

UNIVERSITY OF BIRMINGHAM

University of Birmingham
Research at Birmingham

Killing norms softly

Quinn, Adam; Banka, Andris

DOI:

[10.1080/09636412.2018.1483633](https://doi.org/10.1080/09636412.2018.1483633)

License:

None: All rights reserved

Document Version

Peer reviewed version

Citation for published version (Harvard):

Quinn, A & Banka, A 2018, 'Killing norms softly: US targeted killing, quasi-secrecy and the assassination ban', *Security Studies*. <https://doi.org/10.1080/09636412.2018.1483633>

[Link to publication on Research at Birmingham portal](#)

Publisher Rights Statement:

Checked for eligibility: 21/02/2018

This is an Accepted Manuscript of an article published by Taylor & Francis in *Security Studies* on 19th July 2018, available online:
<http://www.tandfonline.com/10.1080/09636412.2018.1483633>

General rights

Unless a licence is specified above, all rights (including copyright and moral rights) in this document are retained by the authors and/or the copyright holders. The express permission of the copyright holder must be obtained for any use of this material other than for purposes permitted by law.

- Users may freely distribute the URL that is used to identify this publication.
- Users may download and/or print one copy of the publication from the University of Birmingham research portal for the purpose of private study or non-commercial research.
- User may use extracts from the document in line with the concept of 'fair dealing' under the Copyright, Designs and Patents Act 1988 (?)
- Users may not further distribute the material nor use it for the purposes of commercial gain.

Where a licence is displayed above, please note the terms and conditions of the licence govern your use of this document.

When citing, please reference the published version.

Take down policy

While the University of Birmingham exercises care and attention in making items available there are rare occasions when an item has been uploaded in error or has been deemed to be commercially or otherwise sensitive.

If you believe that this is the case for this document, please contact UBIRA@lists.bham.ac.uk providing details and we will remove access to the work immediately and investigate.

Killing norms softly: US targeted killing, quasi-secrecy and the assassination ban

Andris Banka and Adam Quinn

Introduction

How does a once-forbidden practice become normal, legitimate, even routine? More specifically, how can those in government who desire this outcome make it so? We ask this question apropos of a particular case: the programme of targeted killing conceived and executed by the United States under the presidencies of George W. Bush and Barack Obama. In constructing an answer, we proceed as follows. First, we define targeted killing. Next, we survey general theory regarding how political actors accomplish normative shifts. Here we highlight for scrutiny the intuitively plausible idea that engineering a stable new normative settlement requires direct and persuasive public advocacy for any innovation in practice. In this framework, secrecy is an *alternative* to legitimating an innovation, and likely a counter-productive one. Using US targeted killing as a detailed case in support, we propose here a contrary analysis: that official secrecy, deployed in a partial form we term

'quasi-secrecy', can play an instrumental role in the process of normalising potentially controversial shifts in practice. With the central argument thus outlined, Section 2 concludes by providing a clear explanation of the concept of 'quasi-secrecy', the context for its deployment in this case, and some methodological reflection regarding the parameters and limits of what we seek to demonstrate here.

Turning to the case in detail, we first establish that between 1976 and 2001, US administrations operated as though the executive order prohibiting assassination tightly constrained, and perhaps prohibited altogether, CIA operations with the direct aim of killing specified individuals. This prohibition was domestic in origin, stemming from the Church Committee's recommended reforms of the intelligence services. Second, we establish that after September 2001 this prohibition was reinterpreted to permit a category of killing previously treated as proscribed. Facilitated by technological advance, this practice subsequently became frequent and routinized. While this did not constitute a total erasure of the norm against assassination, it did represent a substantial revision of it, and constriction of its scope. Third, we detail and analyse the process by which this shift in practice became publicly known, and via which the executive sought to legitimate it. Here we demonstrate the operation of 'quasi-secrecy' in practice, and illustrate its utility as a mechanism for normalising a controversial innovation. We conclude that this case provides proof of concept for quasi-secrecy's viability as a strategy of legitimation, meaning that even if we do not suppose it was clearly and comprehensively conceived as such at the outset in this instance, it *could* be deployed as deliberate strategy in the future.

1. Defining targeted killing (and ‘assassination’)

Targeted killing, for our purposes here, means the deliberate killing of an identified individual, specified in advance as the target, approved by an authorised part of a government bureaucracy, without independent judicial process.¹ The distinction between permissible targeted killing and ‘assassination’ – and the sustainability of such a distinction – is a matter of contest. In common parlance, ‘assassination’ refers to any planned, individually-targeted extrajudicial killing with a political or ideological rationale, especially where the target occupies a leadership role. In international law, the permissibility of such killing hinges on whether the target can legitimately be designated a combatant in war, their location relative to the relevant lines of battle, and whether treachery or perfidy is involved in the execution.² Pre-emptive use of lethal force against individuals outside a conventional battlefield may be justified by appeal to the principle of self-defence. But legal scholars have sought to establish criteria limiting this: The threat must be clear and imminent, not “distant, unviable, or merely foreseeable”.³ The individual targeted must be “actively involved in an imminent attack”; the killing cannot be simply punishment for past action.⁴

¹ Gabriella Blum and Philip Heymann, “Law and Policy of Targeted Killing,” *Harvard National Security Journal*, 1:3 (2010): 148; Avery Plaw, *Targeting Terrorists: A License to Kill?* (London: Routledge, 2008), 3; John Yoo, “Assassination or Targeted Killings after 9/11,” 56 *New York Law School Review*, no. 57 (2011): 79; Nachman Ben-Yehuda, “Gathering Dark Secrets, Hidden and Dirty Information” *Qualitative Sociology* 13, no. 4 (1990): 349.

² A.P.V. Rogers and Dominic McGoldrick, ‘Assassination and targeted killing’, *International and Comparative Law Quarterly*, 60:3, July 2011, pp.778-788

³ Daniel, Statman, “Targeted Killing,” *Theoretical Inquires in Law* 5:1 (2004): 180-198; Norman G. Printer “The use of force against non-state actors under International Law: An analysis of the U.S. Predator Strike in Yemen,” *UCLA Journal of International Law and Foreign Affairs* (2003): 331; Micah Zenko, “Targeted Killings and Signature Strikes,” *Council on Foreign Relations*, July 16, 2012 <http://blogs.cfr.org/zenko/2012/07/16/targeted-killings-and-signature-strikes/> Quotation from: Amos N. Guiora, “Targeted Killing: When Proportionality Gets All Out of Proportion,” *Case Western Reserve Journal of International Law* 45:1 (2012): 249.

