

The Constitutional and Counterterrorism Implications of Targeted Killing

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Chairman Durbin, Ranking Member Cruz, members and staff of the Subcommittee, thank you for the opportunity to provide written testimony for this opening dialogue on US policy and drone use.

I am Executive Director of Center for Civilians in Conflict, an organization that advocates with warring parties for the protection and recognition of civilians harmed in armed conflict. We have worked with militaries around the world for nearly a decade on more compassionate, smarter policies and operational tactics to minimize civilian suffering.

This testimony is intended to highlight the civilian protection limitations of remotely operated drone strikes. We do not have a problem with unmanned aerial vehicles as a new technology, nor as a technology used in a full-scale military operation assuming proper civilian protection protocols and responses to civilian harm are implemented. Drones are not inherently indiscriminate or unethical. Rather, it is the way that drones are currently being used by the United States in remote areas outside widely recognized conflict zones that creates the potential for unrecognized civilian harm.

Despite recent attempts by the Obama Administration to be more transparent about these drone operations, significant questions remain, including: What civilian protection protocols are in place? How are drone operators trained on distinction? How is a civilian defined? How is civilian harm assessed post-strike? So far, the answer to all of these questions has been “just trust us.” This is not an appropriate policy for a nation that prides itself on transparency and the just use of force.

In my testimony, I first outline the categories of drone strikes and what they mean for avoiding civilians. Second, I discuss the difficulty in truly determining whether drone strikes actually reduce civilian harm in remote areas, as the White House holds they do. Third, I examine myths that obscure the impact of covert drone operations on civilians. Finally, I offer recommendations to bring policy in line with the ethical and strategic imperative of avoiding civilians and addressing civilian harm in any lethal use of force.

Personality and Signature Strikes, and the Definition of a Civilian

The two categories of drone strikes used by the United States—“personality strikes” and “signature strikes”—have opaque parameters and are thus a risk to civilian lives. Personality strikes, or strikes in which the target’s name, face, and history are known, have been used in military operations for centuries. In other words, these strikes are not unique to drone warfare. When personality strikes, however, take place in remote areas without boots on the ground, targeting may be relying on low quality intelligence or only video feed, if not with regard to the target (who may be easily identifiable and well known) then for the people surrounding that target. These people may or may not be civilians.

Signature strikes that target individuals based on a set of pre-determined behaviors, rather than known identity, have also been used in traditional combat situations. However, their use as a way to identify targets for drone strikes in remote regions—particularly Yemen—has increased in recent years and brings even more significant challenges to civilian protection. The United States

does not disclose what behaviors justify a signature strike. There are legal issues involved in this opacity that I presume my colleagues in our human rights community will address with aplomb. My concern is a pragmatic one: Civilians unknowingly—or worse, mistakenly believed to be—engaging in this behavior can be targeted.

For civilians living under drones in, for example, Pakistan, life or death comes down to the visceral question: what behavior will get me or my family killed? A shopkeeper in Waziristan has no obvious way of knowing that offering a ride to a customer, who turns out to be a low-ranking militant, may mark the shopkeeper as a target. Men with weapons riding in convoys might be shepherds on their way to the market, or they might be preparing for an ambush.

In an interview with the Columbia Human Rights Clinic last year, former intelligence analyst Marc Garlasco noted how difficult it was to develop “signatures” in Iraq where American forces had a military presence on the ground. He argued that in areas with even fewer legitimate sources of intelligence—like within the tribal belt of Pakistan or Yemen—it is unlikely that the United States could develop strong signatures. This makes sense. Many Pakistani men carry guns in their daily lives, though they have nothing to do with al Qaeda. The same is true in Yemen. As a Yemeni official last year said, “Every Yemeni is armed... so how can they differentiate between suspected militants and armed Yemenis?”¹

We have been assured in both public statements and private conversations with military officials that the United States has careful vetting processes to ensure this erroneous targeting doesn’t happen. However, there is no evidence to back up those assertions, either to the public or the public’s Congress.

Determining Civilian Harm

The real impact of remote drone strikes on civilian populations is unknown, including by the Obama Administration. Yet a reduced risk for civilian harm is frequently heard as an argument for using drones instead of other weapons platforms. The reality is that there are considerable impediments to knowing who has been harmed and how, which calls into question most official estimates of casualties and obscures the true civilian cost of this particular counterterrorism campaign.

