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# **SELF RESTRAINT AND NATIONAL SECURITY**

**Nathan Alexander Sales,  
George Mason University School of Law**

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## SELF RESTRAINT AND NATIONAL SECURITY

Nathan Alexander Sales  
George Mason University School of Law

### ABSTRACT

Why does the government sometimes tie its own hands in national security operations? This article identifies four instances in which officials believed that the applicable laws allowed them to conduct a particular military or intelligence operation but nevertheless declined to do so. For example, policymakers have barred counterterrorism interrogators from using any technique other than the fairly innocuous methods listed in the Army Field Manual. Before 9/11, officials rejected the CIA's plans to use targeted killings against Osama bin Laden and other terrorist leaders. Judge advocates sometimes use policy considerations to restrict military strikes that would be lawful. And in the 1990s, lawyers erected a "wall" that kept intelligence officers from sharing information with criminal investigators. The article then draws from rational choice theory to suggest two possible explanations for why the government imposes these restraints. First, self restraint might be the result of systematic risk aversion within military and intelligence agencies. Second, self restraint may be the result of empire building, as officials seek to magnify their clout by vetoing the plans of bureaucratic rivals.

# SELF RESTRAINT AND NATIONAL SECURITY

Nathan Alexander Sales<sup>†</sup>

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## INTRODUCTION

The lawyers didn't think much of the plan to kill Osama bin Laden.

It was 1998, and the United States gradually was awakening to the grave threat posed by the Saudi billionaire's al Qaeda terrorist network. Bin Laden's operatives had spent the decade mounting a series of increasingly bold, and increasingly bloody, attacks on American interests. The August 7 bombing of our embassies in Kenya and Tanzania, which claimed hundreds of lives and wounded thousands more, was only the most recent outrage. Bin Laden had even issued what amounted to a declaration of war; a 1998 fatwa proclaimed that "[t]he judgment to kill and fight Americans and their allies, whether civilians or military, is an obligation for every Muslim who is able to do it in any country in which it is possible to do it."

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<sup>†</sup> Assistant Professor of Law, George Mason University School of Law. I'm grateful to Nate Cash, Amos Guiora, Anne O'Connell, Jeremy Rabkin, Matt Waxman, and Tung Yin for their helpful comments on earlier drafts of this article. Special thanks to the Center for Infrastructure Protection and Homeland Security for generous financial support.

Osama clearly meant business, and administration officials huddled to plot their next move. They'd already sent Tomahawk cruise missiles into al Qaeda camps in Afghanistan, and into a Sudanese pharmaceuticals plant that they suspected – wrongly, it turned out – of manufacturing chemical weapons. Now they wanted to solve the bin Laden problem once and for all. The Central Intelligence Agency came up with a simple and elegant solution: Let's just kill him. No, the answer came back. Intelligence community attorneys wouldn't sign off on a plan to dispatch the al Qaeda kingpin. The most they would bless was a mission to kidnap him and bring him to the States to stand trial for his crimes. Of course, the lawyers acknowledged, the chances that bin Laden's devoted bodyguards would let the CIA's Afghan surrogates frog-march him away were vanishingly small. And if Osama happened to die in the inevitable crossfire – wink, wink – well, no one would shed a tear. But deliberately setting out to slay him was out of the question. Nor did the lawyers' scruples stop there. Years later, a frustrated Michael Scheuer, onetime head of the CIA's bin Laden unit, unburdened himself of his views on the learned profession:

The U.S. intelligence community is palsied by lawyers. When we were going to capture Osama bin Laden, for example, the lawyers were more concerned with bin Laden's safety and his comfort than they were with the officers charged with capturing him. We had to build an ergonomically designed chair to put him in, special comfort in terms of how he was shackled into the chair. They even worried about what kind of tape to gag him with so it wouldn't irritate his beard. The lawyers are the bane of the intelligence community.<sup>1</sup>

Why does the government sometimes tie its own hands in national security operations?

Much of the caselaw and scholarship concerning national security rests on the assumption that the executive branch is institutionally prone to overreach – that, left to its own devices, it will inch ever closer to the line that separates illegal from legal, and sometimes enthusiastically leap across it. The obvious conclusion is that external, principally judicial, checks are needed to keep the executive in line.<sup>2</sup> In many cases the executive does indeed push the envelope. But not always. The government often has powerful incentives to stay its own hand – to forbear from military and intelligence operations that it believes are perfectly legal.<sup>3</sup> Officials may conclude

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<sup>1</sup> <http://www.msnbc.msn.com/id/9005619/>. The events described in the previous paragraphs are discussed in greater detail in NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 47-48, 68-70, 115-21, 126-34 (2004) [hereinafter 9/11 COMMISSION REPORT]; STEVE COLL, GHOST WARS 371-96, 405-13, 421-28 (2004); LAWRENCE WRIGHT, THE LOOMING TOWER: AL QAEDA AND THE ROAD TO 9/11, at 265-66 (2006).

<sup>2</sup> See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (arguing that “a state of war is not a blank check for the President,” and emphasizing the judiciary's “necessary role” in preventing executive overreach); David D. Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565 (2003); Geoffrey R. Stone, *Civil Liberties v. National Security in the Law's Open Areas*, 86 B.U. L. REV. 1315, 1327-34 (2006); Benjamin Wittes, *Introduction*, LEGISLATING THE WAR ON TERROR 1, 1-2 (Benjamin Wittes ed. 2009).

<sup>3</sup> A comprehensive analysis of exactly when (and why) the government tends to push the envelope, and when (and why) it tends to restrain itself, is beyond the scope of this article. Nevertheless, we can hazard a tentative guess. It is a commonplace observation that officials are especially prone to overreach in times of crisis, such as during a war or in the aftermath of a terrorist attack. See, e.g., WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE (2000); GEOFFREY R. STONE, PERILOUS TIMES (2004); cf. JACK GOLDSMITH, THE TERROR PRESIDENCY 163-64 (2007)

that a proposed mission – a decapitation strike on al Qaeda’s leadership, say, or the use of mildly coercive interrogation techniques on a captured terrorist – is entirely permissible under domestic and international law. Yet they nevertheless might rule it out. In other words, the government sometimes adopts self restraints on its ability to conduct operations it regards as legally justified; it “fight[s] with one hand behind its back,” to borrow Aharon Barak’s memorable phrase.<sup>4</sup> This article considers the reasons for that tendency by consulting rational choice theory – the notion that government officials are rationally self interested actors who seek to maximize their respective utility. Part I identifies four examples of self restraint in national security operations. Parts II and III then discuss possible explanations for why the government adopts them.

One example of a self-imposed restraint is Executive Order 13491, which limits counterterrorism interrogations – including those conducted by intelligence agencies like the CIA – to the techniques listed in the Army Field Manual. The AFM prohibits or severely restricts a number of fairly mild interrogation methods such as shouting, low-grade threats, the “good cop bad cop” routine, solitary confinement, and other staples of garden-variety law enforcement investigations. A second example, sketched above, is the government’s onetime reluctance to use targeted killings against Osama bin Laden and other figures, despite its belief that doing so would be consistent with domestic and international laws against assassination. Third, lawyers in the Judge Advocate General corps sometimes reject military strikes that would be permissible under the laws of war, but that they regard as problematic for moral, economic, social, or political reasons. A fourth example is the Justice Department’s erection of a “wall” that restricted information sharing between intelligence officials and criminal investigators, despite the fact that the governing statute (the Foreign Intelligence Surveillance Act of 1978) contained no such limits, and despite the fact that the governing DOJ guidelines established mechanisms for swapping such data.

The question then becomes why officials adopt these restraints even when they believe them to be legally unnecessary. Two possible explanations come to mind.

First, self restraint might result from systematic risk aversion within military and intelligence agencies. This aversion stems from the asymmetry between the expected costs and benefits of national security operations; officials usually have more to lose from being aggressive than they have to gain. In particular, operations – even concededly lawful ones – can inspire

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(describing the “cycles of timidity and aggression” in intelligence operations). The rational choice principles applied in this article can help explain why. *See infra* Part II.A.2 (discussing costs of national security operations). During a crisis, officials’ expected costs of inaction can be quite significant. Policymakers justifiably worry that, if the nation’s security suffers on their watch, voters will hold them accountable at the ballot box. These concerns can influence the behavior of the lawyers who review proposed national security operations. To the extent lawyers approve or reject operations based on whether they would promote policymakers’ welfare, *see infra* Part II.C, policymaker concerns about being perceived as “weak on security” will tend to yield fewer restraints. Alternatively, to the extent lawyers issue vetoes to promote their own welfare, *see infra* Part III.C, policymakers’ preferences for aggressive operations likewise will tend to yield fewer restraints. (A lawyer who vetoes a course of action favored by policymakers risks alienating them. *See infra* note 200 and accompanying text.) Absent such a crisis environment, policymakers’ expected costs of inaction may seem lower. In these circumstances, we should expect to see more self restraint.

<sup>4</sup> Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 148 (2002).

adversaries to launch demoralizing propaganda campaigns accusing the United States of war crimes, can sap the willingness of allies to assist this country, and can even result in criminal prosecutions or private lawsuits against the responsible officials.<sup>5</sup> While all national security players exhibit some degree of risk aversion, some are more averse than others. In particular, the senior government officials who ultimately approve operations, and the lawyers who review them for legality, seem to have even less appetite for risk than the operators who actually carry them out. Military and intelligence lawyers therefore will veto interrogation methods, targeted killings, military strikes, or information-sharing arrangements when they calculate – as they often will – that their costs exceed their benefits.

Second, self restraint might result from bureaucratic “empire building,”<sup>6</sup> as lawyers and other officials seek to magnify their clout by vetoing operations planned by their inter-agency (and sometimes intra-agency) competitors. Military and intelligence officials seek to maximize the influence they hold over senior policymakers, as well as their autonomy to pursue the priorities they deem important. One way for an agency to do that is to interfere with rivals’ plans. A bureaucratic player doesn’t gain power by approving whatever mission its competitor wants. It gains power by saying no, because its obstruction forces the competitor to be responsive to its concerns. Reviewers in the government’s national security apparatus therefore will tend to veto operations planned by other entities in a bid to enhance their own welfare.

A few preliminary observations are needed. First, the restraints described in this article aren’t simply examples of officials dutifully adhering to the legal requirements spelled out in statute books and judicial decisions. Instead, officials are supplementing those requirements. They are invoking non-legal norms such as moral and diplomatic considerations to constrain operations that the law authorizes them to conduct (or, more precisely, that they believe the law authorizes them to conduct). Second, this is not a normative analysis. I am not concerned with the question whether coercive interrogations, targeted killings, free-wheeling military strikes, or permissive information sharing arrangements represent sound policy. Nor do I express any opinion on whether self restraint in general, or any particular operational limit, is desirable. Opinions vary widely on those issues.<sup>7</sup> The questions this article poses and tries to answer are

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<sup>5</sup> Commentators have a term for these kinds of accusations: “lawfare.” The concept, which was popularized in a 2001 paper by Air Force Major General (then-Colonel) Charles Dunlap, refers to “a method of warfare where law is used as a means of realizing a military objective.” Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* 5 (2001) [hereinafter Dunlap, *Military Interventions*]. Lawfare is said to encompass a wide range of conduct, from mere propaganda, to using lawyers to communicate with captured combatants, to challenging military or intelligence operations in court. See GOLDSMITH, *supra* note 3, at 58-64; Tung Yin, Boumediene and Lawfare, 43 RICH. L. REV. 895, 879-87 (2009). To the extent that self-imposed restraints seek to preempt adversaries from making lawfare allegations, they may be thought of as a form of “friendly fire lawfare.”

<sup>6</sup> See generally Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005).

<sup>7</sup> Compare GOLDSMITH, *supra* note 3, at 59-60 (expressing concern about the “judicialization of international politics”), and Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military*, 54 UCLA L. REV. 1815, 1844 (2007) (criticizing judge advocates’ use of policy considerations to restrict military operations), with Amos N. Guiora, *License to Kill*, FOREIGN POLICY, July 13, 2009 (describing some of the benefits of the Israel Defense Forces’ legal review of proposed targeted killings), and with Michael N. Schmitt, *The Vanishing Law of War*, HARV. INT’L REV., Spring 2009, at 64, 68 (praising war-fighting states for not “lowering conduct to the level of their lawless opponent, but rather in heightening it, beyond even what the law of war requires”).

descriptive (*To what extent is the government tying its own hands?*) and analytical (*What accounts for the government's tendency to tie its own hands?*). Third, this article ventures no opinion on whether officials are actually correct in believing that the applicable legal principles allow them to undertake the operations in question. Those conclusions are all debatable. My point of departure is that the government believes – rightly or not – that the conduct at issue is permissible. The question then becomes why officials nevertheless rule out national security operations that, by their lights, are perfectly legal.

A final qualification is that any analysis of precisely how and why government officials embraced the restraints they did must be tentative. The problem is the result of classification requirements and other information access rules, and it is endemic to virtually all national security scholarship. The public dataset is simply too scant to be able to draw any firm conclusions about why the White House limited counterterrorism interrogations to the Army Field Manual, or why officials vetoed CIA plans to kill Osama bin Laden, or why JAG officers conclude that certain lawful targets are off limits, or why Justice Department lawyers restricted information sharing. We do have several published accounts about these decisions, but many details almost certainly are still under wraps and likely will remain so for the foreseeable future. Moreover, the information that *has* made its way into the public domain may not represent a complete picture of reality; government officials may selectively release information to manipulate public opinion or otherwise further their own parochial interests. The best we can do, then, is read between the lines of the piecemeal information that has trickled out into the public sphere, and make some educated guesses about the government's inner workings.<sup>8</sup>

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<sup>8</sup> This article emphasizes self restraints that are imposed by elements within the executive branch. But the framework I develop also can help explain why Congress sometimes adopts self restraints for the government as a whole – i.e., why Congress enacts legislation restricting the executive's operational authority more severely than is required by domestic law (in this case the Constitution) or international law. First, Congress might exhibit risk aversion. It might conclude, for example, that the expected costs of conducting mildly coercive interrogations outweigh the expected benefits and thus enact legislation banning the military from using any technique not listed in the Army Field Manual (as it did in the Detainee Treatment Act of 2005, *see infra* notes 20 to 22 and accompanying text). Second, Congress might engage in a form of empire building, allocating to itself a greater portion of the war powers it shares with the President. For example, Congress might assert its primacy in the field of covert operations by passing a law prohibiting the President from approving assassinations (as was proposed in the late 1970s). Still, the executive probably is more likely to adopt self restraints than Congress is. This is so because the executive's expected costs of an operation gone wrong usually will be greater. Unlike legislators, individual executive branch officials face the prospect of personal legal liability for approving or participating in operations that are alleged to violate domestic or international law. *See infra* Part II.A.2.

Similarly, while this article focuses on self restraint in the military and intelligence contexts, the framework developed herein also might be used to explain the occasional tendency of domestic regulatory agencies to restrain themselves. For instance, the Environmental Protection Agency might decide not to regulate carbon emissions, even though it concludes it has legal authority to do so under the Clean Air Act, because it calculates that the expected costs to it of the regulation exceed the expected benefits, or because of self interested vetoes by various bureaucratic players. Still, military and intelligence agencies seem more likely to tie their own hands than their domestic counterparts, because the expected costs of a controversial national security operation often will be greater than expected costs of a controversial regulation. If the EPA decides to start regulating carbon emissions, it risks alienating key domestic constituencies, provoking legal challenges by regulated entities, angering its overseers and appropriators in Congress, and so on. While significant, those costs can pale in comparison to those faced by national security professionals, which may include – in addition to sorts of costs faced by the EPA – investigation, prosecution, and personal liability for alleged war crimes. *See infra* Part II.A.2.

## I. SELF RESTRAINT, PAST AND PRESENT

This Part considers several examples of self restraint in military and intelligence operations – that is, circumstances in which officials vetoed a mission despite their belief that it was perfectly lawful. For instance, in 2009, the White House barred counterterrorism investigators from using any interrogation technique other than the limited methods listed in the Army Field Manual. In the late 1990s, administration officials rejected the CIA’s plans to subject Osama bin Laden to a targeted killing. Members of the military’s JAG Corps have recommended against air strikes that might result in adverse publicity or other harms. And soon after the 1993 bombing of the World Trade Center, Justice Department officials erected an all-but-impregnable “wall” that kept the DOJ’s spies from sharing information with its cops.<sup>9</sup>

What these seemingly disparate examples have in common is that, in each instance, the government’s reason for adopting the restraints was not that it believed them to be legally necessary. To the contrary, officials – often but not always lawyers – concluded that the relevant legal norms allowed the government to carry out the operation in question, but they nevertheless vetoed it. Self restraints thus supplement what the law itself requires; the government is proscribing conduct that the applicable laws do not actually reach. In other words, military and intelligence officials sometimes *overenforce* the relevant legal norms. I do not mean to suggest that the quantity of legal enforcement is suboptimally high – i.e., that it would be efficient or otherwise preferable for some conduct that is unlawful to go unpunished. Rather, by overenforcement I mean the government’s occasional tendency to restrict itself from acting in ways that are not in fact unlawful (or, more precisely, that officials do not regard as unlawful). In other words, self restraint involves the extension of quasi-legal restrictions to conduct that is not believed to be illegal.

In a sense, self restraint is just another example of attorneys giving advice to their clients. A corporation might believe it’s legally entitled to upgrade a smokestack without an environmental permit, but it might nevertheless apply for one because of its lawyer’s recommendation that going it alone carries some legal risk. In the same way, military brass might forbear from attacking a particular target on counsel’s advice even though they believe the strike would be perfectly legal. But self restraint differs from ordinary legal advice in two important ways. First, the entities responsible for reviewing military and intelligence operations for legality typically do more than simply provide counsel. They also issue vetoes. Self restraint

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<sup>9</sup> Other examples of self restraint exist but, for the sake of brevity, this article does not discuss them. For instance, the armed forces have adopted extremely restrictive rules of engagement for counterinsurgency operations in Afghanistan. “[T]he restrictions imposed on counterinsurgency operations typically surpass those found in the law of war.” Schmitt, *supra* note 7, at 67. The idea is to minimize the use of deadly force in the hopes of limiting collateral damage and thereby turn the civilian population against al Qaeda and the Taliban. The strategy comes at a cost, however – more American casualties. See, e.g., Michael Hastings, *The Runaway General*, ROLLING STONE, July 8-22, at 90, 97, 120. A related example concerns military approval mechanisms: Soldiers in Afghanistan and Iraq are required to obtain permission from senior commanders before launching certain kinds of strikes. “In many cases US forces cancelled attacks when disapproved by higher headquarters or when approval did not arrive in a timely fashion. These were policy and operational decisions, not legal ones, for the law of war says nothing about approval levels.” Schmitt, *supra* note 7, at 67. .



thus involves shifting some decisionmaking responsibility from the principals to their agents.<sup>10</sup> Second, as explained in Part III, self restraint often involves agents promoting their own distinct interests at the expense of their principals'. Lawyers may impose a restriction, not so much because they regard an operation as harmful to policymakers' welfare, but because of a self-interested determination that the restraint would enhance the lawyers' own welfare.<sup>11</sup> It may be helpful to think of self restraint in terms of run-of-the-mill advice from legal counsel, but the differences shouldn't be overlooked.