⁴ George Bisharat, “Lawful Versus Wise Policy,” *NY Times*, November 11, 2012, <http://www.nytimes.com/roomfordebate/2012/11/14/how-can-targeted-killings-be-justified/targeted-killings-may-be-lawful->

The extent of collateral damage must be weighed.⁵ Crucially, the government carrying out the killing should articulate a legal basis for its actions.⁶ Much remains unresolved in the interpretation of these criteria, however, e.g. “there is considerable debate as to how far in anticipation [of harm to oneself] it is legitimate to act”.⁷

In the analysis that follows, we are always cognizant of the contested legal and terminological status of lethal acts targeted at individuals designated as terrorists, militants or ‘enemy combatants’. Such targeting is indeed distinct from plotting to kill a prominent figure in a foreign government, the category of act to which ‘assassination’ has historically been applied with least controversy. Some may consider that the possibility of drawing such a distinction disposes *a priori* of the question of how contemporary US practice is reconcilable with the assassination ban: the killings it has carried out did not violate the ban because they are not assassinations. Importantly, we need not adjudicate the objective merits of this proposition in order to fulfil our intended purpose here. We need only note that to presume its truth is to beg a question that is contestable and contested.⁸ It was precisely the goal of the executive, during our period of focus here, to achieve acceptance as unproblematic for a practice that for the previous two and a half decades had been

[but-are-they-wise-policy](#) : Howard A. Wachtel, “Targeting Osama Bin Laden: Examining the Legality of Assassination as a Tool of U.S. Foreign Policy,” *Duke Law Journal* 55:3 (2005): 691; Guiora, “Targeted Killing,” 256).

⁵ Alan, M. Dershowitz “The Rule of Proportionality,” *NY Times*, November 14, 2012,

<http://www.nytimes.com/roomfordebate/2012/11/14/how-can-targeted-killings-be-justified/in-targeted-killings-the-rule-of-proportionality-should-be-the-guiding-principle>

⁶ Zenko, “Targeted Killings”.

⁷ Mark Phythian “Between Covert and Overt Action: The Obama Administration’s Use of Armed Drones as a Tool of Counterterrorism Policy,” *Contemporary Issues in Law*, 12:4 (2013): 296. See also K.E. Eichensehr, “On Target? The Israeli Supreme Court and the Expansion of Targeted Killings,” *Yale Law Journal*, 116:8 (2007): 1873-1881; Mark Sapiro, “Iraq: The Shifting Sands of Preemptive Self-Defense,” *American Journal of International Law*, 97 (2003): 599- 607.

⁸ Elliot Ackerman, “Assassination and the American Language,” *New Yorker*, November 20, 2014,

<http://www.newyorker.com/news/news-desk/assassination-american-language>; Avery Plaw and Matthew S. Fricker “Tracking the Predators: Evaluating the US Drone Campaign in Pakistan,” *International Studies Perspectives* 13:4 (2012): 1- 22; Ward Thomas, “Norms and Security: The Case of International Assassination,” *International Security* 25:1 (2000): 105- 133; Betsy Jose, “The Trouble With Targeted Killings: The Rise and Fall of an International Norm,” *Foreign Affairs*, September 12, 2014, <https://www.foreignaffairs.com/articles/2014-09-12/trouble-targeted-killings>

treated as prohibited. We are concerned here not with the intellectual or moral correctness of that project, only with the process via which it successfully unfolded.

2. Theorising normative shifts

2.1 Norm establishment and erosion

The established definition of norms in the literature is “collective expectations for the proper behaviour of actors with a given identity”.⁹ Broadly speaking, norms serve as “rules of the road”.¹⁰ They tell us “what the playing board will look like, and which moves are acceptable”.¹¹ Norms, when established, may be violated, but this carries a price for the violator and thus they shape behaviour.¹² A rich body of scholarship documents instances of norm-building, diffusion, and socialization.¹³ Instances of norm-weakening have also been charted (though studies of this are somewhat less numerous).¹⁴

⁹ Peter J. Katzenstein et al., eds. *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996), 5.

¹⁰ Carmen Wunderlich, “Theoretical Approaches in Norm Dynamics,” in *Norm Dynamics in Multilateral Arms Control: Interests, Conflicts, and Justice*, ed. Harlad Muller and Carmen Wunderlich (London: University of Georgia Press, 2013), 22.

¹¹ Gregory A. Raymond, “Problems and Prospects in the Study of International Norms,” *Mershon International Studies Review* 41:2 (1997): 215.

¹² Katzenstein, “The Culture,” 118; Nina Tannenwald, *The Nuclear Taboo: The United States and the Non-Use of Nuclear Weapons Since 1945* (Cambridge: CUP, 2007); Ethan A. Nadelmann, “Global Prohibition Regimes: The Evolution of Norms in International Society,” *International Organization* 44:4. (1990): 479-526.

¹³ Nadelmann, “Global Prohibition”; Ann Florini, “The evolution of International Norms,” *International Studies Quarterly* 40:3 (1996): 363-389; Ian Clark, *International Legitimacy and World Society* (Oxford: OUP, 2007); Amitav Acharya, “How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism,” *International Organization* 58:2 (2004): 239-275; Rodger A. Payne, “Persuasion, Frames and Norm Construction,” *European Journal of International Relations* 7:1 (2001): 37–61.

¹⁴ Ryder McKeown, “Norm Regress: US Revisionism and the Slow Death of the Torture Norm,” *International Relations* 23:5 (2009): 5-25; Diana Panke and Ulrich Petersohn, “Why International Norms Disappear Sometimes,” *European Journal of*

The “norm life cycle” model, introduced by Finnemore and Sikkink (1998), provides the archetypal framework for norm establishment: a norm is first proposed by an entrepreneur, then achieves broad acceptance from a critical mass of actors, and finally is widely internalized such that “conformance...is almost automatic”.¹⁵ McKeown (2009) modelled the reverse process in the “norm death series”. Here, revisionists first challenge a widely-internalized norm through “quiet changes in policy away from compliance”.¹⁶ Struggle then occurs “both in public discourse and within government institutions”. Should the change achieve widespread acceptance, the norm suffers a crisis of legitimacy and may expire.¹⁷ Several scholars note that major events – war, revolution, economic crisis – may trigger or accelerate such shifts.¹⁸

Our analysis here takes McKeown’s model as its starting point, with a slight adjustment to level of analysis. The prohibition on assassination is of domestic American rather than international origin, brought into being – as we shall discuss later – by the Church Committee enquiry and reforms in the 1970s. This does not, however, present a conceptual obstacle to adopting the basic architecture of conventional norm theory: as Finnemore and

International Relations, (2011): 1-24; Jeffrey S. Lantis, “Redefining the Nonproliferation Norm? Australian Uranium, the NPT, and the Global Nuclear Revival,” *Australian Journal of Politics and History* (2011): 543 – 561; Vincent, C. Keating, “Contesting the International Illegitimacy of Torture: The Bush Administration’s Failure to Legitimate its Preferences within International Society,” *British Journal of Politics and International Relations* (2013): 1-27.