Consider that if these drone strikes are indeed being conducted under International Humanitarian Law, as is stated policy by the Obama Administration, then not being able to assess whether a strike was proportionate to the military target and whether it distinguished between civilians and combats becomes a legal question of adherence to international law. Aside from legal arguments, there is also a strategic pitfall for the US counterterrorism mission to not understanding the negative impact of these strikes on the population. The cost may be not only to civilian lives but also to America’s reputation.

Most drone strikes occur in areas largely inaccessible to independent external actors. Be it a personality or a signature strike, the lack of conventional U.S. forces on the ground to conduct investigations means there is little way of corroborating evidence that the strike has succeeded in avoiding civilians. Video surveillance cannot talk to witnesses or dig in the dirt for forensic evidence. A homebound sick child is unlikely to be noted by surveillance conducted prior to a strike, and may again be overlooked as the drone counts the bodies recovered from the rubble from thousands of feet above. Further, civilians have no way of notifying officials of what happened to them and their families; there are no US bases to travel to and no court to file claims.

Several organizations have investigated incidents of civilian harm in Pakistan or aggregated media reports of strikes to estimate numbers of civilian casualties, however access remains a challenge for these groups as well. Their estimates vary on the total figures of civilian deaths, though they consistently suggest significantly higher civilian casualties than those provided by U.S. government statements of “extremely low” and some years “in the single digits.”

When U.S. officials provide data, they're often so confusing as to defy credibility. In early 2011, the government estimated that drone strikes had caused 30 civilian casualties to date.¹ In June 2011, then-counterterrorism adviser John Brennan asserted, "there hasn't been a single collateral death because of the exceptional proficiency [and] precision of the capabilities we've been able to develop."² A statement made by a former senior legal adviser to the U.S. Army Special Forces worryingly refutes that assertion: "...based on my military experience, there's simply no way so few civilians have been killed. For one bad guy you kill, you'd expect 1.5 civilian deaths because no matter how good the technology, killing from that high above, there's always the 'oops' factor."³

Civilian casualty statistics will vary depending on the definition used of a "civilian" (as opposed to a targetable individual often dubbed a "militant" by US officials). This term is easily manipulated or unintentionally excludes people who should be considered un-targetable civilians. While media reports routinely cite unnamed Pakistani government officials as confirming the identity of the individuals killed as "militants," such information is rarely corroborated. A civilian killed in a strike targeting a group of "militants" may wrongly be counted as a militant himself; there is nobody to refute this categorization. In signature strikes, the identity of the dead was unlikely to have been known in the first place, and therefore it is more likely that civilians can be misidentified as combatants. Former senior Obama Administration official John Boyle noted in a recent Chatham House study that the Administration has been "very successful in spinning the number of civilian casualties" with government numbers based on "highly selective and partial reading of the evidence."⁴

The Negative Impact of Remote Drones on Civilians

While the exact number of civilian casualties caused by remote drone strikes is unknown, there is strong anecdotal evidence to suggest that there are significant negative ramifications of these strikes on the civilian population. This is not to say that remote drone strikes cause more harm than would a full-scale military operation with boots on the ground. Rather, we note the impact on civilians here to combat the predominant view among US policymakers and the American public that drone strikes are a virtual panacea to civilians suffering in conflict.

Leaving aside the contentious debate regarding militant-versus-civilian deaths, it is important to remember that one incidental, "oops" factor casualty can dramatically alter families' lives. In Pakistan, families are often large, and their well-being is intricately connected among many members. Particularly if the family's breadwinner is killed, the death of one member can create long-lasting instability. In regions most often targeted by drones, women often have a limited earning capacity, and savings and insurance are not common, which leaves widows and orphans extremely vulnerable. Sons may drop out of school to provide for their family, and daughters may forgo education to become caretakers.⁵ These second and third-order effects are all too often underestimated or ignored in favor of praise for the drone program's apparent efficiency and precision.