### A. *Interrogation*

The first example of self restraint is also the most recent. On January 22, 2009, his second full day in office, President Barack Obama announced a clean break from his predecessor's interrogation policies. The George W. Bush administration had incurred widespread condemnation for authorizing the CIA to subject several captured al Qaeda leaders to aggressive questioning methods – including waterboarding, a form of simulated drowning. Executive Order 13491 – which was the brainchild of lawyers in the White House Counsel's Office<sup>12</sup> – directed that anyone detained by the United States in an armed conflict “shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3.”<sup>13</sup> The AFM, the current version of which was adopted in 2006, is quite restrictive. In addition to prohibiting severe coercion like waterboarding, it rules out mildly coercive methods that are commonly used in ordinary criminal investigations in precincts throughout the country. These new limits are widely hailed as sound policy, but they probably are not legally necessary. Or, to be more precise, the Army Field Manual restrictions almost certainly go farther than what the White House believes is legally required. Administration lawyers thus supplemented the domestic and international prohibitions on torture and coercion, ruling out some relatively benign techniques that they likely do not regard as illegal.

Understanding Executive Order 13491 requires some context.<sup>14</sup> The governing treaty – the United Nations Convention Against Torture, which the United States signed in 1988 and ratified in 1994 – directs each signatory to “take effective legislative, administrative, judicial or

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<sup>10</sup> To be sure, such vetoes are not unheard of in the private sector. Depending on how a corporation's bylaws are written, a CEO might be barred from taking any action that hasn't been blessed in advance by the firm's general counsel. But ordinarily we tend to think of lawyers as providing counsel to their clients, who as the ultimate decisionmakers remain free to accept the advice or disregard it as they see fit.

<sup>11</sup> Again, it's conceivable that lawyers similarly could pursue their own interests at the expense of their clients'. An attorney who wants to get some courtroom experience might advise a client to take a sure loser to trial, and an attorney who's worried about his abilities might advise a client to settle a case that a competent litigator easily could win. In other words, something like the agency slack that exists between government policymakers and their reviewers can also exist between clients and their lawyers.

<sup>12</sup> See, e.g., Massimo Calabresi & Michael Weisskopf, *The Fall of Greg Craig, Obama's Top Lawyer*, TIME, Nov. 19, 2009, at \_\_\_; Jeff Zeleny, *Craig Steps Down as White House Lawyer*, N.Y. TIMES, Nov. 13, 2009, at \_\_\_.

<sup>13</sup> Exec. Order No. 13,491, § 3(b).

<sup>14</sup> For a history of U.S. interrogation law and policy from 9/11 through Executive Order 13491, see Stuart Taylor Jr. & Benjamin Wittes, *Looking Forward, not Backward: Refining U.S. Interrogation Law*, in LEGISLATING THE WAR ON TERROR 289, 296-310 (Benjamin Wittes ed. 2009).

other measures to prevent acts of torture in any territory under its jurisdiction,” and to “ensure that all acts of torture are offences under its criminal law.”<sup>15</sup> CAT doesn’t just require a state to ban torture, it also obliges it “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.”<sup>16</sup> (The convention does not require signatories to make CID a crime.) In essence, CID is a form of mistreatment that, while reprehensible, does not rise to the level of outright torture – “torture lite,”<sup>17</sup> as it were.

A pair of federal statutes incorporates these international obligations into U.S. domestic law. The first is the federal torture statute, enacted in 1994, which makes torture a criminal offense.<sup>18</sup> Torture is defined as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”<sup>19</sup> The second statute is the Detainee Treatment Act of 2005, which provides that “[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”<sup>20</sup> Unlike torture, CID is not a crime. The DTA defines CID to mean “the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States.”<sup>21</sup> This definition echoes a reservation clause the Senate adopted when it ratified CAT.<sup>22</sup>

The DTA also limits at least some interrogations to Army Field Manual techniques: “No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of

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<sup>15</sup> CAT, arts. 2, 4.

<sup>16</sup> CAT, art. 16.

<sup>17</sup> Cf. Seth F. Kreimer, “*Torture Lite*,” “*Full Bodied*” Torture, and the Insulation of Legal Conscience, 1 J. NAT. SEC. L. & POL’Y 187 (2005).

<sup>18</sup> 18 U.S.C. § 2340A(a) (“Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.”).

<sup>19</sup> 18 U.S.C. § 2340(1). The torture statute famously fails to define “severe physical . . . pain or suffering.” But it does further specify that “severe mental pain or suffering” means “prolonged mental harm caused by or resulting from” either “the intentional infliction or threatened infliction of severe physical pain or suffering,” the use or threatened use “of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality,” “the threat of imminent death,” or the threat that others will be subjected to these harms. *Id.* § 2340(2).

<sup>20</sup> DTA § 1003(a).

<sup>21</sup> DTA § 1003(d).

<sup>22</sup> See S. EXEC. REP. NO. 101-30, at \_\_\_ (1990) (announcing that the United States understands CID to mean “cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States”). The U.S. obligation under the DTA (and CAT) to avoid cruel, inhuman, and degrading treatment thus is precisely coextensive with its preexisting duty under the Constitution to refrain from cruel and unusual punishments or due process violations. This understanding of CID means that the DTA doesn’t prohibit officials from doing anything beyond what they were already prohibited from doing by the Constitution.

interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.”<sup>23</sup> Notice that the DTA’s strictures only apply to the armed forces. Conspicuously absent is any reference to persons held by the CIA. That omission leaves Langley more or less free as a matter of domestic law to use coercive techniques when questioning captured al Qaeda operatives – so long, of course, as those techniques don’t rise to the level of torture or CID. (The CIA had stopped using waterboarding in 2003, but other aspects of its coercive interrogation program remained live.<sup>24</sup>)

Executive Order 13491 plugged that loophole.<sup>25</sup> It sweepingly provides that “an individual in the custody or under the effective control of an officer, employee, or other agent of the United States Government, or detained within a facility owned, operated, or controlled by a department or agency of the United States, in any armed conflict, shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3.”<sup>26</sup> Those techniques are quite restrictive. The Army Field Manual rules out a number of interrogation methods that arguably constitute torture or CID in violation of domestic and international law, such as beatings, waterboarding, and forced nudity.<sup>27</sup> But it doesn’t stop there. It also prohibits mildly coercive techniques – i.e., methods that involve a small amount of coercion but that fall short of CID, let alone torture.<sup>28</sup> These proscribed measures include techniques that cops and prosecutors routinely use when investigating ordinary crimes.

For instance, criminal investigators frequently yell at suspects or use threats to encourage them to talk – “tell me the truth or I’ll see to it that you spend the rest of your life behind bars,” or even “we’re going to seek the death penalty if you don’t cooperate.” Those moves are now unavailable to counterterrorism interrogators; under the AFM, an official must refrain from “act[ing] as if he is out of control or set[ting] himself up as the object or focal point of the detainee’s fear.”<sup>29</sup> (The 2006 edition of the Army Field Manual eliminated the authority to use a

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<sup>23</sup> DTA § 1002(a).

<sup>24</sup> See Taylor & Wittes, *supra* note 14, at 290.

<sup>25</sup> Congress had attempted to extend the AFM restrictions to the CIA in 2008, but President Bush vetoed the bill and Congress was unable to override it.

<sup>26</sup> Exec. Order No. 13,491, § 3(b). The directive contains two possible loopholes. The first provides that officials may rely on Bush-era interpretations of interrogation laws – the “torture memos” – if “the Attorney General with appropriate consultation provides further guidance.” *Id.* § 3(c). Second, the Executive Order directs an interagency task force to study “whether the interrogation practices and techniques in Army Field Manual 2–22.3, when employed by departments or agencies outside the military, provide an appropriate means of acquiring the intelligence necessary to protect the Nation, and, if warranted, to recommend any additional or different guidance for other departments or agencies.” *Id.* § 5(e)(i). As of this writing, no publicly available information indicates that either escape valve has been activated. To the contrary, in August 2009, the task force released its finding that “the Army Field Manual provides appropriate guidance on interrogation for military interrogators and that no additional or different guidance was necessary for other agencies.” *Quoted in* Anne E. Kornblut, *New Unit to Question Key Terror Subjects*, WASH. POST, Aug. 24, 2009, at A1.

<sup>27</sup> AFM ¶ 5-75.

<sup>28</sup> Taylor & Wittes, *supra* note 14, at 295.

<sup>29</sup> AFM ¶ 8-35.

technique known as “Fear Up (Harsh),” the point of which was to “exploit[] a prisoner’s fears by behaving in an overpowering manner with a loud and threatening voice.”<sup>30</sup>) The AFM also bans the use of any sort of threat. An interrogator “must be extremely careful that he does not threaten or coerce a source,” the manual cautions, because “[c]onveying a threat may be a violation of the [Uniform Code of Military Justice].”<sup>31</sup> Third, police officers sometimes use the “good cop bad cop” routine to elicit information from suspects. The Army Field Manual severely restricts this tactic. Interrogators may not use the technique (“Mutt and Jeff”) unless they obtain prior approval from a fairly senior officer – colonel rank or higher.<sup>32</sup> The AFM thus establishes a presumption against good cop bad cop, a presumption that does not exist in the world of garden-variety law enforcement. (Even when the technique is approved, interrogators are barred from making any kind of threat,<sup>33</sup> and “[r]egular monitoring of the interrogation” is required.<sup>34</sup>)

Fourth, police officers and prison officials sometimes place captives in solitary confinement, either to maintain discipline or to apply psychological pressure that can lead the recalcitrant to cooperate. This, too, is severely restricted by the Army Field Manual. Known as “separation,” the technique may not be used at all on “EPWs”<sup>35</sup> – enemy prisoners of war, who enjoy protected status under the Geneva Conventions. Interrogators are allowed to use separation on “unlawful enemy combatants,”<sup>36</sup> including suspected terrorists, but only in certain circumstances and only pursuant to elaborate safeguards. Separation is available “by exception” – i.e., “on a case-by-case basis” – if “there is a good basis to believe that the detainee is likely to possess important intelligence and the interrogation approach techniques provided in Chapter 8 are insufficient.”<sup>37</sup> Only specially trained interrogators may use separation,<sup>38</sup> and all uses of the method must be documented (“including photographs and/or videotaping, if appropriate and available”).<sup>39</sup> Procedurally speaking, every proposed separation must undergo legal review by a member of the JAG corps, after which “the first General Officer/Flag Officer (GO/FO) in an interrogator’s chain of command [must] approve[] each specific use of separation”; the AFM emphasizes that “this is non-delegable.”<sup>40</sup> Commanders are directed to engage in “strenuous oversight to avoid misapplication and potential abuse.”<sup>41</sup> And detainees held in separation are

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<sup>30</sup> Taylor & Wittes, *supra* note 14, at 306.

<sup>31</sup> AFM ¶ 8-35.

<sup>32</sup> AFM ¶ 8-68.

<sup>33</sup> AFM ¶ 8-68 (“Although he conveys an unfeeling attitude, the HUMINT collector is careful not to threaten or coerce the source. Conveying a threat of violence is a violation of the UCMJ.”); *id.* (directing interrogators to refrain from threats).

<sup>34</sup> *Id.*

<sup>35</sup> AFM ¶ 8-18.

<sup>36</sup> AFM ¶ M-1.

<sup>37</sup> AFM ¶ M-5.

<sup>38</sup> AFM ¶ M-22.

<sup>39</sup> AFM ¶ M-23.

<sup>40</sup> AFM ¶ M-7.

<sup>41</sup> AFM ¶ M-10.

entitled to regular visits by the International Committee of the Red Cross.<sup>42</sup> Needless to say, these substantive and procedural restrictions are far more elaborate than the rules that apply in the ordinary criminal justice context.

Why did the government decide to limit all counterterrorism interrogation to the methods approved in the Army Field Manual? Given the scant public record, it's difficult to answer that question with confidence. Nevertheless, reading between the lines, one possibility can be dismissed fairly readily. It's unlikely that lawyers in the White House Counsel's Office thought they were legally required by the Convention Against Torture, the federal torture statute, or the Detainee Treatment Act to ban any interrogation technique that isn't listed in the Army Field Manual.<sup>43</sup> The more probable explanation is that, even though the government didn't think it was legally bound to limit itself to the AFM, it went farther than the law required for policy reasons.

Consider domestic law first. No publicly available evidence suggests that administration lawyers believed that yelling, minor threats, the good cop bad cop routine, solitary confinement, and other minimally coercive methods are, by virtue of their absence from the Army Field Manual, violations of the Detainee Treatment Act. (It's even less likely they believed that all non-AFM techniques ipso facto fall within the even narrower federal prohibition on torture.) As we've seen, the DTA's ban on cruel, inhuman, and degrading treatment tracks the requirements of the Fifth, Eighth, and Fourteenth Amendments. Federal courts, including the Supreme Court, generally have rejected claims that the use of prosecutorial threats,<sup>44</sup> good cop bad cop interrogations,<sup>45</sup> and solitary confinement<sup>46</sup> are unconstitutional. There are no indications that administration lawyers regarded these cases as wrongly decided – let alone that they decided to correct any such errors by expanding the rights of captured terrorism suspects (but not those of American citizens in the criminal justice system). Executive Order 13491 is broader than domestic law in a second, more mundane sense as well. The DTA only applies to detainees held by the Defense Department; the order goes considerably farther than that, extending the AFM's restrictions to all captives in American custody, including those held by the CIA.

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<sup>42</sup> AFM ¶ M-17.

<sup>43</sup> See Taylor & Wittes, *supra* note 14, at 309 (“The order eliminated not merely the latitude to conduct highly coercive interrogations, but also the latitude to use indubitably legal techniques that do not happen to be approved by the Army for use by its interrogators.”).

<sup>44</sup> See, e.g., Anderson v. Terhune, 467 F.3d 1208, 1213 (9th Cir. 2006) (denying that police coerced defendant's confession when they “threatened him with the death penalty”); Higazy v. Millennium Hotel & Resorts, 346 F.Supp.2d 430, 451 (S.D.N.Y. 2004) (holding that an FBI agent's “alleged threats, whether intended to coax a confession or arbitrarily frighten, may be the subject of proper criticism, but they are not actionable under the Fifth Amendment's due process clause”).

<sup>45</sup> See, e.g., United States v. Banks, 282 F.3d 699, 702 (9th Cir. 2002) (holding that police use of “the ‘good-cop versus bad-cop’ routine” did not violate defendant's Fifth Amendment rights), *rev'd on other grounds*, 540 U.S. 31 (2003); Delap v. Dugger, 890 F.2d 285, 295-96 (11th Cir. 1989) (rejecting as “clearly without merit” defendant's argument that “his confession was involuntary” because “police used improper ‘good cop/bad cop’ interrogation techniques”). Weidner v. Thieret, 866 F.2d 958, 962 (7th Cir.1989) (emphasizing that “[t]he ‘bad cop-good cop’ routine is of course standard”).

<sup>46</sup> See, e.g., Hutto v. Finney, 437 U.S. 678, 686 (1978) (“It is perfectly obvious that every decision to remove a particular inmate from the general prison population for an indeterminate period could not be characterized as cruel and unusual.”).

Nor did the White House likely believe that international law mandates the exclusive use of Army Field Manual methods. There are no indications that administration lawyers regarded the Senate's 1994 reservation as wrongheaded – i.e., that they believed that constitutionally permissible interrogation techniques nevertheless run afoul of our international legal obligations. Such a conclusion would have had drastic and far-reaching implications. Yelling, threats, good cop bad cop, separation, and other non-AFM tactics are staples of the law-enforcement world; they are used every day by federal, state, and local police, prosecutors, and jailers across the country. If officials did regard these techniques as per se instances of cruel, inhuman, and degrading treatment, they would be embracing the proposition that the United States is in continuous and systematic default of the Convention Against Torture. It's doubtful that such a sweeping conclusion underlies the administration's decision to restrict interrogation tactics.

The more likely explanation for Executive Order 13491, then, is that officials made a simple policy choice: We will prohibit more than the law requires us to prohibit. Rather than inching ever closer to the legal line and authorizing any interrogation technique that is even arguably permissible under domestic and international law, the government opted to stay its own hand, ruling out relatively mild coercive methods that it regarded as lawful but imprudent on policy grounds.

### *B. Targeted Killing*

A second example of self restraint in national security operations is the well known presidential ban on assassinations. In the popular imagination, the term “assassination” broadly implies singling out a specific head of state, terrorist operative, or drug kingpin for killing. Yet the United States' understanding of the prohibition – like the principles of conventional and customary international law it reinforces – is quite narrow. In the American view, both domestic and international law permit the government to undertake a wide variety of targeted killings. Yet on a number of occasions, officials have vetoed a plan to slay an adversary, or modified an operation so its apparent deadly aims could be denied plausibly. In the aftermath of 9/11 – and especially given President Obama's escalation of armed drone attacks on suspected al Qaeda operatives<sup>47</sup> – American handwringing over targeted killings may have become a thing of the past. But targeted killings remain a useful illustration of how the government sometimes prevents itself from carrying out operations that it thinks are lawful.

The domestic assassination ban traces its roots to the Church Committee's allegations that the CIA had participated in a number of assassination plots.<sup>48</sup> “In fact, no foreign leader was

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<sup>47</sup> See, e.g., Dana Priest, *U.S. Military Teams, Intelligence Deeply Involved in Aiding Yemen on Strikes*, WASH. POST, Jan. 27, 2010, at \_\_ (mentioning the Obama administration's “dramatic increase” in Predator and Reaper strikes).

<sup>48</sup> For histories of the assassination ban, see Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in *LEGISLATING THE WAR ON TERROR* 346, 370-75 (Benjamin Wittes ed. 2009); Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders*, 26 B.C. INT'L & COMP. L. REV. 1, 19-26 (2003); Tyler J. Harder, *Time to Repeal the Assassination Ban of Executive Order 12,333: A Small Step in Clarifying Current Law*, 172 MIL. L. REV. 1, 11-18 (2002); Howard A. Wachtel, *Targeting Osama bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy*, 55 DUKE L.J. 677, 695-700 (2005).

assassinated by U.S. operatives, but it was not for want of trying.”<sup>49</sup> The committee found that agency operatives were complicit in efforts to kill foreign leaders such as the Congo’s Patrice Lumumba and Cuba’s Fidel Castro, and it called for a legislative ban on all assassinations. Congress never took up the recommendation, but President Ford did. In 1976 he issued an executive order outlawing assassination, and his successors have left the prohibition in place essentially unmodified.<sup>50</sup> Executive Order 12333, the current version of the ban, categorically provides that “[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.”<sup>51</sup> That seems simple enough. But the government interprets the term assassination so narrowly that the ban has very little bite.<sup>52</sup> A brief detour through international law, whose terms the Executive Order reinforces,<sup>53</sup> will help develop the point.

Whether a targeted killing is permissible or not depends in large part on whether it takes place in war or peace.<sup>54</sup> (In addition, an otherwise lawful killing must be carried out in a way that complies with basic law-of-war requirements such as discrimination, proportionality, and necessity.<sup>55</sup>) During wartime, targeted killing is generally lawful; it only becomes a proscribed assassination if one slays one’s adversary in a “treacherous” manner.<sup>56</sup> “[T]he essence of treachery is breach of confidence” – i.e., “an attack on an individual who justifiably believes he has nothing to fear from the assailant.”<sup>57</sup> In times of peace, the definition of assassination is somewhat different: unlawfully killing a targeted person for a political purpose.<sup>58</sup> If a particular targeted killing is lawful, then, it does not count as an assassination, at least as far as the United States is concerned.<sup>59</sup>

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<sup>49</sup> Frederick P. Hitz, *Unleashing the Rogue Elephant: September 11 and Letting the CIA Be the CIA*, 25 HARV. J.L. & PUB. POL’Y 765, 775 (2002).

<sup>50</sup> President Ford’s Executive Order did not proscribe assassination as such, only “political assassination.” Exec. Order No. 11,905 § \_\_\_. Two years later, President Carter dropped the adjective “political,” thereby extending the ban to all species of assassinations. Exec. Order No. 12,036 § \_\_\_.

