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WRITTEN STATEMENT OF
THE COLUMBIA LAW SCHOOL
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For a Hearing on

“Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing”

Submitted to the Senate Judiciary Committee

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Human Rights Clinic, Columbia University School of Law
Naureen Shah, Acting Director

The Human Rights Clinic at Columbia Law School submits this statement to the Senate Judiciary Committee on the occasion of its hearing addressing “Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing.” The Clinic has produced three major studies on the legality of drone strikes and their effect on civilians.¹

Drone technology provides powerful temptation to go to war. As the U.S. government increasingly uses drone technology outside of traditional armed conflict theaters, it sets dangerous precedents: that the government may kill secretly and refuse to answer credible concerns; and that using lethal force is the American norm and standard, despite the costs to U.S. legitimacy and local populations. Serious evaluation of these precedents is necessary. We recommend that Congress actively question claims about the effectiveness and precision of drone strikes, and engage in robust debate about proposals to expand lethal drone operations to new geographic locations and against new groups.

I. Congress Should Actively Question Assertions of Drone Strikes’ Success

The public and policymakers are in the dark about the extent of lethal drone operations outside of Afghanistan, their strategic impact and their effect on local populations. Basic information, such as the government’s legal standard for who may be lethally targeted and its assessment of the number and identity of individuals killed, is not available to the public.

Some congressional committees receive information about drone strikes from the CIA and Department of Defense’s Joint Special Operation Command (JSOC), but they are at risk of conducting oversight in an echo chamber: the CIA and JSOC are empowered to act with great secrecy because they conduct strikes that are effective and precise at unprecedented levels; Congress then asks the CIA and JSOC to report on the strikes, and these organizations oblige by reporting that their strikes were, indeed, effective and precise at unprecedented levels.

Recent reporting by McClatchy Newspapers suggests the folly of taking such assurances of effectiveness and precision at face value. It suggests two layers of obfuscation: U.S. intelligence reports may understate the true number of civilian deaths, and U.S. officials may understate the numbers even further. According to McClatchy, U.S. intelligence reports from the period of January 2010 to September 2011 described a single civilian casualty.² However, media reported significantly more civilian casualties during that period. A ground investigation by the UK’s Bureau of Investigative Journalism found that, within the period the intelligence reports covered, there were at least 45 civilians killed in 10 strikes.³ In particular, a March 17, 2011 strike killed

¹ Our reports *Counting Drone Strike Deaths* (October 2012), *The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions* (September 2012) (with the Center for Civilians in Conflict), and *Targeting Operations with Drone Technology: Humanitarian Law Implications* (March 2011) are available at <http://web.law.columbia.edu/human-rights-institute/counterterrorism/drone-strikes>.

² Jonathan S. Landay, “Obama’s drone war kills ‘others,’ not just al Qaida leaders,” McClatchy Newspapers, April 9, 2013, <http://www.mcclatchydc.com/2013/04/09/188062/obamas-drone-war-kills-others.html>.

³ See Chris Woods & Rahimullah Yusufzai, “Get the data: Twenty-five deadly strikes,” Bureau of Investigative Journalism, July 18, 2011, <http://www.thebureauinvestigates.com/2011/07/18/get-the-data-twenty-five-deadly-strikes/>.

more than a dozen civilians—tribal elders and local policemen who, along with some Taliban members, gathered for a tribal meeting to resolve a local mining dispute.⁴

Reports of civilian casualties from the March 2011 strike were significant enough to gravely undermine U.S.-Pakistani relations. Nevertheless, the U.S. intelligence reports appear not to reflect these civilian casualties. (The intelligence reports are not public, but according to McClatchy they described only one civilian casualty during the period). This is cause for concern: if official government assessments do not reflect claims of civilian casualties that effect foreign relations, they may be far too incomplete a basis for oversight. Worse, during the period the intelligence reports covered, U.S. officials claimed flatly and publicly that there had been no civilian casualties whatsoever.⁵

To date, although U.S. officials have acknowledged civilian casualties as “exceedingly rare,” they have not responded to credible reports and inquiries by journalists and non-governmental organizations about the effect of drone strikes on local populations.⁶ To the contrary, in some cases they have asserted in anonymous leaks that individuals documenting civilian deaths are complicit in an effort to “help Al Qaeda succeed” or that they “unwittingly draw on false propaganda claims by militants.”⁷

The larger problem is that reliance on the government’s assertions of low civilian casualties may skew policymakers’ and the public’s evaluation of whether drone strikes, and U.S. lethal force generally, are truly effective at stemming credible threats to U.S. security. As assertions of low civilian casualties are assimilated into fact, they threaten to provide a dangerous assurance: that the human toll is something we have identified, debated and considered. If we believe we know who and how many people we have killed, calls to examine and deliberate on drone strikes—and calls to end them—lose their urgency. We may come to falsely believe that drone strikes are an “open secret” when in fact, basic and important information about drone strikes remains secret and unavailable to the public. Moreover, low estimates of civilian casualties may distort our perceptions of the effectiveness of strikes and provide false justification for expanding drone strikes to new locations, and against new groups.