¹⁵ Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” *International Organization* 52:4 (1998): 904.

¹⁶ McKeown, “Norm Regress,” 11.

¹⁷ McKeown, “Norm Regress,” 12.

¹⁸ Finnemore and Sikkink, “International Norm”; Andrew P. Cortell and James W. Davis, “When Norms Clash: International Norms, Domestic Practices, and Japan’s Internalisation of the GATT/WTO,” *Review of International Studies* 31:1 (2005): 3-25; Andrew P. Cortell and Sysan Peterson, “Altered States: Explaining Domestic Institutional Change,” *British Journal of Political Science* 29, no. 1 (1999): 188; Deborah Avant, “From Mercenary to Citizen Armies: Explaining Change in the Practice of War,” *International Organization* 54:1 (2000): 49.

Sikkink¹⁹ and Sandholtz²⁰ note, it is readily transferable between levels. It requires only minor alteration, to the identity-content of the model's components. In our case here the executive is the initiating agent of change, rather than the US Government in its totality, while the primary audience for legitimation efforts is not the global public or international institutions, but the American public, and domestic institutions such as Congress and the courts.

2.2. *Strategies of legitimation*

A norm is a bearer of legitimacy.²¹ This cannot be bestowed unilaterally; its existence presupposes a community "able to pass judgment on appropriateness".²² Actors sometimes choose to defect from established rules, but even powerful actors are "limited in the costs they can tolerate" and will therefore seek to ground their actions in some claim to legitimacy.²³ Keating provides a typology of strategies available to an actor engaged in behaviour that transgresses against established normative standards.²⁴ It posits four alternatives. The first is to act openly in violation of the existing norm without any accompanying effort at justification. If the norm is well-established, however, this can only be temporary, since others will demand explanation for norm-violating behaviour, and

¹⁹ Finnemore and Sikkink, "International Norm," 893;

²⁰ Wayne Sandholtz, "Dynamics of International Norm Change: Rules against Wartime Plunder," *European Journal of International Relations*, 14:1 (2008): 104.

²¹ Florini, "The evolution," 365.

²² Thomas Risse et al., eds. *The Power of Human Rights International Norms and Domestic Change* (Cambridge: CUP, 1999), 7; Christian Reus-Smit, "International Crises of Legitimacy," *International Politics* 44: 2 (2007): 159; Martha Finnemore, "Legitimacy, Hypocrisy, and the Social Structure of Unipolarity," *World Politics*, 61:1(2009): 61.

²³ Alex J. Bellamy, *Massacres and Morality: Mass Atrocities in an Age of Civilian Immunity* (Oxford: OUP, 2012), 31.

²⁴ Keating, "Contesting," 6.

transgression against an established norm, by definition, carries cost. The second strategy is overt justification: to acknowledge the action, but claim that one remains compliant with the norm. This will likely involve some creative re-description of either the requirements of the norm or the characteristics of the action taken. The third strategy is overt innovation. In this case, an actor openly and actively advocates amending or overturning the established norm to render their actions permissible.

Finally, there is secrecy. In this case, the actor conceals, and denies the existence of, norm-breaking behaviour. This strategy does not seek to justify actions or advocate for the amendment norms, but to evade the need for legitimation. Secrecy is conventionally framed as an undesirable resort, to be employed when an actor does not believe they can successfully publicly defend their actions.²⁵ Hurd contends that secrecy is a high-risk strategy that can only be a temporary measure.²⁶ Byman is also critical of secrecy, arguing that without transparency and the resulting public debate, “a policy can be held hostage to perfection. If policies are not endorsed beforehand by the public and the political opposition, they will provoke intense controversy when abuses and mistakes occur—as they inevitably will.”²⁷

2.3. Introducing ‘quasi-secrecy’

²⁵ Justin Morris, et al., eds. *The Rise and Fall of Norms in International Politics* (Aberystwyth: International Security and Institutions Research Group, 2009), 5.

²⁶ Ian Hurd, “Breaking and Making Norms: American Revisionism and Crises of Legitimacy,” *International Politics*, 44 (2007): 210.

²⁷ Daniel Byman, “Do Targeted Killings Work?,” *Foreign Affairs* 85, no. 2. (2006): 109.

Building on Keating, our proposition here, supported by analysis of the case, is that although secrecy may *sometimes* be a temporary, counterposed and counterproductive alternative to legitimation, it is misconceived to think of it exclusively, or even primarily, in this way. We contend the case of US targeted killing demonstrates that, on the contrary, when official secrecy and *de facto* public disclosure are combined – a phenomenon we term ‘quasi-secrecy’ – this can provide a quite effective mechanism for normalizing controversial practice. In order that the purpose of the detailed case analysis to follow be maximally clear, in this section we briefly summarise how and why quasi-secrecy took shape in this case, and present in outline form a conceptual model for its operation that we derive from this.

The basic fact that the US Government was killing individuals in on foreign soil using a new, remotely-controlled technology was known and publicly reported from almost the moment it commenced. The first operational instalment of the post-9/11 targeted killing programme, in Yemen in 2002, was accompanied by a single, under-considered instance of public disclosure by a US official (see Section 4 for details). The practice itself was therefore not, *de facto*, a secret for long. Yet, after that moment of initial confusion, it proceeded for years under a blanket of *official* secrecy. On grounds of national security, officials refused to confirm even rudimentary facts, and declined to publicly articulate any reasoning reconciling the practice with established law and norms. Indeed, the programme’s very existence remained highly classified.

This served two functions for the executive. The first was to restrict access to official operational data, such as number of strikes, targets and casualties. Such information would be steadily and painstakingly assembled in parallel through the investigative efforts of journalists, researchers and others. But official non-acknowledgement of these facts lifted any obligation from government officials to engage publicly with potentially uncomfortable questions regarding collateral damage, cost-benefit analysis, etc. The second function was to obviate the need to publicly articulate the legal basis upon which the policy rested. This curtailed the possibility of pressing officials, on the record, as to the logical implications of that legal reasoning, most especially the key question of where – if anywhere – it located the outer limit of the executive's asserted prerogative to kill.