<sup>51</sup> Exec. Order No. 12,333 § 2.11.

<sup>52</sup> The canonical expressions of this view are a legal memorandum prepared by the Army in 1989 and a law review article published that same year by the State Department’s Legal Adviser. See W. Hays Parks, Memorandum of Law (Nov. 2, 1989) (“Parks Memo”); Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89 (1989).

<sup>53</sup> See Anderson, *supra* note 48, at 375 (describing EO 12333’s ban as “coextensive with pre-existing U.S. obligations under international law”).

<sup>54</sup> See Parks Memo, *supra* note 52, at 2-3.

<sup>55</sup> See *infra* note 82 and accompanying text; see also Anderson, *supra* note 48, at \_\_\_ (emphasizing that, in addition to satisfying the legal requirements for self defense, a targeted killing must comply with the proportionality and necessity requirements); Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT’L L. 319, 323, 331 (2004) (same).

<sup>56</sup> Parks Memo, *supra* note 52, at 4; see also Harder, *supra* note 48, at 3-4, 6-9.

<sup>57</sup> Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT’L L. 609, 633 (1992).

<sup>58</sup> See Parks Memo, *supra* note 52, at 2; Sofaer, *supra* note 52, at 116-17; see also Harder, *supra* note 48, at 5-6, 9-11.

<sup>59</sup> See Anderson, *supra* note 48, at 374.

The question then becomes what sorts of peacetime killings are lawful? The United Nations charter is a good place to start. Article 2 generally obliges members to “refrain . . . from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>60</sup> But Article 51 recognizes the right to use military force in self defense: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . . .”<sup>61</sup> The United States historically has taken a fairly broad view of the right to self defense. According to the American understanding, a state is justified in using force: (1) in response to an actual attack by an enemy; (2) to preempt an attack by an enemy (i.e., anticipatory self defense); or (3) in response to a continuing threat, such as the threat posed by terrorist groups.<sup>62</sup> For the United States, a targeted killing in self defense is lawful, and therefore is not an assassination proscribed by international law or Executive Order 12333.<sup>63</sup> Needless to say, the American interpretation is not uncontested; some observers regard most (or even all) targeted killings as unlawful, especially when directed at nonstate actors like terrorist groups or when occurring outside an armed conflict.<sup>64</sup> For our purposes, it doesn’t matter which side has the better understanding of international law. What matters is that the United States,

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<sup>62</sup> See Parks Memo, *supra* note 52, at 7-8; Sofaer, *supra* note 52, at 93-96; see also Anderson, *supra* note 48, at 366-70. This broad understanding of the right of self defense is in some tension with the text of Article 51, which allows states to use force only “if an armed attack occurs.” Cf. Pines, 84 Ind. L.J. at 651 (“Scholars are divided as to whether an armed attack must actually have occurred before a nation can deploy this right to self-defense.”). The American understanding derives from the so-called *Caroline* principle, a doctrine that originally was articulated by Secretary of State Daniel Webster in 1837 and eventually came to be recognized as a principle of customary international law. See Guiora, *supra* note 55, at 323; Wachtel, *supra* note 48, at 690-94. According to Webster, a nation is justified in resorting to preemptive force “if the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” CITE. To the extent that the modern American understanding of self defense dispenses with the requirement that the threat be imminent, it is broader even than Webster’s *Caroline* principle. See also United Nations Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston* 15 (May 28, 2010) [hereinafter *U.N. Report*] (calling the U.S. understanding of self defense “deeply contested and lack[ing] support under international law”).

<sup>63</sup> The traditional American understanding was reaffirmed most recently in a speech by Harold Hongju Koh, former Dean of the Yale Law School and currently the legal adviser at the State Department. *The Obama Administration and International Law* (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>. According to Koh, the United States is entitled under domestic and international law to use targeted killings in either of two circumstances – when “engaged in an armed conflict or in legitimate self-defense.” *Id.* Targeted killing that occurs “when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute ‘assassination.’” *Id.* Koh’s repeated use of the disjunctive “or” suggests that he sees armed conflict and self defense as separate and independent grounds for the use of targeted killing. Given that linguistic formulation, it is improbable that Koh “appeared to acknowledge that self-defense is an additional, not alternative, source of authority.” *U.N. Report, supra* note 62, at 14 n.82.

<sup>64</sup> See, e.g., Guiora, *supra* note 55, at 323 (remarking that a state’s right to use targeted killing in self defense against terrorist threats “is under extensive debate amongst international law experts and policy-makers”); Gary Solis, *Targeted Killing and the Law of Armed Conflict*, 60 NAVAL WAR COLLEGE REV. 127, 135 (2007) (“Without an ongoing armed conflict the targeted killing of a civilian, terrorist or not, would be assassination – a homicide and a domestic crime.”); *U.N. Report, supra* note 62, at 13 (“It has been a matter of debate whether Article 51 permits States to use force against non-state actors.”).



rightly or wrongly, believes that the law authorizes it to engage in targeted killing, yet it often refrained from doing so, at least until recently.

Consider the government's abortive efforts in the late 1990s to capture or kill Osama bin Laden. Over the course of that decade, bin Laden's al Qaeda network and affiliated terrorists planned and executed a series of increasingly brazen attacks on American interests around the globe. On February 26, 1993, several operatives detonated a truck bomb in the parking garage of the World Trade Center, killing six and injuring more than 1,000. Their goal had been to topple one of the twin towers into the other; they predicted a successful attack would kill as many as 250,000.<sup>65</sup> Also in 1993, followers of Omar Abdel-Rahman, a Brooklyn-based Egyptian cleric with ties to al Qaeda, concocted a plot to attack New York City landmarks, including U.N. headquarters, the Lincoln Tunnel, and the George Washington Bridge.<sup>66</sup> In 1995, operatives planned to bomb 12 U.S. airliners over the Pacific – the so-called “bojinka” plot, named after the Serbian word for “explosion.”<sup>67</sup> In February 1998, bin Laden issued a fatwa – a religious ruling – calling for violent jihad against the United States: “The judgment to kill and fight Americans and their allies, whether civilians or military, is an obligation for every Muslim who is able to do it in any country in which it is possible to do it.”<sup>68</sup> Several months later, on August 7, 1998, al Qaeda operatives detonated a pair of bombs almost simultaneously outside the American embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. The Nairobi attack claimed about 212 lives and wounded 4,000 more; the bomb in Dar es Salaam killed at least 11 and injured 85.<sup>69</sup>

By 1998 the Clinton administration had resolved to take decisive action against bin Laden's network. On August 20 – just shy of two weeks after the embassy bombings – the navy fired 75 Tomahawk cruise missiles at an al Qaeda camp in Afghanistan where bin Laden was believed to be staying, and 13 more at a Sudanese pharmaceuticals factory suspected of fashioning chemical weapons. Some 20-30 people died at the camp (though not bin Laden, who turned out not to be there); the pharmaceuticals plant turned out to be unconnected to terrorism.<sup>70</sup> After the strike, the administration considered a more comprehensive strategy for taking the fight to al Qaeda.

One obvious option would have been to subject the Saudi billionaire to a targeted killing. “There was little question at either the National Security Council or the CIA that under American law it was entirely permissible to kill Osama bin Laden and his top aides . . . .”<sup>71</sup> The

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<sup>65</sup> 9/11 COMMISSION REPORT, *supra* note 1, at 71-73; WRIGHT, *supra* note 1, at 176-79.

<sup>66</sup> 9/11 COMMISSION REPORT, *supra* note 1, at 73; WRIGHT, *supra* note 1, at 177.

<sup>67</sup> 9/11 COMMISSION REPORT, *supra* note 1, at 147; WRIGHT, *supra* note 1, at 178.

<sup>68</sup> 9/11 COMMISSION REPORT, *supra* note 1, at 47.

<sup>69</sup> 9/11 COMMISSION REPORT, *supra* note 1, at 115-16; WRIGHT, *supra* note 1, at 270-72.

<sup>70</sup> 9/11 COMMISSION REPORT, *supra* note 1, at 116-17; COLL, *supra* note 1, at 410-12; WRIGHT, *supra* note 1, at 281-82.

<sup>71</sup> COLL, *supra* note 1, at 425; *see also* 9/11 COMMISSION REPORT, *supra* note 1, at 132 (reporting the Clinton administration's belief that “under the law of armed conflict, killing a person who posed an imminent threat to the United States would be an act of self-defense, not an assassination”).

administration could have claimed that al Qaeda and the United States were in an armed conflict, and that a targeted killing therefore would not be a proscribed assassination. (Of course, many commentators doubt that a state of armed conflict can exist between a nation state and a private transnational organization like al Qaeda.<sup>72</sup>) Or the administration could have claimed that a targeted killing of bin Laden was a justified act of self defense that was intended to prevent terrorist attacks that were just around the corner, or against a continuing terrorist threat.

Yet policymakers nevertheless rejected plans to eliminate bin Laden outright. CIA officials apparently sought presidential approval for missions designed specifically to kill the al Qaeda leader. The proposal drew sharp criticism from lawyers throughout the executive branch, including in the intelligence community and the Justice Department. The lawyers favored a mission in which a team of CIA-trained Afghan surrogates would kidnap bin Laden and return him to the United States to stand trial, and that was the option that prevailed in the interagency.<sup>73</sup> It was widely understood that such an attempt would provoke a firefight between the CIA team and bin Laden's bodyguards, and that the Saudi probably would die in the crossfire. Langley called it "the Afghan ambush"; you "open up with everything you have, shoot everybody that's out there, and then let God sort 'em out."<sup>74</sup> That was acceptable, the lawyers concluded. The CIA could not set out deliberately to slay bin Laden, but he could be killed as long as his death was the accidental byproduct of an otherwise legitimate capture attempt.<sup>75</sup> The lawyers also insisted on comically conscientious measures to keep the Saudi terror master as comfortable as possible after his capture – the ergonomic chair and beard-friendly duct tape.<sup>76</sup>

Outright restrictions on targeted killing are an obvious example of self restraint, but sometimes (and more subtly) self restraint manifests itself in how the government structures and publicly defends its operations. One example is the United States' April 15, 1986 bombing raid on Libya. The two countries had engaged in occasional skirmishes after Colonel Mohammar Qaddafi in 1973 drew a "line of death" purporting to mark off the Gulf of Sidra as Libyan territorial waters. In 1981, two Libyan fighters were shot down after they opened fired on American aircraft operating below the line. In March 1986, Libyan ground forces fired on American aircraft in the Gulf of Sidra; the Americans destroyed the missile batteries and also sank a pair of Libyan naval vessels. The final straw came on April 5, when a terrorist bomb at a West Berlin nightclub killed two American soldiers. U.S. intelligence traced the attack to Qaddafi's regime, and President Reagan ordered American aircraft to bomb a number of facilities throughout Tripoli.

A targeted killing of Qaddafi may well have been permissible under the U.S. understanding of assassination. If Libya's sporadic but repeated attacks on American aircraft and servicemen had created a state of armed conflict, then a targeted killing would have been

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<sup>72</sup> See, e.g., *U.N. Report*, *supra* note 62, at 18 (describing as "problematic" the U.S. view that it is in a state of armed conflict with al Qaeda).

<sup>73</sup> COLL, *supra* note 1, at 423-28; 9/11 COMMISSION REPORT, *supra* note 1, at 131-33.

<sup>74</sup> COLL, *supra* note 1, at 378.

<sup>75</sup> COLL, *supra* note 1, at 378-79, 424.

<sup>76</sup> See *supra* note 1 and accompanying text.

lawful.<sup>77</sup> If no such state existed, a targeted killing could have been lawful under the U.S. understanding of self defense as a response to an actual attack or a continuing threat. Indeed, it appears that the goal of the American bombing raid – or at least one of its goals – was precisely to kill the Libyan strongman. Journalist Seymour Hersh later reported that nine of the 18 bombers involved in the raid were tasked with targeting Qaddafi personally, and an Air Force intelligence officer confirmed that the Libyan leader was squarely in the United States’ crosshairs: “There’s no question they were looking for Qadafi. It was briefed that way. They were going to kill him.”<sup>78</sup> Yet the administration denied it had any intention of killing Qaddafi. A few days after the attack, President Reagan said that “[w]e weren’t out to kill anybody.”<sup>79</sup>

The administration’s reluctance openly to declare its goal of killing Qaddafi probably stemmed in part from the fact that the Libyan leader survived the attack; no one likes to confess failure. But something more fundamental may have been at work as well. Although the operation’s objective was to eliminate Qaddafi, the attack was structured in a way that obscured that goal: Instead of a neat and tidy decapitation strike on Qaddafi personally, policymakers ordered a broader attack on a range of targets throughout Tripoli. That meant plausible deniability. The government could claim, with a more or less straight face, that the purpose of the attack was to serve more general military and counterterrorism objectives. In addition, the administration resorted to verbal gymnastics when publicly defending the raid. Rather than forthrightly defending its claimed right to target Qaddafi personally, officials more or less changed the subject, arguing that the strike had broader military objectives. Here is Abraham D. Sofaer, the State Department’s legal adviser, writing a few years later:

The raid was a legitimate military operation, however, in which the U.S. attacked five separate military targets, all of which had been utilized in training terrorist surrogates. Some U.S. policymakers may have been aware that Colonel Qadhafi used one of the target bases as one of several places in which he lived, but that fact did not make the base involved an illegitimate target. Nor was Colonel Qadhafi personally immune from the risks of exposure to a legitimate attack.<sup>80</sup>

The government’s failure to defend targeted killing is especially remarkable given that such a claim would have been a fairly light lift. The administration was already justifying the strike as a legitimate act of self defense under Article 51 of the U.N. charter, so it wouldn’t have required much more effort to argue that the same right of self defense justified a targeted killing of Qaddafi. Yet the government still shrunk from doing so.

### C. JAG Targeting Review

Self restraint also manifests itself in targeting review by members of the armed forces’ Judge Advocate General corps. A principal JAG responsibility is to ensure compliance with

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<sup>77</sup> *But see U.N. Report, supra* note 62, at 13 (endorsing the view that “sporadic, low-intensity attacks do not rise to the level of armed attack that would permit the right to use extraterritorial force”).

<sup>78</sup> Seymour M. Hersh, *Target Qaddafi*, N.Y. TIMES, Feb. 22, 1987, § 6 (magazine), at 17.

<sup>79</sup> Michael R. Gordon, *Reagan Denies Libya Raid Was Meant to Kill Qaddafi*, N.Y. TIMES, Apr. 19, 1986, at \_\_\_.

<sup>80</sup> Sofaer, *supra* note 52, at 119-20.

law-of-war rules such as discrimination, proportionality, and necessity. Judge advocates now sit in military targeting centers and provide advice on a real-time basis about the legality of attacking various targets. In recent years, JAG officers also have begun to review military operations not just for their legality, but for their prudence. Judge advocates sometimes recommend against strikes that are in fact lawful but that are thought to be undesirable for other reasons (e.g., the possibility that the strikes might result in unfavorable publicity). In other words, JAG lawyers sometimes impose self restraints that are more restrictive than what is required by the law of war.

To understand the role judge advocates play in military targeting, it helps to have a basic familiarity with what is alternatively known as the Law of Armed Conflict (LOAC) or International Humanitarian Law (IHL). The rules that regulate the use of military force derive both from treaties (such as the Hague Conventions of 1899 and 1907 and, more recently, the Geneva Conventions) and from various principles of customary international law (which are uncodified norms deriving from practices that states observe from a sense of legal obligation<sup>81</sup>). Among the most important of these principles are discrimination, proportionality, and necessity. *Discrimination* means that the military may not deliberately target civilians. The *proportionality* requirement holds that the armed forces must limit the amount of collateral damage inadvertently inflicted on civilian populations and structures. And under the closely related *necessity* principle, the amount of damage caused by the use of force must not be greater than is needed to achieve a legitimate military objective.<sup>82</sup>

Enter the JAG corps. Judge advocates are perhaps best known in the popular imagination as military prosecutors and defense counsel, but they also play an important role in ensuring that military operations comply with LOAC requirements. Historically, they have done so well before a given operation takes place<sup>83</sup> – for instance, by drafting rules of engagement, “the rules that operationalize the law of armed conflict in a given war or occupation.”<sup>84</sup> In modern warfare, JAG review also takes place as operations unfold.<sup>85</sup> Judge advocates thus increasingly sit alongside battlefield commanders in operations centers, where they review proposed targets in real time and offer legal advice on whether striking them would be permissible under the laws of

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<sup>82</sup> See generally Eric A. Posner, *A Theory of the Laws of War*, 70 U. CHI. L. REV. 297, 298-99 (2003); ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE* 261-66 (2007); MATTHEW WAXMAN, *INTERNATIONAL LAW AND THE POLITICS OF URBAN AIR OPERATIONS* 7-9 (2000).

<sup>83</sup> See Sulmasy & Yoo, *supra* note 7, at 1836 (indicating that JAGs traditionally were “used in a staff capacity on the ‘rear lines’”).

<sup>84</sup> Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT’L L. 1, 15 (2010).

<sup>85</sup> Dickinson, *supra* note 84, at 10 (indicating that judge advocates are now “involved in operational decision making as never before”); Charles J. Dunlap, Jr., *It Ain’t no TV Show: JAGs and Modern Military Operations*, 4 CHI. J. INT’L L. 479, 481 (2003) [hereinafter Dunlap, *TV Show*] (confirming that JAGs now provide commanders with legal advice both “before bombs start dropping” and “as operations unfold”); GOLDSMITH, *supra* note 3, at 60 (indicating that the military now “sends lawyers known as Judge Advocates General into battle alongside military commanders”); Sulmasy & Yoo, *supra* note 7, at 1836 (observing that “JAGs are now involved in every layer of the command structure during combat”).

war.<sup>86</sup> Here's how it was put by an Air Force general who oversaw combat operations during the 1998 bombing of Iraq: "I was in the [operations center] during Desert Fox. Who do you think was standing right behind me? It was my JAG."<sup>87</sup> Another judge advocate confirms that "all targets are supposed to be cleared through us."<sup>88</sup>

This expanded role was perhaps most evident in the 1999 air war over Kosovo. "One of the most striking features of the Kosovo campaign, in fact, was the remarkably direct role lawyers played in managing combat operations – to a degree unprecedented in previous wars."<sup>89</sup> The process by which targets were selected, reviewed, and engaged was as follows. NATO's Combined Air Operations Center would receive live battlefield intelligence from U-2 spyplanes about the nature and location of enemy assets, such as surface-to-air missile batteries. Targeteers would push the information out to F-15 and F-16 fighters lingering in the area, which could be ordered to acquire the targets and destroy them. JAG lawyers then weighed in on whether the proposed strikes would be consistent with the proportionality principle (calibrate civilian casualties to the importance of the mission) and the necessity principle (use no more force than needed); sometimes the missions got the thumbs-up, sometimes they didn't. "At the final stages of this process, once all the intelligence and targeting data was finalized, and often after the fighters had received the target information and began target acquisition, the [Air Operations Center] and its lawyers cancelled some strikes on these 'hot' targets over concerns for collateral damage."<sup>90</sup> Judge advocates played such an important role in targeting that one commentator later complained that "NATO's lawyers . . . became in effect its tactical commanders."<sup>91</sup>

Real-time targeting review is not an entirely new mission for the JAG corps. It is an adaptation of judge advocates' longstanding responsibility to assess military operations for LOAC compliance.<sup>92</sup> JAG lawyers are doing what they have always done, just at a different time. Yet targeting review has changed in one significant respect – the expansion of the grounds on which a judge advocate might recommend against a strike. Judge advocates apparently are no

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<sup>86</sup> JAGs do not have the formal power to veto a selected target, only to offer a legal opinion that attacking the target would not be lawful. The ultimate decision whether or not to pull the trigger always remains with the commanding officer. See Dunlap, *Military Interventions*, *supra* note 5, at 22-23; see also Amos N. Guiora, *License to Kill*, FOREIGN POL'Y, July 13, 2009 (former Israel Defense Forces legal advisor emphasizing that "the decision to strike was the commander's" and that his role was limited to offering legal advice). But JAGs' legal advice carries great weight. Only in rare circumstances would a commander order a strike over a contrary recommendation from his JAG.

