetown University Law Center

David A. Keene, former Chairman, American Conservative Union

MEMBERS:

Stephen Abraham, Lieutenant Colonel (USAR, Ret.); Law Offices of Stephen E. Abraham

Azizah al-Hibri, Professor Emerita, The T.C. Williams School of Law, University of Richmond; Chair, KARAMAH: Muslim Women Lawyers for Human Rights

Bob Barr, former Member of Congress (R-Ga.); CEO, Liberty Strategies, LLC; 21st Century Liberties Chair for Freedom and Privacy, the American Conservative Union; Chairman, Patriots to Restore Checks and Balances; practicing attorney

Christopher Bryant, Professor of Law, University of Cincinnati; Assistant to the Senate Legal Counsel, 1997-99

John Dean, Counsel to President Richard Nixon

Mickey Edwards, Vice President, Aspen Institute; Lecturer, Woodrow Wilson School of Public and International Affairs, Princeton University; former Member of Congress (R-Okla.) and Chairman of the House Republican Policy Committee

Eugene R. Fidell, Senior Research Scholar in Law and Florence Rogatz Visiting Lecturer in Law, Yale Law School

Louis Fisher, Scholar-in-Residence, The Constitution Project; former Specialist in Constitutional Law, Law Library, Library of Congress

Michael German, Senior Policy Counsel, American Civil Liberties Union; Special Agent, Federal Bureau of Investigation, 1988-2004; former Adjunct Professor, National Defense University School for National Security Executive Education

Philip Giraldi, Contributing Editor for *The American Conservative Magazine*, antiwar.com and *Campaign for Liberty*; Executive Director, Council for the National Interest; former Operations Officer specializing in counterterrorism, Central Intelligence Agency, 1975-1992; United States Army Intelligence

Mary O. McCarthy, Consultant, Freedom of Information and Privacy Act; Associate Deputy Inspector General, Investigations, Central Intelligence Agency, 2005-2006; Visiting Fellow, Center for Strategic and International Studies, 2002-2004; Senior Policy Planner, Directorate of Science and Technology, Central Intelligence Agency, 2001-2002; Senior Director, Special Assistant to the President, National Security Council, 1998- 2001; Director for Intelligence Programs, National Security Council, 1996-1998; National Intelligence Officer for Warning, (Deputy 1991-1994) 1991-1996

James E. McPherson, Rear Admiral USN (Ret.); Executive Director, National Association of Attorneys General; Judge Advocate General of the Navy, 2004-2006; Deputy Judge Advocate General of the Navy, 2002-2004; Active Duty, United States Navy, Judge Advocate General's Corps, 1981-2006; former General Counsel for the Department of Defense Counterintelligence Field Activity

Alberto Mora, Former General Counsel, Department of the Navy

Thomas Pickering, Vice Chairman, Hills & Co.; Undersecretary of State for Political Affairs, 1996-2000; United States Ambassador and Representative to the United Nations, 1989-1992

Paul R. Pillar, Visiting Professor and Director of Studies, Security Studies Program, Georgetown University; intelligence officer (positions included Deputy Chief of DCI Counterterrorist Center, National Intelligence Officer for the Near East and South Asia, and Executive Assistant to the Director of Central Intelligence), Central Intelligence Agency and National Intelligence Council, 1977-2005

Judge William Sessions, Partner, Holland and Knight LLP; Director, Federal Bureau of Investigation, 1987-1993; Judge, United States District Court for the Western District of Texas, 1974-1987, Chief Judge, 1980-1987; United States Attorney, Western District of Texas, 1971-1974

Earl Silbert, Partner, DLA Piper; United States Attorney, District of Columbia, 1974-1979; former Watergate Prosecutor

David Skaggs, Senior Advisor, McKenna Long and Aldridge LLP; Former Executive Director, Colorado Commission on Higher Education; former Member of Congress (D-Col.)

Neal Sonnett, Member, American Bar Association (ABA) Board of Governors; past Chair, ABA Task Force on Treatment of Enemy Combatants and Task Force on Domestic Surveillance in the Fight Against Terrorism; past Chair, ABA Criminal Justice Section; former Assistant United States Attorney and Chief of the Criminal Division for the Southern District of Florida

Don Wallace, Chairman, International Law Institute; Professor Emeritus and Adjunct Professor, Georgetown University Law Center

John W. Whitehead, President, The Rutherford Institute

Lawrence B. Wilkerson, Colonel, U.S. Army (Ret.); Adjunct Professor of Government and Public Policy, College of William and Mary; Chief of Staff, Secretary of State Colin L. Powell, 2002-2005

THE CONSTITUTION PROJECT STAFF:

Sharon Bradford Franklin, Senior Counsel, Rule of Law Program

Scott Roehm, Counsel, Rule of Law Program

* Affiliations are listed for identification purposes only