**The Drone Presidency: War and Power in the 21st Century World**

One would be hard pressed these days to tune into a major news outlet or open a national newspaper and not see an article relating to Unmanned Aerial Vehicles, or “drones.” An issue that has long been the province of national security junkies, the president’s reliance on drones as a new method of war mongering is now becoming mainstream and ever more troubling to a greater number of Americans.

Of special concern are two particular issues that I explore in this paper: First of all, the implications of targeting decisions made by President Obama to take out American terrorists abroad. Secondly, what the future state of civil liberties will be, particularly whether the right to privacy will continue to erode once drones have become fully integrated domestically, as per Congress’ mandate to the Federal Aviation Administration earlier this year.[[1]](#footnote-1) All of these questions take place, however, within the broader context of the general trend of the augmentation of executive power over time, particularly since the terrorist attacks of September 11, 2001.

9/11 fundamentally altered not only the way war is fought and what the United States sees as its main threats, but also the institution of the presidency itself. The debate surrounding drones cannot occur without also addressing the rudimental changes that have taken place within the walls of the White House in the past twelve years.

In this paper I seek to address the following questions: 1) What is the state of executive power today and how did the terrorist attacks of 9/11 seemingly alter Americans’ fundamental perspective on the nature of executive power? And 2) what are the legal implications of increased and sustained drone usage both domestically and abroad?

I argue that the country needs to see a renewed restoration of the separation of powers and checks and balances that our nation was founded on in order to reign in the excesses of the executive branch and ensure that Americans retain their basic and beloved civil liberties. Moreover, I show how the balance of power in our current system has shifted in a potentially dangerous direction and how presidents in both parties are attempting to usurp power that should rightfully be divided amongst the three “co-equal” branches.

*The Post 9/11 World and the Augmentation of Executive Authority*

In his 1960 landmark work *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan*, Richard Neustadt states “A striking feature of our recent past has been the transformation into routine practice of the actions we once treated as exceptional.”[[2]](#footnote-2) Every president up to the current one has been influenced by what I call a “presidential inheritance” or as Neustadt refers to it, “presidential common law.”[[3]](#footnote-3) Every move to augment presidential power has slowly compounded over time to create a presidency so expansive it would certainly be unrecognizable to the framers of our constitution.

There have been various attempts by both the legislative and judicial branches to check the ever-increasing power of the executive, but they have been largely unsuccessful. In the history of our nation, Congress has declared war five times, but none since World War II.[[4]](#footnote-4) Congress passed the War Powers Resolution in 1964 in the wake of intense involvement in Korean and Vietnam absent formal declarations of war and in an attempt to reassert itself in the war making process. Section 1541(a) of the War Powers Resolution reads:

It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.[[5]](#footnote-5)

The Resolution states that the president may send troops into a country in an emergency situation and has sixty days to appeal to Congress to make a declaration of war in order to continue the funding of troops. In reality however, the situation was very different.. The purpose of the WPR was to reign in the war-making power of the “Imperial President.” Many scholars argue however, that the unintended consequence of the Resolution was to allow the president a two-month window to engage militarily without congressional oversight.

In more recent years, Congress has allowed the president to engage in a global war on terror with little to no oversight of the war effort. This *laissez faire* attitude led to two presidents expanding a war, and the current president to literally dismiss the War Powers Resolution in Libya in 2011. The Obama administration argued that United States was not involved in the “hostilities” that would trigger the requirements of the WPR that the president seek congressional approval for continued operations.[[6]](#footnote-6) As Clinton Rossiter notes, “In such time, ‘when the blast of war blows in our ears,’ the President’s power to command the forces swells out of all proportion to his other powers.” 9/11 offered such a blast and has fundamentally altered the makeup of the current executive institution.

*The History of Electronic Surveillance and Drones at Home*

Given the creation of technology such as drones monitoring American skies and a billion dollar data collection center in the shadow of the Oquirrh Mountains[[7]](#footnote-7), Justice Louis Brandeis’ comment, stating, “the progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping” seems prophetic.[[8]](#footnote-8) If the Supreme Court justices in the 1920s could hardly conceive of technology that would allow law enforcement officials to intercept private phone conversations, they would not believe the current invasions of privacy being conducted by the government on its citizens every day.

The story of electronic surveillance begins in 1928, with the Supreme Court decision in *Olmstead v. United States*. With national prohibition in full effect through the Volstead Act of 1919, federal law enforcement agents found themselves entrenched in a dilemma. An increase in the amount of alcohol related crime meant more work for law enforcement agents and redefined the relationship between government and the lives of private citizens.[[9]](#footnote-9) Federal agents began wiretapping suspects’ phones to gather intelligence, namely the phone of Roy Olmstead, who was running an underground alcohol smuggling ring from Canada to Seattle, Washington.