<sup>87</sup> Quoted in Dunlap, *Military Interventions*, *supra* note 5, at 24.

<sup>88</sup> Quoted in Dickinson, *supra* note 84, at 16; see also Thom Shanker, *Civilian Risks Curb Airstrikes in Afghan War*, N.Y. TIMES, July 23, 2008, at \_\_ ("Air Force lawyers vet all the airstrikes approved by the operational air commanders.").

<sup>89</sup> Richard K. Betts, *Compromised Command: Inside NATO's First War*, FOREIGN AFFAIRS, Aug. 20001, at 126, 129-30.

<sup>90</sup> Dunlap, *TV Show*, *supra* note 85, at 483 n.16.

<sup>91</sup> Betts, *supra* note 89, at 129-30; see also Dunlap, *Military Interventions*, *supra* note 5, at 5 (dubbing the Kosovo war "a high-water mark of the influence of international law in military interventions").

<sup>92</sup> See Michael L. Kramer & Michael N. Schmitt, *Lawyers on Horseback: Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1428 (2008) (arguing that, "with regard to targeting issues, judge advocates have been providing advice on such matters for decades").

longer confining themselves to legal advice on whether a proposed strike would comply with the laws of war. They are also, at least in some cases, counseling commanders against attacks that would in fact be permissible under the LOAC but that judge advocates find undesirable for policy reasons.

One military lawyer has argued that, when deciding whether to approve a mission, the JAG corps should weigh “Moral, Economic, Social, and Political Factors” in addition to purely legal considerations.<sup>93</sup> That expanded role is said to be necessary because American armed forces should not just refrain from violating the laws of war. They should also refrain from any lawful action that adversaries might falsely denounce as a war crime. “Actual violations of the LOAC may not be necessary to have a detrimental effect – perceived violations can have just as deleterious effects on U.S. and coalition troops’ will to fight.”<sup>94</sup> On this view, the judge advocate’s role is not restricted to ensuring legal compliance, but extends to enriching the military’s decisionmaking process by bringing contrarian perspectives to bear. To wit, the JAG corps should “mitigate groupthink” and “challenge the majority position.”<sup>95</sup> That is not a legal responsibility as such, but it is one that lawyers – by virtue of their training as critical thinkers and their experience with adversarial litigation – purportedly are well equipped to undertake. In the same vein, other judge advocates describe themselves as “the commander’s conscience” and see their role as ensuring that the military takes “the moral high ground.”<sup>96</sup>

This understanding is hardly idiosyncratic, nor is it limited to the JAG corps. Two academic commentators argue that the need for the U.S. to be seen as complying with international law – in addition to actually complying with it – necessitates a greater role for judge advocates in targeting decisions. “[C]ommanders expect judge advocates not only to opine on the strict legality of proposed operations, but also to advise on how the operations will be perceived legally and morally – in other words, on their apparent legitimacy.”<sup>97</sup> The argument seems to be that JAG lawyers should function as a natural brake on military operations that otherwise would (lawfully) push the envelope.

Crucially, these are not claims about what is required by the laws of war.<sup>98</sup> The argument is not that the LOAC has evolved to proscribe attacks that, in past conflicts, would have been

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<sup>93</sup> Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, ARMY LAWYER, Sept. 2006, at 1, 13.

<sup>94</sup> Wheaton, *supra* note 93, at 8; *see also* WAXMAN, *supra* note 82, at xii (“Adversaries often try to prey on apparent U.S. sensitivities to casualties and collateral damage, and the potential of these effects to erode public or allied support for sustained operations.”).

<sup>95</sup> Wheaton, *supra* note 93, at 15. Of course, there is no necessary connection between mitigating groupthink and avoiding attacks with negative publicity value. If the consensus in the command center is that a lawful attack should not be ordered because adversaries might (falsely) denounce it as a war crime, a JAG following the “mitigate groupthink” imperative would argue in favor of the strike.

<sup>96</sup> *Quoted in* Dickinson, *supra* note 84, at 21.

<sup>97</sup> Kramer & Schmitt, *supra* note 92, at 1433; *see also id* at 1432 (“The reality of the twenty-first century battlefield is that judge advocates must often provide advice that goes beyond that which is strictly legal.”).

<sup>98</sup> *Cf.* Dunlap, *Military Interventions*, *supra* note 5, at 21 (“Savvy political reasoning might counsel against hitting a particular target solely out of fear of high civilian casualties, but that is altogether different from saying that the law

permissible. Nor is the argument that, as lawyers, JAG officers should be more cautious than commanders in assessing what sort of conduct is permitted by LOAC principles. Rather, commentators quite explicitly are calling for judge advocates to go beyond the law. They take as a given that the law of war does not constrain the military from mounting a particular mission, and then argue for the imposition of supplemental restrictions on that mission. JAG targeting review thus represents a classic self restraint. JAG officers are sometimes imposing limits on military operations – limits inspired by “moral, economic, social, and political” concerns – that go beyond what is strictly required by LOAC principles of discrimination, proportionality, and necessity. Operations that are concededly permissible under the laws of war nevertheless get a thumbs-down because they are objectionable on policy or other non-legal grounds.

#### *D. The Wall*

A final example of self restraint concerns information sharing. On its face, the Foreign Intelligence Surveillance Act does nothing to restrict agencies from exchanging data with one another. Yet over the course of several decades, the Justice Department applied that statute to erect a “wall” between intelligence officials and criminal investigators. Two related developments were instrumental in the wall’s construction. First, the Justice Department as a whole concluded that FISA’s surveillance tools were unavailable in situations where the government had a hybrid purpose of both collecting foreign intelligence and enforcing federal criminal laws; FISA could only be used if the government’s purpose did not have a significant law enforcement element. Second, the DOJ division responsible for overseeing FISA matters began to police the flow of information between law-enforcement officers and intelligence agents. The result was to choke off information sharing and other forms of coordination between cops and spies. The USA PATRIOT Act of 2001 proverbially “tore down the wall,” but the now moribund restrictions remain an illuminating example of how and why the government ties its own hands.

Enacted in 1978, FISA established a legal framework for wiretapping foreign national security threats. While the executive branch previously conducted such surveillance unilaterally, FISA required it to receive approval from a special tribunal known as the Foreign Intelligence Surveillance Court. FISA’s standards for electronic surveillance are similar to Title III, the federal law that governs wiretaps in ordinary criminal investigations, but they are looser in several important respects. Perhaps the most important difference is that, while criminal investigators ordinarily must establish probable cause to believe that a crime has been, is being, or is about to be committed, FISA requires only probable cause to believe that the target is a foreign power or an agent of a foreign power.<sup>99</sup> Because of FISA’s lower standards, there was a risk that investigators might use it to circumvent Title III’s more rigorous requirements.<sup>100</sup> To

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prohibits the attack.”); Sulmasy & Yoo, *supra* note 7, at 1842 (claiming that targeting review has “propelled JAGs into the arena of policy”).

<sup>99</sup> 50 U.S.C. § 1805(a)(2). See generally Orin S. Kerr, *Internet Surveillance Law After the USA Patriot Act: The Big Brother That Isn’t*, 97 NW. U. L. REV. 607, 620 (2003) (comparing the legal thresholds for government surveillance);

<sup>100</sup> Stewart A. Baker, *Should Spies Be Cops?*, FOREIGN POL’Y, Winter 1994–1995, at 36, 41–42; Nathan Alexander Sales, *Mending Walls: Information Sharing after the USA Patriot Act*, 88 TEX. L. REV. 1795, 1810–12 (2010) [hereinafter Sales, *Mending Walls*].

minimize that danger, Congress provided that FISA tools would only be available if the government certified to the FISA court that “the purpose” of the proposed surveillance was foreign intelligence.<sup>101</sup>

The first major development in the wall’s construction occurred in the 1980s, when the executive branch, along with some courts and members of Congress, began to interpret FISA as requiring that foreign intelligence be “the primary purpose” of proposed surveillance.<sup>102</sup> How did one discern purpose? A great deal hinged on that question. If a wiretap’s aim was foreign intelligence, authorities were allowed to use FISA. If not – e.g., if an intelligence-related purpose was diluted by the presence of an ancillary purpose of, say, enforcing federal narcotics laws – then FISA was off the table. Investigators would have to make do with the ordinary Title III authorities. The Justice Department answered the question by measuring the amount of information sharing between law-enforcement and intelligence officials. The more sharing there was, the less likely the primary purpose of the surveillance was to gather foreign intelligence (and the more likely the FISA court would reject the surveillance application). By contrast, the more rigidly intelligence operations were cordoned off from law enforcement, the more likely it was that the surveillance would have foreign intelligence as its primary purpose (and the more likely it was to receive the FISA court’s blessing).

This reading of FISA’s purpose requirement was not the only plausible way to parse that statutory language. As the Foreign Intelligence Surveillance Court of Review pointed out in 2002, enforcing criminal laws and pursuing foreign intelligence objectives are not mutually exclusive.<sup>103</sup> Sometimes criminal prosecution will serve the government’s intelligence needs; one way to neutralize the threat posed by a spy would be to indict him for espionage. One can imagine the Justice Department adopting a broad interpretation that would permit FISA tools to be used in a wide range of cases – and, derivatively, that would permit extensive information sharing. This is not to say that the court’s aggressive interpretation of FISA is more persuasive than DOJ’s cramped reading. What’s significant is that, instead of adopting a (plausible) reading that would have maximized its discretion to coordinate intelligence and criminal investigations, DOJ embraced an (equally plausible) interpretation that sharply limited its discretion.

By the mid-1990s the wall’s foundation had been laid. The second development occurred in 1995, when the Justice Department issued a pair of internal information-sharing directives. The first, issued by Deputy Attorney General Jamie Gorelick, applied to the parallel criminal and intelligence investigations of the 1993 World Trade Center bombing. The directive’s purpose was to “clearly separate the counterintelligence investigation from the more limited . . . criminal investigations” in order to “prevent any risk of creating an unwarranted appearance that FISA is being used to avoid procedural safeguards which would apply in a criminal investigation.”<sup>104</sup> Toward that end, DOJ directed that information uncovered by intelligence officials in the course

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<sup>101</sup> 50 U.S.C. § 1804(a)(6)(B) (19\_\_).

<sup>102</sup> See *In re Sealed Case*, 310 F.3d 717, 727 (FISCR 2002) (indicating that “the exact moment” when the Justice Department applied the primary purpose test to FISA “is shrouded in historical mist”).

<sup>103</sup> See *In re Sealed Case*, 310 F.3d at 724-25.

<sup>104</sup> Memorandum from Jamie S. Gorelick, Deputy Attorney Gen., to Mary Jo White, U.S. Attorney, S. Dist. N.Y. et al. 2 [hereinafter Gorelick Memo], available at <http://www.cnss.org/1995%20Gorelick%20Memo.pdf>.



of their investigation “will not be provided either to the criminal agents, the [U.S. Attorney’s office], or the Criminal Division” except in special circumstances. That “include[ed] all foreign counterintelligence relating to future terrorist activities.”<sup>105</sup> DOJ was quite clear that the guidelines were not an interpretation of what was required by FISA, but rather “go beyond what is legally required.”<sup>106</sup>

Though the Gorelick memo imposed severe information-sharing limits on agents working the World Trade Center investigations, they weren’t supposed to be insurmountable. The directive expressly contemplated that intelligence and law-enforcement officials would share information about their parallel investigations in certain circumstances. In particular, FBI intelligence officials were ordered to notify criminal investigators if, during their investigation of the bombing, “facts or circumstances are developed that reasonably indicate that a significant federal crime has been, is being, or may be committed.”<sup>107</sup>

The second set of guidelines, issued by Attorney General Janet Reno on July 19, 1995, applied to all DOJ criminal and intelligence investigations. It directed that criminal investigators “shall not . . . instruct the FBI on the operation, continuation, or expansion of FISA electronic surveillance.”<sup>108</sup> It further insisted that cops and spies must avoid “either the fact or the appearance of the Criminal Division’s directing or controlling the [foreign intelligence] or [foreign counterintelligence] investigation toward law enforcement objectives.”<sup>109</sup> The Reno guidelines did not impose strong limits on information sharing between cops and spies. Instead, they were aimed squarely at the one type of coordination that was likely to raise the FISA court’s hackles – criminal investigators directing an intelligence operation. Indeed, the Reno guidelines affirmatively directed cops and spies to share information in certain circumstances. Echoing the Gorelick memo, the Reno directive provided that if “facts or circumstances are developed that reasonably indicate that a significant federal crime has been, is being, or may be committed,” the FBI was to share the information with the criminal division.<sup>110</sup>

Despite these escape valves, cops and spies did not in fact exchange information freely.<sup>111</sup> A fair amount of the responsibility can be laid at the feet of the Office of Intelligence Policy and Review. OIPR is the DOJ component charged with overseeing FISA matters. Its lawyers present surveillance applications to the FISA court and otherwise represent the government in proceedings before that body. They also serve an internal screening function,

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<sup>105</sup> Gorelick Memo, *supra* note 104, at 2, 3.

<sup>106</sup> Gorelick Memo, *supra* note 104, at 2.

<sup>107</sup> Gorelick Memo, *supra* note 104, at 3.

<sup>108</sup> Memorandum from Janet Reno, Attorney Gen., to Assistant Attorney Gen. et al. § (A)(6) (July 19, 1995) [hereinafter Reno Memo], available at <http://www.fas.org/irp/agency/doj/fisa/1995procs.html>.

<sup>109</sup> Reno Memo, *supra* note 108, § (A)(6).

<sup>110</sup> Reno Memo, *supra* note 108, § (B)(1).

<sup>111</sup> See *In re Sealed Case*, 310 F.3d 717, 728 (FISCR 2002) (noting that the DOJ guidelines “provided for significant information sharing and coordination,” but “they eventually came to be narrowly interpreted . . . as requiring . . . a ‘wall’ to prevent the FBI intelligence officials from communicating with the Criminal Division regarding ongoing [foreign intelligence] investigations”).

reviewing proposed applications to ensure compliance with the applicable legal rules, and weeding out the ones they don't think will pass muster before the court.

OIPR took three steps that solidified its role as DOJ's information-sharing watchdog. First, almost immediately after the 1995 directives were issued, OIPR began applying the Gorelick memo's strict limits to *all* foreign intelligence investigations, not merely the 1993 World Trade Center investigation. The Gorelick restrictions metastasized; rules that were adopted for a single investigation came to govern all cases. "As a result, there was far less information sharing and coordination between the FBI and the Criminal Division in practice than was allowed under the department's procedures."<sup>112</sup> Second, OIPR played "gatekeeper,"<sup>113</sup> policing whatever information flow did take place. Neither the Gorelick nor Reno directives mentioned any role for OIPR in regulating exchanges of information tending to suggest "that a significant federal crime has been, is being, or may be committed." But OIPR assumed responsibility for doing so, apparently on the basis of a threat. According to the 9/11 Commission, "[t]he Office threatened that if it could not regulate the flow of information to criminal prosecutors, it would no longer present the FBI's warrant requests to the FISA Court."<sup>114</sup> OIPR used its status as the government's sole representative before the FISA court as leverage to establish a role for itself in policing internal information flow.

The office's third move was the boldest of all. At some point in late 1998, as the Justice Department was ramping up its investigation of the East Africa embassy bombings, a senior OIPR lawyer met with the chief judge of the FISA court and encouraged him to issue an order adopting the wall restrictions, solidifying them into a firm legal requirement. The judge agreed; "[t]he FISA court simply annexed the attorney general's guidelines, making the wall a matter of court order."<sup>115</sup> The court wasn't shy about enforcing those restrictions. In 2000, the court went even further. Now assisted by the same lawyer who had lobbied it to adopt the OIPR restrictions (he'd left DOJ and now was serving as the FISA court's first clerk in several decades), the court issued a standing order that "every [FBI] agent who had access to FISA-derived intelligence would have to sign a special certification, promising that none of the information would be conveyed to criminal investigators without the FISA court's permission."<sup>116</sup> In effect, the court had become OIPR's surrogate; it was enforcing as a matter of law the information-sharing limits that OIPR had developed and applied internally within the Justice Department.

It's now become conventional wisdom that the wall resulted in chronic information sharing failures. Yet it was not legally required – at least not until OIPR's crafty lobbying of the FISA court. FISA itself did not restrict information sharing. Neither did the Justice Department's internal directives – one applied only to the 1993 World Trade Center investigation, the other only barred prosecutors from directing intelligence investigations, and both allowed officials to share evidence that significant crimes were afoot. Instead, the wall was

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<sup>112</sup> 9/11 COMMISSION REPORT, *supra* note 1, at 79.

<sup>113</sup> 9/11 COMMISSION REPORT, *supra* note 1, at 78.

<sup>114</sup> 9/11 COMMISSION REPORT, *supra* note 1, at 79.

<sup>115</sup> STEWART A. BAKER, *SKATING ON STILTS* 57 (2010).

<sup>116</sup> BAKER, *supra* note 115, at 61-62.

built by bureaucratic choice. Rather than applying FISA and the 1995 directives according to their literal terms – to say nothing of aggressively construing them to have even less bite – OIPR embraced a maximalist vision of the limits on information sharing. The wall thus represents a classic case of self restraint – one element within the government imposed restrictions on other elements’ ability to conduct national security operations, restrictions that the governing law did not clearly require.

## II. SELF RESTRAINT AS RISK AVERSION

As we’ve seen, certain officials within military and intelligence agencies – general counsels, legal advisors, and other watchdogs – are responsible for ensuring that national security operations comply with the relevant constitutional, statutory, international, and other legal requirements. These players quite properly intervene to rule out missions they believe would cross a legal line. But sometimes they go beyond that basic function – ensure compliance with the law, full stop – and veto operations that, while lawful, are thought to be undesirable on policy grounds. That is, they impose self restraints that are stricter than the applicable legal norms. Why?

The answer to that question can be found in the individual and institutional incentives that color the behavior of military and intelligence officials. If we look at the government’s national security apparatus through the lenses of rational choice theory (the notion that government officials are rationally self interested actors who seek to maximize their utility<sup>117</sup>) and basic agency principles (i.e., the relationships that exist between senior policymakers and the agents they direct to act on their behalf<sup>118</sup>), what emerges is a complex system in which power is distributed among a number of different nodes. The government – or, at least, the national security community – is subdivided into various semi-autonomous entities, each of which promotes its own parochial interests within the system and, in so doing, checks the like ambitions of rival entities.<sup>119</sup> In other words, the executive branch is beset by factions and thus subject to what Professor Katyal has called the “internal separation of powers.”<sup>120</sup> These basic insights into how military and intelligence agencies operate suggest several possible explanations

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<sup>117</sup> See generally WILLIAM J. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971) (developing public choice account of administrative agency action); JAMES Q. WILSON, *BUREAUCRACY* (1991) (same); see also Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1679-80 (2006) (using rational choice principles to explain reorganization of intelligence agencies); AMY B. ZEGART, *SPYING BLIND* 1-14 (2007) [hereinafter ZEGART, *SPYING BLIND*] (using rational choice theory to explain behavior of intelligence agencies); AMY B. ZEGART, *FLAWED BY DESIGN* 12-53 (1999) [hereinafter ZEGART, *FLAWED BY DESIGN*] (using rational choice framework to explain origins and evolution of national security agencies).