⁴ See Chris Woods, “US claims of ‘no civilian deaths’ are untrue, July 18, 2011, <http://www.thebureauinvestigates.com/2011/07/18/washingtons-untrue-claims-no-civilian-deaths-in-pakistan-drone-strikes/>.

⁵ John Brennan, director of the CIA and then-senior counterterrorism adviser, publicly claimed, “there hasn’t been a single collateral death” from U.S. strikes. See Scott Shane, “C.I.A. is Disputed on Civilian Toll in Drone Strikes,” N.Y. Times, August 11, 2011. Likewise, an anonymous U.S. official told CNN that there was “no evidence to support the claim [of civilian casualties] whatsoever” in responding to a report about the March 17, 2011 strike. Nick Paton Walsh & Nasir Habib, “Source: U.S. departs Pakistan base,” CNN.com, April 22, 2011.

⁶ See John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *The Ethics and Efficacy of the President’s Counterterrorism Strategy* (April 30, 2012), available at <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>.

⁷ In February 2012, unnamed officials responded to a report of CIA strikes targeting funeral-goers and other civilians by stating: “One must wonder why an effort that has so carefully gone after terrorists who plot to kill civilians has been subjected to so much misinformation. Let’s be under no illusions—there are a number of elements who would like nothing more than to malign these efforts and help Al Qaeda succeed.” Scott Shane, “U.S. Said to Target Rescuers at Drone Strikes Sites,” N.Y. Times, February 5, 2012. More explicitly, in May 2012, the New York Times reported an unnamed senior official as stating that reports of civilian deaths “unwittingly draw on false propaganda claims by militants.” Jo Becker & Scott Shane, “Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will,” N.Y. Times, May 29, 2012.

In other conflict settings, such as Afghanistan, U.S. officials have provided greater information about civilian deaths and the effect of operations, without compromising U.S. security.⁸ What differentiates this setting is the claim that drone operations must be kept secret so they can continue. For instance, supporters of secrecy claims that if more information about drone strikes was public, the Pakistani government would face opposition from its citizens and cease acquiescing to U.S. strikes. Thus, at least in public, U.S. officials have refused to provide assessments of drone strikes that go beyond generalized assertions of achievement. This position forecloses informed debate by U.S. policymakers and the public, and directly conflicts with our democratic system of government that is based on public consent. Moreover, this position plays to the interests of foreign governments seeking to avoid accountability to their own citizens, further compromising U.S. democratic values.

II. Congress Should Robustly Debate the Expansion of Drone Strikes

The use of drones outside of traditional combat zones has had the consequence of reducing public debate about whether it is wise, lawful and humane to use lethal force to counter emerging threats to U.S. security. Congress should counteract this trend by robustly debating expansion of drone strikes to new locations and against new groups, and it should assess whether non-lethal alternatives would better serve the stability of regions where strikes are contemplated, the welfare of local populations, and U.S. long-term interests.

It is all too tempting to expand drone strikes without such debate and assessment. Compared to media coverage of wars in Afghanistan and Iraq at their height—with disturbing photos of both torture and ill-treatment at Abu Ghraib and the returning coffins of U.S. servicemen and women—the coverage of drone strikes ordinarily carries no images that would make concrete the human toll of strikes. To the contrary, as many observers have noted, media coverage in the United States of drone strikes frames the impact on in sanitized terms—militants, compounds, convoys—with only the accompanying image of a Predator or Reaper on the tarmac. The American public has no visual cues about the short or long-term impact of drone operations.

Moreover, while drone strikes are frequently in the news, the light footprint of drone technology enables the government to escape public scrutiny over its decisions to expand counterterrorism operations across the globe. Deploying U.S. troops to another combat zone would trigger the public's concern about another costly and long war, and might prompt U.S. officials to publicly and clearly explain why force is justified, while “floating a drone casually and quietly over a boarder, might go under the radar screen both literally and metaphorically,” as one expert notes.⁹ Indeed, as the government has continued to expand drone operations beyond Pakistan, to Yemen and Somalia, it has not faced public demands to justify these decisions or calibrate the expansion to appease public concerns.

⁸ See Columbia Human Rights Clinic & Center for Civilians in Conflict, *The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions* at 44-45.

