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Stanislav Matějka

Fighting Terrorism
Surveillance
and Targeted Killing
in Post-9/11 World

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I. Introduction

The United States has always been perceived as a land of freedom. Millions of people left their home countries and headed to America in pursuit of a new life. The freedom rhetoric can be easily tracked in speeches delivered by the U.S. presidents. George W. Bush mentioned in his second inaugural address the words “free,” “freedom” and “liberty” forty-nine times in total.¹ Similarly, the U.S. national anthem contains the “land of free” wording.

On September 11, when the terrorist attacks shocked the United States and the whole world, President George W. Bush assured his people: “Terrorist acts can shake the foundation of our biggest buildings, but they cannot touch the foundation of America.”² That foundation, as explained by President Obama, is three documents – the Declaration, the Constitution and the Bill of Rights – anchoring “the foundation of liberty and justice in this country, and a light that shines for all who seek freedom, fairness, equality and dignity around the world.”³

Since the 9/11 attacks, the threat of terrorism has occupied front pages of newspapers and prime time news on television for almost two decades now. The war on terror declared by President Bush after the 9/11 is waged inside as well as outside U.S. borders. Perception of the threat has led many countries to major reforms in their national security

1 William Safire, “Bush’s Freedom Speech,” *The New York Times*, January 21, 2005, available at http://www.nytimes.com/2005/01/21/opinion/21safire.html?_r=0 (last access December 13, 2014).

2 Citation from the George W. Bush’s address on September 11, 2001, *CNN*, September 11, 2001, available at <http://edition.cnn.com/2001/US/09/11/bush.speech.text/> (last access December 13, 2014).

3 “Remarks by the President on National Security,” *The White House*, May 21, 2009, available at <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09> (last access December 13, 2014).

policies. In the forefront of this development is the United States with its most advanced technologies at hand and very specific responsiveness to threat to homeland. In the years after the attacks, the United States has come with number of military, security as well as legislative concepts and innovations in order to defeat terrorism and protect security of its people.

Even though these measures seem to be effective, as no other comparable attack has occurred on U.S. soil, many experts are voicing their concerns and the public debate is increasing especially after each revelation of the dark sides of the war on terror's tools and measures.

On the domestic level, civil rights organizations, academic experts and also authors of some of the provisions have been voicing concerns that the new pieces of antiterrorism legislation, intelligence provisions and military tools ceased to observe constitutional protection. In addition, in June 2013, Edward Snowden, a former employee of the National Security Agency, revealed together with journalist Glenn Greenwald secret files containing information about clandestine government surveillance programs affecting all U.S. citizens.

On the level of waging war outside the U.S. borders, the morality of Unmanned Aerial Vehicles (UAVs) and other related issues has become a topic of heated public discussions in the U.S. First of all, it is arguably one of the most important changes in the U.S. military conduct in years. Second, the use of these systems plays a substantial role in shaping both national security policy and the foreign policy of the United States. The issue of robotic, possibly autonomous and lethal systems presents a great challenge for ethicists, military experts, foreign policy analysts and practitioners, philosophers and other thinkers.

For these reasons, it is vital to think conceptually about the facts at hand regarding the use of lethal unmanned aircraft, commonly referred to as drones, as well as surveillance measures and legislation. As the world becomes more and more interconnected through a wider access to computers and the Internet, the debate on any such significant issue is becoming ever more global in a literal sense. In such a debate, there is a much greater risk of unintentional or even intentional misinterpretation, deliberate lies and propaganda by persons groups or even nation states stepping in with their respective agendas.

Nowadays, advanced technology offers wide range of possibilities how to intrude one's privacy and effectively kill people and legal and ethical considerations have to catch up the reality. The main aim of the publication is therefore to examine these two ambivalent sides of the war on terror – use of the UAVs abroad and issues related with the revealed

government surveillance programs in the United States. Both UAVs and surveillance legislation shall protect the security of American people and both raise significant concerns on under which conditions these tools are being used. Authors of this publication seek to answer the following questions: has the United States shifted from the land of freedom into the land of surveillance? What is the statutory and constitutional framework of the current surveillance measures? How are the UAVs in the war on terror currently being used and what are the limits of the utilization of UAVs in the war of terror? For this purpose, this work consists of two major parts focusing on further partial issues.

