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Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing

Testimony Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights

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Statement for the Record Submitted By John W. Whitehead President, The Rutherford Institute

The United States government's use of drone technology to carry out a targeted killing program as part of its counterterrorism operations overseas was undertaken without any public discussion of the dangers of the technology, the reach of the program, the risks to innocent civilians, or the potential for blowback. Nor was Congress given the opportunity to establish any guidelines or limits as to the use of these remote-controlled killing machines.

The ramifications of such unilateral decision-making by the Executive Branch have been devastating on every front. First, America's targeted drone killing program, which has prematurely extinguished hundreds of civilian lives—men, women and children—and chalked their deaths up as unfortunate casualties of war, has made a mockery of the nation's attempts to serve as a human rights leader for the rest of the world.

Second, this tenuous system of worldwide assassination by the President, absent oversight by the other branches of government, runs afoul of international laws of war and the United States Constitution.

Third, the drone killing program undermines decades of foreign policy initiatives aimed at establishing common ground and a nuanced dialogue with the Middle East.

Fourth, if allowed to continue unchecked, the program will invariably foment ill will against America in the form of terrorist violence, blowback for our callous disregard for life.

Fifth, and no less important, the use of drones to target and kill individuals overseas, including American citizens, lays the groundwork for such tactics to be employed once drones take to the skies domestically. Already, in the wake of the Boston Marathon explosions, law enforcement officials have been increasingly vocal about their desire to include drone technology in their

Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights

John W. Whitehead Testimony on Targeted Drone Killings

April 2013

Page 2

arsenal of surveillance and crowd control weapons.¹ However, no steps have yet been taken to establish effective safeguards for Americans' civil liberties and privacy rights. Until this oversight is rectified, we are all in imminent danger.

In light of the passage of the FAA Reauthorization Act, which according to estimates will see at least 30,000 drones take to the skies domestically by 2020, the urgency of this last point cannot be understated.

If we have learned one thing from the President's rash use of drones in the United States' counterterrorism efforts overseas, it is that this technology is too powerful, too lethal and too indiscriminate for us to allow it to be unleashed on the American populace before any real protocols to protect our safety and privacy rights have been put in place.

We cannot afford to wait until after these drones have been deployed domestically to ask the difficult questions and establish clear guidelines. Such an approach can only end in tragedy. Thus, while it is critical that Congress establish a regulatory framework for drone strikes abroad, it is no less critical and no less urgent that Congress be proactive in casting an eagle eye toward the use of drones domestically and establish an independent commission charged with regulating drone use in such a way as to ensure that Americans will not be targeted for killing or otherwise by weaponized surveillance drones.

In sum, allowing the executive branch to unilaterally craft a drone policy without any sort of legal framework within the bounds of the Constitution has led to civilian deaths, the radicalization of once benign foreign populations, and a massive expansion of presidential power beyond anything seen before. We must resolve these problems before they come home to roost.

The Rule of Law and Obama's Kill List

The government of the United States of America is predicated on the notion that the law is supreme, and that no person, no matter how high-ranking, is able to flout it. As Thomas Paine observed in *Common Sense*, "in America, the law is king. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other." In the post-9/11 era, however, we have forgotten about this critical safeguard against tyranny, and have instead allowed the president and his advisors to run roughshod over the Constitution, which has put the security and liberty of the American people in grave danger.

This fact was illustrated clearly in May 2012, when the *New York Times* revealed the existence of a presidential "kill list," a collection of suspected terrorists whom President Obama and his cohorts determined could be dispatched by drone rocket attacks in countries with which the United States is not at war, including, but not limited to, Yemen, Somalia, and Pakistan. The

¹ Ben Wolfgang, "Drone wars: Battle intensifies over domestic drone use after Boston Marathon bombing," *Washington Times* (April 24, 2013), <http://www.washingtontimes.com/news/2013/apr/24/boston-police-want-drones-for-marathon-security/?page=all>.

Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights

John W. Whitehead Testimony on Targeted Drone Killings

April 2013

Page 3

existence of this list is proof positive that the rule of law in America is under threat, as one individual, namely President Obama, has imbued himself with the powers of judge, jury, and executioner.

Every other week, the President convenes with a number of advisors at so-called “Terror Tuesday” meetings, during which time they pick the next unlucky suspected terrorists approved for death by drone. Of course, these targeted strikes are notoriously imprecise, so Obama is not only commanding the death of possible terrorists, but that of civilians situated nearby. The determinations, while seemingly based upon solid facts about who is a direct threat to the United States, are increasingly specious, as low-level terrorists and new recruits, and even simply people carrying weapons, are now approved for targeted assassinations. As an anonymous government official familiar with the drone program observed, “They count the corpses and they’re not really sure who they are.”² In fact, the first drone strike which Obama authorized in Yemen led to the deaths of 14 women and 21 children. Only one al-Qaeda affiliate was killed.³

This extralegal assertion of executive power represents an astounding attack on the United States Constitution, far more egregious than anything seen during the Bush administration. For the President to claim that he has the power to engage in assassinations on a global scale represents a drastic evolution in the scope and scale of executive power.

The Assassination of American Citizens

Unfortunately, Kill Lists and Terror Tuesday meetings are just the tip of the iceberg, for President Obama is not only targeting foreign citizens, but American citizens as well. A man who in the media appears to be engaged in a protracted internal struggle of how best to apply the law and maintain moral legitimacy, Obama seems unfazed by his decision to assassinate American citizens with drones. In fact, he has gone on record saying that his decision to order the assassination of U.S. citizen Anwar al-Awlaki was “an easy one.” Al-Awlaki’s 16-year-old son, Abdulrahman, also a U.S. citizen, met the same fate.

The murder of the elder and younger al-Awlakis represents a turning point in American history. We have entered an era in which any executive action, up to and including murdering an American citizen, can be justified under vague notions of national defense and combatting terrorism. These “justifications” are codified in a Justice Department memo leaked to the press in February 2013, in which government officials acting under Attorney General Eric Holder asserted that the president has the ability to target an American citizen for assassination via drone so long as he believes for whatever reason that the person might, at some point in the future, pose a threat to the country.

² Jo Becker and Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” *New York Times*, May 29, 2012, http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=2&hp&pagewanted=all.

³ Ibrahim Mothana, “How Drones Help Al Qaeda,” *New York Times*, http://www.nytimes.com/2012/06/14/opinion/how-drones-help-al-qaeda.html?_r=1.

Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights

John W. Whitehead Testimony on Targeted Drone Killings

April 2013

Page 4

This represents a direct assault on the United States Constitution, which demands that government officials abide by the due process of law before causing harm to an American citizen or taking his life. Believing he and his advisors to be exempt from these requirements, President Obama asserts the right to assassinate a U.S. citizen via drone without formally charging him with any crime, and without allowing for any judicial review of his decision.

The specious legal reasoning hinges on the notion that a person may only be targeted for assassination if their capture is “infeasible” and the threat they pose to the United States is imminent. Infeasibility of capture, in the logic of the Department of Justice, simply means that a person cannot be arrested without putting American troops in harm’s way, so by definition any person the United States would be interested in capturing from a foreign country becomes infeasible to capture. Furthermore, borrowing from the playbook of President George W. Bush, the Obama administration has chosen to ignore the commonly accepted definition of the word imminence, and instead claims that the imminence requirement “does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future.”⁴

These claims would be laughable if the stakes weren’t so high. Unfortunately, this is quite literally a life or death situation, for both potential targets of Obama’s drone program and the country at large.