<sup>118</sup> Cf. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PENN. L. REV. 101 (2009) (using a principal-agent framework to explain prosecutor accountability to the general public, victims, and other stakeholders); Sulmasy & Yoo, *supra* note 7, at 1826-31 (using a principal-agent framework to explain civilian-military relations); ZEGART, *FLAWED BY DESIGN*, *supra* note 117, at 47 (describing principal-agent relationships that exist between senior policymakers and national security bureaucrats).

<sup>119</sup> See ZEGART, *FLAWED BY DESIGN*, *supra* note 117, at 19-20.

<sup>120</sup> See generally Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

for why self restraint occurs. As elaborated in this Part, such constraints might result from systematic risk aversion on the part of senior policymakers and the agents they charge with reviewing proposed operations for compliance with domestic and international law.<sup>121</sup> In addition, as explained in Part III, self restraint might occur due to bureaucratic empire building by officials who are responsible for ensuring legal compliance.

#### A. A Simple Framework

The first possible explanation of why the government often voluntarily stays its own hand is that members of the national security community are risk averse.<sup>122</sup> That reluctance to push the envelope is not arbitrary, but rather a rational and predictable response to powerful bureaucratic incentives. Military and intelligence officials tend to eschew risk because the costs they expect to incur as a result of forward-leaning and aggressive action usually are significantly greater than the expected benefits. National security players typically have more to lose from boldness than to gain, and that asymmetry inclines them to avoid risky behavior.<sup>123</sup> While all members of the national security community exhibit risk aversion to some extent, lawyers appear to be especially timorous. Attorneys who review proposed operations for legality therefore look askance at risky missions. They tend to veto proposed interrogations, targeted killings, military strikes, and information sharing arrangements that, while strictly legal, are likely to result in propaganda campaigns by adversaries, expose officials to ruinous investigations, or worse. The result is self restraint – the government restricts itself from conducting operations that it regards as lawful because of fears that they will prove too costly.

To illustrate the problem, let's revisit our first example of self restraint. Imagine that an FBI interrogator is trying to decide whether to subject a captured al Qaeda operative to a form of mildly coercive interrogation – say, blaring the collected works of Lawrence Welk in the detainee's cell for twelve-hour periods. The interrogator hopes that exposure to Lawrence Welk's musical stylings will elicit information about planned al Qaeda attacks on the American homeland. He has received assurances from the Justice Department's Office of Legal Counsel that his plan to inflict Lawrence Welk on the captive does not violate the federal torture statute,<sup>124</sup> nor does it constitute "cruel, inhuman, or degrading treatment" under the Detainee Treatment Act.<sup>125</sup> A rational FBI official will undertake the interrogation if his expected benefits

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<sup>121</sup> Cf. James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 376 (James Q. Wilson ed. 1980) ("Government agencies are more risk averse than imperialistic. They prefer security to rapid growth, autonomy to competition, stability to change.").

<sup>122</sup> This article uses the term "risk averse" in a particular sense. I do not argue that, when faced with costs and benefits of equal expected magnitude, officials in the national-security community will tend systematically to assign greater weight to the costs. My argument is that, in many cases, the officials' expected costs are in fact greater than their expected benefits.

<sup>123</sup> See generally GOLDSMITH, *supra* note 3, at 92-95 (indicating that national security officials tend to be risk averse); Nathan Alexander Sales, *Share and Share Alike: Intelligence Agencies and Information Sharing*, 78 *GEO. WASH. L. REV.* 279, 325-30 (2010) [hereinafter Sales, *Share and Share Alike*] (offering rational choice explanation for risk aversion among intelligence agencies).

<sup>124</sup> 18 U.S.C. § 2340.

<sup>125</sup>

exceed his expected costs. What does he anticipate he'll gain if the questioning successfully elicits information about ongoing al Qaeda plots? And what does he anticipate he'll lose if the session goes badly – either because it fails to uncover the information sought or because the interrogation becomes controversial when the public learns about it in the future?

## 1. Benefits

The benefits side of the ledger is fairly slight. Start with the expected benefits of a successful interrogation to the FBI as a whole. The bureau is likely to gain prestige in the eyes of senior policymakers such as the president, who will be grateful for the actionable intelligence the bureau has provided. Those prestige gains in turn may translate into more influence over policymakers (i.e., the White House will give greater weight to the FBI's recommendations than to those of sister agencies), enhanced autonomy (i.e., it will be easier for the bureau to pursue its own priorities), and larger agency budgets.<sup>126</sup> In addition, the FBI's reputation may improve among officials at other agencies who learn about the successful interrogation. The CIA, the Pentagon, and other national security players may develop a greater admiration for the FBI as an agency that can get the job done. Note, however, that any interagency prestige gains are likely to be slight. Classification and compartmentalization requirements – rules that are designed to segregate sensitive data and minimize the risk of espionage and leaks – will keep knowledge of the FBI's accomplishment from being widely distributed.<sup>127</sup> Only officials who have the necessary clearances and the requisite “need to know” will be told. Moreover, barring an unauthorized leak, the general public may never learn of it.

Now consider the expected benefits from the individual FBI official's standpoint. While the bureau stands to gain from a successful interrogation, the interrogator himself is unlikely to capture a meaningful portion of the benefits that accrue to the agency as a whole. The FBI's gains – greater influence, enhanced autonomy, larger budgets, and so on – will be distributed among all of the agency's employees. The responsible official's per capita share will be fairly small. In other words, a successful operation will produce benefits that largely will be externalized onto the agency as such.

Nor is the official likely to gain much prestige from his success in the interrogation room. The information-access rules that limit dissemination of the FBI's breakthrough will just as severely restrict data about the interrogator's role in achieving that breakthrough. The resulting intelligence assessments that circulate among military and intelligence officials most likely will say something like “According to FBI reporting . . .,” omitting the name of the responsible official. As a result, the interrogator can expect to gain little, if any, prestige from his peers; the more likely outcome is that he toils away in thankless anonymity. (He may, however, receive other forms of psychic income. More on this in a moment.<sup>128</sup>) He also is unlikely to receive more tangible rewards. Government agencies generally don't offer sizable cash bounties to high-performing employees – certainly nothing on the order of the million-dollar bonuses that might

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<sup>126</sup> See *infra* Part III.A (arguing that military and intelligence agencies seek to maximize their influence and autonomy).

<sup>127</sup> See MARK M. LOWENTHAL, *INTELLIGENCE: FROM SECRETS TO POLICY* 153-54 (4th ed. 2008).

<sup>128</sup> See *infra* note 157 and accompanying text.

be handed out in the private sector. He might be promoted to a job that involves more responsibility, or that is located in a more desirable city. But even so there are limits, since the most prestigious government jobs are reserved for political appointees, not careerists.<sup>129</sup> Moreover, any new post probably won't carry a significantly higher salary, since government salaries typically top off at relatively modest levels (at least compared to the salaries the private sector can offer to superstar employees).<sup>130</sup>

## 2. Costs

The expected benefits of a successful operation thus are fairly modest. The expected costs of an operation gone awry, by contrast, could be considerable indeed. Suppose that the FBI's interrogation of the al Qaeda captive is a failure; suppose that the techniques the questioner used are leaked and ignite a public controversy. What sorts of costs would result?

For starters, national security operations can impose significant propaganda costs on the entire nation. Adversaries might charge the United States with flouting fundamental domestic and international prohibitions on torture.<sup>131</sup> Domestically, such claims can demoralize the public, sapping its willingness to see the conflict through to its completion. War crimes allegations also can trigger a popular outcry against the administration that is responsible for them, eroding its ability to mobilize public opinion in support of its policy goals.<sup>132</sup> Such accusations also can have dire implications abroad, as they weaken the United States' moral standing in the eyes of the international community. If a country is regarded as a human rights outlaw, its allies will be less willing to lend a hand – or at least less willing to be seen publicly as lending a hand.<sup>133</sup> An accused country's reputation among neutral nations may wane even more precipitously. Note that actual violations are not necessary for these propaganda costs to accrue; the mere perception, even inaccurate, that American forces committed war crimes will be harmful.<sup>134</sup>

These costs can be internalized fairly easily onto the agency that is responsible for them, causing it to lose its pull with the White House, surrender turf to bureaucratic rivals, and suffer employee demoralization. Claims that FBI officials have engaged in torture would have

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<sup>129</sup> See Richard A. Posner, *From the New Institutional Economics to Organization Economics*, 6 J. INSTITUTIONAL ECON. 1, 15-16 (2010).

<sup>130</sup> See Posner, *supra* note 129, at 16.

<sup>131</sup> Al Qaeda operatives are trained to allege, in court and elsewhere, that their captors have abused them. See Yin, *supra* note 5, at 880-81. In particular, an al Qaeda training manual instructs detainees “[a]t the beginning of the trial” to “insist on proving that torture was inflicted on them by State Security.” Al Qaeda Training Manual, lesson 18. The manual further directs captured operatives to “complain of mistreatment while in prison.” *Id.*

<sup>132</sup> See Dunlap, *Military Interventions*, *supra* note 5, at 11 (“Rather than seeking battlefield victories, *per se*, challengers try to destroy the will to fight by undermining the public support that is indispensable when democracies like the U.S. conduct military interventions.”).

<sup>133</sup> See Anderson, *supra* note 48, at 378; Daniel Byman & Matthew Waxman, *Defeating US Coercion*, 41 SURVIVAL 107, 111 (1999); Taylor & Wittes, *supra* note 14, at 325.

<sup>134</sup> Dunlap, *TV Show*, *supra* note 85, at 482; Kramer & Schmitt, *supra* note 92, at 1409; Wheaton, *supra* note 93, at 8.

devastating consequences for the bureau. Torture is repellant to most members of the public (especially elite opinionmakers)<sup>135</sup> and accusations that the FBI committed that crime would render it politically radioactive. For reasons of self preservation, the President and his advisors would rush to distance themselves from the toxic agency, causing the FBI to forfeit much of its influence over senior policymakers. This evaporation of White House support also would encourage the FBI's bureaucratic rivals – the CIA, the Pentagon, and others – to poach some of its turf, as they calculate that a weakened bureau won't be able to fend off their raids. Finally, FBI personnel would become demoralized; the negative publicity surrounding their employer's alleged crimes would distract them from their daily jobs and inspire doubts about the worthiness of their agency's mission.

This is not a mere hypothetical. Comparable harms appear to have befallen the CIA in the wake of allegations that the agency subjected several al Qaeda detainees to harsh interrogation techniques, including waterboarding, in violation of domestic and international prohibitions against torture. For instance, the CIA lost a good chunk of turf in 2009 when the White House reassigned responsibility for counterterrorism interrogations to an interagency task force that is headed by its rival the FBI.<sup>136</sup> (The task force, which is known as the High-Value Detainee Interrogation Group, bears the improbable acronym "HIG.") The CIA also lost a highly publicized battle with the Justice Department when the White House decided, over its strenuous objections, to release classified memos describing its interrogation methods.<sup>137</sup> And morale among CIA employees plummeted in the wake of the interrogation scandals.<sup>138</sup>

Allegations of war crimes and other legal violations thus can impose crippling propaganda costs on the agency that stands accused of committing them. What of individual employees? Again, the costs that accrue to the agency as a whole could be internalized fairly easily onto the officials who are responsible for them. The FBI could fire our hypothetical interrogator. Embroiling your employer in an international war-crime scandal probably would be sufficient cause for termination, even under the government's relatively forgiving employment rules. Or, if the official isn't fired outright, informal peer pressure could induce him to resign. Even if the official toughs it out, he might find himself demoted to a less prestigious and lower paying position, or transferred to an undesirable job in the remote hinterlands.

Termination and demotion are only the beginning. An official could face ruinous criminal proceedings as prosecutors and agency inspectors general look into whether his conduct in the interrogation room, or on the battlefield, was unlawful.<sup>139</sup> At worst, the official could find

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<sup>135</sup> Cite 2008 polling data on waterboarding.

<sup>136</sup> Kornblut, *supra* note 26, at A1.

<sup>137</sup> Mark Mazzetti & Scott Shane, *Memos Spell Out Brutal C.I.A. Mode of Interrogation*, N.Y. TIMES, Apr. 17, 2009, at A1.

<sup>138</sup> See, e.g., Mark Hosenball, *Too Little for Langley?*, NEWSWEEK, Apr. 20, 2009, at \_\_; Robert Baer, *The CIA and Interrogations: A Bad Fit from the Start*, TIME, Aug. 28, 2009, at \_\_.

<sup>139</sup> Note that information-access rules won't offer much of a shield to these investigations. The classification and compartmentalization requirements that would restrict dissemination of information about the official's role in a successful interrogation wouldn't be an obstacle to inspectors general or criminal investigators. They would simply be "read into" the relevant compartments as necessary to determine whether any crimes were committed. Thus we

himself behind bars for violating the federal torture statute or the Uniform Code of Military Justice. Regardless of the outcome at trial, he will have incurred massive debt to defend himself against the charges, and it's by no means certain that his former employer will reimburse him for his legal fees. (Some counterterrorism officials have even been buying liability insurance policies as a hedge against the day they find themselves haled into court.<sup>140</sup>) Plus, the years of investigation and prosecution will take a significant emotional toll on him and his family, even if he prevails in court and ends up having no out-of-pocket expenses.<sup>141</sup>

And that's just the domestic side. If the official escapes the notice of American courts, he still could face investigation and prosecution before an international tribunal or a foreign court claiming universal jurisdiction<sup>142</sup> – the notion that a country may try certain alleged violations of international law regardless of where in the world they occurred.<sup>143</sup> Such litigation is a fairly recent development. Traditionally, the requirements of international law were enforced by one state against another state. If Imperial Japan violated, say, the LOAC discrimination principle by targeting Chinese civilians during WWII, the victims themselves had no real remedy. The only recourse would be for China to protest Japan's actions through diplomatic channels. Legal norms also were enforced through international public opinion. A scofflaw state would incur reputational costs – it would lose legitimacy in the eyes of its peer nations.<sup>144</sup> These traditional enforcement devices now are supplemented by a third mechanism: Governments and private parties have begun to enforce international legal requirements directly against officials who are accused of flouting them. There is now a very real prospect that an alleged war crime will result not just in an angry diplomatic demarche or bad publicity, but also in personal legal liability for the officials thought to be responsible.

Often, it's political and military leaders who find themselves in the litigation crosshairs. In 2004, a group of Iraqis appeared before a Belgian court to file criminal complaints against President George H.W. Bush, Chairman of the Joint Chiefs of Staff Colin Powell, and General Norman Schwarzkopf. The complainants sought redress for war crimes allegedly committed by American forces during the 1991 Gulf War. (The case was dismissed after the United States threatened to relocate NATO from Brussels.) A second example comes from Israel. In 2002, the Israeli air force dropped a one-ton bomb on the home of Salah Shehadeh, Hamas's military leader in the Gaza Strip. In addition to its intended target, the bomb killed 14 civilians

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have another asymmetry: The compartmentalization rules that prevent officials from gaining prestige from a successful interrogation will not protect them from the fallout of an unsuccessful interrogation.

<sup>140</sup> See GOLDSMITH, *supra* note 3, at 95-96.

<sup>141</sup> See GOLDSMITH, Afterword to paperback edition (“The ordeal of answering subpoenas, consulting lawyers, digging up and explaining old documents, and racking one’s memory to avoid inadvertent perjury is draining, not to mention distracting, for those we ask to keep our country safe.”).

<sup>142</sup> Dickinson, *supra* note 84, at 14 (reporting judge advocates’ concerns that coercive interrogation “puts the interrogators and the chain of command at risk of criminal accusations abroad”).

<sup>143</sup> See generally Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183, 190-92 (2004).

<sup>144</sup> *But see* Posner, *supra* note 82, at 309 (denying that “reputational concerns . . . have *much* influence on the conduct of states during war, but they might have *some* influence”).



(including Shehadeh's wife and three of their children) and injured some 150 other bystanders.<sup>145</sup> Several Palestinians later petitioned Spain to open a criminal investigation of the Israeli military and political leaders who ordered the strike. In 2009, a Spanish prosecutor obliged, asserting the power to investigate alleged war crimes anywhere in the world under principles of universal jurisdiction. (The case was later dismissed.)<sup>146</sup>

In addition to senior policymakers, sometimes ordinary soldiers and spies can find themselves in the dock. During an April 2003 battle in the streets Baghdad, a team of U.S. Marines believed that they were taking enemy fire from the nearby Palestine Hotel. They obtained permission to engage and shot back. It turned out that the hotel actually was housing more than 100 journalists who were observing the firefight. One of them – a Spanish cameraman named Jose Couso – was killed. The journalist's family filed a criminal complaint in 2003 against the soldier who fired the fatal shot, the officer who gave the order, and their commanding officer. On July 26, 2010, the Spanish National Court ordered "the three men to appear in its courtroom or face extradition."<sup>147</sup> More recently, in 2009, an Italian court convicted 23 Americans (most of whom were covert CIA operatives) of abducting a suspected terrorist in Milan and rendering him to Egypt to face interrogation.<sup>148</sup>

Civil lawsuits appear to be as common as criminal proceedings. After the strike on Salah Shehadeh, an activist group named the head of Israel's General Security Service in a federal civil suit, alleging violations of the Alien Tort Claims Act and the Torture Victim Protection Act. (The case was eventually dismissed.)<sup>149</sup> In 2004, family members of a Chilean army officer brought a civil action against former National Security Advisor Henry Kissinger, alleging that the CIA was responsible for his death in the course of a 19\_\_ kidnapping operation.<sup>150</sup> Civil litigation also arose after NATO forces in April 1999 bombed Radio Television Serbia, a facility that both served as a military communications relay and was used to broadcast Serbian government propaganda. Sixteen people were killed and another 16 were injured. Lawyers representing the victims filed civil lawsuits before the European Court of Human Rights, as well as the U.N. International Criminal Tribunal for the Former Yugoslavia. (Both suits ultimately were dismissed.)<sup>151</sup>

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<sup>145</sup> Gabriella Blum & Philip B. Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SEC. J. 145, 152-53 (2010).

<sup>146</sup> See generally Sharon Weill, *The Targeted Killing of Salah Shehadeh: From Gaza to Madrid*, 7 J. INT'L CRIM. JUSTICE 617 (2009).

<sup>147</sup> Lisa Abend, *Spanish Court Seeks Arrest of U.S. Soldiers in Hotel Attack*, TIME, July 29, 2010, at \_\_.

<sup>148</sup> Rachel Donadio, *Italy Convicts 23 Americans for C.I.A. Renditions*, N.Y. TIMES, Nov. 4, 2009, at \_\_.

<sup>149</sup> See *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007), *aff'd*, 563 F.3d 9 (2d Cir. 2009).

<sup>150</sup> Pines, 84 Ind. L.J. at 652-53; 412 F.3d 190 (D.C. Cir. 2005).

<sup>151</sup> See Dunlap, *Military Interventions*, *supra* note 5, at 14; GOLDSMITH, *supra* note 3, at 61-62.

