



URGENT: BARRON NOMINATION COULD BE ON SENATE FLOOR AS EARLY AS THIS WEEK

May 5, 2014

Re: Need for All Senators to Read Key OLC Opinions, Including Ones Authorizing the Killing of a United States Citizen Away from a Battlefield, Before Voting on the Nomination of their Author, David Barron, for the United States Court of Appeals for the First Circuit

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Dear Senator:

Before voting on the nomination of David Barron for the United States Court of Appeals for the First Circuit, the American Civil Liberties Union strongly urges you to read the two known Justice Department legal opinions, authored or signed by Mr. Barron, which reportedly authorized the killing of an American citizen by an armed drone, away from a battlefield. The ACLU also urges you to obtain and read any and all other legal opinions related to the targeted killing or armed drone program that were written or signed by Mr. Barron. The ACLU does not endorse or oppose any nominee, but strongly urges the Senate to delay any vote on confirmation of Mr. Barron until all senators have an opportunity to read, with advice of cleared staff, these legal opinions that authorized an unprecedented killing, as well as any other opinions written or signed by Mr. Barron on the killing program.

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Mr. Barron served as the Acting Assistant Attorney General for the Office of Legal Counsel (“OLC”) at the Department of Justice, from 2009-10, during a critical period in the ramping up of the targeted killing and drone program and while the federal government was specifically debating the proposed extrajudicial killing of an American citizen. A March 9, 2013 *New York Times* article reported that Mr. Barron wrote or signed two OLC legal opinions authorizing the killing of an American citizen. According to the news article, Mr. Barron and his staff authorized the killing in an initial short OLC opinion, but “after reading a legal blog that focused on a statute that bars Americans from killing other Americans overseas,” wrote a longer OLC opinion that concluded that the killing of the American citizen was lawful, despite the Constitution and international and domestic law, including an overseas-murder statute that Congress enacted as part of a 1994 crime bill.¹

¹ The statutory ban on overseas murders applies, in relevant part, to: “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.” 18 U.S.C. sect. 1119.

These two OLC memos presumably were among the four OLC memos that members of the Intelligence Committee and Judiciary Committee were given brief access to review last year during the confirmation debate on John Brennan for Director of the Central Intelligence Agency. However, these OLC opinions have not been provided to any other senators who are not on those two committees. In addition, staff for Senator Dianne Feinstein, as Chairman of the Intelligence Committee, estimated that there are as many as eleven OLC opinions on the killing program. But even the Intelligence Committee has been denied access to these other seven OLC opinions. Because of the intense secrecy around these legal opinions authorizing the president to kill, we do not know whether Mr. Barron wrote or signed any of these additional OLC opinions. All senators should demand access to all opinions on the killing program written or signed by Mr. Barron.

No senator can meaningfully carry out his or her constitutional obligation to provide “advice and consent” on this nomination to a lifetime position as a federal appellate judge without being able to read Mr. Barron’s most important and consequential legal writing. At least in the modern history of the United States, there are no reports of any other president, based on a claim of Executive Branch authority, ordering the killing of a United States citizen away from a battlefield. By extension, there are no reports of any other federal government lawyer in modern American history, other than Mr. Barron, signing a legal opinion authorizing, without any judicial order, the killing of an American citizen away from a battlefield.

The OLC opinions written or signed by Mr. Barron helped form the purported legal foundation for a large-scale killing program that has resulted in, as Senator Lindsey Graham stated last year, as many as 4,700 deaths by drone attacks, including the deaths of four American citizens acknowledged by Attorney General Eric Holder (one of the United States citizens killed by a missile fired from a drone was a 16-year old boy). Nearly one year after the president promised in a speech at the National Defense University to both rein in the killing program and be more transparent, the administration continues to carry out the program based on expansive claims of presidential authority, and there has been no additional transparency. In fact, earlier this year, several newspapers reported that OLC was secretly debating whether to authorize the killing of another American citizen.

Last month, the United States Court of Appeals for the Second Circuit ordered the government to release a redacted version of at least one of the OLC opinions signed by Mr. Barron. That decision came in Freedom of Information Act cases filed separately by the ACLU and the New York Times and two of its reporters, seeking the legal and factual bases for the killings of U.S. citizens. The actual release of the redacted OLC opinion has been delayed pending a decision by the government on whether to appeal the court’s decision.

Even if there is a delay in its public release, we are confident that at some point soon, all Americans will be able to read at least one opinion by Mr. Barron that authorized the killing of an American citizen. In this respect, the Barron nomination has some echoes of the nomination of Jay Bybee, who as head of OLC from 2001 to 2003, wrote and signed two OLC opinions authorizing the use of torture. Mr. Bybee justified the use of torture despite specific legal prohibitions against it. It remains to be seen whether the OLC memos justifying the use of lethal force contain similar or other flaws, which makes it all the more important that Senators demand access to them. Mr. Bybee was nominated, and eventually confirmed in March 2003, as a judge

on the Tenth Circuit. Despite repeated requests from members of the Judiciary Committee, the government at that time did not turn over even a list of his OLC legal opinions, and he was confirmed without any senators reading any of the OLC torture opinions that he signed. After the first of his torture opinions was released in 2004 in the wake of the disclosure of the use of torture at the Abu Ghraib prison, several senators lamented that the Senate had confirmed Mr. Bybee without seeing any of his torture opinions. One difference between the Bybee nomination then and the Barron nomination now is that no one in the Senate in 2003 knew that Mr. Bybee had written such consequential opinions at the time of his confirmation, but all senators know now that Mr. Barron has written at least two such consequential opinions—but are being denied access to them by the administration. No senator should risk voting on the Barron nomination without first seeing all of his opinions related to the killing program.

There is no reason why any senator should be denied access to these important opinions written by Mr. Barron. The administration considers OLC opinions binding on the Executive Branch in the absence of contrary authority. The OLC opinions represent the administration's view of the law on when a person can be killed away from a battlefield. There are few questions of greater importance and consequence to Congress. Moreover, there is no reason why any Executive Branch claims of classified information or privilege should preclude you from seeing the opinions before agreeing to vote on the nomination. All senators can be provided access to the most highly classified information, including on such information as material related to the decision to use lethal force—and any and all privileges can be waived by the administration. No senator should accept “no” as the answer to a request to read OLC opinions written or signed by Mr. Barron on the killing program.

Thank you for your attention to this matter, and please do not hesitate to call us at 202-675-2308 if you have any questions regarding this issue.

Very truly yours,



Laura W. Murphy
Director



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