

Self-Restraint and National Security

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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."

Osama clearly meant business, and Clinton 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 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:

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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.¹

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.² In many cases the Executive does indeed push the envelope. But not always.³ The government often has powerful incentives to stay its own hand – to forbear from military and intelligence operations that it believes are perfectly legal. Officials may conclude 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 that limit its ability to conduct

1. *Hardball with Chris Matthews* (MSNBC television broadcast Aug. 18, 2005), available at <http://www.msnbc.msn.com/id/9005619>. The events discussed in the previous paragraphs are described in greater detail in THE 9/11 COMMISSION REPORT: FINAL REP. OF THE NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S. 47-48, 68-70, 115-121, 126-134 (2004) [hereinafter 9/11 COMMISSION REPORT]; STEVE COLL, GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM SOVIET INVASION TO SEPTEMBER 10, 2001, at 371-396, 405-413, 421-428 (2004); LAWRENCE WRIGHT, THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11, at 265-266 (2006).

2. 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, 1327-1334 (2006); Benjamin Wittes, *Introduction* to LEGISLATING THE WAR ON TERROR 1, 1-2 (Benjamin Wittes ed., 2009).

3. See generally Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 861-862 (2009) (arguing that bureaucrats sometimes “self-regulate” to control subordinates, induce reliance by outside parties, and entrench today’s policy choices); Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 894 (2007) (arguing that the President may have an incentive to engage in “self binding” because such restrictions “generate support from the public and other members of the government”).

operations it regards as legally justified; it “fight[s] with one hand behind its back,” to borrow Aharon Barak’s memorable phrase.⁴

This article tries to explain these restraints by consulting public choice theory – in particular, the notion that government officials are rationally self interested actors who seek to maximize their respective welfare. Part I develops an analytical framework. Part II identifies four examples of self-restraint. Parts III and IV offer hypotheses for why the government adopts them.

One example of self-restraint is Executive Order 13,491, which limits counterterrorism interrogations, including those conducted by 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 low-grade threats, the “good cop, bad cop” routine, and other staples of garden-variety law enforcement investigations. A second example, sketched above, is the White House’s onetime reluctance to use targeted killings against Osama bin Laden, 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 law 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 applicable statute (the Foreign Intelligence Surveillance Act of 1978) contained no such limits, and despite the fact that the governing DOJ guidelines established mechanisms for

4. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 19, 148 (2002). Barak goes on to argue that restraints are desirable. “Preserving the rule of law and recognition of individual liberties . . . strengthen [a democracy’s] spirit and strength and allow it to overcome its difficulties.” *Id.*

Certain scholars allege that foreign adversaries push aggressive interpretations of domestic and international laws to restrain American national security operations; the practice is called “lawfare.” Self-imposed restraints thus might be thought of as “friendly fire lawfare.” The concept of lawfare, which was popularized in a 2001 paper by Charles J. Dunlap, Jr., then an Air Force colonel, 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), <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf> [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. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 58-64 (2007); Tung Yin, *Boumediene and Lawfare*, 43 RICH. L. REV. 865, 879-887 (2009). According to Eric Posner, however, “[t]he lawfare threat is greatly exaggerated”; “[i]f a weak country cannot coerce a more powerful country through force of arms, then it cannot coerce the other country with law either.” Eric A. Posner, *Dockets of War*, NAT’L INT., Feb. 23, 2011, <http://nationalinterest.org/article/dockets-war-4890>.

swapping such data.

The question then becomes why officials adopt these restraints even when they believe them to be legally unnecessary. Public choice theory suggests two possible explanations.

First, self-restraint might result from systematic asymmetries in military and intelligence officials' expected value calculations. The expected costs of a given national security operation often dwarf the expected benefits; officials have more to lose from being aggressive than they have to gain. In particular, operations – even concededly lawful ones – can inspire 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. In addition, the resulting costs can be internalized onto the responsible officials more easily than the resulting benefits. While all national security players experience a degree of cost-benefit asymmetry, some experience more than others. In particular, the senior policymakers who approve operations, and the lawyers who review them, seem even more cautious than the operators who actually carry them out. This may be because policymakers and lawyers discount some of the benefits that operators expect to gain (e.g., certain forms of psychic income), and also account for certain costs that operators overlook (e.g., ramifications for the country's broader strategic priorities). Policymakers and lawyers therefore will veto proposed missions when they calculate – as they often will – that their costs exceed their benefits.

Second, self-restraint might result from bureaucratic “empire building,”⁵ as lawyers and other officials seek to magnify their clout by rejecting operations planned by their inter- and intra-agency competitors. Military and intelligence figures seek to maximize, among other values, the influence they hold over senior policymakers as well as autonomy to pursue the priorities they deem important. One way for an official to do that is to interfere with a rival's plans. A bureaucratic player typically gains no power by serving as a competitor's yes man. Often, it gains by saying no, because its obstruction forces the rival to be responsive to its concerns. Reviewers in the government's national security apparatus therefore will veto operations planned by other entities when doing so will enhance their welfare.

A few preliminary observations are needed. First, this article is emphatically not normative. I am not concerned with whether coercive interrogations, targeted killings, free-wheeling military strikes, or

5. Todd J. Zywicki, *Institutional Review Boards as Academic Bureaucracies: An Academic and Experiential Analysis*, 101 NW. U. L. REV. 861, 872-874 (2007); see also Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005) (arguing that bureaucrats are less likely to empire build than is commonly supposed, because they do not internalize the resulting benefits that accrue to their employer agencies).

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.⁶ The questions this article poses and tries to answer are purely descriptive and analytic: *To what extent are officials tying their own hands, and what accounts for their tendency to do so?* Second, the restraints described in this article are not simply examples of officials dutifully adhering to 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).⁷ Third, this article ventures no opinion on whether officials are actually correct 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 national security apparatus believes – rightly or not – that the conduct at issue is permissible. The question then becomes why officials nevertheless rule out 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 public dataset is simply too scant to allow outsiders to draw any firm conclusions about why the White House, intelligence community lawyers, military officers, and Justice Department attorneys made the decisions they did. The problem results from classification requirements and other information access rules, and it is endemic to virtually all national security scholarship. 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; officials may selectively release information to manipulate public opinion or otherwise further their own interests. The best we can do is read between the lines of the piecemeal information that has trickled out into the

6. Compare GOLDSMITH, *supra* note 4, at 59-60 (expressing concern about the “judicialization of international politics”), and Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 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 POL’Y, July 13, 2009 (describing some of the benefits of the Israel Defense Forces’ legal review of proposed targeted killings), and 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”).

7. Cf. Magill, *supra* note 3, at 863 (“[S]elf-regulation does not include the many agency actions that limit discretion that are required by some authoritative source.”).

public sphere, and make some educated guesses about the government's inner workings.

I. A PUBLIC CHOICE FRAMEWORK

This article draws primarily from public choice theories of bureaucratic behavior. That is, it regards national security professionals as rationally self interested actors who seek to maximize their respective welfare.⁸ 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 President, the Secretary of Defense, and so on). *Operators* are the officials who carry them out (members of covert CIA strike forces, FBI electronic surveillance teams, etc.). *Reviewers* – who are often but not always lawyers – are the officials who scrutinize planned operations for consistency with domestic and international law (the JAG corps, the Justice Department's Office of Intelligence Policy and Review, etc.). These three types of officials participate in a principal-agent relationship.⁹ Policymakers are the principals; operators and reviewers are the agents.

In fact, the picture is even more complex than this, for the national security community features a number of overlapping and intersecting principal-agent relationships.¹⁰ For instance, reviewers don't just provide advice to the policymakers who approve missions; they also provide advice to the operators who carry them out. Members of the JAG corps advise

8. See generally DENNIS C. MUELLER, PUBLIC CHOICE III (2003); WILLIAM J. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971); MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 7-8 (2009); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989); see also, e.g., Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 440-441 (1993) (using rational choice principles to explain legal advice rendered by Justice Department's Office of Legal Counsel); AMY B. ZEGART, SPYING BLIND: THE CIA, THE FBI, AND THE ORIGINS OF 9/11, at 12, 56-58 (2007) [hereinafter ZEGART, SPYING BLIND] (using rational choice theory and other frameworks to explain behavior of intelligence agencies).

9. See generally Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (1987) [hereinafter McNollgast] (discussing various strategies the federal government's principals might use to ensure faithful performance by bureaucrats, their agents); see also, e.g., Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 1001 (2009) (using a principal-agent framework to explain prosecutor accountability to the general public, victims, and other stakeholders); Sulmasy & Yoo, *supra* note 6, at 1826-1831 (using a principal-agent framework to explain civilian-military relations); AMY B. ZEGART, FLAWED BY DESIGN 47 (1999) [hereinafter ZEGART, FLAWED BY DESIGN] (describing principal-agent relationships between senior policymakers and national security bureaucrats).

10. Cf. McNollgast, *supra* note 9, at 248 ("One difference between this agency relationship and the ones normally encountered in economic theory is that there are many principals.").

battlefield commanders (as well as the Secretary of Defense) whether a proposed strike would comply with the law of war,¹¹ and OIPR lawyers advise FBI agents (as well as the Attorney General) whether a proposed wiretap would pass muster under FISA.¹² That means reviewers are in some sense agents of the operators, and, concomitantly, that operators are in some sense principals. Similar principal-agent complexity exists among senior policymakers.¹³ Cabinet members like the Attorney General are policymakers in that they help shape the administration's national security policies and then direct subordinates to implement those policies. But they are also agents of the President, the executive branch's ultimate policymaker. In addition, the President and his cabinet are principals insofar as they sit at the top of the executive branch food chain, but – as democratically elected or accountable officeholders – they are ultimately the agents of the constituencies who installed them in office in the first place.¹⁴ These complexities are, however, largely irrelevant to the analysis that follows.

The utility functions of government officials famously include a wide range of values.¹⁵ As relevant here, senior policymakers in the executive branch will seek to maximize at least three things. Above all, they will want to maximize their chances of keeping their jobs. First-term Presidents want to be reelected; members of the cabinet and the White House staff want their boss to stay in office and they want to retain his confidence.¹⁶ Second, policymakers will want to maximize their political capital, which they can use to promote their domestic and international policy agendas. A President who wants Congress to enact desired legislation is more likely to attain that goal if he has high public approval ratings and is able to call in favors on Capitol Hill than if he is unpopular with voters and lacks congressional allies.¹⁷ Third, taking a longer view, policymakers will want to burnish their legacies. Presidents want to be on the “right side of history”; they want future generations to approve of the policy choices they make while in power.¹⁸

11. *See infra* Part II.C.

12. *See infra* Part II.D.

13. *Cf.* GRAHAM ALLISON & PHILIP ZELIKOW, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* 255-256 (2d ed. 1999).

14. McNollgast, *supra* note 9, at 252; Posner & Vermeule, *supra* note 3, at 875-876.

15. *See, e.g.*, Levinson, *supra* note 5, at 932-933; McNollgast, *supra* note 9, at 247; MUELLER, *supra* note 8, at 362; STEARNS & ZYWICKI, *supra* note 8, at 342.

16. *Cf.* AMY B. ZEGART, *EYES ON SPIES: CONGRESS AND THE UNITED STATES INTELLIGENCE COMMUNITY* 37 (2011).

17. Posner & Vermeule, *supra* note 3, at 894.

18. *Id.* at 876-877; Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in *RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW* 285, 304 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

This quest for job security, political capital, and legacy will lead policymakers to pursue two specific goods in the national security context. First, operational success. Policymakers will want a given military or intelligence operation to accomplish the objective that it is meant to achieve. If a President leads a war that quickly topples the enemy, he is likely to enjoy improved public approval ratings, weaker resistance from political opponents, and the prospect of favorable treatment in the history books.¹⁹ A President who leads the nation into a quagmire can expect the opposite outcomes. Second, policymakers seek legal compliance. They will want a given operation to accomplish its goals in a way that does not offend any applicable principle of domestic or international law. This is so because the costs of such violations can be significant.²⁰ All things being equal, a wartime President would prefer to vanquish an enemy by complying with the law of war than to gain victory by, say, deliberately bombing protected civilians. Policymakers commission two different sets of agents to pursue these goals. Operators are responsible for the first – 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 divided.