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In sum, substantial asymmetries exist between the expected costs and expected benefits of national security operations.<sup>152</sup> An official contemplating whether to undertake an aggressive, forward-leaning operation will know that there isn't much in it for him, even if everything goes according to plan. Maybe he gets a modest cash bonus or a promotion, but that's about it. If the operation goes poorly – if it fails to achieve its objective, or if it results in a firestorm of public controversy – the official knows that his agency's neck (and therefore his own) will be on the chopping block. A misbegotten operation can undermine an agency's influence, turf, and morale. The best case scenario for the responsible official is that he only loses his career; the worst is that he ends up in jail. That gap between expected costs and benefits creates strong incentives for national security players to avoid bold action. Rational officials will tend to simply play it safe.<sup>153</sup>

### *B. A More Sophisticated Framework*

The simple framework of bureaucratic risk aversion sketched out above has some explanatory power, but it is incomplete. It does not account for the fact that different national security players apparently have different appetites for risk. The senior policymakers who authorize military and intelligence missions, and the lawyers who review those operations, both seem more risk averse than the operators who actually carry them out. Here's the puzzle in a nutshell. Operators are risk averse, and we therefore should expect them naturally to eschew missions that threaten to expose them to bureaucratic embarrassment, criminal liability, or other significant costs. Their baseline aversion to risk should be enough to predispose them against such missions; it shouldn't be necessary for other officials to wield the veto pen. Yet that is exactly what happens. In 2009, the intelligence community sought permission to use some forms of coercive interrogation in counterterrorism investigations, only to be overruled by White House lawyers. In the late 1990s, the CIA drew up plans to kill Osama bin Laden but policymakers declined to give the go-ahead. Members of the JAG corps sometimes recommend against strikes that battlefield commanders wish to undertake. And Justice Department lawyers strictly regulated information sharing sought by FBI criminal investigators in the years before 9/11.

A more sophisticated account of risk aversion is needed to resolve this apparent paradox. In particular, what's needed is a theory that can explain why different types of national security officials have more or less tolerance for risk. The framework developed below suggests that lawyers will tend to be more risk averse than operators – and therefore will tend to veto contemplated missions that operators would prefer to undertake – because they systematically assign less weight to the benefits of a successful operation and greater weight to the costs. In particular, lawyers' cost-benefit calculations do not account for the psychic income that operators expect to receive from a job well done; by contrast, lawyers do account for certain

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<sup>152</sup> Cf. Posner, *supra* note 129, at 16 (arguing that a national security official's "monetary salary may not be high enough to compensate for a loss of nonpecuniary income as a result of public criticisms, frequent shakeups in the managerial ranks, increased job pressures, or other adverse features of the work environment").

<sup>153</sup> Cf. Wilson, *supra* note 121, at 378 (referring to administrative agencies' "defensive, threat-avoiding, scandal-minimizing instincts").

costs that operators tend to ignore – the costs a mission can entail for policymakers’ broader strategic priorities. That divergence between the welfare functions of lawyers and operatives lies at the root of the government’s tendency to impose restraints on itself.

For purposes of this analysis, the government’s national security apparatus may be subdivided into three categories. First are the *policymakers*, the senior executive branch officials who authorize various military and intelligence operations (the Attorney General, the Secretary of Defense, the President, etc.). *Operators* are the officials who actually carry them out (military commanders in the field, members of covert CIA strike forces, FBI electronic surveillance teams, and so on). *Reviewers* – who are often but not always lawyers – are the officials who scrutinize planned operations for consistency with domestic and international legal requirements (the JAG corps, the Justice Department’s OIPR, the White House Counsel’s Office, and so forth).

These three categories of personnel comprise a sort of principal-agent relationship.<sup>154</sup> Policymakers are the principals. Policymakers who are contemplating a national security operation will have a pair of complementary interests, roughly speaking. First, they want to accomplish the military or intelligence objective the mission is meant to achieve; second, they want to do so in a way that does not offend any applicable principle of domestic or international law. Operators and reviewers are the agents. Operators are responsible for achieving the principals’ first goal – mission success. Reviewers are responsible for the second – legal compliance. Neither agent receives a comprehensive commission to act as the principals’ surrogate. Instead, responsibility for achieving policymakers’ twin objectives is bifurcated among the two sets of agents.

To simplify the analysis, I will assume for now that no agency slack exists between the policymaker-principals and their reviewer-agents.<sup>155</sup> In other words, the interests of the reviewers and the policymakers are assumed to be identical. Or, to say something similar, it is assumed that policymakers are able to monitor comprehensively, and without cost, the performance of their reviewer-agents. Reviewers thus will approve or reject a proposed operation only to the extent that it would respectively advance or hinder the policymakers’ interests. The reviewers’ distinct and parochial interests will not influence the decision, for by stipulation they have no such interests. Therefore, if policymaker-principals are risk averse, their reviewer-agents will be too. Any aversion to risk on the part of the reviewers is not an independent preference, but rather is derivative of the policymakers’ own risk aversion.<sup>156</sup> (Note

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<sup>154</sup> See sources cited *supra* note 118.

<sup>155</sup> See Posner, *supra* note 129, at 5-6, 8 (discussing agency costs); ZEGART, *FLAWED BY DESIGN*, *supra* note 117, at 47 (same).

<sup>156</sup> My assumption of a synergy between the interests of policymakers and reviewers is concededly unrealistic. Reviewer-agents typically will have their own set of personal and institutional interests, and those interests sometimes will diverge from those of their policymaker-principals. In addition, it is costly for policymakers to monitor the performance of reviewers, which creates opportunities for the latter to shirk. In particular, reviewers will pursue their own interests at the expense of their principals’ whenever their expected benefits of doing so, discounted by the probability of detection, exceed their expected costs. Later, I will relax this assumption and allow for reviewers to pursue their own parochial interests. That more realistic picture of how different sets of interests interact within the national-security apparatus will suggest another possible reason for self restraint – bureaucratic empire building on the part of entities charged with enforcing legal norms. See *infra* Part III.

that I am not making a parallel assumption that the interests of policymakers and *operators* converge. As elaborated below, this analysis allows operators to pursue their own unique interests, sometimes to the detriment of policymakers.)

On occasion, a dispute will arise between the two sets of agents as to whether a proposed operation would enhance or reduce the welfare of the policymakers. When weighing the expected costs and benefits of a particular military or intelligence operation, both operators and reviewers will start from a baseline of risk aversion. Yet sometimes they will reach different conclusions about the respective magnitude of the mission's expected costs and benefits. Operators might look at a proposed mission and conclude that its benefits outweigh its costs. Reviewers might look at the same mission and conclude that its costs outweigh its benefits. What accounts for the difference?

One explanation is that operators may expect to reap greater net benefits from the proposed mission than policymakers do. For starters, operators might anticipate large amounts of psychic income from a successful mission – exhilaration from participating in a paramilitary strike on Osama bin Laden's Tarnak Farms compound, satisfaction at using a Predator drone to launch a Hellfire missile into a convoy of al Qaeda leaders, and so on.<sup>157</sup> The psychic income from a successful mission typically accrues only to the operators who actually participate in it. It does not accrue to the policymakers, who played no part in the actual conduct of the mission. An operator's expected benefits may be greater than a policymaker's expected benefits, and that asymmetry can skew the former's preferences in favor of missions that are disadvantageous from the latter's standpoint.<sup>158</sup> Relatedly, the expected costs of a given operation might be greater for policymakers than for operators. Policymakers have wider strategic lenses than operators do; they're not just interested in whether a proposed mission will achieve its objective, they also worry about whether the mission will hinder their broader strategic priorities. Snatching a suspected al Qaeda leader from the streets of London may eliminate a threat, but it also threatens to complicate the United States' diplomatic relations with the United Kingdom, European Union, and United Nations. Operators tend to ignore, or at least discount, these strategic costs.

As a result, a given mission might be welfare-enhancing (benefits > costs) for operators but welfare-reducing (costs > benefits) for policymakers. In these circumstances, reviewers – whose interests are assumed to be identical to policymakers' – will veto the proposed operation,

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<sup>157</sup> See Sales, *Share and Share Alike*, *supra* note 123, at 327-28 n.250 (speculating that military and intelligence operatives may receive significant psychic income from successful missions, income that does not accrue to intelligence analysts or other members of the national-security community). Cf. Posner, *supra* note 129, at 20 (“[T]he type of person who operates undercover, runs spies, organizes coups, and engages in or manages other risky clandestine activities is likely to have a different psychology from a deskbound intelligence analyst.”).

<sup>158</sup> The psychic income that operators anticipate from successful missions may be partially offset by a form of “approval income” that accrues to policymakers, at least in some cases. A successful operation that proves popular with the public can bolster a policymaker's public approval ratings. That windfall may result in political capital that the official can expend to advance his policy agenda, foreign or domestic. For a first-term president, a successful operation can improve his reelection prospects, and a popular cabinet official is more likely to stay in office than an unpopular one. These forms of income probably do not accrue to front-line military and intelligence operators, whose job prospects ordinarily do not depend on public opinion. If policymakers anticipate that a proposed operation will yield approval income, the ordinary gap between their expected benefits and those of operators will narrow, and may even disappear.

maximizing policymakers' utility at the expense of operators' utility.<sup>159</sup> In effect, reviewers initiate a wealth transfer, limiting the welfare of operators and shifting it to policymakers.<sup>160</sup>

To see this dynamic in a concrete setting, let's return to our hypothetical interrogation. The FBI official (an operator-agent) might calculate that the benefits of his plan to inflict Lawrence Welk on the al Qaeda captive outweigh the costs. He is well aware that an interrogation gone wrong could result in embarrassment for his agency and criminal liability for himself. But he also anticipates receiving significant amounts of psychic income if the interrogation succeeds – namely, intense satisfaction from breaking an al Qaeda member and inducing him to come clean. By contrast, a lawyer in the FBI chief counsel's office (a reviewer-agent) might conclude that the costs outweigh the benefits. The cost side of the ledger is stacked. Policymakers – especially the FBI director and the Attorney General – will worry that leaked reports about the coercive interrogation will render the FBI politically radioactive, undermine America's moral standing in the international community, deter allies and neutrals from offering assistance to the United States, and so on. As for the benefits, policymakers do not capture the psychic income that accrues to the FBI agent in the interrogation room, so the reviewer will exclude it from the cost-benefit calculus. Given the relative magnitude of the costs, policymakers will regard the interrogation as welfare-reducing. The reviewer therefore will veto it.

### C. *Costs, Benefits, and Self Restraint*

How does the risk aversion of national security officials – including the relatively greater timidity of policymaker-principals and their reviewer-agents – result in self restraint? Reviewers will veto military and intelligence operations when they calculate that policymakers' expected

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<sup>159</sup> Sometimes reviewers may actually have greater appetites for risk than operators. For instance, during the Nixon administration, a young NSC lawyer named David Young crafted a legal memorandum that justified widespread domestic surveillance of political dissidents and others deemed to be subversive. The president, much taken with Young's analysis, circulated it among his national security cabinet. J. Edgar Hoover – no shrinking violet when it came to domestic surveillance – demurred, eventually succeeding in having the memo withdrawn. (Hoover didn't have any problem with monitoring dissidents; it's just that he didn't want a paper trail.) *See generally* \_\_\_. What accounts for the unexpected result that reviewers sometimes are more aggressive and forward-leaning than operators – i.e., that lawyers sometimes function as “policy entrepreneurs”? WILSON, *supra* note 117, at 242. Perhaps some reviewers derive psychic income from pushing the envelope. They may experience intense intellectual satisfaction from solving a thorny legal problem, or intense ideological satisfaction at seeing their legal views and policy preferences embraced by senior officials. In these circumstances, lawyers may find that an operation's benefits exceed its costs notwithstanding the very different cost-benefit conclusion reached by operators.

<sup>160</sup> There is another possible explanation for the divergence between operators' and reviewers' cost-benefit calculations: cognitive failures. Cognitive failures might cause operators mistakenly to pursue missions whose costs *to them* are in fact greater than the benefits *to them*. Operators might become so emotionally invested in a planned mission that they overestimate the amount of psychic income they stand to gain from a success. Alternatively, their intense attachment to the mission could cause them to underestimate the likelihood that it might expose them to criminal sanctions and other costs. (There is some anecdotal evidence that intelligence operatives' judgment may in fact be effected by their emotional commitments. In the 1990s, CIA's bin Laden unit was known as the “Manson family” – a macabre reference meant to convey their single-minded devotion to capturing the Saudi billionaire at almost any cost. *See* COLL, *supra* note 1, at 454.) Reviewers, by contrast, may not be as emotionally invested in the proposed operations. As a result, they may be able to calculate the expected costs and benefits *to the operators* more accurately.

costs will exceed their expected benefits. And as we've seen, those costs can be considerable. If an adversary (falsely) alleges that a (lawful) mission offended some principle of domestic or international law, that (false) accusation could undermine global perceptions of American legitimacy, compromise diplomatic relations with allies and neutral states alike, and weaken support among key domestic constituencies. The accusation could cause the responsible agency to lose influence with the White House, surrender turf to bureaucratic rivals, and suffer poor employee morale. And officials could even find themselves indicted at home or abroad for war crimes. Reviewers therefore tend to supplement legal restrictions with self imposed constraints: They rule out operations that the United States regards as perfectly legal but that are deemed too costly.

As an example, consider the government's decision to restrict all interrogations to the methods spelled out in the Army Field Manual. The White House probably believed that the U.N. Convention Against Torture, the federal torture statute, and the Detainee Treatment Act permit counterterrorism interrogators to use the same sorts of techniques that law-enforcement officials use on a routine basis – shouting, prosecutorial threats, the good cop bad cop drill, solitary confinement, and the like. These non-AFM techniques may be unsavory, but they likely do not offend the international or domestic proscriptions on torture and cruel, inhuman, and degrading treatment – at least as those legal requirements are understood by the United States. Yet officials nevertheless restricted them. Why?

One possible explanation is risk aversion on the part of the White House. For the CIA officials responsible for questioning captured al Qaeda operatives, the ability to use mildly coercive interrogation techniques was welfare-enhancing. Interrogators believed that non-AFM methods increased their chances of breaking captives and inducing them to talk.<sup>161</sup> That in turn would yield the interrogators significant psychic income – namely, feelings of satisfaction at having advanced the CIA's mission of detecting and disrupting terrorist plots against U.S. interests. (The claim that coercive interrogation can yield actionable intelligence is, of course, hotly contested,<sup>162</sup> but there is little doubt that at least some CIA officials believed it to be true.)

But from the standpoint of administration policymakers – and, therefore, from the standpoint of administration lawyers – the benefits of allowing even modestly coercive interrogations were dwarfed by the costs. For the White House, the propaganda costs of allowing intelligence officials to continue interrogating outside the Army Field Manual framework must have seemed astronomical. The George W. Bush administration had outraged international opinion by authorizing coercive CIA interrogations, and the new team feared that failing to make a clean break would compromise their efforts to strengthen ties with Middle

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<sup>161</sup> Cf. Michael Hayden & Michael B. Mukasey, *The President Ties His Own Hands on Terror*, WALL ST. J., Apr. 17, 2009, at \_\_\_ (former CIA Director and former Attorney General arguing that severely coercive CIA interrogation techniques, such as waterboarding and prolonged sleep deprivation, can result in actionable intelligence, and claiming that “fully half of the government's knowledge about the structure and activities of al Qaeda came from those interrogations”).

<sup>162</sup> See Wittes & Taylor, *supra* note 14, at 310-26 (reviewing arguments for and against the effectiveness of coercive interrogation).

Eastern and Muslim nations.<sup>163</sup> Then there were the expected legal costs. Policymakers must have been aware that foreign prosecutors, invoking principles of universal jurisdiction, might pursue criminal investigations into whether their predecessors violated international law by approving waterboarding and other harsh interrogation tactics.<sup>164</sup> A similar fate might befall them if they allowed minimally coercive techniques to persist. The benefits side of the ledger must have looked paltry by comparison. Policymakers probably feared that coercive interrogation wouldn't result in useful intelligence, since captives would simply confess to whatever their questioners wanted to hear in order to bring the ordeal to an end.<sup>165</sup> And the specific techniques the AFM restricted – shouting, threats, good cop bad cop, and isolation – were so gentle that hardened al Qaeda operatives probably wouldn't succumb to them anyway. Given the asymmetry between the expected costs of non-AFM interrogations and the expected benefits, it's no wonder White House lawyers recommended ruling them out.

Another example concerns the government's pre-9/11 reluctance to engage in targeted killings. Under the traditional American understanding of domestic and international laws against assassination, it would have been permissible to kill Osama bin Laden in the wake of the 1998 al Qaeda embassy bombings. Likewise, a targeted killing of Mohammar Qadaffi would have been a justified response to Libya's terrorist bombing of a German nightclub. For the U.S., such killings would have been acts of self defense and therefore would not have constituted assassinations. Yet those operations nevertheless were ruled out altogether or modified to obscure their true purpose. In the case of bin Laden, intelligence-community lawyers rejected CIA plans to slay the al Qaeda kingpin, insisting that agency operatives capture him instead. In the case of Qadaffi, the White House ordered air strikes that apparently were intended to kill the Libyan dictator personally, but it tried to obscure its purpose by adding various other facilities to the target package and then, in the aftermath of the strike, dissembling about its true intentions.

Risk aversion helps explain why. CIA operatives favored deploying a covert team to kill bin Laden because they calculated that the benefits (including their expected psychic income from a successful strike) exceeded the costs. But from the standpoint of policymakers, the proposed mission was welfare-reducing. Policymakers and their reviewer-agents did not doubt the consensus American position that such a strike would be a legitimate act of self-defense.<sup>166</sup> But they evidently concluded that the mission's costs were excessive. If the strike were successful, the United States might be denounced for using force as an instrument of foreign policy in violation of the U.N. charter. Or it might stand accused of violating its own domestic prohibition on assassinations. The CIA operation also might end up inadvertently killing

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<sup>163</sup> See, e.g., Peter Baker, *Obama's War Over Terror*, N.Y. Times, Jan. 17, 2010, at \_\_\_; R. Jeffrey Smith, *Emanuel Rejects Trial for Memos' Authors*, WASH. POST, Apr. 20, 2009, at \_\_\_.

<sup>164</sup> See, e.g., Marlise Simons, *Spanish Court Weighs Inquiry on Torture for 6 Bush-Era Officials*, N.Y. TIMES, Mar. 29, 2009, at A6.

<sup>165</sup> See, e.g., Mark Mazetti, *Obama Issues Directive to Shut Down Guantánamo*, N.Y. TIMES, Jan. 22, 2009, at A1 (quoting Senate testimony of Dennis Blair, the Obama administration's incoming Director of National Intelligence, that "torture is not moral, legal or effective"); AFM ¶ 5-74 (warning that coercion "is a poor technique that yields unreliable results . . . and can induce the source to say what he thinks the HUMINT collector wants to hear").

<sup>166</sup> See 9/11 COMMISSION REPORT, *supra* note 1, at 132; COLL, *supra* note 1, at 425. Attorney General Janet Reno apparently objected to the planned targeted killing on legal grounds, but there are no indications that other officials shared her interpretation of the applicable laws. See COLL, *supra* note 1, at 425-26.

bystanders, such as the wives and children of al Qaeda members. If so, officials might face international criminal proceedings charging them with killing an excessive number of civilians (in violation of the proportionality principle) or, even worse, deliberately targeting civilians (in violation of the discrimination principle).<sup>167</sup> That the United States regarded these claims as baseless was irrelevant; the strike would be costly regardless of whether they had any legal merit. Officials therefore vetoed the planned targeted killing, opting for a kidnap job instead.<sup>168</sup>

The 1986 attack on Libya likewise can be explained by risk aversion, though perhaps not as neatly. Unlike the CIA's proposed strikes on bin Laden, policymakers did not object to the use of targeted killing against Qaddafi. What they objected to was an *obvious* targeted killing. As long as the attack on the Libyan strongman could be carried out and then publicly defended in a way that let the White House maintain plausible deniability, officials were content to let it proceed. It appears, then, that policymakers and reviewers concluded that actually killing Qaddafi was welfare-enhancing, but publicly confirming that the United States meant to kill him was welfare-reducing. Officials did not regard the war crimes accusations that could result from killing Qaddafi as prohibitively costly, but they did regard as prohibitively costly the (presumably more intense) accusations that could result from publicly confirming their goal of slaying the Libyan leader.