Displacement is also rampant in areas under US drone operations. In northwest Pakistan, homes are often shared by multiple families, compounding the suffering and hardship caused when a house is destroyed.⁶ We interviewed a man named Usman Wazir who was made homeless when a drone destroyed his home, killing his brother, his wife, and their two teenage children. Shakeel Khan and his elderly parents survived a drone attack on their home, which killed his brother and his brother's wife and children. Khan told us that he is struggling to support himself and his parents, adding: "We don't have enough to reconstruct our house and fear that the drones

¹ Compare David S. Cloud, "UN Report Faults Prolific Use of Drone Strikes by US," *Los Angeles Times*, June 3, 2010, suggesting fewer than 50 civilians have been killed in strikes since the summer of 2008; with Ken Dilanian, "C.I.A. Drones May Be Avoiding Pakistani Civilians," *The Los Angeles Times*, February 22, 2011, reporting, a few months later, that only 30 civilians had been killed in strikes since June 2008.

² See Scott Shane, "C.I.A. Is Disputed on Civilian Toll in Drone Strikes," *The New York Times*, August 11, 2011.

³ Adam Entous, "Special Report: How the White House Learned To Love the Drone," *Reuters*, May 18, 2010.

⁴ Michael Boyle, "The case against drones," Chatham House, *International Affairs*, January 2013.

⁵ Center for Civilians in Conflict, "Civilian Harm and Conflict in Northwest Pakistan" (2010) at 26, <http://civiliansinconflict.org/resources/pub/civilian-harm-and-conflict-in-northwest-pakistan>.

⁶ Center interview with Pakistani civilian (name withheld), interview no. 34, Northwest Pakistan, 2010.

will strike us again.”⁷ Daud Khan and his surviving family were forced to move from their village in Waziristan when they could not afford to rebuild their home destroyed in a drone strike.⁸

Drone strikes have also hit many homes in Yemen, contributing to the displacement of over 100,000 people.⁹ In southern Yemen, an air strike in the town of Jaar reduced an entire block to rubble in two successive explosions.¹⁰ Lisa Schirch of 3P Human Security explains property loss and displacement because of drone strikes in this way: “drone-related displacement disrupts long-term stability by decreasing the capacity of local people to respond through civil society initiatives that foster stability, democracy and moderation and increase displaced people’s vulnerability to insurgent recruitment.”¹¹

Psychological trauma is a negative ramification of drone strikes that is hard to measure and will be an insidious burden on civilian populations for years to come, even after drones strikes end. In northern Pakistan, where drones are overhead 24 hours a day, civilians live in constant fear of being struck.¹² Michael Kugelman of the Woodrow Wilson International Center for Scholars noted: “I have heard Pakistanis speak about children in the tribal areas who become hysterical when they hear the characteristic buzz of a drone. [...] Imagine the effect this has on psyches, and particularly on young ones already scarred by war and displacement.”¹³ The fear associated with covert drone strikes can truly affect an entire community.

As one victim told Center for Civilians in Conflict:

“We fear that the drones will strike us again... my aged parents are often in a state of fear. We are depressed, anxious, and constantly remembering our deceased family members...it often compels me to leave this place.”¹⁴

Another man described the anguish of his sister-in-law, who lost her husband and two sons in a U.S. drone strike in Pakistan:

“After their death she is mentally upset...she is always screaming and shouting at night and demanding me to take her to their graves.”¹⁵

With U.S. targeting criteria classified, civilians in Pakistan, Yemen, and Somalia do not know when, where, or against whom a drone will strike. The opaque nature of these criteria, particularly with regard to signature strikes, substantially compounds the constant fear that a family member will be unexpectedly and suddenly killed. Additionally, civilian victims of drone strikes may be assumed to be connected to militancy by their community because of drones’ fabled precision. Victims face the double burden of dealing with a physical attack and a societal stigma.¹⁶

The Myths of Drones

American policymakers note the drone’s precision as a revolutionary leap forward in the conduct of warfare. I take issue with this assumption, and note that it has significant policy implications. If a drone strike is considered to cause such minimal civilian harm, the US is unlikely to prioritize policies that properly respond to civilian casualties. In fact, this appears to be the case in reality. Civilians harmed by drone strikes are left to fend for themselves, their communities

⁷ “Civilian Harm and Conflict in Northwest Pakistan,” at 60–62.