Lower level national security bureaucrats – the operators and reviewers – will try to maximize, among other things, their influence and their autonomy.²¹ By influence, I mean that they will want to expand the sway they hold over the President, cabinet officials, and other senior policymakers.²² CIA officials 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. By autonomy, I mean that military and intelligence officials will want free rein to pursue priorities that are important to them and their agencies, notwithstanding the priorities of other players (including their principals).²³ FBI figures 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.

National security bureaucrats won't just want to maximize their *personal* influence and autonomy. They also will want to maximize the

19. These gains are not always durable, of course. Witness President George H.W. Bush's defeat in the 1992 presidential election after having led an international coalition to expel Saddam Hussein's invading army from Kuwait.

20. See *infra* Part III.A.2.

21. MUELLER, *supra* note 8, at 362; Nathan Alexander Sales, *Share and Share Alike: Intelligence Agencies and Information Sharing*, 78 GEO. WASH. L. REV. 279, 304-313 (2010).

22. Sales, *supra* note 21, at 307-308.

23. ALLISON & ZELIKOW, *supra* note 13, at 150-151; Magill, *supra* note 3, at 884; Sulmasy & Yoo, *supra* note 6, at 1827; ZEGART, *FLAWED BY DESIGN*, *supra* note 9, at 212.

influence and autonomy of the agencies for which they work, from cabinet-level departments (such as the Department of Justice) to individual sub-units within those larger entities (such as the National Security Division, OIPR, and so on down the bureaucratic ladder). This is so because individual officials can internalize a portion of the influence and autonomy gains that accrue to the organizations for which they work. An Assistant Secretary at a powerful and prestigious department is more likely to prevail in an interagency squabble than an Assistant Secretary at a backwater. In this respect, welfare maximization in the national security community resembles welfare maximization in private firms. Just as corporate officers have incentives to maximize their firms' profits (which they can partially internalize in the form of bonuses and higher salaries), so military and intelligence officials have incentives to maximize their agencies' influence and autonomy (which they can partially internalize in the form of greater individual power and turf).²⁴ The smaller the bureaucratic entity, the greater each official's per capita share of any gains in its influence and autonomy. As such, we should expect to see to see bureaucratic players strive to maximize the welfare of their immediate unit (e.g., OIPR) more vigorously than they strive to maximize the welfare of the larger enterprises of which they are a part (e.g., the Justice Department as a whole). As I will discuss below, however, there are significant limits to an individual bureaucrat's ability to internalize the welfare gains that accrue to his employer agency.²⁵

To say that officials 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.²⁶ Sometimes, the accrual of jurisdiction would enhance one's sway over senior policymakers and one's ability to achieve one's core priorities. But sometimes jurisdictional acquisitions would have the opposite effect. Bureaucrats might worry that gaining new powers, and with them new responsibilities, could result in blame if they fail to solve problems that prove intractable.²⁷ Or bureaucrats might worry that their new jurisdiction might undermine their ability to achieve their core

24. Cf. MUELLER, *supra* note 8, at 362 ("Bureaucratic man pursues power. Economic man pursues profit [T]here is a close link between the economic theory of profit and the political theory of power.").

25. See *infra* Part III.A.

26. Levinson, *supra* note 5, at 933, 935; Posner & Vermeule, *supra* note 3, at 866; James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 376 (James Q. Wilson ed., 1980).

27. Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1700 n.265 (2006) ("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."). This may explain why the FBI for years resisted Congress's efforts to assign it responsibility for investigating organized crime. RICHARD GID POWERS, *BROKEN: THE TROUBLED PAST AND UNCERTAIN FUTURE OF THE FBI* 262 (2004).

priorities.²⁸ What looks like an effort to maximize jurisdiction may really be an effort to maximize influence and autonomy.

Notice, also, what's missing from the list of priorities: money. William Niskanen has claimed that bureaucrats – presumably including ones with national security responsibilities – seek to maximize their budgets²⁹ (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”).³⁰ 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.”³¹ Sometimes military and intelligence figures 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 officials will find that bigger budgets are welfare-reducing – specifically, when the price of the enhanced budget is enhanced responsibilities that they calculate would expose them to blame (and, as a result, diminish their influence) or distract them from their priorities.³² Again, what appears to be budget maximization sometimes may really be influence and autonomy maximization.

With this framework in mind, we can begin to offer some preliminary hypotheses about why national security officials sometimes adopt self-restraints. From a policymaker's standpoint, the expected benefits of a national security operation often will be dwarfed by its expected costs (enemy propaganda, loss of national prestige, individual criminal liability, and so on). For rational policymakers, the welfare maximizing choice sometimes will be to avoid bold and aggressive operations. Reviewers likewise can find inaction to be welfare maximizing. For an influence- and autonomy-maximizing reviewer, vetoing an operation proposed by a bureaucratic competitor can redistribute power and turf away from one's rival and to oneself. Operators, by contrast, are likely to have a very different cost-benefit calculus. An operator's expected benefits typically will be larger than a policymaker's or a reviewer's, because he will account for the psychic income (such as feelings of exhilaration and satisfaction)

28. This 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. Nathan Alexander Sales & Jonathan H. Adler, *The Rest Is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1504.

29. NISKANEN, *supra* note 8, at 38-39; *see also* Richard A. Posner, *From the New Institutional Economics to Organization Economics*, 6 J. INSTITUTIONAL ECON. 1, 19 (2010).

30. William A. Niskanen, Jr., *Bureaucrats and Politicians*, 18 J. L. & ECON. 617, 618-619 (1975); *see also* Stephenson, *supra* note 18, at 295.

31. WILSON, *supra* note 8, at xviii.

32. MORTON H. HALPERIN, *BUREAUCRATIC POLITICS AND FOREIGN POLICY* 51 (2d ed. 2006) (arguing that bureaucrats prefer “less money with greater control rather than more money with less control”).

that accrues to those who personally participate in a mission. As a result, rational operators may regard a given operation as welfare-enhancing even when policymakers and reviewers regard the same mission as welfare-reducing.

A few observations are needed about the public choice framework sketched out above – its possibilities and its limitations – before applying it. This article emphasizes restraints imposed by elements within the executive branch. But the framework also might be used to explain why Congress sometimes adopts 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, there may be an asymmetry in the legislators’ expected value calculations. Members of Congress 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 2005.³³ Second, members might engage in a form of empire building, allocating to themselves a greater portion of the war powers they share with the President. For example, Congress might assert its primacy over covert operations by passing a law prohibiting the President from approving assassinations, as the Church Committee proposed in the late 1970s.³⁴ Still, the Executive probably is more likely to adopt restraints than Congress is, because the Executive’s expected costs of an operation gone wrong usually will be greater.³⁵ Unlike legislators, 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.³⁶

In addition, my focus is on self-restraint in the military and intelligence contexts, but the framework also might be used to explain the occasional tendency of domestic regulatory agencies to restrain themselves.³⁷ For instance, the head of the Environmental Protection Agency might decide not to regulate carbon emissions, even though she concludes she has legal authority to do so under the Clean Air Act, because she calculates that the expected costs to her of the regulation exceed the expected benefits, or because of self interested vetoes by various bureaucratic players. Still, military and intelligence officials seem more likely to tie their own hands

33. See *infra* notes 59-61 and accompanying text.

34. See, e.g., SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS: AN INTERIM REPORT, S. REP. NO. 94-465 (1975) [hereinafter CHURCH COMMITTEE ASSASSINATION REPORT].

35. See *infra* Part III.A.2.

36. See *infra* notes 175-188 and accompanying text.

37. Cf. Magill, *supra* note 3.

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.³⁸

The framework developed above is largely static. This article considers the behavior of national security officials during periods of relative stability, and does not explore whether the hypothesized explanations for self-restraint hold true across a range of timeframes and scenarios.³⁹ In other words, it largely overlooks the “cycles of timidity and aggression” that Jack Goldsmith has diagnosed in military and intelligence agencies.⁴⁰ Still, the framework may be rich enough to explain why self-restraints are more likely to emerge during periods of stasis than during emergencies. It is a commonplace observation that officials are especially prone to overreach in times of crisis, such as the aftermath of a terrorist attack.⁴¹ Public choice principles can help explain why. During a crisis, officials’ expected costs of inaction can be quite significant. Policymakers justifiably may 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 operations. To the extent lawyers approve or reject operations based on whether they would promote policymakers’ welfare,⁴² policymaker concerns about being perceived as “weak on security” will tend to yield fewer restraints than in times of stasis. Alternatively, to the extent lawyers issue vetoes to promote their own welfare,⁴³ 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.⁴⁴ Absent such a crisis environment, policymakers’ expected costs of inaction may seem lower. In these ordinary circumstances, we should expect to see more self-restraint.

My use of this analytical framework is not intended to deny the validity of other possible explanations for self-restraint. For instance, Eric Posner and Adrian Vermeule argue that Presidents have an incentive to engage in

38. See *infra* Part III.A.2.

39. Cf. Posner & Vermeule, *supra* note 3, at 877.

40. GOLDSMITH, *supra* note 4, at 163-164.

41. See, e.g., WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004).

42. See *infra* Part III.C.

43. See *infra* Part IV.B.

44. See *infra* notes 234-236 and accompanying text.

“self binding,” because it will enhance their credibility and “generate support from the public and other members of the government.”⁴⁵ Elizabeth Magill likewise argues that bureaucrats sometimes find it advantageous to “self-regulate” – i.e., “limit their options when no source of authority requires them to do so” – as a means of controlling subordinates, inducing reliance by outside parties, and entrenching today’s policy choices.⁴⁶ Still more accounts emerge if we widen the analytical lens beyond public choice principles. One might explain self-restraints by consulting theories of bounded rationality – the notion that imperfect information, cognitive failures, and other factors prevent bureaucratic players from accurately measuring the expected costs and benefits of a given action.⁴⁷ Or one might look to new institutionalism – the notion that bureaucratic outputs are determined in large part by organizations’ cultures, histories, and structures.⁴⁸ And, of course, there are the public interest explanations: Officials might embrace a particular restraint because they believe in good faith that it represents sound public policy. The public interest framework may actually complement, not contradict, this article’s public choice story. One of the reasons officials might build their bureaucratic empires is because they calculate that doing so will position them to achieve desirable policy outcomes. In any event, the point of this article is to generate hypotheses that can account for the occasional tendency of national security figures to restrain themselves. Other frameworks are likely to yield equally plausible alternative hypotheses.

II. SELF-RESTRAINT, PAST AND PRESENT

This Part identifies four 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. In 2009, the White House barred counterterrorism investigators from using any interrogation technique other than the limited methods in the Army Field Manual. In the

45. Posner & Vermeule, *supra* note 3, at 894.

46. Magill, *supra* note 3, at 860, 861-862.

47. *See generally* HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR: A STUDY OF DECISION-MAKING PROCESSES IN ADMINISTRATIVE ORGANIZATIONS (4th ed. 1997); *see also, e.g.*, ALLISON & ZELIKOW, *supra* note 13, at 19-20; ZEGART, SPYING BLIND, *supra* note 8, at 51 (arguing that imperfect information and cognitive failures can prevent intelligence agencies from adapting to meet new challenges); *cf. infra* note 197 (suggesting that, due to bounded rationality, some national security players may tend to overestimate the expected benefits to be gained from a given military or intelligence operation).