Over time, the Obama administration gradually loosened the secrecy governing the programme in both regards, i.e. operational facts and legal reasoning. This came first through strategic leaks. The aim of these was to make it publicly known that the administration was pursuing a major, pro-active counterterrorist programme, and to portray it in the most favourable possible light. This allowed the administration to claim credit for taking effective action, while at the same time retaining in place a shield against critical interrogation of the programme as a whole. Later, the ground having been thus laid, the administration did open up officially, to a limited extent, regarding both operational facts and legal basis. This allowed it to claim a belated good faith effort at openness and accountability; indeed, it may have reflected the reality of such good faith. In doing so, however, it retained a regime of classification sufficient to allow (a) selective acknowledgement or denial of operational facts at its own discretion, and (b) curtailment, at

the point of its own choosing, of official engagement with discussion of the programme's legal implications.

The result was a regime of quasi-secrecy: the coexistence over an extended period of official secrecy and *de facto* public disclosure regarding an ongoing practice. This allowed relevant audiences, including the public, to grow accustomed to the programme's existence through regular references in the news media and wider culture. At the same time, it contained the risk of focused controversy and backlash to levels lower than would be entailed in full disclosure and direct, uninhibited advocacy for a new normative dispensation.

The Bush and, more so, Obama administrations did engage in justification of their actions up to a point. But official secrecy was not an alternative to such efforts at legitimation – it was complementary to it. By declining to avow all operational facts, or present with total transparency its claim to a new legal authority of specifiable scope and basis, the executive deprived those who would oppose its actions of two things vital to engaging in a public contest of ideas through the political system: mutually-acknowledged data, and authoritative official interlocutors. And yet: there is no evidence that this was ultimately counterproductive. On the contrary, when official figures for drone strikes and civilian casualties were finally released, in the final year of Obama's presidency, they generated little reaction. A major reason for this, we would contend, was that those receiving this 'new' information did not perceive it as such. Having been ambiently aware for years already of targeted killing and drone strikes, a non-expert member of the public might reasonably – if incorrectly – have supposed the information finally being provided for the

first time to have been officially acknowledged long before. Likewise, a reasonable person might in 2016 suppose it far too late, and therefore redundant, to seek to open discussion regarding the legal and normative implications of targeted killing; surely such issues must have been debated and resolved via the proper forums and channels at the appropriate, considerably earlier, time? We discuss this further in the section 6.

We should be clear that the realistic objective of any effort to legitimate controversial new practice is not universal support. In our case here, the key domestic audiences were the public, Congress, and the judicial establishment, i.e. those among whom majority opposition could materially impede the executive's ability to continue with the targeted killing programme. Some elements of society were highly unlikely ever to be persuaded of the legitimacy of targeted killing: human and civil rights organisations; liberal lawyers; longstanding critics of expansive executive war powers on both the political left and right. Resistance from such irreconcilables being a given from the outset, the objective for the executive was to prevent the foreseeable opposition of these elite constituencies from gaining wider purchase among higher-priority audiences. A secrecy-sceptical model of legitimation would warn that failure to be transparent at the outset and engage in overt persuasive advocacy for a new normative settlement would prove counterproductive in this regard. We would contend, however, that in this case, while secrecy and quasi-secrecy may have frustrated – and continues to frustrate – such elite groups, it did not demonstrably impede the executive in ultimately securing and maintaining the consent of its priority audiences.

To abstract to the general conceptual level: the model for normalisation via quasi-secrecy that we posit here has four stages. First, policy changes to permit acts previously prohibited, and this is kept secret. Second, credible reports of the new practice come in from the field and are published, but the executive adopts a blanket stance of refusing to confirm or deny their veracity. Third, the executive itself becomes a source of public information about the practice, via leaks designed to portray it favourably, but continues to maintain *official* secrecy across the board. Fourth, if the previous stages unfold without generating sufficient opposition to force reconsideration, the executive publicly avows the new practice, and may also present on the record selected facts and justificatory arguments. This should not be confused with total transparency, however: a significant level of official secrecy may be retained, and may continue indefinitely.

Finally, a note on context: the success of any legitimisation effort is contingent at least to some degree on the conduciveness of the circumstances in which it takes place. Our focus in this article is on formal US policy, and the actions and statements of government officials. But the events described should be viewed in the light of a substantial scholarly literature on the wider cultural and historical context in which the events analysed here occurred. Carvin and Williams have insightfully located twenty-first century American targeted killing within a longstanding national project to craft a “legal-scientific way of warfare that... seeks to balance the need to employ overwhelming force with legal and humanitarian concerns through science and technology”.²⁸ Other scholars similarly remind us that contemporary US actions are situated within longer-term patterns of development in both liberal-democratic

²⁸ Stephanie Carvin and Michael John Williams, *Law, Science, Liberalism and the American Way of Warfare*, (Cambridge: CUP, 2015), p.19

and legal norms²⁹, and the technologies of targeting and violence.³⁰ Additionally, we might posit some more immediate factors that made quasi-secret targeted killing by the US after 2001 possible. These include: the inaccessible locations where most strikes took place, making independent reporting difficult; the CIA's standing authority to carry out deniable covert operations at the instruction of the president, and therefore its ready suitability to serve as the agent of such a programme; and the disproportionate international power of the US, which afforded it latitude to brush off outside enquiries about its conduct, e.g. from the United Nations.

