

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICAN CIVIL LIBERTIES UNION, *et al.*,

Plaintiffs,

v.

DEPARTMENT OF JUSTICE, *et al.*,

Defendants.

No. 1:10-cv-436-RMC

NOTICE OF ADDITIONAL AUTHORITY

Plaintiffs respectfully bring to the Court's attention an article by Tara McKelvey in the February 21, 2011, edition of Newsweek Magazine, titled *Inside the Killing Machine: President Obama is ordering a record number of Predator strikes. An exclusive interview with a man who approved 'lethal operations'*, which is relevant to the CIA's motion for summary judgment and to plaintiffs' cross-motion for partial summary judgment (filings nos. 15, 20-23, 25). A copy of the article is attached hereto.

The article recounts an interview with John A. Rizzo, who was the Chief Legal Officer at the CIA from 2001 to 2002 and then against from 2004 until his retirement in 2009. *See* Steptoe & Johnson LLP, Biographical note of John Rizzo, Senior Counsel, <http://www.steptoel.com/professionals-869.html>. In the course of the interview, Mr. Rizzo makes the following points, among others:

- He "was the one who signed off" on CIA targeted killing operations.
- "The Predator [drone] is the weapon of choice" for CIA targeted killings.
- CIA Predator drones that engage in targeted killings are remotely operated from offices in Northern Virginia.

- Before an individual is targeted by the CIA, lawyers working at the CIA's Counterterrorist Center "write a cable asserting that the individual poses a grave threat to the United States."
- Cables that are "ready for prime time" conclude with the following words: "Therefore we request approval for targeting for lethal operation." These words are followed by a space for the signature of the CIA General Counsel (or the Acting General Counsel, in Mr. Rizzo's case), along with the word "concurd."
- He reviewed about one such cable per month.
- At any given time roughly 30 individuals were being targeted.
- In carrying out strikes, the CIA tried to minimize collateral damage, especially to women and children.

These disclosures further undermine the CIA's "*Glomar* response" – that is, its refusal to confirm or deny the very existence of any records responsive to plaintiffs' Freedom of Information Act request. Plaintiffs have argued that the extensive public disclosures by current and former officials about the CIA's targeted drone killings eliminate the possibility that any harm to national security would result from disclosing the mere fact that the CIA has documents responsive to their FOIA request. *See* filings nos. 20-21 at 20-24; no. 25 at 12-14. While Mr. Rizzo is retired and therefore does not speak officially, the extensive detail that he provides, as the very official who authorized CIA targeted killings for a significant period of time covered by plaintiffs' FOIA request, demonstrates that no conceivable harm to national security could result from the CIA's

mere confirmation that it has responsive records.¹ There is no longer any mystery about whether the CIA has responsive records. *Cf. Watts v. Indiana*, 338 U.S. 49, 54 (1949) (“[T]here comes a point where this Court should not be ignorant as judges of what we know as men [and women].”) (plurality opinion). The Court should therefore reject the CIA’s invocation of Exemption (b)(1). *See Wash. Post v. U.S. Dep’t of Def.*, 766 F. Supp. 1, 10-12 (D.D.C. 1991) (“By providing evidence that the information being withheld is already within the public domain, a FOIA plaintiff brings into question the government’s determination that release of such information might reasonably be expected to damage the national security.”). The Court should also regard the CIA’s reliance on Exemption (b)(3) with all due skepticism. *See* filings nos. 20-21 at 8-15; no. 25 at 1-3.

Respectfully submitted,

/s/ Arthur B. Spitzer

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¹ The government does not appear to have treated Mr. Rizzo’s candid remarks as a threat to national security. Plaintiffs are aware of no evidence that the federal government has initiated a criminal or civil investigation against Rizzo for disclosing classified secrets.

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Inside the Killing Machine

President Obama is ordering a record number of Predator strikes. An exclusive interview with a man who approved 'lethal operations.'

Tara Mckelvey

President Obama is ordering a record number of Predator strikes. An exclusive interview with a man who approved 'lethal operations.'

It was an ordinary-looking room located in an office building in northern Virginia. The place was filled with computer monitors, keyboards, and maps. Someone sat at a desk with his hand on a joystick. John A. Rizzo, who was serving as the CIA's acting general counsel, hovered nearby, along with other people from the agency. Together they watched images on a screen that showed a man and his family traveling down a road thousands of miles away. The vehicle slowed down, and the man climbed out.