48. *See, e.g.*, ZEGART, FLAWED BY DESIGN, *supra* note 9, at 12-53 (using a new institutionalist framework to explain origins and evolution of national security agencies); *see also* Eric R. Claeys, *Progressive Political Theory and Separation of Powers on the Burger and Rehnquist Courts*, 21 CONST. COMM. 405, 409-411 (offering an institutionalist account of recent Supreme Court decisions).

late 1990s, Clinton administration officials rejected the CIA's plans to kill Osama bin Laden. Members of the military's JAG Corps have recommended against air strikes that might result in adverse publicity or other harms. And in the mid-1990s, Justice Department officials erected a "wall" that kept the DOJ's intelligence analysts from sharing information with its criminal investigators.⁴⁹

In each instance, the government's reason for adopting these restraints was not that it believed them to be legally necessary. To the contrary, officials – often but not always lawyers – concluded that the relevant laws allowed them to carry out the operation in question, but they nevertheless vetoed it. Self-restraints thus supplement what the law requires; officials proscribe conduct that the applicable laws do not actually reach. In other words, military and intelligence figures 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 officials' occasional tendency to restrict themselves from acting in ways that are not in fact unlawful (or, more precisely, that they do not regard as unlawful).⁵⁰

49. 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 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 6, 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. Michael Hastings, *The Runaway General*, ROLLING STONE, July 8-22, 2010, 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 6, at 67. It also has been alleged that the Justice Department is excessively cautious in presenting surveillance applications to the Foreign Intelligence Surveillance Court – a charge which DOJ denies. Compare Letter from Raymond W. Kelly, Police Comm'r, City of N.Y., to Michael Mukasey, Attorney Gen., Oct. 27, 2008, at 1, 4 (claiming that the Justice Department "is doing less than it is lawfully entitled to do" and urging the Department to use "the full extent of [its] authority without self-imposed constraint"), with Letter from Michael B. Mukasey, Attorney Gen., to Raymond W. Kelly, Police Comm'r, City of N.Y., Oct. 31, 2008, at 2 (responding that DOJ "already tr[ies] to be as aggressive in our approach as we can within the bounds of reason and the law").

50. In a sense, self-restraint is just another example of attorneys giving advice to their clients. Cf. Lund, *supra* note 8, at 448-449. 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

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 13,491 – which reportedly was the brainchild of lawyers in the White House Counsel's Office⁵¹ – 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.”⁵² 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 hailed by many 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.

provide counsel. They also issue vetoes. Self-restraint thus involves shifting some decisionmaking responsibility from the principals to their agents. (Such vetoes are not unheard of in the private sector. Corporate bylaws might bar the CEO 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.) Second, as explained in Part IV, self-restraint sometimes 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. (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.) 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.

51. See, e.g., Massimo Calabresi & Michael Weisskopf, *The Fall of Greg Craig, Obama's Top Lawyer*, TIME, Nov. 19, 2009, <http://www.time.com/time/magazine/article/0,9171,1940673,00.html>; Jeff Zeleny & Peter Baker, *President's Top Lawyer To Step Down*, N.Y. TIMES, Nov. 13, 2009, at A12.

52. Exec. Order No. 13,491, §3(b), 74 Fed. Reg. 4893 (Jan. 22, 2009).

Understanding Executive Order 13,491 requires some context.⁵³ The governing treaty – the Convention Against Torture, which the United States signed in 1988 and ratified in 1994 – directs each party to “take effective legislative, administrative, judicial or 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.”⁵⁴ CAT also obliges a state “to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.”⁵⁵ In essence, CID is a form of mistreatment that, while reprehensible, does not rise to the level of outright torture – “torture lite,”⁵⁶ as it were.

A pair of federal statutes incorporates these international obligations into domestic law. The first is the federal torture statute, enacted in 1994, which makes torture a criminal offense.⁵⁷ 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.”⁵⁸ 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.”⁵⁹ 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

53. For a history of U.S. interrogation law and policy from 9/11 through Executive Order 13,491, 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).

54. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 2, 4, Dec. 10, 1984, 1465 U.N.T.S. 113-114.

55. *Id.*

56. See Seth F. Kreimer, “*Torture Lite*,” “*Full Bodied*” *Torture*, and the *Insulation of Legal Conscience*, 1 *J. NAT. SECURITY L. & POL’Y* 187 (2005).

57. 18 U.S.C. §2340A(a) (2006) (“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.”).

58. *Id.* §2340(1). The torture statute famously fails to define “severe physical . . . pain or suffering.” But it does 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).

59. 42 U.S.C. §2000dd(a) (2006).

to the Constitution of the United States.”⁶⁰ This definition echoes a reservation the Senate adopted when it ratified the CAT.⁶¹

The DTA also limits certain 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 interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.”⁶² 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 methods don’t rise to the level of torture or CID.

Executive Order 13,491 plugged that loophole.⁶³ 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.”⁶⁴ Those techniques are quite restrictive. The Army Field Manual

60. *Id.* §2000dd(d).

61. S. EXEC. REP. NO. 101-30, at 29 (1990) (the United States considers itself bound by the Article 16 obligation concerning CID only insofar as the term means the “cruel, unusual and inhumane treatment or punishment prohibited by the 5th, 8th, and/or 14th 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 does not prohibit officials from doing anything beyond what they were already prohibited from doing by the Constitution.

62. 42 U.S.C. §2000dd(a).

63. 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.

64. Exec. Order No. 13,491, §3(b), 74 Fed. Reg. 4893 (Jan. 22, 2009). 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 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*

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.⁶⁵ It also prohibits mildly coercive techniques – methods that involve a small amount of coercion but that fall short of CID, let alone torture.⁶⁶ (At a minimum, the CIA apparently regards the AFM as having this sweeping effect.⁶⁷)

The proscribed measures include techniques that police 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.”⁶⁸ (The 2006 edition of the Army Field Manual eliminated the authority to use a 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.”⁶⁹) The AFM also bans threats. 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].”⁷⁰

Third, police officers sometimes use the “good cop, bad cop” routine to elicit information from suspects. The Army Field Manual 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.⁷¹ 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 method is approved, interrogators are barred from making any kind of threat,⁷² and “[r]egular monitoring of the interrogation” is required.⁷³

Terror Subjects, WASH. POST, Aug. 24, 2009, at A1.

65. U.S. Dep’t of Army, Field Manual 2-22.3, Human Intelligence Collector Operations ¶5-75 (2006) [hereinafter AFM].

66. Taylor & Wittes, *supra* note 53, at 295.

67. Cite ODNI/CIA sources and newspaper accounts.

68. AFM, *supra* note 65, ¶8-35.

69. Taylor & Wittes, *supra* note 53, at 306. *But see* Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377, 439 & n.189 (2011) (book review) (arguing that the revised Army Field Manual continues to permit shouting and “Fear Up (Harsh)”).

70. AFM, *supra* note 65, ¶8-35.

71. *Id.* ¶8-68.

72. *Id.* (“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).

73. *Id.*

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 restricted by the Army Field Manual. Known as “separation,” the technique may not be used at all on “EPWs”⁷⁴ (enemy prisoners of war, who enjoy protected status under the Geneva Conventions). Interrogators are allowed to use separation on “unlawful enemy combatants,”⁷⁵ 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.”⁷⁶ Only specially trained interrogators may use separation,⁷⁷ and all uses of the method must be documented (“including photographs and/or videotaping, if appropriate and available”).⁷⁸ 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.”⁷⁹ Commanders are directed to engage in “strenuous oversight to avoid misapplication and potential abuse.”⁸⁰ And detainees held in separation are entitled to regular visits by the International Committee of the Red Cross.⁸¹ These rules are far more elaborate than the ones that apply in the ordinary criminal justice context.

Why did the White House decide to limit counterterrorism interrogations 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 is not listed in the AFM.⁸² The more probable explanation is that, even though officials didn’t think they were

74. *Id.* ¶8-18.

75. *Id.* ¶M-1.

76. *Id.* ¶M-5.

77. *Id.* ¶M-22.

78. *Id.* ¶M-23.

79. *Id.* ¶M-7.

80. *Id.* ¶M-10.

81. *Id.* ¶M-17.

82. Taylor & Wittes, *supra* note 53, 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.*”).

legally bound to limit themselves to the AFM, they went farther than the law required for policy reasons.

Consider domestic law first. No publicly available evidence suggests that Obama administration lawyers believed that yelling, minor threats, the good cop bad cop drill, 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 is even less likely they believed that all non-AFM techniques ipso facto fall within the even narrower federal prohibition on torture. 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,⁸³ good cop bad cop interrogations,⁸⁴ and solitary confinement⁸⁵ 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 13,491 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 farther than that, extending the AFM's restrictions to all captives in American custody, including those held by the CIA.

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. A contrary 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

83. *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").

84. *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, 295-296 (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").

85. *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.").

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 is doubtful that such a sweeping conclusion underlies the Administration's decision to restrict interrogation tactics.

The more likely explanation for Executive Order 13,491, then, is that officials made a simple policy choice to prohibit more than the law requires. Rather than inching ever closer to the legal line and authorizing interrogation techniques that are even arguably permissible under domestic and international law, the government opted to stay its own hand, ruling out methods that it regarded as lawful but imprudent on policy grounds.

B. Targeted Killing

A second example of self-restraint concerns the well known presidential ban on assassinations. In the popular imagination, the term "assassination" broadly implies singling out a specific head of state or terrorist operative for killing. Yet the United States' understanding of the prohibition is quite narrow. In the American view, both domestic and international law permit the government to undertake a wide variety of targeted killings. Nevertheless, 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 operatives⁸⁶ – American reluctance to use 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 disclosure that the CIA had participated in a number of assassination plots.⁸⁷ "In fact, no foreign leader was assassinated by U.S. operatives, but it was not for want of trying."⁸⁸ The committee found that

86. Dana Priest, *U.S. Playing a Key Role in Yemen Attacks; Providing Data, Weapons; Six Top Leaders of al-Qaeda Affiliate Killed*, WASH. POST, Jan. 27, 2010, at A1.

87. CHURCH COMMITTEE ASSASSINATION REPORT, *supra* note 34. 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, 370-375 (Benjamin Wittes ed., 2009); Nathan Canestaro, *American Law and Policy on Assassinations of Foreign Leaders: The Practicality of Maintaining the Status Quo*, 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).

88. Frederick P. Hitz, *Unleashing the Rogue Elephant: September 11 and Letting the*

agency operatives were complicit in efforts to kill foreign leaders such as 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.⁸⁹ Executive Order 12,333, the current version, 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.”⁹⁰ That seems simple enough. But the government interprets the term assassination so narrowly that the ban has very little bite.⁹¹ A brief detour through international law, whose terms the executive order reinforces,⁹² 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.⁹³ (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.⁹⁴) During wartime, targeted killing is generally lawful; it only becomes a proscribed assassination if one's adversary is slain in a “treacherous” manner.⁹⁵ “[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.”⁹⁶ In times of peace, the definition of assassination is different: unlawfully killing a targeted person for a political purpose.⁹⁷ If a targeted killing is lawful, then, it does not count as an assassination, at least as far as the United States is concerned.⁹⁸

CIA Be the CIA, 25 HARV. J.L. & PUB. POL'Y 765, 775 (2002).

89. President Ford's executive order did not proscribe assassination as such, only “political assassination.” Exec. Order No. 11,905, §5(g), 41 Fed. Reg. 7703 (Feb. 18, 1976). Two years later, President Carter dropped the adjective “political,” thereby extending the ban to all species of assassinations. Exec. Order No. 12,036, §2-305, 46 Fed. Reg. 29,693 (June 1, 1981).

90. Exec. Order No. 12,333, §2.11, 46 Fed. Reg. 59,941 (Dec. 4, 1981).

91. The canonical expressions of this view are a legal memorandum prepared by the Army in 1989 and a law review article published the same year by the State Department's Legal Adviser. W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, at 4 [hereinafter Parks Memo]; Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89 (1989).