2.4 Reflections on methodology, case selection, sources

Our claims in this article should be viewed within the following parameters. It is a starting premise that the practice of targeted killing *has* been successfully normalised and legitimated within the American polity. It is therefore not a primary task of this article to substantiate this fact, but we do provide support for it in Section 6, citing public opinion data and acceptance of the executive's practice by Congress and the courts. Rather, our

²⁹ Kyle Grayson, *Cultural Politics of Targeted Killing: On drones, counter-insurgency and violence* (Abingdon and New York: Routledge, 2016); Frank Sauer and Niklas Schörnig, 'Killer drones: The 'silver bullet' of democratic warfare?', *Security Dialogue*, 43:4, 2012, pp.363-380; Craig A. Jones, 'Lawfare and the juridification of late modern war', *Progress in Human Geography*, 40:2, 2016, pp.221-239

³⁰ Katharine Hall Kindervater, 'The Emergence of Lethal Surveillance: watching and killing in the history of drone technology', *Security Dialogue*, 47:3, 2016, pp.223-238; Ian Graham Ronald Shaw and Majed Akhter 'The Unbearable Humanness of Drone Warfare in FATA, Pakistan', *Antipode* 44:4 2012, pp.1490-1509.

overriding focus is on the *process* by which normalization was achieved. In methodological terms, the case evidence and analysis presented here fulfils two functions. First, it serves to falsify two potential hypotheses, closely related to one another: (a) that secrecy is an oppositional alternative to seeking and obtaining legitimacy for a normative innovation; and (b) that secrecy is always counterproductive to achieving that end.³¹ To put it another way, this case is shown to be a non-congruent counterexample with regard to these propositions.³² The case's second function is to provide an initial probe of the coherence and plausibility of the proposition that what we call 'quasi-secrecy' can serve as a mechanism facilitating normalization. This is demonstrated via historical process-tracing of how US practice shifted and how that shift was accounted for publicly. Our findings here provide, we would contend, sufficient grounds for further pursuit of this line of inquiry in future research.

Focus on the case of US targeted killing can be justified by reference to two considerations. First, the unusually explicit status of the prior prohibition in the United States. All states are in principle governed by the same international restraints regarding killing. But the existence of an explicit order banning assassination, interpreted before 2001 as tightly constraining the kind of targeted killing pursued on large scale thereafter, meant the American executive faced a more acute challenge than others might have when seeking legitimacy for its actions in the eyes of domestic audiences. Second, the scale of the US programme, and consequently the lack of ambiguity as to whether a major shift took place. A small number

³¹ On the validity of using single cases to contradict hypotheses, so long as the case is well-suited as a test of claim, see Ronald Rogowski, "The role of theory and anomaly in social-scientific inference," *American Political Science Review* 89:2 (1995).

³² On congruence, see Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, MA: MIT Press, 2005), 181-284.

of other states – including Israel, the UK and France – engaged in similar lethal actions during the same period. However, the US has carried out by far the largest number of targeted killings and drone strikes. The sheer size of the American programme, combined with its systematic and institutionalised character, which we discuss in Section 6, eliminates scope for any plausible claim that killings in this period represented merely rare anomalous exceptions to a still-standing general prohibition.

The sources available for use in this enquiry vary by period. Our portrayal of the Church Committee era, when the ban on assassination was established, can be grounded fully in archival sources that include declassified materials from the National Security Archive and the Ford Presidential Library. For later periods, where classification remains in fuller force, the official record is necessarily less complete. Nevertheless, using a combination of public documents, memoirs, and secondary sources based on interviews with participants, it is possible to construct a robust account of how and when practices changed. The account provided here of official acknowledgement of the post-2001 targeted killing programme by the executive, i.e. what was disclosed publicly and when regarding operations and their legal basis, is based on a comprehensive survey of officially available speeches, press conferences, hearings, Congressional debates, legal documents, and published interviews from the period. The account of parallel disclosure-by-leak is likewise grounded in a comprehensive survey of contemporary print media.

For some kinds of enquiry into a practice such as targeted killing, high levels of government secrecy might present a major obstacle.³³ The gap between what is 'known' about the practice through indirect reportage and what is officially avowed has been a source of frustration even to those with relatively strong claims to rightful access to information. Philip Alston, UN Special Rapporteur on extrajudicial, summary or arbitrary executions, complained in 2011 of "an almost surreal tendency on the part of the executive and the courts to pretend that information that has been comprehensively leaked, remains unknown or at least uncognizable".³⁴ Fortunately for our purposes here, it is precisely this disjunction between facts widely known and those officially acknowledged that is of interest. We do not claim to uncover here new data regarding US covert practice. For the underlying facts of the targeted killing programme, we draw upon on the deep reservoir of reportage already assembled on the public record. The significance of our contribution lies rather in analysis of how quasi-secrecy served the executive's interest in its normalization.

It is important to specify some claims we do *not* make. First, we do not propose that quasi-secrecy was the *only* mechanism by which normalization could possibly have been successfully achieved. We contend only that it was the mechanism by which it occurred in this instance, and that this success is suggestive of its viability and potential utility as such. Second, we do not maintain that quasi-secrecy was a singular, coherently-conceived and deliberately pursued strategy on the part of the Bush or Obama administrations. As the case detail will demonstrate, more than one factor contributed to bringing about the blend of

³³ Robert M. Bosco, "The Assassination of Rafik Hariri: Foreign Policy Perspectives," *International Political Science Review* 30:4 (2009): 350.

³⁴ Alston, "The CIA," 12.

simultaneous classification and disclosure: the demands of foreign governments to obscure their complicity; prudential concern for restricting sensitive operational detail; the desire to win public credit for effective counterterrorist measures; and, perhaps, sincere commitment to some degree of transparency and accountability. Our claim is that whether conceived as a deliberate whole or simply the product of a synthesis of competing pressures, the ultimate *de facto* strategy of quasi-secrecy proved a highly effective mechanism for achieving normalization of a controversial innovation. We propose that this should be considered initial proof of concept for quasi-secrecy as a strategy that might be deliberately adopted by future administrations in analogous circumstances.

3. The prohibition at maximum force: 1976-2001

3.1 Establishment of the norm against assassination

The origins of the prohibition on US Government deployment of assassination lie in domestic pressures and processes. Specifically, it resulted from the Church Committee investigation into “illegal, improper, or unethical” activities on the part of the intelligence services.³⁵ Despite the Ford administration’s public position that it would provide “maximum assistance”³⁶, the committee faced resistance throughout, first to its full access

³⁵ *State Department Office of the Historian*, “Foreign Relations of the United States”, 1917–1972 Volume XXXVIII, Part 2, Organization and Management of Foreign Policy; Public Diplomacy, 1973–1976, Document 31, 1975.

