



UPDATE: BEFORE VOTING ON THE BARRON NOMINATION, ALL SENATORS SHOULD BE ABLE TO READ ALL OLC OPINIONS WRITTEN OR SIGNED BY MR. BARRON ON THE TARGETED KILLING AND DRONE PROGRAM; NOT JUST THE ONE OPINION OFFERED BY THE WHITE HOUSE

May 6, 2014

Re: Nomination of David Barron for the United States Court of Appeals for the First Circuit

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Dear Senator:

The American Civil Liberties Union would like to provide you with this update to our earlier letter to you dated May 5 (attached) on the nomination of David Barron for the United States Court of Appeals for the First Circuit. As we explained in the letter yesterday, the ACLU does not endorse or oppose any nominee. However, we strongly urge the Senate to delay any vote on confirmation of Mr. Barron until all senators have an opportunity to read, with advice of cleared staff, all legal opinions written or signed by Mr. Barron that authorized the killing of an American citizen by an armed drone away from a battlefield, as well as any and all other opinions written or signed by Mr. Barron related to targeted killing.

Earlier today, the White House stated its offer to provide access to senators to read, in a classified setting, one memorandum that Mr. Barron signed while serving as the acting head of the Office of Legal Counsel (“OLC”) at the Department of Justice from 2009-10. The memo reportedly formed part of the legal basis for the targeted killing program. While this is a step forward, it falls short of what senators need to fulfill the constitutional obligation to provide “advice and consent” on this nomination to a lifetime position as a federal appellate judge. The proffered memo *is only one of at least two* OLC legal opinions on this issue written or signed by Mr. Barron. Senators should be able to read *all* of his OLC opinions on targeted killing before voting on the nomination.

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. Even if the legal opinion being proffered by the White House to the Senate is one of the two opinions referenced in this article, it leaves senators blocked from seeing at least one key opinion reportedly written or signed by Mr. Barron. If Mr. Barron has signed or authored only one such opinion, the White House should make that clear.

Moreover, the office of Intelligence Committee Chairman Dianne Feinstein has publicly estimated that there are *at least eleven* OLC opinions on the targeted killing or drone program. Even the Intelligence Committee has been denied access to seven of the OLC opinions. While we do not know whether Mr. Barron wrote or signed more than two of these OLC opinions, senators should ask the White House to provide *all* OLC opinions written or signed by Mr. Barron on this issue, even if they were earlier denied to the Intelligence and Judiciary committees.

We should add that the memo that the White House has offered to let senators read in a classified setting is the same memo that a court last month ordered the government to release *publicly* in a redacted form. The United States Court of Appeals for the Second Circuit ordered the government to release a redacted version of the opinion, in a decision that 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 public release of the redacted OLC opinion has been delayed pending a decision by the government on whether to appeal the court's decision. Several senators from both parties have made clear today their view that the government should comply with the court order and *publicly* release the opinion signed by Mr. Barron, and not instead provide only this opinion to senators behind closed doors.

We emphasize again that, while the ACLU does not endorse or oppose Mr. Barron's nomination or any other judicial nomination, we urge you to request and read all of the targeted killing opinions written or signed by Mr. Barron before voting on his nomination. As we have said consistently for the past decade and more, we strongly believe that the Senate's votes on judicial nominations should be fully informed.

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



Christopher E. Anders
Senior Legislative Counsel

Attachment: ACLU letter to Senate, dated May 5, 2014