92. Anderson, *supra* note 87, at 375 (describing EO 12333's ban as “coextensive with pre-existing U.S. obligations under international law”).

93. Parks Memo, *supra* note 91, at 4-5.

94. Anderson, *supra* note 87, at 370-375; Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L L. 319, 323, 331 (2004); *see infra* notes 115-116 and accompanying text (discussing discrimination, proportionality, and necessity).

95. Parks Memo, *supra* note 91, at 5; *see also* Harder, *supra* note 87, at 3-4, 6-9.

96. Michael N. Schmitt, *State-Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609, 633 (1992).

97. Parks Memo, *supra* note 91, at 4; Sofaer, *supra* note 91, at 116-117; *see also* Harder, *supra* note 87, at 5-6, 9-11.

98. Anderson, *supra* note 87, at 374.

What sorts of peacetime killings are lawful? Article 2 of the United Nations charter 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.”⁹⁹ But Article 51 recognizes the right to use 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”¹⁰⁰ 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.¹⁰¹ 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 12,333.¹⁰² 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.¹⁰³

99. U.N. Charter art. 2, ¶4.

100. *Id.* art. 51

101. Parks Memo, *supra* note 91, at 7; Sofaer, *supra* note 91, at 93-96; *see also* Anderson, *supra* note 87, at 366-370. 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.*” *See* U.N. Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, at 15 (May 28, 2010), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf> [hereinafter U.N. Report] (calling the U.S. understanding of self defense “deeply contested and lack[ing] support under international law”); Daniel L. Pines, *The Central Intelligence Agency’s “Family Jewels”: Legal Then? Legal Now?*, 84 *IND. L.J.* 637, 651 (2009) (“Scholars are divided as to whether an armed attack must actually have occurred before a nation can deploy this right to self-defense.”).

102. 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 justifications for the use of targeted killing. Given that linguistic formulation, it is improbable that Koh “appeared to acknowledge that self-defence is an additional, not alternative, source of authority.” U.N. Report, *supra* note 101, at 14 n.82.

103. *See, e.g.,* Guiora, *supra* note 94, 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 C. REV.* 127, 135 (2007) (“Without an ongoing armed conflict the targeted killing of a civilian, terrorist or not, would be assassination – a homicide

For our purposes, it doesn't matter which side has the better understanding of international law. What matters is that the United States, rightly or wrongly, believes that the law authorizes it to perform certain targeted killings, 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. One possible response 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"¹⁰⁴ The Clinton 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.¹⁰⁵ Or the Administration could have claimed that a targeted killing was a justified act of self defense 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.¹⁰⁶ 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."¹⁰⁷ That was acceptable, the lawyers concluded. The CIA should not set out deliberately to slay bin Laden, but he could be killed as long as his death

and a domestic crime."); U.N. Report, *supra* note 101, at 13 ("It has been a matter of debate whether Article 51 permits States to use force against non-state actors.").

104. 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").

105. 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. *See, e.g.*, U.N. Report, *supra* note 101, at 18 (describing as "problematic" the U.S. view that it is in an armed conflict with al Qaeda).

106. COLL, *supra* note 1, at 423-428; 9/11 COMMISSION REPORT, *supra* note 1, at 131-133.

107. COLL, *supra* note 1, at 378.

was the accidental byproduct of an otherwise legitimate capture attempt.¹⁰⁸ 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.¹⁰⁹

Sometimes self-restraint manifests itself more subtly in how officials structure and publicly defend targeted killing operations. One example is the United States' April 15, 1986, bombing raid on Libya. The two countries had engaged in occasional skirmishes after Colonel Mohammad 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 in Tripoli.¹¹⁰

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 forces had created a state of armed conflict, then a targeted killing would have been lawful.¹¹¹ 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 one goal of the American bombing raid 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."¹¹² 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."¹¹³

108. *Id.* at 378-379, 424.

109. *See supra* note 1 and accompanying text.

110. MATTHEW M. AID, *THE SECRET SENTRY: THE UNTOLD HISTORY OF THE NATIONAL SECURITY AGENCY* 186-187 (2009).

111. *But see* U.N. Report, *supra* note 101, 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").

112. Seymour M. Hersh, *Target Qaddafi*, N.Y. TIMES, Feb. 22, 1987, §6 (magazine), at 17.

113. Michael R. Gordon, *Reagan Denies Libya Raid Was Meant To Kill Qaddafi*, N.Y. TIMES, Apr. 19, 1986, at 5.

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. Officials 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. 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.¹¹⁴

This 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 would not have required much more effort to argue that the same right of self defense justified a targeted killing of Qaddafi. Yet officials still shrank from doing so.

C. JAG Targeting Review

Self-restraint also can be seen in targeting review by members of the armed forces' Judge Advocate General corps. A principal JAG responsibility is to ensure compliance with law-of-war rules such as discrimination, proportionality, and necessity. Judge advocates now sit in targeting centers and provide real-time advice 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

114. Sofaer, *supra* note 91, at 119-120.

words, JAG lawyers sometimes impose restraints that are more restrictive than 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 or International Humanitarian Law. The rules that govern 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, the uncodified norms deriving from practices that states observe from a sense of legal obligation.¹¹⁵ Among the most important principles are discrimination, proportionality, and necessity. *Discrimination* means that the military may not deliberately target civilians. The *proportionality* requirement holds that the amount of collateral damage inadvertently inflicted on civilian populations and structures must be calibrated to the importance of the military objective. And under the *necessity* principle, the amount of damage inflicted on legitimate targets must not be greater than is needed to achieve the military objective.¹¹⁶

Enter the JAG corps. Judge advocates are perhaps best known 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 place¹¹⁷ – for instance, by drafting rules of engagement, “the rules that operationalize the law of armed conflict in a given war or occupation.”¹¹⁸ In modern warfare, JAG review also takes place as operations unfold.¹¹⁹ Judge advocates sometimes sit alongside battlefield commanders in operations centers, where they review proposed targets in real time and advise whether striking them would be permissible under the law of war.¹²⁰ Here’s how it

115. See generally Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

116. See generally Eric A. Posner, *A Theory of the Laws of War*, 70 U. CHI. L. REV. 297, 298-299 (2003); ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 261-266 (2007); MATTHEW WAXMAN, *INTERNATIONAL LAW AND THE POLITICS OF URBAN AIR OPERATIONS* 7-9 (2000).

117. Sulmasy & Yoo, *supra* note 6, at 1836 (indicating that JAGs traditionally were “used in a staff capacity on the ‘rear lines’”).

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

119. *Id.* 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 4, at 60 (indicating that the military now “sends lawyers known as Judge Advocates General into battle alongside military commanders”); Sulmasy & Yoo, *supra* note 6, at 1836 (observing that “JAGs are now involved in every layer of the command structure during combat”).

120. JAGs do not have the formal power to veto a selected target, only to offer a legal

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.”¹²¹ Another judge advocate confirms that “all targets are supposed to be cleared through us.”¹²²

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.”¹²³ 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 often had the capacity to acquire the targets and destroy them. JAG lawyers then weighed in on whether the proposed strikes would comply with proportionality and necessity; 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.”¹²⁴ Judge advocates played such an important role in targeting that one commentator later complained that “NATO’s lawyers . . . became in effect its tactical commanders.”¹²⁵

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.¹²⁶ JAG lawyers are doing what they have always done, just at a different time. Yet targeting review

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. Dunlap, *Military Interventions*, *supra* note 4, at 22-23; Amos N. Guiora, *License to Kill*, FOREIGN POL’Y, July 13, 2009. But JAGs’ legal advice carries great weight. Only in rare circumstances would a commander order a strike over a contrary recommendation from his JAG.

121. Quoted in Dunlap, *Military Interventions*, *supra* note 4, at 24.

122. Quoted in Dickinson, *supra* note 118, at 16; see also Thom Shanker, *Civilian Risks Curbing Airstrikes in Afghan War*, N.Y. TIMES, July 23, 2008, at A1 (“Air Force lawyers vet all the airstrikes approved by the operational air commanders.”).

123. Richard K. Betts, *Compromised Command: Inside NATO’s First War*, FOREIGN AFF., Aug. 2001, at 126, 129-130.

124. Dunlap, *TV Show*, *supra* note 119, at 483 n.16.

125. Betts, *supra* note 123, at 129-130; see also Dunlap, *Military Interventions*, *supra* note 4, at 5 (calling the Kosovo war “a high-water mark of the influence of international law in military interventions”).

126. 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”).

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 longer confining themselves to legal advice on whether a proposed strike would comply with the law 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.¹²⁷ That expanded role is said to be necessary because American armed forces should not just refrain from violating the law 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.”¹²⁸ 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.”¹²⁹ 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.”¹³⁰ Two academic commentators likewise have called for JAG lawyers to become more involved 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.”¹³¹

Crucially, these are not claims about what is required by the law of war.¹³² The argument is not that the LOAC has evolved to proscribe attacks

127. Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, ARMY LAW., Sept. 2006, at 1, 15.

128. *Id.* at 9; *see also* WAXMAN, *supra* note 116, at xiii (“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.”).

129. Wheaton, *supra* note 127, 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.

130. *Quoted in* Dickinson, *supra* note 118, at 21.

131. Kramer & Schmitt, *supra* note 126, 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.”).

132. *Cf.* Dunlap, *Military Interventions*, *supra* note 4, at 21 (“Savvy political reasoning might counsel against hitting a particular target solely out of fear of high civilian casualties,

that, in past conflicts, would have been permissible. Rather, the idea quite explicitly is that judge advocates should adopt additional restrictions – limits that are inspired by “moral, economic, social, and political” concerns and that go beyond what is strictly required by the LOAC principles of discrimination, proportionality, and necessity. Operations that are concededly permissible under the law of war nevertheless are to get a thumbs-down because they are objectionable for non-legal reasons.¹³³

D. The Wall

A final example of self-restraint concerns information sharing. On its face, the Foreign Intelligence Surveillance Act does not restrict agencies from exchanging data with one another. Yet over the course of several decades, Justice Department officials applied that statute to erect a “wall” between intelligence analysts 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 data between the law enforcement and intelligence worlds. 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 officials tie their 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

but that is altogether different from saying that the *law* prohibits the attack.”); Sulmasy & Yoo, *supra* note 6, at 1842 (claiming that targeting review has “propelled JAGs into the arena of policy”).

133. It can be quite difficult to differentiate between legal advice and policy advice in the context of JAG targeting review. This is so because, more than statutes or treaties, LOAC requirements tend to be open-ended, and the process of applying the rules to concrete settings often resembles the process of selecting from a range of policy options. For instance, when deciding whether the proportionality principle permits an air strike on an artillery battery located next to an elementary school, officials will have to determine how important is the military objective as well as how many innocent civilian lives it is “worth.” Yet those are the same considerations officials presumably would take into account when deciding whether the attack is worthwhile at all, even in the absence of a legal prohibition on disproportionate strikes.

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.¹³⁴ To minimize the danger that investigators might use FISA to circumvent Title III's more rigorous requirements,¹³⁵ 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.¹³⁶

The wall's first bricks were laid 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.¹³⁷ 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, the less likely the primary purpose was to gather foreign intelligence (and the more likely the FISA Court would reject the surveillance application). By contrast, the more rigidly intelligence was 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 always mutually exclusive.¹³⁸ Sometimes criminal prosecution will serve the government's intelligence needs; one way to neutralize a spy is to indict him for

134. 50 U.S.C. §1805(a)(2) (2006). 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).

135. 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, 1810-1812 (2010).

136. 50 U.S.C. §1804(a)(7)(B) (2000).

137. *United States v. Truong*, 629 F.2d 908, 912-913 (4th Cir. 1980); see also *In re Sealed Case*, 310 F.3d 717, 727 (FISA Ct. Rev. 2002) (indicating that "the exact moment" when the Justice Department applied the primary purpose test to FISA "is shrouded in historical mist").