A moment later, an explosion filled the screen, and the man was dead. "It was very businesslike," says Rizzo. An aerial drone had killed the man, a high-level terrorism suspect, after he had gotten out of the vehicle, while members of his family were spared. "The agency was very punctilious about this," Rizzo says. "They tried to minimize collateral damage, especially women and children."

The broad outlines of the CIA's operations to kill suspected terrorists have been known to the public for some time—including how the United States kills Qaeda and Taliban militants by drone aircraft in Pakistan. But the formal process of determining who should be hunted down and "blown to bits," as Rizzo puts it, has not been previously reported. A look at the bureaucracy behind the operations reveals that it is multilayered and methodical, run by a corps of civil servants who carry out their duties in a professional manner. Still, the fact that Rizzo was involved in "murder," as he sometimes puts it, and that operations are planned in advance in a legalistic fashion, raises questions.

More than a year after leaving the government, Rizzo, a bearded, elegant 63-year-old who wears cuff links and

pale yellow ties, discussed his role in the CIA's "lethal operations" with me over Côtés du Rhone and steak in a Washington restaurant. At times, Rizzo sounded cavalier. "It's basically a hit list," he said. Then he pointed a finger at my forehead and pretended to pull a trigger. "The Predator is the weapon of choice, but it could also be someone putting a bullet in your head."

The number of such killings, carried out mostly by Predators in Pakistan, has increased dramatically during the Obama administration, and these covert actions have become an integral part of U.S. counterterrorism strategy.

How CIA staffers determine whether to target someone for lethal operations is a relatively straightforward, and yet largely unknown, story. The president does not review the individual names of people; Rizzo explains that he was the one who signed off. People in Washington talk about a "target list," as former undersecretary of state Richard Armitage described the process at a recent event in Washington. In truth, there is probably no official CIA roster of those who are slated to die. "I never saw a list," says a State Department official who has been involved in discussions about lethal operations, speaking without attribution because of the nature of the subject. Officials at the CIA select targets for "neutralization," he explains. "There were individuals we were searching for, and we thought, it's better now to neutralize that threat," he says.

The military and the CIA often pursue the same targets—Osama bin Laden, for example—but handle different regions of the world. Sometimes they team up—or even exchange jobs. When former CIA officer Henry A. Crumpton was in Afghanistan after 9/11, he and Gen. Stanley McChrystal—the former head of Joint Special Operations Command, a secretive military unit—worked closely together, and so did their subordinates. "Some of the people I knew and who worked for me went to work for him—and vice versa," recalls Crumpton. Some counterterrorism experts say that President Obama and his advisers favor a more aggressive approach because it seems more practical—that administration officials prefer to eliminate terrorism suspects rather than detain them. "Since the U.S. political and legal situation has made aggressive interrogation a questionable activity anyway, there is less reason to seek to capture rather than kill," wrote American University's Kenneth Anderson, author of an essay on the subject that was read widely by Obama White House officials. "And if one intends to kill, the incentive is to do so from a standoff position because it removes potentially messy questions of surrender."

In defense of a hard-nosed approach, administration officials say the aerial-drone strikes are wiping out Qaeda militants and reducing the chances of another terrorist attack. They have also been careful to reassure the public that the killings are legal. When NEWSWEEK asked the administration for comment, a U.S. official who declined to be identified addressing such a sensitive subject said: "These CT [counterterrorism] operations are conducted in strict accordance with American law and are governed by legal guidance provided by the Department of Justice."

Explains Bruce Riedel, a former CIA officer, "We're not in kindergarten on this anymore: we've been doing this since 2001, and there's a well-established protocol."

A Los Angeles Times article once described John Rizzo as "the most influential career lawyer in CIA history," and he arguably knows more than anyone else in the government about the legal aspects of the CIA's targeted

killings. But he stumbled into the world of espionage almost by accident. He graduated from George Washington University Law School and was living in D.C. in the 1970s when the Church committee released its report on the CIA's attempts to assassinate foreign leaders. Rizzo sensed an opportunity: "With all that going on, they'd need lawyers." He got a CIA job soon afterward.

Decades later, as the CIA's interrogations and lethal operations were ramped up after 9/11, Rizzo found himself at the center of controversy. He was, as he puts it, "up to my eyeballs" in President Bush's program of enhanced interrogations in the so-called black sites, or secret prisons, located in Afghanistan and in other countries. Justice Department lawyer John C. Yoo wrote the infamous "torture memo" of August 2002 because Rizzo had asked for clarification about techniques that could be used on detainees. Rizzo had once hoped to become the CIA's general counsel, but members of the Senate intelligence committee balked because of the role he played in authorizing the interrogations. Rizzo retired in 2009.

