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October 11, 2011

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

Dear Attorney General Holder:

I am writing on behalf of the Association of the Bar of the City of New York to request that you provide information and clarification on the position of the United States Government on the law governing targeted killings. Specifically, we request that you release to the public any memoranda of law delivered by the Office of Legal Counsel ("OLC") that relates to this issue and the death of U.S. citizen Anwar al-Awlaki. The authority of our government to kill individuals, especially U.S. citizens, away from an active theater of traditional warfare and without a trial or other public evidence of due process, raises many important questions. In addition to Constitutional and statutory concerns, it portends global implications that may undermine humanity's general assumptions about the security of life under the law, even in wartime.

Despite the centrality of this issue, the people of the United States and its allies have received only incomplete or unofficial insights into the Government's legal position. Over the past year and a half, State Department Legal Adviser, Harold Hongju Koh, and Assistant to the President for Homeland Security and Counterterrorism, John Brennan, have delivered speeches presenting the most substantive public explanations of the Administration's policies on legitimacy in the use of force. More recently, reports based on leaks have appeared in the media. But to date, the Administration has not offered a thorough and transparent legal analysis – the likes of which are critical for the meaningful development of the law at home and around the world.

¹ Harold Hongju Koh, The Obama Administration and International Law, Annual Meeting of the American Society of International Law (Mar. 25, 2010), available at http://www.state.gov/s/l/releases/remarks/139119.htm, and John O. Brennan, Strengthening our Security by Adhering to our Values and Laws, Program on Law and Security, Harvard Law School (Sept. 16, 2011), available at http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an.

² See, e.g., Charlie Savage, Secret U.S. Memo Made Legal Case to Kill a Citizen, N. Y. TIMES (Oct. 8, 2011), available at http://www.nytimes.com/2011/10/09/world/middleeast/secret-us-memo-made-legal-case-to-kill-acitizen.html?hp.

The Association of the Bar of the City of New York (the "Association") was established in 1870 to advance and defend the rule of law. Over the past ten years in particular, many of our members – working through the Association's committees and the Task Force on National Security and the Rule of Law – have issued thoroughly researched and thoughtfully reasoned reports and letters to promote America's long-term security through respect for lawful and humane policies. The principal lesson we have derived from our work is that full and faithful respect for the rule of law strengthens our country. Our system of justice – based on time-tested Constitutional and international norms – is a source of strength, not vulnerability. At certain times, U.S. policies regarding treatment of individuals suspected of membership in, or support of, al Qaeda or associated groups appear to have violated our traditions of fair process and respect for human dignity and the rule of law. Only by making the legal reasoning transparent (and subject to scrutiny) can the United States establish the legitimacy of its policies and actions. In that spirit, we make this request with the intention of helping to promote the rule of law and strengthen our national security.

A report issued by nineteen former OLC lawyers provides insightful guidance on this issue.

OLC should follow a presumption in favor of timely publication of its written legal opinions. Such disclosure helps to ensure executive branch adherence to the rule of law and guard against excessive claims of executive authority. Transparency also promotes confidence in the lawfulness of governmental action. Making executive branch law available to the public also adds an important voice to the development of constitutional meaning—in the courts as well as among academics, other commentators, and the public more generally—and a particularly valuable perspective on legal issues regarding which the executive branch possesses relevant expertise.³

While the OLC Guidelines recognize an exception for advice related to national security, we urge that you release the portions of any OLC opinion that are necessary to promote confidence that the rule of law governs these life-and-death decisions. We realize, of course, that some factual assumptions and perhaps other information may need to be redacted in order to protect sources or methods. But we hope those sensitivities do not stop you from releasing the legal reasoning sections. We ask that you consider the implications for the numerous countries dealing with terrorist threats. Without access to the reasoned opinions of the U.S. Government, the practice of targeted killing appears more likely to spread.

Mr. Koh's March 25, 2010 address, in which he articulated "a commitment to living our values by respecting the rule of law," succinctly articulated our common cause in this request:

As I said, both the President and Secretary Clinton . . . understand that by imposing constraints on government action, law legitimates and gives credibility to governmental action. As the President emphasized forcefully in his National Archives speech and elsewhere, the American political system was founded on a vision of common humanity, universal rights and rule of law. Fidelity to [these] values[] makes us stronger and safer. This also means following universal standards, not double standards. In his Nobel lecture at Oslo, President Obama

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³ Dawn E. Johnsen, *Guidelines for the President's Legal Advisors*, 81 IND. L. J. 1345. 1350 (2006) (annexing Walter E. Dellinger, et al., *Principles to Guide the Office of Legal Counsel* (Dec. 21, 2004)) (the "OLC Guidelines").

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affirmed that '[a]dhering to standards, international standards, strengthens those who do, and isolates those who don't.'

The decision to kill an American citizen away from an active theater of traditional warfare deserves the transparency necessary to demonstrate that commitment.

Very truly yours,

Samuel W. Seymour President

cc: President Barack Obama

Hon. James R. Clapper, Jr. Director of National Intelligence

Hon. Jeh C. Johnson General Counsel U.S. Department of Defense Washington, DC

Hon. Harold Hongju Koh Legal Adviser U.S. Department of State Washington, DC

Hon. Virginia A. Seitz Assistant Attorney General Office of Legal Counsel U.S. Department of Justice Washington, DC