138. *In re Sealed Case*, 310 F.3d at 724-725.

espionage. The Justice Department might have adopted 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 cautious reading. What is 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 limited its discretion.

By the mid-1990s, the wall’s foundation was in place. 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.”¹³⁹ Toward that end, DOJ directed that information uncovered by intelligence officials in the course 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.”¹⁴⁰ DOJ was quite clear that the guidelines were not an interpretation of FISA, but rather “go beyond what is legally required.”¹⁴¹

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.”¹⁴²

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.”¹⁴³ It

139. 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>.

140. *Id.* at 2, 3.

141. *Id.* at 2.

142. *Id.* at 3.

143. 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/jrpf/>

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.”¹⁴⁴ The Reno guidelines did not impose strong information sharing limits. Instead, they were aimed squarely at the one type of coordination 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. 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.¹⁴⁵

Despite these escape valves, cops and spies did not in fact exchange information freely,¹⁴⁶ and 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, 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. “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.”¹⁴⁷ Second, OIPR played “gatekeeper,”¹⁴⁸ policing whatever information flow did take place. Neither the Gorelick nor Reno directives mentioned any role for OIPR in regulating information exchanges, but OIPR assumed responsibility for doing so, apparently on the basis of a threat. “The Office threatened that if it could not regulate the flow of information to criminal prosecutors, it would no longer present the FBI’s

agency/doj/fisa/1995procs.html.

144. *Id.* §(A)(6).

145. *Id.* §(B)(1).

146. *In re Sealed Case*, 310 F.3d 717, 728 (FISA Ct. Rev. 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”).

147. 9/11 COMMISSION REPORT, *supra* note 1, at 79.

148. *Id.* at 78.

warrant requests to the FISA Court.”¹⁴⁹ OIPR used its status as the government’s representative before the FISA Court as leverage to police DOJ’s 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.”¹⁵⁰ In 2000, the court went even further. Assisted by the same lawyer who had lobbied it to adopt the OIPR restrictions (he had 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.”¹⁵¹ 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 conventional wisdom that the wall resulted in chronic information sharing failures. Yet it was not legally required – at least not until OIPR lobbied the FISA Court. FISA itself did not restrict information sharing, and neither did the Justice Department’s internal directives. Instead, the wall was 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.

III. SELF-RESTRAINT AS COST-BENEFIT ASYMMETRY

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 domestic and international legal requirements. These players 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 reject operations that, while lawful, are thought to be undesirable on policy grounds. That is, they impose self-restraints that are stricter than the applicable laws. Why?

149. *Id.* at 79.

150. STEWART A. BAKER, SKATING ON STILTS: WHY WE AREN’T STOPPING TOMORROW’S TERRORISM 57 (2010).

151. *Id.* at 61-62.

One way to answer that question is to consider the individual and institutional incentives that color the behavior of military and intelligence officials. Looking at the government's national security apparatus through the lens of public choice theory (especially the idea that bureaucrats are rationally self interested actors who seek to maximize their utility¹⁵²) and basic agency relationships (e.g., the relationships between senior policymakers and the subordinates who act on their behalf¹⁵³) reveals a complex system in which power is distributed among a number of different nodes. The executive branch "is a 'they,' not an 'it.'"¹⁵⁴ The national security community in particular 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;¹⁵⁵ the government thus is subject to what Neal Katyal has called the "internal separation of powers."¹⁵⁶ These basic insights into how military and intelligence agencies operate suggest several possible explanations for why self-restraint occurs. As elaborated in this Part, such constraints might result from systematic asymmetries in the expected value calculations of senior policymakers and their lawyers. In addition, as explained in Part IV, self-restraint might occur due to bureaucratic empire building by officials who review operations for compliance with domestic and international law.

A. A Simple Framework

One possible explanation for why the government stays its own hand is expected value asymmetry. This reluctance to push the envelope is a rational and predictable response to powerful bureaucratic incentives. Officials tend to be cautious because the costs they expect to incur as a result of forward-leaning and aggressive action usually are greater than the expected benefits. Similarly, government employment rules and other mechanisms make it easier to internalize onto individual bureaucrats the costs of a failed operation than the benefits of a successful one.¹⁵⁷ National security players typically have more to lose from boldness than to gain, and

152. See sources cited *supra* note 8.

153. See sources cited *supra* note 9.

154. Posner & Vermeule, *supra* note 3, at 886.

155. ALLISON & ZELIKOW, *supra* note 13, at 143-147, 294-296; ZEGART, *FLAWED BY DESIGN*, *supra* note 9, at 19-20.

156. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006). *But see* Posner & Vermeule, *supra* note 3, at 897-899 (critiquing Katyal's call for the creation of checking mechanisms within the executive branch).

157. *Cf.* Levinson, *supra* note 5, at 935-936 (arguing that bureaucrats do not internalize the gains resulting from their agencies' jurisdictional expansions).

that asymmetry inclines them to avoid risky behavior.¹⁵⁸ While all members of the national security community experience some cost-benefit asymmetry, senior policymakers and their lawyers seem especially cautious. Attorneys who review proposed operations for legality therefore look askance at risky missions. They tend to veto proposals that, while legal, could inspire propaganda campaigns by adversaries, expose officials to ruinous investigations, or worse. The result is self-restraint – officials rule out operations that they regard as lawful because of fears they will prove too costly.

To illustrate the problem, it is useful to 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, playing the collected works of Kenny G in the detainee’s cell for twelve-hour periods. The interrogator hopes that exposure to Kenny G’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 Kenny G on the captive does not violate the federal torture statute,¹⁵⁹ nor does it constitute “cruel, inhuman, or degrading treatment” under the Detainee Treatment Act.¹⁶⁰ A rational FBI official will undertake the interrogation if his expected benefits exceed his expected costs. What does he anticipate he’ll gain if the questioning successfully elicits information about ongoing al Qaeda plots? What does he anticipate losing if the session later becomes controversial when the public learns about it? And what mechanisms are available to internalize the resulting positive and negative externalities?

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 the President and other senior policymakers, who will be grateful for the actionable intelligence. 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) and enhanced autonomy (i.e., it will be easier for the Bureau to pursue its priorities).¹⁶¹ In addition,

158. GOLDSMITH, *supra* note 4, at 92-95; Sales, *supra* note 21, at 325-330; *see also* John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 266-267 (2000) (citing PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 59-81 (1983)).

159. 18 U.S.C. §2340A (2006).

160. 42 U.S.C. §2000dd (2006).

161. *See supra* Part I.

the FBI's reputation may improve among officials at other agencies who learn about the successful interrogation and develop greater admiration for the Bureau. However, 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.¹⁶² 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 interrogator's standpoint. The government's employment, classification and other rules largely will prevent him from internalizing the positive externalities that accrue to the FBI as a whole. The FBI will profit from the interrogation, but the gains – greater influence, enhanced autonomy, and so on – will be distributed among all of the agency's employees. The responsible official's per capita share will be fairly small.

It's also unlikely that the official will receive tangible compensation for his success in the interrogation room. Congress and the administration might reward the FBI with a bigger budget, but very few of those dollars will find their way into the interrogator's pockets. Government agencies don't offer sizable cash bounties to high-performing employees – certainly nothing on the order of the million-dollar bonuses that might be handed out in the private sector.¹⁶³ The interrogator might be promoted to a job that involves more responsibility or 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.¹⁶⁴ Moreover, any new post is unlikely to 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).¹⁶⁵ It is likely that the successful interrogator will receive certain forms of psychic income – satisfaction at preventing terrorist attacks, furthering his agency's mission, and serving his country's interests.¹⁶⁶ However, he probably won't 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 it. The resulting intelligence assessments that circulate among military and intelligence officials most likely will say something like “According to FBI

162. MARK M. LOWENTHAL, *INTELLIGENCE: FROM SECRETS TO POLICY* 153-154 (4th ed. 2008).

163. STEARNS & ZYWICKI, *supra* note 8, at 341.

164. Posner, *supra* note 29, at 15-16.

165. *Id.* at 16.

166. *See infra* note 193 and accompanying text.

reporting . . .,” omitting the name of the responsible official and his methods.

2. Costs

The expected benefits of a successful operation thus are fairly modest, and the resulting gains cannot be readily internalized. The expected costs of an operation gone awry, by contrast, could be considerable indeed. Suppose the FBI's interrogation of the al Qaeda captive is a failure; suppose the techniques are leaked and ignite a public controversy. What sorts of costs would result, and how easily could the negative externalities be internalized onto the responsible official?

For starters, national security operations can impose significant propaganda costs on the nation as a whole. Adversaries might charge the United States with flouting fundamental domestic and international prohibitions on torture.¹⁶⁷ 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.¹⁶⁸ Such accusations 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.¹⁶⁹ 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.¹⁷⁰

These costs can be internalized fairly easily onto the responsible agency. Claims that FBI officials have engaged in torture would have devastating consequences for the Bureau. Torture is repellent to most members of the public¹⁷¹ and accusations that the FBI committed that crime

167. Al Qaeda operatives are trained to allege, in court and elsewhere, that their captors have abused them. Yin, *supra* note 4, at 880-881. 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, *available at* <http://www.fas.org/irp/world/para/manualpart1.html>. The manual further directs captured operatives to “complain of mistreatment while in prison.” *Id.*

168. Dunlap, *Military Interventions*, *supra* note 4, 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.”).

169. Anderson, *supra* note 87, at 378; Daniel Byman & Matthew Waxman, *Defeating US Coercion*, 41 SURVIVAL 107, 111 (1999); Taylor & Wittes, *supra* note 53, at 325.

170. Dunlap, *TV Show*, *supra* note 119, at 482; Kramer & Schmitt, *supra* note 126, at 1409; Wheaton, *supra* note 127, at 8.

171. Paul Gronke & Darius Rejali, *U.S Public Opinion on Torture, 2001-2009*, PS:

would render it politically radioactive. For reasons of self preservation, the President and his advisors would distance themselves from the toxic agency. This evaporation of White House support also would encourage the FBI's bureaucratic rivals – the CIA, the Pentagon, and others – to poach 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 colleagues' alleged crimes would distract them from their daily jobs and inspire doubts about the worthiness of their agency's mission.

This is not mere speculation. Comparable harms befell the CIA in the wake of allegations that the agency subjected several al Qaeda detainees to harsh interrogation techniques in violation of domestic and international prohibitions on 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.¹⁷² 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.¹⁷³ And morale among CIA employees plummeted in the wake of the interrogation scandals.¹⁷⁴

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 is not fired outright, informal peer pressure could induce him to resign. Even if he toughs it out, he might find himself demoted to a less prestigious and lower paying position, or transferred to an undesirable job in the hinterlands.

Legal proceedings are another mechanism for internalizing negative externalities. An official could face ruinous criminal investigations as prosecutors look into whether his conduct in the interrogation room was

POLITICAL SCIENCE & POLITICS, July 2010, at 437, 437.

172. Kornblut, *supra* note 64, at A1. The task force, which is known as the "High-Value Detainee Interrogation Group," bears the improbable acronym "HIG."

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

174. See, e.g., Mark Hosenball, *Too Little for Langley? Presidential Pep-Talks May Not Suffice for an Anxious CIA*, NEWSWEEK, Apr. 19, 2009, <http://www.thedailybeast.com/newsweek/2009/04/19/too-little-for-langley.html>; Robert Baer, *The CIA and Interrogations: A Bad Fit from the Start*, TIME, Aug. 28, 2009, <http://www.time.com/time/nation/article/0,8599,1919406,00.html>.

unlawful. At worst, the official could find himself behind bars for violating the federal torture statute.¹⁷⁵ Even if the charges are dismissed or he is exonerated, he still will have incurred significant debt to defend himself, and his employer agency may not reimburse his legal fees. (Some counterterrorism officials have been buying liability insurance as a hedge against this possibility.¹⁷⁶) Plus, the years of investigation and prosecution will take a significant emotional toll on him and his family, even if he prevails and ends up having no out-of-pocket expenses.¹⁷⁷

If the official manages to escape the notice of American courts, he still could face investigation and prosecution before an international tribunal or a foreign court claiming universal jurisdiction¹⁷⁸ – the notion that a country may try certain alleged violations of international law regardless of where in the world they occurred.¹⁷⁹ There is now a 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 those thought to be responsible.¹⁸⁰ Again, such allegations can be quite costly even if the officials are ultimately exonerated.