³⁶ Nicholas M. Horrock, “Senators Weigh Public Hearings on Assassinations,” *NY Times*, March 11, 1975; Richard L. Madden, “President Scans C.I.A. Tie To Any Death Plot Abroad”, *NY Times*, March 18, 1975; *White House* (1975) National Security Council Staff, “Memo of Conversation, Kissinger, Schlesinger, Colby, Areeda, Hoffman, Silberman, Scowcroft,” Investigation of Allegations of CIA Domestic Activities, February 20, 1975. Gerald R. Ford Library, Gerald R. Ford Papers, National Security Files, Memoranda of Conversations, Box 9; *CIA* (1975) “Responsibilities and Support”, Gerald R. Ford Presidential Library, White House Operations, Richard Cheney Files, Intelligence Series, Box 6.

to intelligence materials,³⁷ then to the public release of its report.³⁸ That report condemned US use of assassination as immoral, logistically precarious, and liable to be counterproductive.³⁹ It also noted that “a system which relies on secrecy” created the “risk of confusion and rashness in the very areas where clarity and sober judgment were most necessary”.⁴⁰

The committee favoured an assassination ban written into statute,⁴¹ but the ultimate result was a compromise short of that: an executive order issued on February 18, 1976.⁴² The order did not define ‘assassination’, with the result that the scope of the prohibition has been contested ever since, among both scholars and officials. Some argue this ambiguity was deliberate, engineered to preserve the option of narrow interpretation.⁴³ Others contend that it barred the US government “from directing, facilitating, encouraging, or even incidentally causing the killing of any specified individual”.⁴⁴ During the period 1976-2001, the assassination ban served as a strong constraining influence on US action. It came under strain from two sources. The first is of lesser importance for our purposes: the provocation of dictators such as Libya’s Muammar Gaddafi, Iraq’s Saddam Hussein and Panama’s Manuel Noriega. These have received extended consideration elsewhere, but we do not discuss them here because targeting heads of state entails the most unambiguous possible violation

³⁷ Gerald K. Haines, “The Pike Committee Investigations and the CIA: Looking for a Rogue Elephant”, *CIA*, 1998, https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter98_99/art07.html

³⁸ Nicholas M. Horrock, “Ford Acts To Bar Death Plot Data,” *NY Times*, November 3, 1975.

³⁹ Senate Reports, “*Alleged Assassination Plots Involving Foreign Leaders*,” Washington: Government Printing Office 3, no. 8 (1975): 258; 282.

⁴⁰ Senate Reports, “*Alleged Assassination*”, 7.

⁴¹ Senate Reports, “*Alleged Assassination*”, 281.

⁴² *Executive Order 11905*, United States Foreign Intelligence Activities February 18, 1976, <http://www.presidency.ucsb.edu/ws/?pid=59348>

⁴³ Rothe and Collins, “The Normality,” 379; Wachtel, “Targeting Osama.”

⁴⁴ Patricia Zengel, “Assassination and the Law of Armed Conflict,” *Military Law Review* 134 (1991), 145.

of the assassination ban, and thus its consideration raised issues distinct from the post-9/11 targeted killing programme. Our focus is the second source of strain: terrorism and militancy emerging from the Middle East. This invited the US Government to narrow its interpretation of the ban, to permit targeting terroristic non-state actors. Two examples from the period merit detailed attention, and we treat them individually below. Importantly, neither led to the prohibition on targeting and killing individuals being set aside; on the contrary, they evidence its continuing force. However, they did see the first private articulation of legal rationales that would become relevant in the post-9/11 period, making them important precursors to practices later to come.

3.2 The Reagan administration and Lebanese hit squads

The Reagan administration came close to carrying out targeted killings in Lebanon, in reaction to the threat posed by militant Islamist groups such as Islamic Jihad and Hezbollah. This began with a secret proposal from National Security Council official Oliver North, in spring 1984, to covertly contract local teams to eliminate those responsible for bombing US facilities.⁴⁵ Stanley Sporkin, General Counsel to the CIA, privately argued that legal basis for such action could be found in self-defence, and that it was possible to draw a robust legal distinction between the proposed action and killings of the kind carried out prior to Church and prohibited after 1976.⁴⁶ This received firm pushback from the CIA, whose leadership personally recalled the reputational damage brought to the agency by the Church

⁴⁵ Robert Chesney, "Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate," *Journal of National Security Law & Policy*, 5: (2012): 550; Bob Woodward, *Veil: The Secret Wars of the CIA 1981-1987* (New York: Simon & Schuster, 1987).

⁴⁶ Chesney, "Military-Intelligence", 550; Woodward, *Veil*, 161.

revelations; CIA Director Richard Helms and his deputy John McMahon believed the proposal violated the assassination ban.⁴⁷ In summer 1985, through a task force on counterterrorism strategy under Vice President Bush, officials engaged in formal discussion for the first time of adopting a narrow interpretation of the ban's scope that excluded terrorists.⁴⁸ Despite the CIA's objections, Reagan initially approved the Lebanon proposal: he secretly issued presidential findings (i.e. directives) clearing the legal path for the plan, and approximately \$1 million was allocated for training and support.⁴⁹

The US aborted the plan, however, when a prospective Lebanese 'contractor' carried out an unapproved car bombing, killing 80 and wounding 200.⁵⁰ The presidential findings were also rescinded, though at the same time as White House press secretary Marlin Fitzwater acknowledged this he denied they had involved any authorisation of assassination, something Vice President Bush stated publicly would be "absolutely criminal".⁵¹ Anonymous officials would later tell the *Washington Post* that the orders of the president had been intended to circumvent the existing bar on assassinations.⁵² This led White House reporter Helen Thomas to directly ask: "Mr. President, did you sign two orders, directive intelligence orders, which appeared to circumvent the assassination directive – ban on assassinations?"

⁴⁷ Mark Mazzetti, *The Way of the Knife: The CIA, a Secret Army, and a War at the Ends of the Earth* (New York: Penguin Group, 2013), 68; Woodward, *Veil*.

⁴⁸ Doyle McManus, "Assassination Ban May Not Apply in Anti-Terror Raids," *LA Times*, July 13, 1985.

⁴⁹ Bob Woodward and Charles R. Babcock, "Anti-terrorist Plan Rescinded After Unauthorized Bombing," *The Washington Post*, May 12, 1985; Woodward, *Veil*.

⁵⁰ Woodward and Babcock, "Anti-terrorist Plan."

⁵¹ *Chicago Tribune*, "Reagan: CIA given no leeway on killings," June 10, 1988,

<http://archives.chicagotribune.com/1988/10/06/page/4/article/reagan-cia-given-no-leeway-on-killings>

⁵² Woodward, *Veil*.

Reagan denied he had ever issued a “permit to assassinate anyone in any of the things that we were doing”.⁵³

After leaving office, Reagan would admit that targeting killing had been considered, but claim he had ultimately decided it was a “game that America couldn’t and didn’t play”.⁵⁴

Robert Oakley, State Department counterterrorism coordinator under Reagan, later recalled there was “a great debate about whether or not one could do this, and a lot of the laws and regulations and executive orders were studied very, very carefully”.⁵⁵ There were “differences of opinion within the executive branch”, but in the final analysis the president decided, “no, we are not going to go that route”.⁵⁶ In light of the role new technology would play later, it is worth underscoring that this decision was heavily influenced by practical concerns regarding the likelihood of successful execution, not just internal resistance on legal and normative grounds.