The wall offers a third example of how worries about excessive operational costs can produce self restraints. A good deal of information sharing between intelligence officials and criminal investigators would have been permissible under the law as it stood in the 1990s. FISA itself contained no express limits on data exchange, and a pair of Justice Department directives established a mechanism for information to flow between the department's cops and spies. From the standpoint of operators, information sharing was utility-maximizing. It enabled analysts to piece together the entire intelligence "mosaic" – the bits and pieces of information that, taken individually, might not signify much at all, but that take on new meaning when seen in light of other data points.<sup>169</sup> Yet officials nevertheless restricted data exchange between the intelligence and law enforcement worlds. In their eyes, sharing was utility-reducing.

Consider first the decision to interpret FISA as barring surveillance unless its primary purpose was foreign intelligence, as well as their use of sharing as the metric by which the purpose of an operation was judged. Policymakers plausibly could have construed FISA as permitting "hybrid" operations – i.e., where the government has a dual purpose of collecting foreign intelligence and enforcing criminal laws against national security offenses – just as the FISA court of review did in 2002.<sup>170</sup> Their reluctance to do so may have stemmed from a belief that the expected costs of such a reading were excessive. If the FISA court disagreed with that

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<sup>167</sup> See COLL, *supra* note 1, at 422.

<sup>168</sup> Other factors may have played a role in persuading officials not to proceed with the strike. The White House worried about the propaganda value of an unsuccessful attack. Policymakers feared that, if they approved a hit on bin Laden and failed to get their man, the United States would lose credibility and enhance the Saudi's standing, as after the August 20, 1998 cruise missile strike. See COLL, *supra* note 1, at 412, 422; WRIGHT, *supra* note 1, at 285-86.

<sup>169</sup> See *CIA v. Sims*, 471 U.S. 159 (1985).

<sup>170</sup> See *In re Sealed Case*, 310 F.3d 717, 724-25 (FISCR 2002).



interpretation – i.e., if the court concluded that information sharing had so altered the nature of an operation that its primary purpose was no longer foreign intelligence – it would reject the agency’s surveillance applications. The consequences would be dire indeed: DOJ’s wiretaps would go dark. With those consequences looming, the expected benefits of sharing must have seemed inchoate and remote. Intelligence analysts theoretically could improve their products by “connecting the dots,” but no one could point to a particular terrorist plot that had ever been disrupted as a result. By contrast, the expected costs of pursuing an aggressive interpretation of FISA were concrete and immediate – an adverse ruling from the FISA court might bring much (if not all) of the department’s national security surveillance to a screeching halt.

Similar calculations may have influenced OIPR’s subsequent policy of vigorously policing the flow of data among cops and spies. OIPR could have taken a *laissez-faire* approach, reasoning that the Justice Department’s 1995 guidelines had directed intelligence officials to share any information suggesting “that a significant federal crime has been, is being, or may be committed” with their law-enforcement counterparts.<sup>171</sup> Instead, it did the opposite. It began to apply the rigorous restrictions of the Gorelick memo, which on their face applied only to the 1993 World Trade Center case, to *all* intelligence and criminal investigations. OIPR refused to present applications to the FISA court unless it was allowed to oversee the flow of information between intelligence analysts and prosecutors,<sup>172</sup> and at one point it even lobbied the court to reinforce its sharing restrictions via court order.<sup>173</sup> Again, OIPR probably was aware that expanded information sharing would have both improved the quality of FBI intelligence products and assisted criminal investigators in tracking down leads. But those benefits, difficult to quantify, were dwarfed by the consequences of an adverse decision by the FISA court. The wiretaps would be shut off; investigators would be left blind and deaf, lacking legal authority to conduct surveillance of suspected spies, terrorists, and other national security threats. Because the expected costs of an aggressive interpretation seemed so much greater than the expected benefits, OIPR opted to play it safe.<sup>174</sup>

The JAG corps’ targeting review is a final illustration of how self restraint can result from risk aversion.<sup>175</sup> It must be emphasized, again, that the public record as to how military targeting centers actually operate is quite meager. Still, we do know that the armed forces

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<sup>171</sup> Gorelick Memo, *supra* note 104, at 3; Reno Memo, *supra* note 108, § (B)(1).

<sup>172</sup> See 9/11 COMMISSION REPORT, *supra* note 1, at 79.

<sup>173</sup> See BAKER, *supra* note 115, at 57.

<sup>174</sup> The expected costs of information sharing differ from the expected costs of other kinds of operations. In the case of coercive interrogations, targeted killings, and military strikes, the potential harms were twofold: first, the risk that adversaries would delegitimize the United States by accusing it of war crimes; second, the risk that officials would find themselves subject to criminal proceedings before domestic, foreign, or international tribunals. By contrast, aggressive information sharing posed a different kind of threat – the risk that DOJ overreach would lead to the loss of critical legal authorities (specifically, the risk that the FISA court would reject the government’s surveillance applications). Another important difference is that enemies of the United States have less ability to inflict propaganda and other costs in the surveillance context. Proceedings before the FISA court are *ex parte* and in camera; third parties like belligerent nations and groups therefore would have had no occasion to appear as parties before the court to contest DOJ’s sharing practices (though they conceivably might have filed amicus briefs).

<sup>175</sup> See WAXMAN, *supra* note 82, at xi (“Public and coalition sensitivity to . . . collateral damage or civilian injury may reduce operational flexibility more severely than does adherence to international law.”).

sometimes conduct attacks in areas with protected civilian bystanders and protected civilian infrastructure. We also know that JAG officers sometimes recommend against allowing these missions to proceed, occasionally as they are unfolding in real time. Reading between the lines, it's possible to hazard some guesses about the reasons why these strikes are ruled out. Certain operations may be vetoed for prudential reasons, not legal ones. That is, some missions may be ruled out, not because they are likely to kill an excessive number of civilians in violation of the proportionality principle, but because JAG lawyers anticipate that adversaries will accuse U.S. forces of war crimes.<sup>176</sup> In other words, judge advocates may be heeding the calls for them to "provide advice that goes beyond that which is strictly legal"<sup>177</sup> and to recommend against operations on "Moral, Economic, Social, and Political" grounds.<sup>178</sup>

Why would JAG lawyers conclude that these attacks aren't worth it? Perhaps they think that the military benefits of a given strike are relatively slight. The attack might destroy a tank here or disable a communications facility there, but it's unlikely to have decisive strategic implications for the campaign as a whole. By contrast, the expected costs may be significant indeed. If a bomb falls short of its target and lands on a nearby hospital, mosque, or private residence, enemy propaganda machines would churn out films of corpses in the rubble and accusations of war crimes.<sup>179</sup> Judge advocates may worry that those allegations would have strategic implications, weakening allies' determination to fight and sapping support for the campaigns on the home front. Even worse, foreign courts might indict military personnel for their roles in such an attack. Again, given the dearth of public information, it would be irresponsible to do more than simply speculate about what sorts of missions are scrubbed and the reasons for doing so. But given judge advocates increasing tendency to evaluate proposed attacks based on policy considerations, this hypothesis is by no means implausible.

### III. SELF RESTRAINT AS EMPIRE BUILDING

The previous account of self restraint – the government ties its own hands when the expected costs to senior policymakers of a national security operation exceed the expected benefits – depended on a critical assumption. It assumed that no agency slack exists between policymakers and their agents who review proposed missions for legality. On that telling, self restraints are imposed when the interests of operators, such as soldiers and interrogators, diverge from the interests of policymakers (and therefore, by derivation, the interests of lawyers). But the lawyers themselves were assumed to have precisely the same interests as the policymakers at whose behest they act.

That assumption is unrealistic. Intelligence-community attorneys, judge advocates, and Justice Department lawyers have their own discrete interests that often differ from, and even conflict with, the interests of their principals. Compounding the problem is the fact that it is prohibitively costly for policymakers to monitor their agents comprehensively. A principal

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<sup>176</sup> See Dunlap, *TV Show*, *supra* note 85, at 482; Kramer & Schmitt *supra* note 92, at 1433-34; Wheaton, *supra* note 93, at 8.

<sup>177</sup> Kramer & Schmitt, *supra* note 92, at 1432.

<sup>178</sup> Wheaton, *supra* note 93, at 13.

<sup>179</sup> See WAXMAN, *supra* note 82, at 45-46.

“wants the agent’s incentives to coincide with his own,” but “the agent is a self-interested person just like the principal”; as a result, “the agent is unlikely to be perfectly faithful to the principal” unless “the principal can evaluate and monitor the agent’s performance with great accuracy and adjust the agent’s compensation accordingly.”<sup>180</sup> Given the opportunity, therefore, reviewers will shirk. “Agencies can ignore presidential directives, delay implementation of presidential programs, and limit presidential options when it suits their needs because presidents do not have the time or resources to watch them.”<sup>181</sup>

This tendency of rationally self interested reviewers to pursue their parochial interests suggests another, complementary explanation for self restraint. Officials in the government’s national security apparatus can enhance the sway they hold over policymakers, as well as their ability to pursue the priorities that are important to their agencies, by interfering with rivals’ plans. Reviewers therefore will tend to veto operations planned by their interagency competitors in an effort to empire build – i.e., to magnify their clout within the larger bureaucracy.<sup>182</sup> Empire building is similar to risk aversion in that both explanations describe self restraint as the product of conflicting interests between operators and reviewers. The difference is that, in the risk aversion account, reviewers veto operations to vindicate *policymakers’* interests. Here, reviewers veto to vindicate *their own* interests.

#### A. *What Do Agencies Maximize?*

Roughly speaking, agencies with national security responsibilities will try to maximize their *influence* and their *autonomy*.<sup>183</sup> By influence, I mean that agencies will want to expand the sway they hold over senior executive branch policymakers, such as officials at the White House and in the Cabinet. The CIA will want the National Security Council to authorize a covert operation aimed at destabilizing the Iranian regime, and to disregard the doubts voiced by intelligence-community lawyers. The National Security Agency likewise will want the President to credit its assessment that a cross-border raid by Pakistani commandos into India is imminent, not the Pentagon’s prediction that no such strike is likely. By autonomy, I mean that military and intelligence agencies will want free rein to pursue priorities that are important to their leaders and employees, notwithstanding the priorities of other players.<sup>184</sup> The FBI will want captured al Qaeda operatives to be interrogated within the criminal-justice framework, rather than handed over to the CIA for questioning by intelligence operatives. Similarly, military officers will want to try suspected terrorists using familiar courts-martial procedures from the Uniform Code of Military Justice, rather than accede to a White House preference for irregular military commissions. The desire to maximize influence and autonomy is true not only of cabinet-level departments (such as the Department of Justice), but also of individual sub-units within those larger agencies (such as the Justice Department’s National Security Division, the NSD’s Office of Intelligence Policy and Review, and so on down the bureaucratic food chain).

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<sup>180</sup> Posner, *supra* note 129, at 8; *see also* O’Connell, *supra* note 117, at 1702; Sulmasy & Yoo, *supra* note 7, at 1826.

<sup>181</sup> ZEGART, *FLAWED BY DESIGN*, *supra* note 117, at 47.

<sup>182</sup> *See* Levinson, *supra* note 6, at 932.

<sup>183</sup> *See* Sales, *Share and Share Alike*, *supra* note 123, at 304-13.

<sup>184</sup> *See* Sulmasy & Yoo, *supra* note 7, at 1827; ZEGART, *FLAWED BY DESIGN*, *supra* note 117, at 212.

To say that agencies prize influence and autonomy is not to suggest that they invariably try to expand the scope of their jurisdiction. Bureaucrats do not lust for ever more turf.<sup>185</sup> Sometimes, the accrual of more jurisdiction would enhance an agency's sway over senior policymakers and its ability to achieve its core priorities. But occasionally jurisdictional acquisitions would have the opposite effect. Agencies might worry that gaining new powers, and with them new responsibilities, could result in blame if they fail to solve problems that prove intractable.<sup>186</sup> (This fear may explain why the FBI for years resisted Congress's efforts to assign it responsibility for investigating narcotics crimes.<sup>187</sup>) Or agencies might worry that their new jurisdiction might undermine their ability to achieve their core priorities. (This fear may explain why the Army Corps of Engineers for years declined to regulate wetlands, preferring instead to focus on its traditional mission of maintaining the navigability of waterways.<sup>188</sup>) What appears to the naked eye to be an agency effort to maximize the scope of its jurisdiction may turn out, on closer inspection, to be an effort to maximize influence and autonomy.

Notice, also, what isn't on the list of priorities: money. William Niskanen has claimed that administrative agencies – presumably including ones with national security responsibilities – seek to maximize their budgets<sup>189</sup> (or, in a later refinement, their discretionary budgets, by which he means “the difference between . . . total budget and the minimum cost of producing the expected output”<sup>190</sup>). That account seems incomplete. As James Q. Wilson has argued, “bureaucrats have a variety of preferences; only part of their behavior can be explained by assuming they are struggling to get bigger salaries or fancier offices or larger budgets.”<sup>191</sup> Sometimes military and intelligence agencies will plump for bigger budgets – specifically, when more money would enhance their sway over policymakers or their ability to achieve their priorities. But in some cases agencies will find that bigger budgets are welfare-reducing – specifically, when the price of the enhanced budget is enhanced responsibilities that the agency calculates would expose it to blame (and, as a result, diminish its influence) or distract it from its priorities. Again, what appears to be budget maximization sometimes may really be influence and autonomy maximization.

### *B. Vetoes and Zero Sum Games*

How do military and intelligence officials' quest for influence and autonomy produce restraints on national security operations? In short, vetoes enhance clout. One way for an agency to enhance its welfare, and simultaneously reduce that of a competitor, is to interfere with

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<sup>185</sup> See Levinson, *supra* note 6, at 935.

<sup>186</sup> See O'Connell, *supra* note 117, at 1700 n.265 (“To be certain, political actors do not always seek more turf; additional authority may bring liabilities such as the potential for blame if that authority is not used well.”).

<sup>187</sup> RICHARD GID POWERS, *BROKEN: THE TROUBLED PAST AND UNCERTAIN FUTURE OF THE FBI* 262 (2004).

<sup>188</sup> See Nathan Alexander Sales & Jonathan H. Adler, *The Rest is Silence: “Chevron” Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1504.

<sup>189</sup> NISKANEN, *supra* note 117, at 38-39; see also Posner, *supra* note 129, at 19.

<sup>190</sup> William A. Niskanen, Jr., *Bureaucrats and Politicians*, 18 J. L. & ECON. 617, 618-19 (1975).

<sup>191</sup> WILSON, *supra* note 117, at x.

the latter's plans. A reviewer magnifies its power when it inserts itself into the decision chain and influences whether or not a proposed operation takes place.<sup>192</sup> A bureaucratic player doesn't gain by approving whatever mission its rivals want. It gains by saying no – at least where there are no indications that senior policymakers favor the proposed operation. (More on the effect of principals' preferences in a moment.) Obstruction can enhance reviewers' welfare in a more indirect way, too. Operators might try to preempt rejections by accommodating reviewers' concerns at the time proposed missions are being drawn up. The mere prospect of a rejection can have a chilling effect, even if it never actually materializes. Operators can come to internalize the reviewers' priorities in their own decisionmaking process; the most effective veto is the one that never needs to be issued.<sup>193</sup> An entity charged with reviewing the legality of military or intelligence operations therefore will have incentives to reject proposed missions in an effort to maximize its influence and autonomy. In effect, the authority of reviewers to issue vetoes enables them to redistribute to themselves a portion of operators' power to undertake national security missions.

Self-interested vetoes may be especially prevalent in the national security community because the rivalries there can be particularly intense.<sup>194</sup> These rivalries stem in part from the fact that different military and intelligence players often have areas of overlapping responsibility, and competition can be especially vigorous at the bureaucratic seams. For instance, both the FBI and CIA plausibly could claim to be the lead agency for domestic counterintelligence operations – the FBI because espionage committed in the United States is a federal crime, the CIA because espionage typically is directed by foreign officials located abroad.<sup>195</sup> A similar dynamic can exist within agencies. FBI intelligence officials and FBI criminal investigators alike plausibly could claim to be the lead entity for domestic counterterrorism; during the 1990s, the FBI pursued parallel criminal and intelligence investigations into the 1993 World Trade Center bombing. In situations where national security agencies are producing competing goods – e.g., intelligence analyses, policy recommendations, and so on – they will tend to regard one another as adversaries.

A complementary reason for the intense rivalries between, and sometimes within, national security agencies is because the amount of influence and autonomy within the system is fixed, at least in most cases. It's a zero sum game. When one player expands its influence, that almost inevitably means that another will surrender some of its own. Agencies know this and act accordingly. Every gain for a bureaucratic competitor is a setback, and the contests between rival agencies therefore can be especially fierce.<sup>196</sup> The turf war “is not unique to government, but it tends to be more virulent there.”<sup>197</sup>

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<sup>192</sup> See BAKER, *supra* note 115, at 46-47.

<sup>193</sup> Cf. ZEGART, *FLAWED BY DESIGN*, *supra* note 117, at 51 (emphasizing that “[t]he anticipated threat of bureaucratic resistance gives government agencies a strong hand”).

<sup>194</sup> See generally, e.g., MARK RIEBLING, *WEDGE* (2002) (recounting the intense, decades long rivalry between the FBI and CIA).

<sup>195</sup> See Hitz, *supra* note 49, at 770-71.

<sup>196</sup> ZEGART, *FLAWED BY DESIGN*, *supra* note 117, at 38; ZEGART, *SPYING BLIND*, *supra* note 117, at 58, 68.

<sup>197</sup> Posner, *supra* note 129, at 19.

To illustrate the point, consider an analogy from the private sector. Apple and Microsoft produce rival operating systems for personal computers. Just as government agencies want to maximize their influence and autonomy, these two private firms want to maximize their profits. Apple is a threat to Microsoft's profits, and vice versa, so the competition between the two firms can be cutthroat. But that rivalry probably will be less intense than those in the national security community. This is so because it's possible for a private firm to enhance its profits in a way that doesn't threaten the profits of another. As relevant here, Apple has a pair of options if it wants to grow its profits. The first is to persuade some of Microsoft's customers to defect to Apple. The second is to persuade people who don't currently own computers to enter the market and buy Apple products instead of Microsoft products. Option one reallocates the shares of the pie. Option two increases the overall size of the pie while preserving the firms' existing shares.

In national security, there is no option two. The amount of influence and autonomy in the system is fixed, or nearly so, and an agency's only real hope for enhancing its welfare is to poach from its rivals. Imagine two bureaucratic competitors, the Defense Department and the State Department, vying with one another to "sell" the president their respective recommendations about whether to take out an al Qaeda training camp in the Afghanistan-Pakistan border region. There's only so much advice the president can take. If he relies more on the advice of one, he inevitably will rely less on the advice of the other; if one agency's influence waxes, its rival's necessarily wanes. There's only one way for State to increase its influence: to persuade the president to adopt its recommendation. If it loses – if the president approves the proposed strike, thereby expanding the Pentagon's share of the influence pie at Foggy Bottom's expense – there's no way for the agency to recoup its losses by growing the overall size of the pie. State can't bring other "consumers" into the marketplace and persuade them to "purchase" its policy recommendations or intelligence products, because there are no other potential consumers comparable to the president.<sup>198</sup> It's a zero sum game, and the competition between the two agencies therefore will be especially fierce.<sup>199</sup>

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<sup>198</sup> State can, of course, "blow the whistle" – it can complain about the president's decision to sympathetic members of Congress, or it can leak the decision to the press in a bid to influence public opinion. To the extent that Congress and the public are consumers of national security agencies' outputs, a bureaucratic loser's attempts to persuade them can be thought of as efforts to expand the size of the influence pie. Even so, Congress and the public are not consumers in the same way the president is; they do not have direct, day-to-day management authority over military and intelligence agencies.