Often, political and military leaders are the ones 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 (including Shehadeh's wife and three of their children) and injured some 150 other bystanders.¹⁸¹ Several Palestinians

175. *But see* Posner, *supra* note 4 (emphasizing that “jail time is vanishingly rare”).

176. GOLDSMITH, *supra* note 4, at 95-96.

177. Jack Goldsmith, *No New Torture Probes*, WASH. POST, Nov. 26, 2008, at A13 (“[T]he 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 the country safe.”); Posner, *supra* note 4 (acknowledging that “[l]egal liability is an ever-present menace and generates anxiety among executive-branch personnel”).

178. Dickinson, *supra* note 118, at 14 (reporting judge advocates’ concerns that coercive interrogation “puts the interrogators and the chain of command at risk of criminal accusations abroad”).

179. *See generally* Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183, 190-192 (2004).

180. *But see* Posner, *supra* note 4 (“[I]t is more likely that an American would choke to death on his foie gras while snacking at a café in Paris than that he would be arrested there for committing international crimes.”).

181. Gabriella Blum & Philip B. Heymann, *Law and Policy of Targeted Killing*, 1

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.¹⁸²)

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. In July 2010, the Spanish National Court ordered “the three men to appear in its courtroom or face extradition.”¹⁸³ Likewise, in 2009, 23 Americans (most of whom were covert CIA operatives) were convicted in absentia by an Italian court of abducting a suspected terrorist in Milan and rendering him to Egypt to face interrogation.¹⁸⁴ Most of the officials were sentenced to seven years incarceration; one received a nine year jail term.¹⁸⁵

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 Statute and the Torture Victim Protection Act. (The case was eventually dismissed.¹⁸⁶) 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 kidnapping operation. (The D.C. Circuit ultimately found the case nonjusticiable.¹⁸⁷) 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

HARV. NAT'L SECURITY J. 145, 152-153 (2010).

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

183. Lisa Abend, *Spanish Court Seeks Arrest of U.S. Soldiers in Hotel Attack*, TIME, July 29, 2010, <http://www.time.com/time/world/article/0,8599,2007388,00.html>.

184. Rachel Donadio, *Italy Convicts 23 Americans, Most Working for C.I.A., of Abducting Muslim Cleric*, N.Y. TIMES, Nov. 5, 2009, at A15.

185. Mathias Vermeulen, *Italy Appeals Court Ups US Sentences in CIA Trial*, ASSOC. PRESS, Dec. 15, 2010.

186. *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007), *aff'd*, 563 F.3d 9 (2d Cir. 2009).

187. Pines, *supra* note 101, at 652-653; *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005).

government propaganda. Sixteen people were killed and another 16 were injured. Lawyers representing the victims filed civil lawsuits that ended up before the European Court of Human Rights, as well as the International Criminal Tribunal for the Former Yugoslavia. (Both suits ultimately were dismissed.¹⁸⁸)

* * *

In sum, substantial asymmetries exist between the expected costs and expected benefits of national security operations.¹⁸⁹ And the government's employment rules and other mechanisms make it easier for the responsible officials to capture the negative externalities of a failed operation than the positive externalities of a successful one. 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. If the operation goes poorly, he 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.¹⁹⁰

188. Dunlap, *Military Interventions*, *supra* note 4, at 14; GOLDSMITH, *supra* note 4, at 61-62.

189. *Cf.* Posner, *supra* note 29, 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").

190. National security officials may be even more determined to play it safe than the managers of private firms. One explanation for this is that it is more difficult to offset the risks of military and intelligence decisions than it is to offset the risks of business decisions. If a mutual fund manager buys a stock that promises high returns but also holds a high risk of default, he can mitigate that risk by diversifying – he can buy government bonds or other low-return, low-volatility instruments. That sort of move isn't available here. If an official subjects an al Qaeda detainee to coercive interrogation, or orders an airstrike on a gun battery in a civilian neighborhood, he can't reduce the risk of a war crimes indictment by meticulously complying with the law of armed conflict in other cases. It's a one way ratchet; every questionable operation increases one's exposure and each by-the-book mission does nothing to reduce it. There are several risk-management strategies available to the national security community, but they may not be that effective. For instance, military and intelligence officials might purchase professional liability insurance (and indeed many are doing so, *see supra* note 176 and accompanying text). While these policies might cover the insured's legal fees and maybe even civil damages, the official will still incur significant nonpecuniary costs in the ensuing investigation (negative publicity, stress, loss of professional prestige), and he still might end up being convicted.

B. A More Sophisticated Framework

The simple framework sketched out above has some explanatory power, but it is incomplete. It does not account for the fact that senior policymakers and lawyers both seem to regard military and intelligence missions as costlier than operators do. Here's the puzzle in a nutshell. We should expect operators naturally to eschew missions that threaten to expose them to bureaucratic embarrassment, criminal liability, or other significant costs. Their baseline aversion to excessive costs should be enough to predispose them against such operations; it shouldn't be necessary for other officials to wield the veto pen. Yet that is exactly what happens.

A more sophisticated account is necessary to resolve this apparent paradox. What is needed is a theory that can explain why different national security officials have differing levels of enthusiasm for risky operations. The explanation developed below suggests that lawyers will tend to be more cautious 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' expected value 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 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.

To simplify the analysis, I will assume for now that no agency slack exists between senior policymakers (the principals in this scenario) and the reviewers they commission as agents.¹⁹¹ 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 costlessly 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. If policymaker-principals are timid, their reviewer-agents will be too by derivation.¹⁹² I am not making a parallel assumption that the interests

191. Posner, *supra* note 29, at 5-6, 8; ZEGART, *FLAWED BY DESIGN*, *supra* note 9, at 47.

192. My assumption of a synergy between the interests of policymakers and reviewers is concededly unrealistic. Sometimes reviewers will find it advantageous to further policymakers' interests – for instance, an agent who gives the principal the answer he wants to hear stands to gain a measure of influence and autonomy. *See infra* Part IV.A (arguing that military and intelligence officials seek to maximize their influence and autonomy); *infra* notes 234-236 and accompanying text (arguing that reviewers can maximize their influence and autonomy by approving operations that policymakers are known to favor). But the

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. 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 compound in Abbottabad, satisfaction at using a drone to launch a missile into a convoy of al Qaeda leaders, and so on.¹⁹³ The psychic income from a successful mission typically accrues only to the operators who actually participate in it. It does not accrue to 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. To be sure, the psychic income that operators anticipate from successful missions may be offset by a form of “public approval income” that can accrue to policymakers. A successful operation can bolster a policymaker’s approval ratings. That may result in political capital that the official can expend to advance his policy agenda, foreign or domestic. A successful operation also can improve a first-term President’s reelection prospects.¹⁹⁴ 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

interests of reviewer-agents and their policymaker-principals sometimes diverge. *Cf.* McNollgast, *supra* note 9, at 247. Also, 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 reviewers to pursue their own 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 IV.

193. Sales, *supra* note 21, at 327-328 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).

194. *See supra* notes 15-18 and accompanying text.

yield public approval income, the ordinary gap between their expected benefits and those of operators will narrow, and may even disappear.

At the same time, the expected costs of a given operation might be greater for policymakers than for operators. Policymakers have wider strategic lenses; they are 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.¹⁹⁵ 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, United Nations, and other players. 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, maximizing policymakers' utility at the expense of operators' utility.¹⁹⁶ In effect, reviewers initiate a wealth transfer, limiting the welfare of operators and shifting it to policymakers.¹⁹⁷ Reviewer vetoes can be welfare-enhancing in another way: Sometimes officials may privately regard a particular operation as excessively costly but may not want to be seen publicly as opposing it – perhaps because the mission is backed by powerful figures in Congress or elsewhere in the executive branch. “High-ranking government officials have strong incentives to shift the

195. ALLISON & ZELIKOW, *supra* note 13, at 165-166.

196. Sometimes reviewers may actually have greater appetites for risk than operators. What accounts for the unexpected result that lawyers sometimes are more aggressive and forward-leaning than operators – i.e., that lawyers sometimes function as “policy entrepreneurs”? WILSON, *supra* note 8, at 242. Perhaps some reviewers derive psychic income from pushing the envelope. They may experience intellectual satisfaction from solving a thorny legal problem, or ideological satisfaction at seeing their legal views and policy preferences embraced by senior officials. LUND, *supra* note 8, at 447. In these circumstances, lawyers may find that an operation's benefits exceed its costs notwithstanding the very different cost-benefit conclusion reached by operators.

197. There is another possible explanation for the divergence between operators' and reviewers' cost-benefit calculations: bounded rationality. *See* sources cited *supra* note 47. 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. 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.

responsibility for inaction away from themselves in such circumstances.”¹⁹⁸ In these cases, a lawyer’s veto allows policymakers to pursue their favored course of (in)action at little cost to themselves; the veto externalizes the costs of inaction onto the lawyer.

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 Kenny G on the al Qaeda captive outweigh the costs. He is aware that an interrogation gone wrong could result in embarrassment for his agency and criminal liability for himself. But he also anticipates significant 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, 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.¹⁹⁹

C. Costs, Benefits, and Self-Restraint

How do national security officials’ expected-value calculations – including the relatively greater caution of policymaker-principals and their reviewer-agents – result in self-restraint? Reviewers will veto military and intelligence operations when they calculate that policymakers’ expected costs will exceed their expected benefits. Those costs can be considerable:

198. Lund, *supra* note 8, at 492-493.

199. Self selection can also explain these divergences between operators and reviewers. People have idiosyncratic preferences about employment conditions such as risk, and they will naturally gravitate to jobs in which they expect they will be able to indulge those preferences. Posner & Vermeule, *supra* note 3, at 880; STEARNS & ZYWICKI, *supra* note 8, at 364-365. See generally Michael Spence, *Job Market Signaling*, 87 Q. J. ECON. 355 (1973). Risk-seeking hawks will tend to work for SEAL Team Six, while risk-avoiding doves will tend to favor OIPR. “[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.” Posner, *supra* note 29, at 20. On this account, an operator’s desire to undertake an aggressive mission, and a reviewer’s decision to veto it, are not so much the result of different cost-benefit calculations. Instead, the disagreement stems from the fact that people have different appetites for risk and therefore self select into the appropriate professions.

undermined perceptions of American legitimacy, compromised diplomatic relations, loss of agency influence and autonomy, and criminal investigations of the responsible officials. Reviewers therefore tend to supplement legal restrictions with self imposed constraints. They rule out operations they regard as perfectly legal but that are deemed too costly.²⁰⁰

As an example, consider the decision to restrict all interrogations to the methods spelled out in the Army Field Manual. The White House probably believed that the Convention Against Torture, the federal torture statute, and the Detainee Treatment Act permit counterterrorism interrogators to employ the same mildly coercive techniques that law enforcement officials use – shouting, prosecutorial threats, the good cop bad cop drill, solitary confinement, and the like. These non-AFM techniques likely do not offend the international or domestic proscriptions on torture or cruel, inhuman, and degrading treatment – at least as the United States understands those requirements. Yet officials nevertheless restricted them. Why?