Today, Rizzo can sometimes sound boastful. "How many law professors have signed off on a death warrant?" he asks. He is quick to emphasize that the groundwork was prepared in a judicious manner, and felt it important that he observe the killing of some of the high-level terrorism suspects via live footage shown in CIA offices. "I was concerned that it be done in the cleanest possible way," he explains.

Clean, but always morally complex. Rizzo would sometimes find himself sitting in his office on the seventh floor of the CIA building with a cable about a terrorism suspect in front of him, and he would wonder how his Irish-Italian parents would feel about his newly assigned duties.

After President Bush authorized the CIA to hunt down Qaeda fighters in the wake of 9/11, "the attorneys were always involved, but they were very good—very aggressive and helpful, in fact," says Crumpton. "They would help us understand international law and cross-border issues, and they would interpret specific language of the presidential directive."

Under another Bush order, signed several years later, a variety of people who worked in terrorist camps could be targeted, and not just named terrorism suspects; at that point, the pool of potential candidates reviewed by CIA lawyers became much larger. Despite the secrecy surrounding these orders, their scope has become clear. "The authority given in these presidential findings is surely the most sweeping and most lethal since the founding of the CIA," William C. Banks, director of Syracuse University's Institute for National Security and Counterterrorism, told a House committee.

The hub of activity for the targeted killings is the CIA's Counterterrorist Center, where lawyers—there are roughly 10 of them, says Rizzo—write a cable asserting that an individual poses a grave threat to the United States. The CIA cables are legalistic and carefully argued, often running up to five pages. Michael Scheuer, who used to be in charge of the CIA's Osama bin Laden unit, describes "a dossier," or a "two-page document," along with "an appendix with supporting information, if anybody wanted to read all of it." The dossier, he says, "would go to the lawyers, and they would decide. They were very picky." Sometimes, Scheuer says, the hurdles may have been too high. "Very often this caused a missed opportunity. The whole idea that people got shot because someone has a hunch—I only wish that was true. If it were, there would be a lot more bad guys dead."

Sometimes, as Rizzo recalls, the evidence against an individual would be thin, and high-level lawyers would tell their subordinates, “You guys did not make a case.” “Sometimes the justification would be that the person was thought to be at a meeting,” Rizzo explains. “It was too squishy.” The memo would get kicked back downstairs.

The cables that were “ready for prime time,” as Rizzo puts it, concluded with the following words: “Therefore we request approval for targeting for lethal operation.” There was a space provided for the signature of the general counsel, along with the word “concurred.” Rizzo says he saw about one cable each month, and at any given time there were roughly 30 individuals who were targeted. Many of them ended up dead, but not all: “No. 1 and No. 2 on the hit parade are still out there,” Rizzo says, referring to “you-know-who and [Ayman al-] Zawahiri,” a top Qaeda leader.

As administration critics have pointed out, government officials have to go through a more extensive process in order to obtain permission to wiretap someone in this country than to make someone the target of a lethal operation overseas.

Rizzo seems bitter that he and other CIA officials have been criticized for authorizing harsh interrogations under Bush, and yet there has been little outcry over the faster pace of lethal operations under Obama. (From 2004 to 2008, Bush authorized 42 drone strikes, according to the New America Foundation. The number has more than quadrupled under President Obama—to 180 at last count.)

The detainees, by and large, survived, Rizzo observes; today, high-level terrorism suspects often do not.

And for all the bureaucratic review, it’s not always precise in the real world. In December people took to the streets of Islamabad to protest the strikes and to show support for a Waziristan resident, Karim Khan, whose son and brother were killed in a strike in 2009 and has filed a lawsuit against the U.S., charging a CIA official for their deaths.

Administration officials insist that the targeted killings rest on a solid legal foundation, but many scholars disagree. Georgetown University’s Gary Solis, the author of *The Law of Armed Conflict*, says people at the CIA who pilot unmanned aerial vehicles are civilians directly engaged in hostilities, an act that makes them “unlawful combatants” and possibly subject to prosecution.

These days, Rizzo is working on a memoir. He does not talk about the morality of what he did—he is not that kind of guy—but lately has been trying to come to terms with the implications of the deadly task he performed, and which others are now performing in that office building in Virginia.

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