The Role of the Department of Justice

Alongside Obama, Attorney General Eric Holder has played a major role in the steady erosion of the rule of law over the past few years. His legal acrobatics have involved redefining core concepts of law which have been around since the signing of the Magna Carta. For example, in a March 5, 2012 speech at the Northwestern University School of Law, Holder declared that “The Constitution guarantees due process, not judicial process.” What Holder was attempting to suggest is that the Fifth Amendment’s assurance that “No person shall be deprived of life, liberty, or property without due process of law” does not necessarily involve having one’s day in court and all that that entails—it simply means that a process occurs, in this case, the president reviewing evidence before ordering someone’s death. As one history professor warned, “Insert even a sliver of difference between due process and judicial process, and you convert liberty into tyranny.”⁵

In an attempt to mask these attacks on the Constitution, Justice Department lawyers have created certain guidelines to govern the vetting process for selecting targets to be assassinated. These

⁴ “Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force,” p. 7, http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf.

⁵ Robert Zaller, “Eric Holder and the day the Constitution died,” *The Triangle* (May 18, 2012), <http://thetriangle.org/2012/05/18/eric-holder-and-the-day-the-constitution-died/>.

Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights

John W. Whitehead Testimony on Targeted Drone Killings

April 2013

Page 5

“guidelines” – if one were to consider a series of exceptions to the rule of law guidelines - in the memo from the Department of Justice purport that only “senior operational leaders” of al-Qaeda and “associated forces” are targeted. However, recent evidence indicates otherwise.

A recent report by *McClatchy* reveals that the Obama administration’s assurances that it is only targeting senior operational leaders in al-Qaeda and allied forces for death by drone is false. In fact, they are targeting a number of low-level so-called militants and extremists, many of whom have never participated in an attack against the American homeland, nor are imminently planning to do so.⁶

All of the aforementioned demonstrates President Obama’s crass indifference to human life, to upending the rule of law, and to dismantling everything that stands between the constitutional republic which we are supposed to be and the soft dictatorship which we have become.

Failure to Secure the Homeland

What is the purpose of all of this? Ostensibly it is to make the United States of America safe from foreign enemies. On the contrary, President Obama’s Drone Wars have done little to provide further protection to the American people, and may in fact be jeopardizing the nation’s security. Drone strikes have provided a rallying cry for the few radical militant groups left. As Ibrahim Mothana, a Yemeni democracy activist, noted in an op-ed in the *New York Times*, “Drone strikes are causing more and more Yemenis to hate America and join radical militants; they are not driven by ideology but rather by a sense of revenge and despair.”⁷

Those acquainted with the reality of America’s drone policy and military decision making realize the gravity of the situation. Retired general Stanley McChrystal has said that drone strikes are “hated on a visceral level” and feed into a “perception of American arrogance.”⁸

The ultimate irony, of course, is that Obama is creating a foreign policy quagmire similar to the ones which in part led to the 9/11 attacks in the first place. Bombing campaigns and foreign occupations were the rallying cry for al-Qaeda militants in the years before 9/11. Drone strikes perpetuate this cycle of violence, creating another situation to be exploited by terrorist groups abroad.

One need only speak with those living under the watchful presence of drones to understand why drone strikes can radicalize a population. In Pakistan the psychological impact of constant

⁶ Jonathan S. Landay, “Obama’s drone war kills ‘others,’ not just al Qaeda leaders,” *McClatchy*, (April 9, 2013), <http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html#storylink=cpy>.

⁷ Ibrahim Mothana, “How Drones Help Al Qaeda,” *New York Times*, http://www.nytimes.com/2012/06/14/opinion/how-drones-help-al-qaeda.html?_r=1.

⁸ Robert F. Worth, Mark Mazzetti, and Scott Shane, “Drone Strikes’ Dangers to Get Rare Moment in Public Eye,” *The New York Times*, (February 5, 2013), http://www.nytimes.com/2013/02/06/world/middleeast/with-brennan-pick-a-light-on-drone-strikes-hazards.html?pagewanted=all&_r=0.

Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights
John W. Whitehead Testimony on Targeted Drone Killings
April 2013
Page 6

surveillance, as well as the possibility of a violent attack on civilian populations, has already taken its toll on the people.

A joint study conducted by the NYU School of Law and Stanford University Law School released in September 2012 demonstrates the way in which civilian populations in areas of Pakistan where drone strikes are common have altered their behavior in response to the threat of death from above. Humanitarian workers refuse to help victims of drone strikes because the United States is known to attack rescuers. People avoid gathering in large groups for fear of being targeted, so community meetings are generally off the table. Parents are weary to send their children to school, for fear that they will be caught in the crossfire. In short, as the report notes, the drone policy in Pakistan “terrorizes men, women, and children.”⁹

Drones Are Coming Home

Ultimately, the danger of Obama’s drone policy is not simply what happens on the other side of the world. It is what will happen within the American homeland, as drones are being rapidly integrated into the American airspace over the next few years.

As Peter Singer, a senior fellow at the Brookings Institution and expert on the proliferation of drone technology, has noted, drones are a “game-changing technology, akin to gunpowder, the steam engine, the atomic bomb—opening up possibilities that were fiction a generation earlier but also opening up perils that were unknown a generation ago.”¹⁰

We are plowing headfirst into this new era, and with little thought to what might be around the corner. Through a combination of defense lobbying and zealous advocacy by military brass, drones have become a mainstay of American life for the foreseeable future and a cornerstone of the emerging police state. Since 2007, the Federal Aviation Administration (FAA) has provided permits to 1,428 drone operators within the United States, 327 of which are still active. According to the FAA, there are six test sites planned for the integration of drones into US airspace, and within five years we will see 10,000 drones take to the sky.¹¹

While these drones will occasionally be put to good uses, such as tracking wildfires and other environmental disasters, or locating missing persons, more often they will be used to expand the already pervasive American surveillance state. They will become routine tools of surveillance, used to track people going about their daily business. They will become tools for corralling and controlling protestors and dissenters, adding a frightening twist to police crackdowns as seen during the Occupy Wall Street movement in 2011.

⁹ Glenn Greenwald, “New Stanford/NYU study documents the civilian terror from Obama's drones,” *The Guardian*, (September 25, 2012), <http://www.guardian.co.uk/commentisfree/2012/sep/25/study-obama-drone-deaths>.

¹⁰ David Wood, “American Drones Ignite New Arms Race From Gaza To Iran To China,” *The Huffington Post*, (November 27, 2012), http://www.huffingtonpost.com/2012/11/27/american-drones_n_2199193.html.

¹¹ Brian Bennett and Joel Rubin, “Drones are taking to the skies in the U.S.,” *The Los Angeles Times*, (February 15, 2013), <http://www.latimes.com/news/nationworld/nation/la-na-domestic-drones-20130216,0,1021089,full.story>.

Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights
John W. Whitehead Testimony on Targeted Drone Killings
April 2013
Page 7

Michael Downing, the LAPD deputy chief for counter-terrorism and special operations, has expressed his enthusiasm for drone technology. He envisions them being flown over large-scale media events such as the Oscars, using them to surveil political protests, and flying them through buildings to track criminal suspects.¹²

This surveillance state will be fueled by the military-industrial complex, and defense contractors are itching for a stake in the booming drone market, hence why two of the largest drone manufacturers, General Atomics and AeroVironment, spend \$2 million and \$1 million respectively lobbying Congress members to advocate for the introduction of drones into American airspace.¹³

The affordability of drones will make them an easy sell for most police departments. While manned airplanes and helicopters can cost \$600/hour to operate, a drone can be put in the sky for less than \$25/hour.¹⁴ Their relative affordability is bolstered by a \$4 million Homeland Security program which encourages local law enforcement to adopt drone technology as quickly as possible.¹⁵