One possible explanation is an asymmetry in the White House's cost-benefit calculations. For the CIA officials responsible for questioning

200. Bureaucrats will have an incentive not to push the boundaries of their powers for another reason – the risk that aggressive conduct will provoke Congress to restrict their delegated authorities or otherwise subject them to stricter limits. One account of Congress's decision to delegate legislative power to administrative agencies emphasizes expertise and information asymmetries. Bureaucrats, the theory goes, have more information than their legislator principals about the conditions that prevail in the regulated field and the outcomes that are likely to result from various policy choices. Knowing this, Congress establishes a "discretionary window" in which the agency is given authority to act. Stephenson, *supra* note 18, at 288. The scope of delegated power thus ordinarily will be broader than the scope of exercised power. But if bureaucrats push to the limit, they run the risk of alienating their legislator principals. Bureaucrats therefore will tend to stay their own hands to dissuade Congress from narrowing the range of options available to them. Posner & Vermeule, *supra* note 3, at 901; Stephenson, *supra* note 18, at 301.

Still, this risk of legislative retrenchment seems fairly low, and a bureaucrat's corresponding incentive to restrain himself therefore seems fairly weak. This is so because it can be quite costly for Congress to discipline wayward agencies. "Awaking the sleeping giant of Congress is no easy feat." Magill, *supra* note 3, at 875. Congress lacks a legislative veto, *see* *INS v. Chadha*, 462 U.S. 919 (1983), so its most effective means of remedying perceived agency overreach will be to enact fresh legislation. Not only will this require Congress to overcome the ordinary collective action problems associated with passing laws. Posner & Vermeule, *supra* note 3, at 885-886. It will also, in many cases, require Congress to override a presidential veto with bicameral two-thirds supermajorities. A White House that previously, through the executive branch's internal review process, approved a proposed agency action will probably veto any bill that subsequently seeks to thwart that agency action. Consider in this regard the Congressional Review Act of 1996, which establishes an expedited process for legislation that would overturn an agency rule. The CRA has been successfully used exactly once – in 2001, to annul the Department of Labor's new ergonomics regulations. Significantly, this took place after the Clinton administration, which had proposed the rule, was replaced by the George W. Bush administration. The absence of a veto threat made it significantly, perhaps decisively, less costly for Congress to discipline the agency.

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.²⁰¹ That in turn would yield the interrogators significant psychic income – feelings of satisfaction at having advanced the CIA’s mission of detecting and disrupting terrorist plots. The claim that coercive interrogation can yield actionable intelligence is, of course, hotly contested,²⁰² but at least some CIA officials believed it to be true.

But from the standpoint of policymakers – and, therefore, from the standpoint of their 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 domestic and 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 Eastern and Muslim nations.²⁰³ Then there were the expected legal costs. Policymakers must have been aware that foreign prosecutors, invoking principles of universal jurisdiction, might investigate their predecessors for approving waterboarding and other harsh tactics.²⁰⁴ A similar fate might befall them if they allowed even minimally coercive techniques to persist. The benefits side of the ledger must have looked paltry by comparison. Policymakers probably feared that coercive interrogation would not 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.²⁰⁵ 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

201. Cf. Michael Hayden & Michael B. Mukasey, *The President Ties His Own Hands on Terror*, WALL ST. J., Apr. 17, 2009, at A15 (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”).

202. Wittes & Taylor, *supra* note 53, at 310-326 (reviewing arguments for and against the effectiveness of coercive interrogation).

203. Peter Baker, *Obama’s War over Terror*, N.Y. TIMES, Jan. 17, 2010, § MM (magazine), at 30; R. Jeffrey Smith, *Emanuel Rejects Trial for Memos’ Authors*, WASH. POST, Apr. 20, 2009, at A3.

204. Marlise Simons, *Spanish Court Weighs Inquiry on Torture for 6 Bush-Era Officials*, N.Y. TIMES, Mar. 29, 2009, at A6.

205. 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, *supra* note 65, ¶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”).

them anyway. That asymmetry between the expected costs and benefits of non-AFM interrogations may help explain why 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, it would have been lawful to kill Osama bin Laden in the wake of the 1998 al Qaeda embassy bombings. Likewise, a targeted killing of Mohammad Qaddafi 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. 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 Qaddafi, the White House ordered air strikes that apparently were intended to kill the Libyan dictator, but it tried to obscure its purpose by attacking various other targets and then, in the aftermath of the strike, dissembling about its true intentions.

Divergent expected-value calculations might explain why. It may be that 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.²⁰⁶ 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 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 or, even worse, deliberately targeting civilians.²⁰⁷ Officials therefore vetoed the planned targeted killing, opting for a kidnap job instead.²⁰⁸

206. 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 others shared her interpretation of the applicable laws. COLL, *supra* note 1, at 425-426.

207. COLL, *supra* note 1, at 422.

208. *Id.* at 427-428. 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. *Id.* at 412, 422; WRIGHT, *supra* note 1, at

The 1986 attack on Libya likewise might be explained by expected value asymmetry, though 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 information sharing wall offers a third example of how self-restraints might result from worries about excessive operational costs. It is important to specify precisely which power government officials failed to exercise. The authority at issue was not a bureaucrat's power to *give* information to someone at a different agency. From the bureaucrat's standpoint, the exercise of such a power would have been welfare reducing; as I have argued elsewhere, officials have strong incentives to hoard data to prevent rivals from free riding on their analytical outputs.²⁰⁹ Instead, the power that was not fully exercised was the authority to *receive* data from elsewhere in the intelligence community. Officials frequently did try to exercise this power, as when Justice Department criminal investigators unsuccessfully sought information about al Qaeda members from FBI intelligence analysts in the weeks before 9/11.²¹⁰

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 cops and spies. From the standpoint of analysts and other operators, the ability to receive data from elsewhere in the intelligence community was utility-maximizing. It would enable them to piece together the entire intelligence "mosaic" – the bits and pieces of information that individually might not signify much, but that take on new meaning when combined with other data points.²¹¹ Yet policymakers and reviewers alike nevertheless restricted information sharing. In their eyes, sharing was utility-reducing.

285-286.

209. See generally Sales, *supra* note 21.

210. 9/11 COMMISSION REPORT, *supra* note 1, at 271; WRIGHT, *supra* note 1, at 353-354.

211. CIA v. Sims, 471 U.S. 159 (1985).

Consider first the decision to interpret FISA as barring surveillance unless its primary purpose was foreign intelligence, as well as the use of sharing as the metric by which to judge the purpose of an operation. 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 2002.²¹² 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 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: 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.

Similar calculations may have inspired OIPR’s subsequent policy of policing the flow of data among cops and spies. Reviewers at 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.²¹³ 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,²¹⁴ and at one point it successfully lobbied the court to reinforce its sharing restrictions via court order.²¹⁵ Again, OIPR may have been aware that expanded information sharing could improve the quality of FBI intelligence products and assist 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. Because the expected costs of an aggressive interpretation seemed so much greater than the expected benefits, OIPR opted to play it safe.²¹⁶

212. *In re Sealed Case*, 310 F.3d 717, 724-725 (FISA Ct. Rev. 2002).

213. Gorelick Memo, *supra* note 139, at 3; Reno Memo, *supra* note 143, §(B)(1).

214. 9/11 COMMISSION REPORT, *supra* note 1, at 79.

215. BAKER, *supra* note 150, at 57.

216. 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

The JAG corps' targeting review is a final illustration of how self-restraint might result from asymmetrical costs and benefits.²¹⁷ 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 JAG officers sometimes recommend against allowing missions to proceed, occasionally as they are unfolding in real time. Reading between the lines, it is possible to hazard a guess that some of these strikes are ruled out for prudential reasons, not legal ones. That is, some missions may be rejected but because JAG lawyers anticipate that adversaries will falsely accuse U.S. forces of war crimes.²¹⁸ Judge advocates may, in other words, be heeding the calls for them to "provide advice that goes beyond that which is strictly legal"²¹⁹ and to recommend against operations on "Moral, Economic, Social, and Political" grounds.²²⁰

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 near a hospital, mosque, or private residence, enemy propaganda machines would churn out films of corpses in the rubble and accusations of war crimes.²²¹ 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. That the United States might be convinced that the strikes are perfectly lawful is irrelevant; the operations would be costly regardless of whether these claims had any legal merit.

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, groups, and individuals 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).

217. WAXMAN, *supra* note 116, at xi ("Public and coalition sensitivity to . . . collateral damage or civilian injury may reduce operational flexibility more severely than does adherence to international law.").

218. Dunlap, *TV Show*, *supra* note 119, at 481-482; Kramer & Schmitt, *supra* note 126, at 1433-1434; Wheaton, *supra* note 127, at 8.

219. Kramer & Schmitt, *supra* note 126, at 1432.

220. Wheaton, *supra* note 127, at 15.

221. WAXMAN, *supra* note 116, at 45-46.

IV. SELF-RESTRAINT AS EMPIRE BUILDING

The previous account of self-restraint – the government ties its hands when an operation’s expected costs to senior policymakers 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 and other reviewers have their own discrete interests that often conflict with those of their principals.²²² And it is prohibitively costly for policymakers to monitor their agents comprehensively. A principal “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.”²²³ Given the opportunity, therefore, reviewers will shirk. Officials “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.”²²⁴

This tendency of self interested reviewers to pursue their own interests suggests another, complementary hypothesis for self-restraints. Officials in the government’s national security apparatus can enhance the sway they hold over policymakers, as well as their ability to pursue their own priorities, by interfering with rivals’ plans. Reviewers might veto operations planned by their interagency competitors in an effort to empire build – to magnify their clout within the bureaucracy. Empire building is similar to cost-benefit asymmetry in that both explanations describe self-restraint as the product of conflicting interests between operators and reviewers. The difference is that, in the asymmetry account, reviewers veto operations to vindicate *policymakers’* interests. Here, reviewers veto to vindicate *their own* interests.

222. Lund, *supra* note 8, at 447 (“The analyst has his own interests, which have to be suppressed if he is truly to act as an oracle of the law. And that does not happen automatically, if it happens at all.”).

223. Posner, *supra* note 29, at 8; *see also* O’Connell, *supra* note 27, at 1702; Sulmasy & Yoo, *supra* note 6, at 1826.

224. ZEGART, *FLAWED BY DESIGN*, *supra* note 9, at 47.

A. Vetoes and Zero Sum Games

Previously I argued that national security bureaucrats seek to maximize their influence over senior policymakers, as well as autonomy to pursue their core priorities.²²⁵ How might that quest produce self-restraints? In short, vetoes can enhance clout. One way for an official to enhance his welfare is to interfere with a competitor's plans. A reviewer can magnify his power when he inserts himself into the decision chain and influences whether or not a proposed operation takes place.²²⁶ A bureaucratic player doesn't gain by approving whatever mission his rivals want. Often, he 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.²²⁷) Obstruction can enhance reviewer 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; the most effective veto is the one that doesn't need to be issued. Operators can come to internalize the reviewers' priorities in their own decisionmaking processes.²²⁸ An official charged with reviewing the legality of military or intelligence operations therefore will have an incentive to reject proposed missions in an effort to maximize his influence and autonomy.

Self-interested vetoes may be especially prevalent in the national security community because the rivalries there can be particularly intense.²²⁹ 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.²³⁰ A similar dynamic can exist within agencies. FBI intelligence officials and FBI criminal investigators each 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

225. See *supra* notes 21-32 and accompanying text.

226. BAKER, *supra* note 150, at 46-47; Stephenson, *supra* note 18, at 299.

227. See *infra* notes 234-236 and accompanying text.

228. Stephenson, *supra* note 18, at 299 (remarking that a reviewer “does not need to object frequently to agency proposals in order to be effective, so long as agencies can anticipate [the reviewer's] likely reactions and tailor their proposals accordingly”).

229. See, e.g., MARK RIEBLING, WEDGE: FROM PEARL HARBOR TO 9/11 – HOW THE SECRET WAR BETWEEN THE FBI AND CIA HAS ENDANGERED NATIONAL SECURITY (2002).