⁸ *Ibid.*

⁹ “Yemen: tens of thousands in Abyan in need of urgent help,” International Committee of the Red Cross, June 6, 2012, noting that “fierce fighting, sometimes involving air strikes, has led to a severe deterioration of the humanitarian situation” in parts of southern Yemen; “Briefing Notes: Internal displacement grows in Yemeni,” Office of the UN High Commissioner for Refugees, March 9, 2012, estimating 150,000 internally displaced people in the south.

¹⁰ Kelly McEvers, “Yemen Airstrikes Punish Militants, and Civilians,” NPR, July 6, 2012.

¹¹ Lisa Schirch, “9 Costs of Drone Strikes,” Huffington Post, June 28, 2012.

¹² Center interview with Pakistani civilian (name withheld), interview no. 59, Northwest Pakistan, 2010; Jane Perlez and Pir Zubair Shah, “Drones Batter Al Qaeda and Its Allies Within Pakistan,” The New York Times, April 4, 2010.

¹³ Michael Kugelman, “In Pakistan, Death Is Only One of the Civilian Costs of Drone Strikes,” Huffington Post, May 2, 2012.

¹⁴ Center interview with Pakistani civilian (name withheld), interview no. 62, Northwest Pakistan, 2010.

¹⁵ “Civilian Harm and Conflict in Northwest Pakistan,” at 27.

¹⁶ Center interview with Pakistani civilian (name withheld), interview no. 20, Northwest Pakistan, 2010.

angered by the lack of recognition, and yet continually told that drones are so precise that they minimize suffering.

Official US statements that drone “precision” is distinct in the history of warfare because drones hit their targets and avoid civilians better than other technologies belies the actual definition of “precision.” Rather, “precision” means that a particular weapon will go where the pilot or operator tells it to go—an ability that is decidedly not unique to drones. In fact, a fighter jet carrying the same missile or bomb as a drone can be just as precise. Precision is based less on the actual weapon, and more on knowing who the target is, knowing who is a civilian, and knowing if there are civilians in the strike area. Errors in intelligence, limitations of video surveillance, and a lack of human intelligence from the ground are all factors that can lead a drone to be just as risky for civilians as another weapon with the same bad inputs. If the target isn’t the right target, the drone will indeed strike him—but what good does “precision” do in this case?

Though drones do provide unparalleled surveillance capabilities and can fly lower and slower than, for example, a fighter jet, civilians remain at risk if the intelligence feeding into the targeting analysis is faulty. This can occur if a drone’s video intelligence is corroborated by an untrained, paid local informant rather than a US service member on the ground (as would be the case in a full scale military operation like that of Afghanistan), or if the intelligence being offered from locals is marred by tribal vendettas. Remote operation also risks the “soda straw” effect, in which a drone operator may zoom in on a target but lose a wider picture of the area—like viewing a small amount of liquid through a soda straw. Thus, a civilian may move into the vicinity of the strike without being noticed or considered as part of a targeting analysis. Post-strike, there is nobody to note the civilian’s death, record it, or use the lesson learned for improving future operations.

One pilot described this effect when targeting a truck in Afghanistan. Viewed through Predator footage, the truck appeared to be far enough away from surrounding houses and pedestrians for a strike to be approved. The ground commander, who was also monitoring the Predator footage, gave clearance to take the shot. After the missile had been fired, two young boys unexpectedly appeared on the operator’s screen riding a bicycle. The pilot described his horror as he could do nothing but wait and watch as the missile killed the two boys along with the occupants of the truck.¹⁷ With a wider field of view and ground intelligence, the two boys may have been identified in time.

When drone strikes do harm civilians, US policies have failed to provide appropriate channels of accountability. Civilians suffering losses from US combat operations in Afghanistan are eligible for amends in the form of monetary payments or “solatia.” This is an ad hoc tradition for the US military in Vietnam, Korea, and Iraq as well. A civilian suffering losses from a remote drone strike is likely to receive only a denial that his or her harm ever occurred, or the explanation that their family member had something to do with a terrorist group. This response to civilian harm is antithetical to stated US values of regretting every civilian loss as a result of American operations. Even John Brennan recently said in Senate testimony during his confirmation hearing: “Where possible, . . . and, if appropriate, [the US] should provide condolence payments to families of those killed.”¹⁸

Policy Recommendations¹⁹

Instead of holding onto assumptions regarding precision, effectiveness, and low levels of civilian harm, US policymakers should create counterterrorism policy in full awareness of their unintended, negative consequences and then decide if drones are the proper weapon to rely on in countering terrorism. This will require an honest assessment of the remote drone program and

¹⁷ See Matt J. Martin and Charles W. Sasser, *Predator: The Remote-Control Air War over Iraq and Afghanistan: A Pilot’s Story* (Minneapolis: Zenith Press, 2010), 211-212.