Without obtaining a warrant, law enforcement officials wiretapped Olmstead’s phone and compiled around 700 pages of conversation, none of which implicated Olmstead in illegal activity. When three of his men were intercepted coming across the Canadian border into Washington, however, the police were able to combine their testimony with what was said in the recorded phone conversations and put a case together.[[10]](#footnote-10)

The Court had previously ruled that, on the basis of the Fourth Amendment, private mail could not be intercepted and submitted as evidence in court as it constituted a personal “effect” subject to privacy. The case raised the following questions: “Did the use of evidence gained from wiretaps and confiscated papers violate the Fourth Amendment protection against unreasonable searches and seizures? Were telephone conversations similar to mailed letters, which were protected by the Fourth Amendment? Furthermore, Did the use of evidence gained from wiretaps and confiscated papers violate the Fifth Amendment protection against self-incrimination?”[[11]](#footnote-11)

In a 5-4 decision, the Court ruled against Olmstead. Writing for the majority, former president and then Chief Justice William Howard Taft wrote, “Whatever may be said of the tapping of telephone wires as an unethical intrusion upon the privacy of persons who are suspected of a crime, it is not an act which comes within the letter of the prohibition of constitutional provisions . . . Evidence thus obtained is not believed to be distinguishable from evidence obtained by listening in on telephone wires.”[[12]](#footnote-12)

Justice Louis Brandeis wrote a particularly powerful dissent, confronting the issue of rectifying the founders’ intentions with newfangled technology: “When the Fourth and Fifth Amendment were adopted, ‘the form that evil had theretofore taken,’ had been necessarily simple. Force and violence were then the only means known to man by which a Government could directly effect self-incrimination . . . Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.”[[13]](#footnote-13) Brandeis acknowledges that which Taft fails to: that technology will not stop with wiretaps. The government will continue to come up with new and more intrusive instruments to peer into the lives of its citizens, searching for evidence of criminal activity. The Court’s role, as Brandeis sees it, is to posit a new conception of the Fourth and Fifth Amendments that will be applicable as years pass and new technology is created.

As luck would have it, the future seemed to fall on the side of the dissenters. Olmstead’s conviction did little to end illegal alcohol smuggling. In the power vacuum following his imprisonment, others merely took his place. As the Seattle Post Intelligencer reported, “prohibition continued to corrupt, and the solution, the paper thought, law in changing the law.”[[14]](#footnote-14) Thus, the case became part of a larger debate on the scope of government power, corruption and privacy, which were pieces of the debate regarding improving or repealing Prohibition.

Trespass theory

In 1967, the Court granted certiorari to a case that would overturn the holding established in Olmstead. *Katz v. United States* concernedCharles Katz, a man charged on an eight-count indictment for transmitting illegal bookmaking information via a public telephone booth from Los Angeles to Boston and Miami. FBI officials obtained the information by placing a listening device on the outside of a telephone booth frequented by Katz. Despite the loose interpretation of privacy resulting from *Olmstead*, the Court found 7-1 in favor of Katz.

Writing for the majority, Justice Stewart wrote, “We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the ‘trespass’ doctrine there enunciated can no longer be regarded as controlling.” Furthermore, “the Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth, and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”[[15]](#footnote-15)

With *Katz*, the Court signaled that the security from seizure guaranteed to citizens in the Fourth Amendment should be interpreted as freedom from almost any government intrusion. The distinction between public and private behavior and communication was an important principle in the case. In a concurrence in judgment, Justice Harlan established the following test for determining the scope of reasonable Fourth Amendment searches:

“As the Court’s opinion states, ‘the Fourth Amendment protects people, not places.’ The question, however, is what protection it affords those people. Generally, as here, the answer to that question requires reference to a ‘place.’ My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’[[16]](#footnote-16)

Thus, because he or she assumes a great degree of privacy there, behavior engaged in within the home should be protected from warrantless searches, while public behavior, such statements made in “plain view” have no expectation of privacy and are not protected from being overheard. [[17]](#footnote-17)

Our expectations certainly have fallen a great deal since 1967. Last year, the Court heard one of the most recent cases concerning electronic surveillance. FBI agents placed a GPS tracking device on Antoine Jones’ car without obtaining a warrant when they suspected him of narcotics violations. The device remained on the car for one month while the FBI watched his movements, finally arresting him in 2005.