In fact, drones are already being used for routine police surveillance. Since 2005, US Customs and Border Patrol have been utilizing drones in order to secure the Mexican border.¹⁶ In 2011, police in North Dakota used a Predator drone to conduct surveillance on a farming family before arresting them for an alleged cattle theft.¹⁷ Police in Mesa County, CO used drones to photograph vandalism at a public school, evidence which was then used to prosecute the crime.¹⁸ This spring, police in California will begin using Qube drones, which are capable of hovering for 40 minutes at heights of about 400 ft. to conduct surveillance on targets as far as 1km away.¹⁹

The rapid adoption of this technology is being undertaken without any regulations in place to protect the privacy and civil liberties of Americans in the drone age. Combined with the Obama

¹² Brian Bennett and Joel Rubin, "Drones are taking to the skies in the U.S.," *The Los Angeles Times*, (February 15, 2013), <http://www.latimes.com/news/nationworld/nation/la-na-domestic-drones-20130216,0,1021089,full.story>.

¹³ Glenn Greenwald, "The growing menace of domestic drones," *Salon*, (December 12, 2011), http://www.salon.com/2011/12/12/the_growing_menace_of_domestic_drones/.

¹⁴ Brian Bennett and Joel Rubin, "Drones are taking to the skies in the U.S.," *The Los Angeles Times*, (February 15, 2013), <http://www.latimes.com/news/nationworld/nation/la-na-domestic-drones-20130216,0,1021089,full.story>.

¹⁵ Lev Grossman, "Drone Home," *TIME*, (February 11, 2013), <http://www.time.com/time/magazine/article/0,9171,2135132,00.html>.

¹⁶ Lev Grossman, "Drone Home," *TIME*, (February 11, 2013), <http://www.time.com/time/magazine/article/0,9171,2135132,00.html>.

¹⁷ Brian Bennett, "Police employ Predator drone spy planes on home front," *The Los Angeles Times*, (December 10, 2011), <http://articles.latimes.com/2011/dec/10/nation/la-na-drone-arrest-20111211>.

¹⁸ Larry Abramson, "Drones: From War Weapon To Homemade Toy," *NPR*, (August 2, 2012), <http://www.npr.org/2012/08/02/157441681/drones-from-war-weapon-to-homemade-toy>.

¹⁹ "Drone technology could be coming to a Police Department near you," *KESQ*, (February 26, 2013), <http://www.kesq.com/kesq/Drone-technology-could-be-coming-to-a-Police-Department-near-you/-/232254/19098288/-/wph5eoz/-/index.html>.

administration's intransigence on the issue of assassinating American citizens, this implementation of drone technology in American airspace does not bode well.

Micro-Drones and the Future of American Freedom

In reality, we are on the cusp of a technological revolution which will upend our concepts of society, freedom, justice, and law. Beyond the Predator and Reaper drones which are currently patrolling countries abroad, as well as our nation's borders, the US government and various defense contractors are working on creating micro aviation vehicles, or micro-drones. These drones are modeled after birds, insects, and other small animals, with the intention of creating small surveillance devices that can remain hidden in plain view while navigating spaces off limits to conventional aircraft.

For example, in 2011, DARPA, the advanced research division of the Department of Defense, released its prototype for a "Nano Hummingbird."²⁰ Shaped like a bird, this drone is negligibly larger than an actual hummingbird and can fit in the palm of one's hand. It flits around effortlessly, blending in with its surroundings.

In June 2012, researchers at the University of Pennsylvania revealed drones similar to DARPA's hummingbird called "Nano Quadrators."²¹ These small, four-propellered drones operate based upon the flight dynamics of insects, enabling them to operate as a swarm. Using twenty drones, University of Pennsylvania researchers demonstrated how, moving compactly as a unit, the drones were able to navigate obstacles, form complex patterns, and even execute a fluid figure eight arrangement.