¹⁸ Responses to Posthearing Questions, Mr. John Brennan, US Senate Intelligence Committee, February 2013, <http://www.intelligence.senate.gov/130207/posthearing.pdf>

¹⁹ Detailed recommendations on the drone program can be found at Center for Civilians in Conflict and Columbia Law School, *The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions* (2012), <http://civiliansinconflict.org/resources/pub/the-civilian-impact-of-drones>

far more information than is currently available on how drone strikes impact the local civilian population. Three broad policy recommendations logically follow:

1. Increase Transparency

Only a few outside a tight circle of policymakers know who is targeted, why, how, and what measures are put in place to protect civilians. Naturally, some secrecy is necessary; however, the details we seek would surely not put America's security at risk. It is necessary to openly address:

- How are civilians and civilian casualties defined?
- How are civilian casualties assessed?
- What is the definition of a targetable individual?
- Are drone operators trained in civilian protection and how?
- How can civilians protect themselves from behavior-based targeting?

The conventional U.S. military has become relatively open about each of these protocols in other circumstances. There is no reason drone operations should be any different.

2. House the Drone Program under the Defense Department to Enhance Transparency and Civilian Protection

Administration officials have repeatedly offered assurances that the Central Intelligence Agency—the lead on many remote drone operations—complies with international law and does its utmost to avoid civilian casualties, yet there is no evidence to suggest this is the case. Moreover, the CIA lacks an institutional history of openly adhering to international, or even American, norms and values in using lethal force. Perhaps more disturbingly, joint CIA-JSOC drone operations may not be considered “traditional military activities” despite use of lethal force by the US government, which means Army, Navy and Marine directives on civilian protection or law of war compliance may not cover them.²⁰

America's armed services have a transparent chain of command, are trained in civilian protection practices, and study lessons-learned. It will not be enough, however, to transfer all remote drone operations under military command. JSOC—the agency likely to lead those operations—is currently free from public scrutiny. Congress will need to ensure the Pentagon increases JSOC's accountability and that military directives on civilian protection are enforced.

3. Recognize Civilian Harm

United States policy must recognize the actual harm drone strikes cause to civilians. As far as my organization knows, no victim of the remote drone campaign has received apologies, an explanation for their losses, or amends from the US government. As recently as 2011, the United States refused to admit drone strikes were happening at all, leaving victims with denials rather than help. Our research further shows that most conflict victims in the world, and indeed in Pakistan, want an explanation of why they were harmed and recognition of their losses. Acknowledgement and explanations can answer unanswered questions, dignify loss and, in cases where the explanation is public, can remove local suspicion of families victimized by a strike. Non-legal monetary payments in cases of unintended or otherwise lawful civilian harm can prove that a family was not the intended target and help them begin to recover, though no amount of aid will ever replace their loss.

²⁰ See “Directive 2311.01E: DoD Law of War Program,” Department of Defense, May 9, 2006, §4.1, <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>. CIA operates under Title 50 “covert action” of US law allowing for deniability of U.S. role, whereas JSOC falls under Title 10 “armed forces” is technically guided by military doctrine and its actions can be acknowledged by the U.S. government. But in joint CIA and JSOC activities those actions can be blurred and may be considered covert under Title 50.

The lack of US troops on the ground in areas of drone strikes does not absolve the United States from responsibility to investigate incidents of civilian harm and, where appropriate, to recognize and assist victims. The United States could initiate a claims process similar to that used by the US military in other areas of kinetic action by working in concert with personnel on the ground, either through USAID programs or, in some cases, through connections to the local government.

Avoiding and addressing civilian harm caused by US drone strikes requires a more robust and open dialogue about how drones are being used and their impact on the civilians living under them. May this be the first of more inquiries to come.

Thank you again for your consideration of these issues and your leadership.