3.3 The Clinton administration and Osama bin Laden

Until 1998, Osama bin Laden, though monitored by the CIA, was perceived as a “low priority” threat.⁵⁷ This changed in 1998 after the bombings of US embassies in Kenya and Tanzania, which killed hundreds. Following this, President Clinton signed a presidential

⁵³ *Public Papers of the Presidents*, “Ronald Reagan, 1988-1989,” The Ronald Reagan Presidential Library, 1988, 1292.

⁵⁴ Ronald Reagan, *An American Life: An Autobiography* (New York: Simon & Schuster, 1990), 713.

⁵⁵ *PBS Frontline*, “Interview: Robert Oakley,” 2003.

⁵⁶ *PBS Frontline*, “Interview”.

⁵⁷ *The 9/11 Commission Report*, “Responses to Al Qaeda’s initial assaults,” 2004, 110.

finding authorizing covert action to capture bin Laden, and to kill him if he resisted. Clinton would later amend the secret memorandum of understanding setting parameters for the operation a number of times: first expanding the list of permitted targets beyond bin Laden to include a small number of key lieutenants, and later authorizing shooting down any aircraft or helicopter he might use to try to escape Afghanistan.⁵⁸ Richard Clarke, Clinton's counterterrorism head, notes that because of its unwillingness to approve a straightforward killing, the administration produced a series of unusual documents that gave "extremely specific authorities for particular CIA operations aimed at bin Laden".⁵⁹ According to Clarke, "there was concern in both the Justice Department and in some elements of the White House and some elements of the CIA that we not create an American hit-list that would become an ongoing institution that we could just keep adding names to and have hit teams go out and assassinate people".⁶⁰

Investigative reporter Jeremy Scahill, who has had access to many of the Clinton-era national security files, notes the baroque quality of the order: "The authorization for killing bin Laden was built in a way that there almost was one scenario where he could be killed – when he was in certain kind of a house, with a particular brand of lock on the door and only then you can strike the house".⁶¹ According to CIA Director George Tenet, "almost every authority granted to CIA prior to 9/11 made it clear that just going out and assassinating Bin

⁵⁸ Charles Cogan, "Hunters not Gatherers: Intelligence in the Twenty-First Century," *Intelligence and National Security* 19:2 (2004): 315.

⁵⁹ Shaun Waterman, "Assassination ban 'no shield' for al-Qaida," *UPI*, March 24, 2005, http://www.upi.com/Business_News/Security-Industry/2005/03/24/Assassination-ban-no-shield-for-al-Qaida/29171111717578

⁶⁰ *Democracy Now*, "Ex-Counterterrorism Czar Richard Clarke: Bush, Cheney and Rumsfeld Committed War Crimes," 2014.

⁶¹ Jeremy Scahill, "Global Ethics Forum: Jeremy Scahill on the World as a Battlefield," *Carnegie Council for Ethics in International Affairs*, 2013.

Laden would not have been permissible or acceptable”.⁶² Years later, during 9/11 Commission hearings, CIA officials and lawyers uniformly said that they had interpreted authorities signed by Clinton as instructing them to try to capture Bin Laden alive, and that the only acceptable context for killing him would be during a credible operation aimed at capture.⁶³ Two senior CIA officers later said they would have been “morally and practically opposed to getting CIA into what might look like an assassination.” One went so far as to say he would have “refused an order to directly kill Bin Laden.”⁶⁴

4. The Bush administration after 9/11: a covert shift

4.1 Narrowing the scope of the prohibition

Before 9/11 only one country, Israel, engaged programmatically in targeted killing, and it was criticized by the United States for doing so.⁶⁵ In July 2001, Secretary of State Colin Powell said of Israel’s targeted hits: “We...express our distress and opposition to these kinds of targeted killings and we will continue to do so”.⁶⁶ US Ambassador to Israel Martin Indyk

⁶² George Tenet, *At the Center of the Storm. My Years at the CIA* (New York: Harper Collins, 2007), 110.

⁶³ *9/11 Commission Hearing*, “Staff Statement No. 7. National Commission on Terrorist Attacks Upon the United States,” 2004, 3.

⁶⁴ *9/11 Commission Hearing*, “Staff Statement,” 3.

⁶⁵ Statman, “Targeted Killing,” 180.

⁶⁶ Herb Keinon, Janine Zacharia, and Lamia Lahoud, “UN, US: Stop Targeted Killings,” *Jerusalem Post*, July 6, 2001.

stated: “The United States government is very clearly on record as against targeted assassinations” .⁶⁷

In 9/11’s aftermath, however, many criticised the legacy of Church for having neutered the US intelligence community’s capabilities, including Paul Bremer, Chairman of the bipartisan National Commission on Terrorism, and Henry Kissinger.⁶⁸ Former Secretary of State James Baker openly endorsed revoking the assassination ban.⁶⁹ Former president Bush said there was a need to “free up the intelligence system from some of its constraints”.⁷⁰ Within government, several senior figures made statements about the need to revisit restrictions on covert operations, including Vice President Cheney,⁷¹ Secretary of State Powell,⁷² Chairman of the Senate Intelligence Committee, Bob Graham,⁷³ and Vice-Chairman Richard Shelby.⁷⁴ A former CIA official observed that in the post-9/11 environment there was a feeling that “the things we couldn’t do before, now we can do them”.⁷⁵ Georgia Congressman Bob Barr even made a formal proposal to overturn “those portions of

⁶⁷ Jane Mayer, “The Predator War,” *New Yorker*, October 26, 2009,

<http://www.newyorker.com/magazine/2009/10/26/the-predator-war>

⁶⁸ Chris Mooney, “Back to Church,” *American Prospect*, December 19, 2001, <http://prospect.org/article/back-church>; David Corn, “Did We Handcuff the CIA?,” *Slate*, September 18, 2001,

http://www.slate.com/articles/news_and_politics/politics/2001/09/did_we_handcuff_the_cia.html; Roger, Burbach Two 9/11s, one story,” *Guardian*, September 10, 2003, <http://www.theguardian.com/world/2003/sep/11/chile.september11>

⁶⁹ PBS “Interviews: James Baker”, 2001, <http://www.pbs.org/wgbh/pages/frontline/shows/gunning/interviews/baker.html>

⁷⁰ Michael Smith, “Congress may lift ban on CIA assassinations,” *Telegraph*, September 17, 2001,

<http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1340790/Congress-may-lift-ban-on-CIA-assassinations.html>

⁷¹ Oliver Burkeman, “US considers assassination squads,” *Guardian*, August 13, 2002,

<http://www.theguardian.com/world/2002/aug/13/usa.alqaida>

⁷² Smith, “Congress may”.

