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Recent decision denying plaintiffs access to legal memos supporting the Obama administration's conduct of targeted drone strikes on suspected terrorists is deeply troubling.

BY LOUIS FISHER

In a 75-page decision issued on January 2, Judge Colleen McMahon of the Southern District of New York denied plaintiffs access to legal memos that support the Obama administration's conduct of targeted attacks on suspected terrorists. Individuals killed in drone strikes include U.S. citizens. One set of plaintiffs, *New York Times* reporters Scott Shane and Charlie Savage, filed a Freedom of Information Act (FOIA) request. They sought copies of all Office of Legal Counsel opinions or memoranda since 2001 that address the legal status of targeted killing of people suspected of ties to terrorist groups. The other plaintiff, the American Civil Liberties Union, directed a FOIA request to the Justice Department but also to the Defense Department and the Central Intelligence Agency. It requested copies of all records pertaining to the targeted killings of U.S. citizens.

McMahon writes: "Outside the criminal law context, the phrase [due process] has come to mean that no person can be aggrieved by action of the Government without being given notice of the proposed action and an opportunity to be heard." Outside the criminal law context, why should the government be permitted to take the life of a U.S. citizen without giving notice and an opportunity to be heard in federal court? During the American Civil War, McMahon says, hundreds of thousands of U.S. citizens were killed in battle "without any suggestion that their due process rights were being violated." How does that precedent apply to conditions after the attacks of September 11, 2001? In the Civil War, U.S. citizens were not specifically targeted, any more than they were targeted in the bombing raids during World War II or any other U.S. military operation.

An interesting passage in the court's decision concerns the treason clause, which appears not in Article II for the executive but in Article III for the judiciary. Section 3 provides: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in

open Court." McMahon cites Justice Antonin Scalia's dissent in *Hamdi v. Rumsfeld* (2004) that when the government accuses a citizen of waging war against it, "our constitutional tradition has been to prosecute him in federal court for treason or some other crime." Punishment comes only after a trial, not before it. She decided not to apply that constitutional principle to this case.

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Why keep legal memos secret? The government advised the court: "It is entirely logical and plausible that the legal opinion contains information pertaining to military plans, intelligence activities, sources and methods, foreign government information, and foreign relations." Unconvinced by that argument, McMahon said "that begs the question. In fact, legal analysis is not an 'intelligence source or method.' " If a legal memo did contain information about intelligence sources and methods, she explained, it is "entirely logical and plausible that such information could be redacted from the legal analysis." Moreover, as she pointed out, a court could inspect the legal memo in camera to determine if the memo contains material that is "inextricably intertwined with material that is protected from disclosure by statute." Yet she chose not to take that step. Anyone familiar with the state secrets case of *U.S. v. Reynolds* (1953) will appreciate how easily a court can be hoodwinked by the executive branch when it refuses to look at documents.

McMahon relied in part on the attorney-client privilege, which protects communications between client and attorney for the purpose of providing legal assistance. From the beginning, opinions of attorneys general were published, including those directed to the president. Thousands of legal opinions issued by the Office of Legal Counsel are released to the public. Another argument used to keep legal memos secret is the deliberative-process privilege, which covers agency records that are "predecisional" and "deliberative." The Justice Department regularly concedes that it make available to congressional committees documents covered by the deliberative-process privilege. It is sometimes claimed that the deliberative-process privilege safeguards candid and frank communications necessary for effective governmental decision-making. That is not credible. No "chilling" is involved in making public a legal memo that can be judged for its reasonableness. Withholding a legal memo can only raise legitimate doubts about its quality.

Early in the decision, McMahon states: "[T]his Court is constrained by law, and under the law, I can only conclude that the Government has not violated FOIA by refusing to turn over the documents sought in the FOIA requests, and so cannot be compelled by this court of law to explain in detail the reasons why its actions do not violate the Constitution and laws of the United States." The court is under the law, but apparently the executive branch is its own law. Remarkably, McMahon added: "I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for their conclusion a secret."

That is an extraordinary statement from a federal court. A mere ipse dixit by the executive branch is enough to keep a legal memo secret. Legal opinions that authorize targeted killings, including those of U.S. citizens, need to be made public. No plausible case can be made for withholding legal reasoning. With secret legal memos, government functions by fiat. The dominant force is not law but executive will over democracy and the constitutional system of checks and balances.

Louis Fisher is scholar in residence at the Constitution Project. He served four decades in the Library of Congress as senior specialist in separation of powers at the Congressional Research Service and specialist in constitutional law at the Law Library. His books include The Politics of Executive Privilege *(2004) and a recently completed treatise,* The Law of the Executive Branch: Presidential Power, *to be published this year by Oxford University Press.*