<sup>199</sup> The amount of influence and autonomy within the national-security community is usually constant, but there are some situations when the overall size of the pie can expand or contract. In a national security crisis, a president that previously spent 65 percent of his time on domestic issues and 35 percent on foreign affairs might reverse his priorities. After 9/11, for instance, the national security community as a whole gained influence over the White House, as the president and his advisors began to devote more attention to military, intelligence, and foreign affairs matters. This can be thought of as an expansion of the overall size of the pie available to agencies with security related responsibilities. By contrast, the waning of perceived national security threats can cause the overall influence of the national security community to shrink. After the end of the Cold War, presidents decided to devote less time to foreign affairs and shift their priorities to the domestic sphere. That can be thought of as a shrinking of the pie available to military and intelligence agencies. Other than in these circumstances, however, the total amount of influence and autonomy available to national security agencies appears to be relatively constant.

Because every gain in your rival's influence and autonomy necessarily means a diminution in your own, national security agencies will have especially strong incentives to do what they can to weaken their competitors. One way for a reviewer to accomplish that is to veto an operator's planned mission.

Except in certain circumstances. Sometimes the welfare enhancing move for a reviewer will be to say yes. If it is known within the national security apparatus that senior policymakers favor a particular operation, reviewers will have strong incentives to approve it. A reviewer who vetoes a course of action which senior policymakers are known to favor risks alienating his principal at the cost of some of his agency's influence and autonomy. In other words, reviewer knowledge of policymaker preferences can produce a "yes man" effect. Some observers believe that this dynamic was at work in the months before the United States' 2002 invasion of Iraq. Because administration officials were known to favor invasion, intelligence analysts had powerful incentives to provide them with evidence that Iraq had or was seeking prohibited weapons of mass destruction.<sup>200</sup> This incentive to say yes, however, will not be present where the operation the reviewer is asked to approve is proposed by a bureaucratic rival, and where the preferences of his superiors in the White House are unknown. In those cases, a veto is typically welfare enhancing.

Second, reviewers will have an interest in wielding the veto pen selectively. They will not robotically reject any proposed operation that crosses their desks. They will want to be seen as reasonable and deliberate because such a perception helps conserve their political capital – i.e., their influence. If a reviewer, whether an individual official or a bureaucratic unit, develops a reputation for vetoing planned missions reflexively, operators will stop taking its concerns seriously; they will stop internalizing the reviewer's priorities in their decisionmaking processes. Instead, they'll simply shrug and say "the lawyers are at it again," as the head of the CIA's bin Laden unit eventually came to do.<sup>201</sup> Even worse from a reviewer's standpoint is that excessive rejections could result in an erosion of its authority. Promiscuous use of vetoes may inspire a backlash, as operators complain up the chain of command and perhaps persuade policymakers to weaken the problematic reviewer or even have it replaced altogether. A rational reviewer seeking to maximize its influence and autonomy therefore will issue vetoes up to the point where doing so would solidify its place in the bureaucratic decision chain, but it will stop short of the line beyond which further rejections would strain its credibility.

### *C. Agency Welfare and Self Restraint*

The efforts of rationally self interested reviewers to promote their welfare – i.e., to expand their pull and their turf – helps explain their tendency to veto proposed military and intelligence operations. Officials know that they can expand their share of the pie by interfering with competitors' plans. Reviewers in the government's national security apparatus therefore will tend to veto operations planned by their interagency competitors in a bid to enhance their own clout.

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<sup>200</sup> See LOWENTHAL, *supra* note 127, at 187; RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS 115 (2005).

<sup>201</sup> See *supra* note 1 and accompanying text.

A prime example of how bureaucratic jockeying for influence and autonomy can result in self restraint is Executive Order 13491, which holds all counterterrorism interrogations to the Army Field Manual standards. During the presidential transition from late 2008 into early 2009, the incoming White House Counsel's Office prepared a draft executive order that would extend the AFM restrictions to the CIA. Officials at Langley and other intelligence agencies bitterly contested the proposal, but their arguments ultimately fell on deaf ears; the President signed the order his second full day in office.<sup>202</sup> By successfully lobbying the President to adopt the AFM restrictions, and by vetoing the CIA's preferred interrogation practices, the lawyers in the Counsel's Office magnified their turf; their victory expanded their share of the influence pie and shrunk the CIA's by a corresponding amount. When the President sat down to chart a new course in the nation's interrogation policies, it wasn't the CIA Director or even the Director of National Intelligence, the titular head of the intelligence community, who was whispering in his ear. It was his lawyer. Indeed, the Counsel's Office managed the interagency policymaking process so tightly that Michael Hayden, then the head of the CIA, never actually saw a draft of the order before it was issued. "You didn't ask," he reportedly told the White House the morning the directive would be issued, "but this is the CIA officially nonconcurring."<sup>203</sup> The Counsel's Office had combined a clear policy vision and savvy bureaucratic maneuvering to make itself "an instant power center" in the young administration.<sup>204</sup>

The lawyers' victory didn't just enhance their own welfare, it also boosted the standing of the FBI, the Justice Department, and the Defense Department. That may help explain they left Langley more or less to fend for itself as the incoming administration debated its interrogation policy (at least as far as we can tell from publicly available information).<sup>205</sup> Executive Order 13491 helped set in motion a series of losses that saw the CIA steadily cede turf to its competitors. In April 2009, the White House approved a Justice Department proposal to declassify and publicly release a quartet of legal memoranda that justified the CIA's coercive interrogation program – the "torture memos." Langley went to the mat to kill the plan, orchestrating a behind-the-scenes lobbying campaign by a bipartisan group of former CIA Directors, but it wasn't enough.<sup>206</sup> Then in August 2009, the White House announced that a new interagency group – the "HIG," which would be headed by the FBI and would operate under the National Security Council's supervision – would be responsible for conducting all high-profile interrogations.<sup>207</sup> The CIA effectively had been demoted and the Bureau, its bitter rival, now sat at the head of the table. Langley's string of bureaucratic defeats, beginning with Executive Order 13491, created a vacuum, and the FBI, Justice Department, and Pentagon were only too happy to fill it.

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<sup>202</sup> See, e.g., Michael Isikoff, *The End of Torture*, NEWSWEEK, Jan. 22, 2009, at \_\_; Calabresi & Weisskopf, *supra* note 12, at \_\_.

<sup>203</sup> Quoted in MARK THIESSEN, *COURTING DISASTER* 336 (2010).

<sup>204</sup> Calabresi & Weisskopf, *supra* note 12, at \_\_.

<sup>205</sup> See Taylor & Wittes, *supra* note 14, at 315.

<sup>206</sup> See, e.g., Calabresi & Weisskopf, *supra* note 12, at \_\_; Michael Isikoff, "Holy Hell" Over Torture Memos, NEWSWEEK, Apr. 3, 2009, at \_\_.

<sup>207</sup> See, e.g., Kornblut, *supra* note 26, at A1.



Empire building also helps explain the government's reluctance to authorize targeted killing of Osama bin Laden and other al Qaeda leaders in the 1990s. CIA operatives repeatedly asked for presidential permission to slay the Saudi billionaire, but Justice Department officials and intelligence community lawyers just as doggedly refused. The most they were willing to approve were capture missions that conceivably might result in bin Laden's inadvertent death. IC lawyers may have declined to approve outright targeted killings for similar reasons that the White House Counsel's office reined in the CIA's interrogators. By vetoing a bureaucratic rival's plans, they made themselves an indispensable part of the decision chain. The Justice Department may have had even more immediate reasons to oppose the CIA's targeted killing scheme. Doing so preserved its autonomy. Langley's proposal to slay bin Laden was a direct competitor of DOJ's own plan to use the criminal justice system to have him indicted, tried, and convicted. If covert CIA teams dispatched the al Qaeda leader in the middle of the night, prosecutors in the Southern District of New York would never get a shot at him. By objecting to the targeted killing proposal, DOJ limited the CIA's autonomy to pursue its institutional priorities while expanding its autonomy to pursue priorities of its own.

A third example of how bureaucratic vetoes can maximize influence and autonomy concerns the role of the Justice Department's Office of Intelligence Policy and Review in building the information sharing wall. Restrictions on data exchange between FBI intelligence officials and criminal investigators enhanced OIPR's influence in the Justice Department bureaucracy. It's not quite right to suggest, as the 9/11 Commission has, that the sharing restrictions resulted from a simple misunderstanding of what was required by FISA and the Justice Department's 1995 directives.<sup>208</sup> That implies an inadvertent mistake. The wall was not built by accident. It was instead the result, at least in part, of OIPR's crafty turf warfare. In particular, OIPR applied the restrictive guidelines for the World Trade Center investigation to *all* investigations, and it established itself as the hub through which all intelligence information would flow; at one point it even lobbied the FISA court to enforce OIPR's information-sharing limits.<sup>209</sup>

These efforts had the effect of magnifying OIPR's bureaucratic clout. By setting itself up as the Justice Department's information-sharing gatekeeper, OIPR gained influence and diminished that of DOJ's cops and spies. OIPR's veto pen forced other members of the national-security bureaucracy to implement that body's vision of proper information-sharing practices. And its influence only grew greater when the FISA court issued a standing order that effectively adopted OIPR's vision as a matter of law. Regulating data exchange also enabled OIPR to enhance its autonomy. Expanded sharing threatened to undermine a key office priority – preserving its credibility with the FISA court, and therefore its stellar record in obtaining judicial approval for the Justice Department's FISA applications. (At the time, the FISA court had never rejected an OIPR surveillance application.<sup>210</sup>) OIPR feared that the more coordination and sharing took place, the more likely it was the FISA court would regard the primary purpose of proposed surveillance as something other than foreign intelligence, such as garden-variety criminal enforcement. The court might, in other words, begin to suspect that cops were trying to

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<sup>208</sup> 9/11 COMMISSION REPORT, *supra* note 1, at 79.

<sup>209</sup> See *supra* notes 111 to 116 and accompanying text.

<sup>210</sup>

use FISA as an end run around Title III's more rigorous surveillance standards. If that happened, the court would look with greater skepticism on OIPR's applications. And that loss of credibility would mean, almost inevitably, that fewer and fewer applications would be approved. OIPR therefore had good reasons to be cautious.

OIPR's interests with respect to FISA surveillance thus diverged from those of policymakers. Policymakers wanted to receive intelligence products that could be used to identify and incapacitate suspected terrorists and spies. For that to happen, policymakers needed operators to conduct surveillance and pool the resulting take in a way that improved the quality of their analytical products. OIPR's interest, on the other hand, was in maintaining its good name with the FISA court. One way to achieve that was to restrict any sharing that could raise judicial hackles. From OIPR's perspective, the expected costs of the FISA court rejecting a surveillance application were greater than expected costs of forgone surveillance. The cost of letting a phone go untapped may have been great in absolute terms (e.g., missing a clue that could have prevented a catastrophic terrorist attack). But much of that cost would be externalized onto other government officials – the operators who actually conduct surveillance and the senior policymakers who are publicly visible and who therefore can be held accountable. By contrast, the cost of a rejected FISA application may have been low in absolute terms – OIPR's reputation would suffer with the FISA court, thereby undermining its ability to gain approval for surveillance applications in the future – but many of those costs would be borne by OIPR. That asymmetry naturally inclined OIPR to resist data exchange.

While empire building account can explain some self restraints, the hypothesis has its limits. In particular, bureaucratic rivalry is an imperfect explanation for why JAG officers sometimes rule out military strikes that they regard as permissible under the laws of war.

It's certainly the case that the JAG corps gains bureaucratic clout by playing an active role in determining which targets battlefield commanders may and may not attack. Recall that judge advocates sometimes recommend against attacking particular targets, not just because doing so would offend various law-of-war requirements such as necessity and proportionality, but because they conclude that a strike would be imprudent for moral, economic, geopolitical, or other non-legal reasons.<sup>211</sup> As a result, battlefield commanders effectively lose a portion of their power to make those judgments on their own. Commanders no longer independently determine whether a proposed strike would be justified morally or economically; they cede some of that authority to JAG officers. By inserting themselves into the decision chain and recommending against proposed strikes, the military's lawyers can "bec[o]me in effect its tactical commanders."<sup>212</sup>

Yet the natural bureaucratic competition between operators and reviewers looks very different in the context of military targeting. Other examples of self-imposed restraints – information-sharing restrictions in particular – involve operators and reviewers whose relationship is intensely antagonistic; those whose freedom of action is constrained often chafe at

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<sup>211</sup> See *supra* notes 92 to 98 and accompanying text.

<sup>212</sup> Betts, *supra* note 89, at 129-30.

the constraint.<sup>213</sup> Yet that seems not to be the case with military officers and their judge advocates. While some scholars claim that increasingly active JAG targeting review is inhibiting military effectiveness,<sup>214</sup> many battlefield commanders don't see it that way. To the contrary, some military brass affirmatively welcome JAG legal review in the targeting process. Recall one general's boast that his lawyer was right by his side throughout Operation Desert Fox in 1998.<sup>215</sup> Perhaps unexpectedly, many commanders who are constrained by judge advocates' advice, legal and otherwise, do not appear to resent it.

Why not? This is only speculation, but perhaps military commanders are more risk averse than their counterparts in intelligence and law enforcement agencies. It may be that soldiers' expected costs of an operation gone wrong are greater than the comparable costs spies and cops expect to face. In particular, the military's personnel rules might make it easier to terminate, demote, or reassign officials in response to poor performance than the rules that apply to civilian officials. Or maybe military commanders suspect that, owing to their public visibility, they're more likely to be haled before foreign or international war-crimes tribunals than are intelligence operatives, who typically operate anonymously and in the shadows.

Whatever the explanation, there is some anecdotal evidence to support the hypothesis that military officials exhibit greater levels of risk aversion. It has been reported that JAG lawyers "spend a great deal of time not, as one might expect, trying to prevent LOAC violations, but rather explaining to targeteers, planners, and even commanders that the law is not the war fighting impediment they tend to think it is."<sup>216</sup> At least in some cases, judge advocates have a more permissive understanding of what the law of war allows than the operators whose missions they are reviewing. That could suggest that some commanders are even more timorous than their lawyers are. It may be that, because of a greater likelihood that they will bear the costs of an operation gone wrong, and their correspondingly greater aversion to risk, military officials are especially eager to rely on the advice of counsel. By reviewing and approving operations in advance, judge advocates "provide harried decision-makers with a critical guarantee of legal coverage," thereby assuring battlefield commander that they "will not face legal consequences."<sup>217</sup> In effect, JAG advice serves as a "get-out-of-jail-free card[],"<sup>218</sup> and for that reason it is welcomed by many commanders.

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<sup>213</sup> See BAKER, *supra* note 115, at 46-47, 54-55 (describing antagonism between intelligence agencies and OIPR).

<sup>214</sup> See, e.g., Betts, *supra* note 89, at 129 (decrying the "unprecedented" "hyperlegalism" of the Kosovo war); Sulmasy & Yoo, *supra* note 7, at 1836 ("This new legalization of warfare, mostly imbued from international obligations and the realities of twenty-four hour media coverage, can prevent field commanders from achieving legitimate objectives of warfare.").

<sup>215</sup> See Dunlap, *Military Interventions*, *supra* note 5, at 24.

<sup>216</sup> Dunlap, *Military Interventions*, *supra* note 5, at 21.

<sup>217</sup> MICHAEL IGNATIEFF, VIRTUAL WAR 199 (2000).

<sup>218</sup> GOLDSMITH, *supra* note 3, at 97.

## CONCLUSION

If the only thing we knew about national security was what we learned from Hollywood, we'd come away with the impression that the Pentagon and CIA were populated entirely by rogue agents who routinely, if not gleefully, flout the legal restrictions that govern them. Think of Jack Bauer goading a captured terrorist into talking by staging a mock execution of his young son, or General Jack Ripper enthusiastically ordering a nuclear strike on the Soviet Union. That crude caricature is almost the exact opposite of reality. Military and intelligence officials tend to be scrupulously careful when deciding how to deploy the immense powers at their fingertips. The government frequently adopts constraints on its ability to carry out certain national security operations, restrictions that go much farther than what is required by the governing principles of domestic or international law.

Recent history offers plenty of examples. Counterterrorism interrogators aren't getting as close as possible to the legal line drawn by the Convention Against Torture, the federal torture statute, and the Detainee Treatment Act; they've been restricted to the relatively benign techniques authorized in the Army Field Manual. In the 1980s and 1990s, officials were reluctant to order targeted killings that they believed were perfectly consistent with domestic and international prohibitions on assassination; they either rejected them outright (in the case of Osama bin Laden) or modified them to camouflage their true purpose (in the case of Mohammar Qaddafi). Military officers aren't itching to order attacks that are even arguably permissible under the laws of war; they're foregoing lawful strikes that members of the JAG corps regard as problematic for moral, economic, and other non-legal reasons. Justice Department lawyers didn't aggressively promote information sharing under the Foreign Intelligence Surveillance Act; they built a wall that segregated cops from spies and set themselves up as the department's information sharing gatekeepers.

Why?

Rational choice theory can help answer that question. As developed in this article, there are two explanations that can account for the government's tendency to tie its own hands in national security operations: risk aversion and empire building.

Officials in military and intelligence agencies tend to be risk averse for a straightforward reason: It's in their interest to be risk averse. The expected costs of national security operations are almost always greater than the expected benefits. The best case scenario for a cop, spy, or soldier is that he gets a pat on the back; the worst is that he goes to jail. That asymmetry naturally predisposes officials to play it safe, and senior government policymakers (and therefore their lawyers) are likely to be especially timorous. It shouldn't come as much of a surprise, then, when attorneys in the intelligence community or the Pentagon veto an operation – even a concededly lawful operation – that has the potential to inspire demoralizing propaganda campaigns by adversaries, complicate this country's international relations, expose officials to criminal prosecutions, or worse. The lawyers are doing what all lawyers do – trying to keep their clients out of trouble. You may be convinced that it's legal to bomb a particular convoy, or use a particular interrogation technique, or share a particular intelligence report with your buddy at the

FBI. But there's no guarantee that Belgian war crimes prosecutors or the FISA court will see things the same way. Why roll the dice?

Of course, lawyers are not purely disinterested altruists. They, too, are rationally self interested actors, and this insight suggests a second explanation for self restraint. Issuing vetoes helps attorneys build their bureaucratic empires. A Justice Department lawyer who wants to enhance his office's pull knows that a sure way of doing so is to raise doubts about the wisdom of the CIA's proposal to gun down Osama bin Laden, or to prevent prosecutors in the Southern District of New York from getting too cozy with intelligence analysts at FBI headquarters. Nobody respects a yes man; they respect – or at least fear – someone who can keep them from doing what they want. In other words, vetoes magnify the two things that savvy turf warriors care about the most – their influence over senior policymakers and their autonomy to pursue key agency priorities. The lawyers tend to say no because it's in their interest to say no; doing so advances their personal and institutional welfare.

None of this is to say that self restraint in military and intelligence operations is normatively desirable. Nor is it to say that self restraint is undesirable. It is only to say that these restraints exist, and that – if one regards national security professionals as rationally self interested actors – they exist for entirely predictable reasons.