230. See Hitz, *supra* note 88, at 770-771.

competing goods – e.g., intelligence analyses, policy recommendations, and so on – their officers and employees will tend to regard each another as adversaries.

A complementary reason for the intense rivalries between, and 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 his influence, that almost inevitably means that another will surrender some of his own. Bureaucrats know this and act accordingly. Every gain for a competitor is a setback, and the contests between rivals therefore can be especially fierce.²³¹ The turf war "is not unique to government, but it tends to be more virulent there."²³²

To illustrate the point, consider an analogy from the private sector. Apple and Microsoft produce rival operating systems for personal computers, and managers at these two firms want to maximize their companies' 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, because it is possible for a private firm to prosper in a way that doesn't threaten the prosperity of another. As relevant here, Apple's management 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 consumers 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 a savvy turf warrior's best hope for enhancing his agency's welfare is to poach from his rivals. Imagine two bureaucratic competitors, the Secretary of Defense and the Secretary of State, vying with one another to "sell" the President their respective recommendations about whether to bomb an al Qaeda training camp in the Afghanistan-Pakistan border region. The President can only take so much advice; if one Secretary's influence waxes, the other's necessarily wanes. There's only one way for the Secretary of State to increase her influence: to persuade the President to adopt her recommendation not to attack. 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 her to recoup her losses by growing the overall size of the pie. The Secretary of State can't bring other "consumers" into the marketplace and persuade them to "purchase" her

231. ZEGART, *FLAWED BY DESIGN*, *supra* note 9, at 38; ZEGART, *SPYING BLIND*, *supra* note 8, at 58, 68.

232. Posner, *supra* note 29, at 19.

policy recommendations or intelligence products, because there are no other potential consumers comparable to the President.²³³

The amount of influence and autonomy within the national security community is usually constant, but there may be 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. 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 players 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 will be to say yes. A reviewer might approve a competitor's proposal if doing so procures the rival's support for an initiative of his own – the bureaucratic equivalent of legislative logrolling. In addition, there will be incentives to approve an operation if it is known that senior policymakers favor it.²³⁴ A reviewer who vetoes a course of action favored by policymakers 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. This dynamic may have been at work in the months before the United States' 2003 invasion of Iraq. Because Administration officials were known to favor invasion, intelligence analysts had powerful incentives to provide evidence

233. 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.

234. Lund, *supra* note 8, at 438 (citing pressures on government lawyers “to shape their view of the law to suit the policy preferences or political demands of the administration” in which they serve); *id.* at 502 (emphasizing that lawyers' “influence and status within the government will be strongly and inversely correlated” with the extent to which they ignore White House interests).

that Iraq had or was seeking prohibited weapons of mass destruction.²³⁵ A similar yes man effect may have been present during the Gulf of Tonkin crisis, when senior policymakers were eager for confirmation that the North Vietnamese navy had attacked an American intelligence vessel.²³⁶ This incentive to give the thumbs-up, 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 more likely to be welfare enhancing.

Second, reviewers have an interest in wielding the veto pen selectively. They will not want to 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 influence. If a reviewer develops a reputation for vetoing planned missions reflexively, operators will stop taking his concerns seriously; they will stop internalizing the reviewer's priorities in their decisionmaking processes. 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.²³⁷ Even worse from a reviewer's standpoint is that excessive rejections could result in an erosion of his 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 him replaced altogether. A rational reviewer therefore will issue vetoes up to the point where doing so would solidify his place in the bureaucratic decision chain, but he will stop short of the line beyond which further rejections would strain his credibility.

B. Agency Welfare and Self-Restraint

The efforts of rationally self interested reviewers to promote their welfare can help explain their decisions to veto proposed military and intelligence operations. National security bureaucrats therefore will tend to veto operations planned by their interagency competitors in a bid to enhance their clout.

A prime example of how self-restraint might be explained by bureaucratic jockeying for influence and autonomy is Executive Order 13,491, which holds all counterterrorism interrogations to the Army Field Manual standards. During the presidential transition from late 2008 into early 2009, lawyers in the incoming White House Counsel's Office prepared a draft executive order extending the AFM restrictions to the CIA. Officials at Langley bitterly contested the proposal, but their arguments

235. LOWENTHAL, *supra* note 162, at 187; RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11, at 115 (2005).

236. AID, *supra* note 110, at 80, 102-104.

237. See *supra* note 1 and accompanying text.

ultimately failed to persuade; the President signed the order his second full day in office.²³⁸ By successfully lobbying the President to adopt the AFM restrictions, and by vetoing the CIA's preferred interrogation practices, the lawyers magnified their turf; their victory expanded their share of the influence pie and shrunk the CIA's by a corresponding amount. Regardless of whether the Counsel's Office sought clout for its own sake, or for the more public minded purpose of preventing interrogation abuses, the effect was the same: The lawyers were now calling the shots. 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 attorney.

The lawyers' victory did not just enhance their own welfare, it also boosted the standing of the CIA's rivals at the FBI, Justice Department, and Defense Department. That may help explain why officials at those agencies left Langley more or less to fend for itself as the incoming administration debated its interrogation policy.²³⁹ Executive Order 13,491 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.²⁴⁰ Then in August 2009, the White House announced that a new interagency group, headed by the FBI and operating under the National Security Council's supervision, would be responsible for conducting all high-profile interrogations.²⁴¹ The CIA effectively had been demoted and the Bureau, its rival, now sat at the head of the table. Langley's string of bureaucratic defeats, beginning with Executive Order 13,491, created a vacuum, and officials at the FBI, Justice, and Pentagon were only too happy to fill it.

Empire building also might explain the government's reluctance to kill Osama bin Laden and other al Qaeda leaders in the 1990s. CIA operatives repeatedly asked for presidential permission to slay the Saudi billionaire, but intelligence community lawyers just as doggedly refused. The most they were willing to approve were capture missions that might result in bin Laden's inadvertent death. IC lawyers may have declined to approve

238. Michael Isikoff, *The End of Torture*, NEWSWEEK, Jan. 21, 2009, <http://www.thedailybeast.com/newsweek/2009/01/21/the-end-of-torture.html>; Calabresi & Weisskopf, *supra* note 51.

239. Taylor & Wittes, *supra* note 53, at 315.

240. Calabresi & Weisskopf, *supra* note 51; Michael Isikoff, “Holy Hell” over Torture Memos, NEWSWEEK, Apr. 2, 2009, <http://www.thedailybeast.com/newsweek/2009/04/02/holy-hell-over-torture-memos.html>.

241. Kornblut, *supra* note 64.

outright targeted killings for self interested reasons: By vetoing a bureaucratic rival's plans, they made themselves an indispensable part of the decision chain and thus magnified their influence. 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 directly competed against DOJ's own plan to have him tried in the criminal justice system. 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 ability to pursue its institutional priorities while expanding its ability to pursue priorities of its own.

A third example of how efforts to maximize influence and autonomy can produce vetoes concerns the role of the Justice Department's Office of Intelligence Policy and Review in building the information sharing wall. Restrictions on data exchange enhanced OIPR's influence in the Justice Department bureaucracy. It is not quite right to suggest, as the 9/11 Commission has, that the sharing limits resulted from a simple misunderstanding of what was required by FISA and the Justice Department's 1995 directives.²⁴² The wall wasn't built by accident. It was instead the result, at least in part, of OIPR's turf warfare.

In particular, OIPR officials applied the restrictive guidelines for the World Trade Center investigation to *all* investigations, and they turned their office into the hub through which all intelligence information would flow.²⁴³ These moves magnified OIPR's clout. By setting themselves up as the Justice Department's information sharing gatekeepers, OIPR lawyers gained influence and diminished that of DOJ's cops and spies. Regulating data exchange also enhanced OIPR's autonomy. 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.²⁴⁴ OIPR officials feared that, with more coordination, the FISA Court was increasingly likely to regard the primary purpose of proposed surveillance as something other than foreign intelligence, such as garden-variety criminal enforcement. 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 applications would be approved. OIPR lawyers therefore had good reasons to be cautious.

OIPR's interests thus diverged from policymakers'. Policymakers wanted to receive intelligence products that could be used to identify and incapacitate suspected terrorists and spies. For that to happen,

242. 9/11 COMMISSION REPORT, *supra* note 1, at 79.

243. See *supra* notes 146-151 and accompanying text.

244. At the time, the FISA Court had never rejected an OIPR surveillance application.

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 may have been 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.

This empire building account can explain some self-restraints, but 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 law of war.

The JAG corps certainly gains bureaucratic clout by playing an active role in determining which targets battlefield commanders may and may not attack.²⁴⁵ 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 on moral, economic, or geopolitical grounds; they cede some of that authority to JAG officers.

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 the constraint.²⁴⁶ 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,²⁴⁷ many battlefield commanders do not see it that way. To the contrary, some military brass affirmatively welcome JAG legal review in the targeting process. Recall

245. See *supra* notes 126-132 and accompanying text.

246. BAKER, *supra* note 150, at 46-47, 54-55 (describing antagonism between intelligence agencies and OIPR).

247. Betts, *supra* note 123, at 129 (decrying the “unprecedented” “hyperlegalism” of the Kosovo war); Sulmasy & Yoo, *supra* note 6, 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.”).

one general's boast that his lawyer was right by his side throughout Operation Desert Fox in 1998.²⁴⁸ Somewhat 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 perceive greater cost-benefit asymmetries 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. Perhaps the military's personnel rules might make it easier to terminate, demote, or reassign officials for poor performance than the rules that apply to civilians. Or maybe military commanders suspect that, owing to their public visibility, they are 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 caution. JAG lawyers reportedly "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."²⁴⁹ 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 hesitant than their lawyers are. It may be that, because of a greater likelihood that they will bear the costs of an operation gone wrong, 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."²⁵⁰ In effect, JAG advice serves as a "get-out-of-jail-free card[,"²⁵¹ and for that reason it is welcomed by many commanders.

CONCLUSION

If the only thing we knew about national security was what we learned from Hollywood, we would 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

248. Dunlap, *Military Interventions*, *supra* note 4, at 24.

249. *Id.* at 21.

250. MICHAEL IGNATIEFF, *VIRTUAL WAR: KOSOVO AND BEYOND* 199 (2000).

251. GOLDSMITH, *supra* note 4, at 97.

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 are often scrupulously careful when deciding how to deploy the immense powers at their fingertips. They frequently adopt constraints on their ability to carry out certain national security operations, restrictions that go farther than what is required by the applicable principles of domestic or international law.

Recent history offers plenty of examples. Counterterrorism interrogators aren't getting as close as possible to the lines drawn by the Convention Against Torture, the federal torture statute, and the Detainee Treatment Act; they are 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 law of war; they sometimes forego 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?

Public choice theory can help answer that question. As developed in this article, there are at least two explanations that can account for the government's tendency to tie its own hands in national security operations: cost-benefit asymmetry and empire building.

Officials in military and intelligence agencies tend to be cautious for a straightforward reason. It is in their interest to be cautious. The expected costs of national security operations are often 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 gap naturally predisposes officials to play it safe, and senior government policymakers (and therefore their lawyers) are likely to be especially cautious. 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, 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 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 take the chance?

Of course, lawyers are not pristinely disinterested altruists. They, too, are rationally self interested actors, and this insight suggests a second possible explanation for self-restraint. Vetoes can help attorneys build their bureaucratic empires. A Justice Department lawyer who wants to enhance his pull and that of his office knows that he can do so by raising doubts about the wisdom of the CIA's proposal to gun down Osama bin Laden, or by preventing prosecutors in the Southern District of New York from getting too cozy with intelligence analysts at FBI headquarters. Nobody respects a yes man; the person they respect is the one who can keep them from doing what they want. Vetoes thus can magnify two of the things that turf warriors care about the most – their influence over senior policymakers and their autonomy to pursue their own agendas. 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.