Amongst public outcries that “Big Brother” was watching American citizens, the Court unanimously declared that this search violated Jones’ Fourth Amendment rights. [[18]](#footnote-18)Writing for the majority, Justice Antonin Scalia added to the conditions in Katz, stating the “Government’s installation of GPS device on a target’s vehicle and its use of that device to monitor the vehicle’s movements, constitutes a search” under the Fourth Amendment.[[19]](#footnote-19)

The public expectation that Harlan described in Katz clearly is that government cannot constitutionally, absent a valid warrant, track a person’s car on public roads and use that data to arrest them. Currently, there are drones in American skies doing that very thing.

*Drones Abroad*

A few weeks ago, Senator Rand Paul filibustered President Obama’s nomination of John Brennan for Director of CIA with the claim that Obama must assure due process for US citizens now that drones are becoming more and more present on US soil. Senator Paul claimed that President Obama had essentially crowned himself judge, jury and executioner all in one, with almost no check from Congress.   
As a U.S. citizen, Al-Awlaki should have been guaranteed due process, which means he is entitled to a judicial hearing and an opportunity to defend himself in a court of law. These guarantees of due process have their roots in the Magna Carta and have long been considered procedural safeguards against tyranny and abuse of presidential power.

While some scholars argue the U.S. Constitution prohibits the Obama administration’s extrajudicial killing of Al-Awlaki, others have argued that the killing was justified under the President’s Commander in Chief powers, which allows the President to take actions to protect the nation from attack by an imminent threat for self-defense purposes. The justification for the targeted killing of Al-Awlaki was provided by a number of government officials including Attorney General, Eric Holder.  
In a March, 2012 speech given at Northwestern Law School, Attorney General Eric Holder explained the legal logic of the administration’s decision to kill al-Awlaki. According to Holder, “the government may not use this authority [standing statutory law] intentionally to target a U.S. person, here or abroad, or anyone known to be in the United States.”[[20]](#endnote-1) Despite this comment that would seem to prohibit the administration’s killing of al-Awlaki, Holder continued by providing several examples of terrorists that had been prosecuted in a court. He then moved away from courts by noting that military commissions also provide viable alternatives to federal courts.   
Holder stated that “the government must take into account all relevant constitutional considerations with respect to United States citizens – even those who are leading efforts to kill innocent Americans. Of these, the most relevant is the Fifth Amendment’s Due Process Clause, which says that the government may not deprive a citizen of his or her life without due process of law.[[21]](#endnote-2) This claim is despite the fact that lawyers have been prohibited since 2003, by the national government, from taking some suspected terrorists as pro bono clients without explicit permission… from the national government.  
Most troubling to civil liberties advocates is his contention that ‘Due process’ and ‘judicial process’ are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.”

The questions posed by the case of Al-Awlaki and three other Americans are just some of the issues related to increased drone usage and broadly, the vast augmentation of executive power in the post 9/11 world.

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2. Neustadt, Richard E. "Leader or Clerk?" *Presidential Power and the Modern Presidents: From Roosevelt to Reagan.* New York: Wiley, 1960. 8. Print. [↑](#footnote-ref-2)
3. Ibid. 9. [↑](#footnote-ref-3)
4. Gibson, Tobias. Anna Holyan. End Congress’s Abdication of War. [↑](#footnote-ref-4)
5. War Powers Resolution. 50 USC S. 1541- Purpose and policy. 1960. [↑](#footnote-ref-5)
6. Gibson, Tobias. Anna Holyan. End Congress’s Abdication of War. [↑](#footnote-ref-6)
7. Wired. http://www.wired.com/threatlevel/2012/03/ff\_nsadatacenter/ [↑](#footnote-ref-7)
8. Olmstead v. US. Brandeis dissent. 1967. [↑](#footnote-ref-8)
9. Richard F. Hamm. Olmstead v. United States: The Constitutional Challenges of Prohibition Enforcement. [↑](#footnote-ref-9)
10. Ibid. [↑](#footnote-ref-10)
11. Ibid. [↑](#footnote-ref-11)
12. Olmstead. [↑](#footnote-ref-12)
13. Olmstead v US. Brandeis dissent. [↑](#footnote-ref-13)
14. Hamm [↑](#footnote-ref-14)
15. Katz v. US [↑](#footnote-ref-15)
16. Katz v. US. Harlan’s concurrence in judgment. [↑](#footnote-ref-16)
17. Ibid. [↑](#footnote-ref-17)
18. NY Times article, Liptak. [↑](#footnote-ref-18)
19. United States v. Jones. 2012 [↑](#footnote-ref-19)
20. Eric Holder. March 5, 2012. “Attorney General Eric Holder Speaks at Northwestern University School of Law.” <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (accessed September 25, 2012). [↑](#endnote-ref-1)
21. Ibid. [↑](#endnote-ref-2)