⁹ See Philip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 Harvard National Security Journal 283, 326 (2011), <http://harvardnsj.org/2012/01/the-cia-and-targeted-killings-beyond-borders/>.

Among policymakers, drones enjoy support as an attractive alternative to counterinsurgency strategies that cost significant U.S. blood and treasure in Iraq and Afghanistan. As the Administration seeks to counter a growing number of groups it believes to be Al Qaeda affiliates, in a growing number of places around the globe, drone strikes appear to be an alternative to adding multiple new land-war fronts in the Middle East and Africa. Policymakers appear comfortable that with “surgical” drone strikes, the CIA and JSOC will disrupt militant groups and prevent terrorist plots, favoring this strategy over alternative means to establishing security or setting conditions for peace. Lethal targeting and drone strikes are increasingly held up as the norm and standard for justice.

Approaches to counterterrorism that yield less concrete and identifiable gains—such as diplomacy, prevention of “radicalization,” intelligence gathering and detention—are losing salience. The easy metrics of drone strikes’ touted benefits—killing high-level Al Qaeda leaders—may obscure their less measurable yet grave costs:

1. *Inherent Threat to Life:* Drone strikes are inherently more threatening to civilian life than alternative, non-lethal approaches. By virtue of the remote control technology involved and the circumstance of limited or no supporting boots on the ground, drone strikes deny targeted individuals the chance to surrender. While interrogation and detention, as recent history shows all too well, carry their own risks of human rights abuses, these non-lethal approaches at least provide the opportunity for an assessment of whether targeted individuals in fact pose a threat to U.S. interests—an opportunity taken off the table by drone strikes.
2. *Political Effects:* Drone strikes undermine the legitimacy of fragile governments in the countries where they occur, as we have seen in the cases of Pakistan and Yemen.¹⁰ In Pakistan, drone strikes contribute to a crisis of confidence in a civilian government that, to its own citizens, appears powerless to stop U.S. drone strikes or assert Pakistani interests. Strikes have arguably pushed militant groups from the northwest region of the country to major Pakistani cities, where they have conducted frequent and devastating terrorist attacks, further undermining the Pakistani government’s legitimacy and the stability of the country.¹¹ These results are inimical to U.S. long-term interests for the region.
3. *Increasing Violence & Threats to Local Populations:* Drone strikes can contribute to patterns of violence and the terrorizing of local civilian populations. In Pakistan, militant groups have pursued retaliatory attacks against local civilians they suspect of being U.S. informants, including torture and killings. The frequency of drone strikes can push militant groups to move to new areas and communities, which are then filled with guns, munitions and fighters, leading the

¹⁰ See Michael J. Boyle, “The costs and consequences of drone warfare,” *International Affairs* (2013), http://www.chathamhouse.org/sites/default/files/public/International%20Affairs/2013/89_1/89_1Boyle.pdf.

¹¹ See Rafia Zakaria, “President Obama: The drones don’t work, they just make it worse,” Al Jazeera, March 26, 2013, <http://www.aljazeera.com/indepth/opinion/2013/03/201332685936147309.html>.

local civilian population at greater risk of being caught up in future drone strikes or violence by militant groups.¹²

4. *Legitimacy as World Leader:* Drone strikes have serious ramifications for U.S. leadership. U.S. claims of expansive legal authority to conduct strikes do not enjoy support in the international community. Expansion of drone strikes to new areas will bring added scrutiny and criticism of U.S. legal claims, and undermine the U.S. government's ability to argue that other governments should be restrained in their use of force.
5. *Turning public opinion against the United States:* Many commentators have compared drone strikes to the detention and torture scandals of recent years, in terms of providing fodder for narratives that characterize the United States as abusive and tyrannical. While local political dynamics should not be oversimplified, increasing conflict-related violence can be expected to polarize public opinion.

III. Conclusion & Recommendations

Drone strikes, as a use of lethal force, should be the exception rather than the rule outside of traditional armed conflict theaters. Congress has a crucial role to play in ensuring drone strikes do not create a precedent for increasingly secretive and permissive killing practices. We urge the Committee and other members of Congress to:

- Seek official government counts of the number of individuals killed and their identities, and make these publicly available as soon as practicable;
- Encourage the Department of Defense and the CIA to establish or implement processes for declassifying information about lethal drone operations, once they are completed;
- Seek information about the impact of covert drone strikes from sources outside of government, including journalists and civil society based in countries where strikes occur; and
- Investigate credible reports of civilian casualties by journalists and human rights groups

¹² See Columbia Human Rights Clinic & Center for Civilians in Conflict, *Civilian Impact of Drones* at 21-24.