In 2012, Israel unveiled its new insect-inspired drone which they dubbed the "spy-butterfly" because of its two sizable wings. Weighing in at only 20g, this drone was developed for indoor surveillance, including public places such as "train stations and airport terminals—or office buildings." The size and muted sound of the "virtually noiseless" machines makes them unnoticeable and therefore ideal for intelligence gathering. The spy-butterfly is so realistic that, when tested, "birds and flies tended to fall behind the device arranging into a flock."²²

As exemplified by the aforementioned micro-drones, the drones we will see in America will be much smaller in size than the ones being used abroad. They will be able to take off and land anywhere, able to maneuver through city streets and hallways, and able to stop and turn on a dime, giving them a fluidity of movement that no conventional aircraft can match. They will be

²⁰ "Robot Hummingbird Spy Drone with Camera," *YouTube*, (March 3, 2011), http://www.youtube.com/watch?feature=player_embedded&v=K1EYpAqqC2s#!.

²¹ "US military surveillance future: Drones now come in swarms?" *RT*, (June 20, 2012), <http://rt.com/news/us-drones-swarms-274/>.

²² "Spy-Butterfly: Israel developing insect drone for indoor surveillance," *RT*, (May 19, 2012), <http://rt.com/news/israel-drone-indoor-butterfly-672/>.

Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights
John W. Whitehead Testimony on Targeted Drone Killings
April 2013
Page 9

equipped with all sorts of weapons and sensors, including tasers, bean-bag guns,²³ “high-resolution video cameras, infrared sensors, license plate readers, [and] listening devices.”²⁴

One type of drone sensor, the Gorgon Stare, can keep track of an area 2.5 miles across from 12 different angles. A drone equipped with this technology can quite literally spy on an entire city at once. Another sensor system, ARGUS, can find an object that is only 6 inches long, from 20,000 feet up in the air.²⁵ They will be able to hover over cityscapes and public events for long periods of time, providing a means of 24/7 surveillance.

Perhaps the most disturbing development in drone technology, DARPA has even begun to develop a Micro-Electro-Mechanical System (MEMS) for the manipulation of insects into “cyborgs.”²⁶ Through genetic engineering, they might actually control the movement of insects and utilize them for surveillance purposes. While the project is still in its infancy, its implications are frightening.

The Need for Legislation to Protect Americans’ Civil Liberties

The Rutherford Institute has been particularly vocal about the need for legislation to prohibit the federal government from using data recorded via surveillance drones in criminal prosecutions so as to guard against the eventuality of a total surveillance society, in which all Americans become suspects to be tracked by government agents on the off chance that they might commit a crime. The Institute has also pressed for a ban on federal agencies utilizing drones outfitted with weapons and anti-personnel devices, whether lethal or non-lethal.²⁷

No matter where one stands on the issue of drone use domestically, it is clear that we need to take a more cautious and well-reasoned approach on how drone technology will be implemented and what safeguards are necessary to ensure that Americans’ safety, privacy, and civil liberties are not jeopardized.

²³ Robert Stanton, “Texas civil libertarians have eye on police drones,” *The Houston Chronicle*, (October 31, 2011), <http://www.chron.com/news/houston-texas/article/Texas-civil-libertarians-have-eye-on-police-drones-2245644.php>.

²⁴ Brian Bennett and Joel Rubin, “Drones are taking to the skies in the U.S.,” *The Los Angeles Times*, (February 15, 2013), <http://www.latimes.com/news/nationworld/nation/la-na-domestic-drones-20130216,0,1021089,full.story>.

²⁵ Lev Grossman, “Drone Home,” *TIME*, (February 11, 2013), <http://www.time.com/time/magazine/article/0,9171,2135132,00.html>.

²⁶ Nick Turse, “Tomgram: Nick Turse, The Pentagon’s Battle Bugs,” *Tom Dispatch*, (March 30, 2008), <http://www.tomdispatch.com/post/174912>.

²⁷ Proposed “Freedom from Drone Surveillance Act,” The Rutherford Institute, https://www.rutherford.org/files_images/general/Drone_Legislation_09-18-2012.pdf.