The first part called *Land of freedom or land of surveillance? Right to privacy in the U.S. after 9/11* examines the contradiction between the proclaimed freedom and the factual complex surveillance intruding privacy, whose legality and constitutionality is being questioned. After 9/11, a vast number of antiterrorism acts, executive orders, presidential directives and intelligence programs in the name of national security have been introduced. This work focuses on the two major National Security Agency eavesdropping programs, revealed by Edward Snowden. The first of them is the bulk collection of telephony metadata conducted under Section 215 of the USA Patriot Act and the other is PRISM and upstream acquisition of Internet communications pursuant to Section 702 of the Foreign Intelligence Surveillance Act of 1978 modified by the Amendments Act of 2008.

In order to elaborate on the legal context of the surveillance issues with focus on the statutory and Constitutional deficits of the NSA data collecting programs revealed by Edward Snowden and provide sufficient explanation of both programs, it is also essential to introduce the Foreign Intelligence Surveillance Act (FISA) as well. Even though the act does not belong among the legislation passed after 9/11, it is the crucial basis for the antiterrorism legislation, especially for USA Patriot Act, which builds significantly on FISA provisions, as it deepens, modifies and amends them. For purposes of this publication, only the Sections 215 and 218 of the Title II of the USA Patriot Act will be analyzed. The law itself is 365 pages long and consists of ten Titles, encompassing a wide variety of issues. However, only Title II, "Enhanced surveillance procedures," is thematically connected with our topic, as it brought new rules for surveillance procedures. Sections 215 and 218 raise high concerns regarding privacy rights.

This work focuses primarily on the disputed surveillance provisions violating the right to privacy. It does not include the Guantánamo prison

issue, indefinite detention and imprisonment, although these are important and controversial issues arising directly from the 9/11 legislative measures as well, but they are beyond the scope of this work. Similarly, this publication is not involved with any deeper examination of the commercial tracking of one's online activities by private companies for purposes of marketing and targeted advertising.

The second part called *Unmanned Aerial Vehicles in U.S. National Security Policy: New Face of War on Terror* identifies major limitations of the use of unmanned lethal systems in warfare and outlines how these challenges contribute to a Revolution in Military Affairs (RMA). The use of unmanned systems as a part of the U.S. national security policy is here analyzed with regard to more abstract questions of morality and the concept of just war and warrior ethos. Unmanned systems challenge not only the military conduct but many other areas of society and it is an ambition of this publication to address those as well.

As this work aims to demonstrate, the U.S. strategy of using UAVs has the potential to change the overall conduct of national security policies in the future. It also aims to prove that the implementation of UAVs in combination with other technologies has caused a RMA. This current revolution is beyond even the traditional theories of RMA as will be proven in the following chapters based on theoretical concepts of the warrior ethos and the ideal of the just war. The intent is to prove that these new technologies will change warfare far more than expected. Traditional concepts of warfare, its justification and the role and perception of the warrior may all eventually become irrelevant due to expansion of UAVs.

Some authors conclude that, although UAVs present a revolutionary technology, they are not a disruptive one. That means that even if drones provide the President with the extraordinary capability of striking an enemy without the political consequences of having American servicemen and servicewomen put into harm's way, this does not imply an absolute alteration of national security or foreign policy. This work argues that the RMA is a gradual process. The potential of this RMA is one of the greatest in history, comparable for instance to the invention of the nuclear bomb.

Among the sources used in this work there are some worth deeper explanation. The Privacy and Civil Liberties Oversight Board is an independent, bipartisan agency within the executive branch, established by implementing the 9/11 Commission recommendations. The 9/11 Commission – officially named National Commission on Terrorist Attacks Upon the United States – was created in 2002 to examine circumstances