⁷³ James Risen and David Johnston, “A Day of Terror: Intelligence Agencies; Officials Say They Saw No Signs of Increased Terrorist Activity,” *NY Times*, September 12, 2001, <http://www.nytimes.com/2001/09/12/us/day-terror-intelligence-agencies-officials-say-they-saw-no-signs-increased.html>

⁷⁴ Risen and Johnston, “A Day of Terror”.

⁷⁵ Bob Drogin and Greg Miller, “Spy Agencies Facing Questions of Tactics,” *LA Times*, October 28, 2001, <http://articles.latimes.com/2001/oct/28/news/mn-62715>

executive orders purporting to prohibit the government from directly eliminating terrorist leaders".⁷⁶ This secured 14 co-sponsors, though it ultimately went no further.⁷⁷

This drew some public resistance from figures such as Chair of the House Foreign Affairs Committee Lee Hamilton,⁷⁸ former CIA director and later Secretary of Defence Robert Gates⁷⁹ and Democratic senator Christopher Dodd.⁸⁰ Outside government, NGOs and international lawyers argued for preserving pre-9/11 standards. Human Rights Watch sent a letter to President Bush urging that the United States should remain committed to "investigation, arrest, trial and punishment," not "executions or targeting non-combatants".⁸¹ Cherif Bassiouni, an eminent scholar of international criminal law, warned against having "the intelligence agencies be judge, jury and executioner all wrapped into one. The potential for abuse is too big and the symbolism is too harmful".⁸²

In the event, there would be no open declaration that the restrictions governing targeted killing had narrowed. Rather, there was simply shift in practice, authorized and executed secretly. As Ulrich (2014) notes, the president may legally amend or revoke an executive order without "publicly disclosing that he has done so".⁸³ During NSC meetings after 9/11,

⁷⁶ *House of Representatives*, "Administration's Draft Anti-terrorism Act of 2001," Committee on the Judiciary House of Representatives, 2001.

⁷⁷ Jeffrey F. Addicott, "Proposal for a new executive order on assassination," *University of Richmond Law Review*, 37 (2002): 758; David Ennis, "Preemption, Assassination, and the War on Terrorism," *Campbell Law Review* 27:2 (2005): 263.

⁷⁸ David G. Savage and Henry Weinstein, "Some Call for Lifting of Assassination Ban," *Los Angeles Times*, September 14, 2001, <http://articles.latimes.com/2001/sep/14/news/mn-45711>

⁷⁹ Nancy Benac, "Assassination Ban Gets New Look," *Associated Press*, September 22, 2001, <http://www.fas.org/sgp/news/2001/09/ap092201.html>

⁸⁰ David Rennie, "Bush orders shoot to kill on terrorists," *Telegraph*, 6 December, 2002, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1416311/Bush-orders-shoot-to-kill-on-terrorists.html>

⁸¹ *Human Rights Watch*, "U.S. Policy on Assassinations".

⁸² Savage and Weinstein, "Some Call".

⁸³ Jonathan Ulrich, "The Gloves Were Never On: Defining the President's Authority to Order Targeted Killing in the War Against Terrorism," *Virginia Journal of International Law* 45:4 (2004): 1034.

President Bush reportedly requested a scorecard: a list of top al-Qaeda members, to be crossed out after their elimination.⁸⁴ According to Richard Clarke, Bush told staff on the day of the attacks: “Everything is available for the pursuit of this war. Any barriers in your way, they’re gone”.⁸⁵ CIA headquarters would become the hub for counterterrorism operations. Bob Woodward reported a senior official in 2001 as stating, vaguely but ominously: “The president has given the Agency the green light to do whatever is necessary. The gloves are off. Lethal operations that were unthinkable pre-September 11 are now underway”.⁸⁶

A landmark moment came on September 15, at a strategy meeting of Bush’s national security team at Camp David, when CIA Director George Tenet put forward a plan to hunt and kill al-Qaeda members and associated forces, without geographical limitation.⁸⁷ John Rizzo, a CIA lawyer involved in drafting the proposal, later commented he had “never seen a presidential authorization as far-reaching and as aggressive in scope”.⁸⁸ According to John Radsan the Assistant General Counsel of the CIA, the authorization was “generally worded”, amounting to: “Go out and get the bad guys. Disrupt them, kill them, interrogate them”.⁸⁹ Banks characterises the authority transferred to the CIA as the “most sweeping and most lethal” since the agency’s creation.⁹⁰ A decade later, President Bush would acknowledge having granted broad authority to the CIA for covert actions, including “permission to kill Al

⁸⁴ Peter L. Bergen, *Man Hunt: The Ten-Year Search for Bin Laden from 9/11 to Abbottabad* (New York: Random House 2012), 142; Risen and Johnston, “A Day of Terror”; Bob Woodward, *State of Denial: Bush at War Part III* (New York: Simon & Schuster, 2006), 330.

⁸⁵ Richard A. Clarke, *Against All Enemies: Inside America’s War on Terror* (New York: Free Press, 2004), 24.

⁸⁶ Bob Woodward, “CIA Told to Do ‘Whatever Necessary’ to Kill Bin Laden,” *Washington Post*, October 21, 2001, <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/18/AR2007111800655.html>

⁸⁷ Mark Mazzetti and Scott Shane, “C.I.A. Had Plan to Assassinate Qaeda Leaders,” *NY Times*, July 13, 2009, <http://www.nytimes.com/2009/07/14/us/14intel.html? r=0>

⁸⁸ *PBS Frontline*, “Target America,” 2001, <http://www.pbs.org/wgbh/frontline/film/topsecretamerica/transcript/>

⁸⁹ *Ibid.*

⁹⁰ William C. Banks, *The Predator*. In Volker C. Franke *Terrorism and Peacekeeping: New Security Challenges* (London: Praeger, 2005), 146.

Qaeda operatives”,⁹¹ something he knew to be “a significant departure from America’s policies over the past two decades”.⁹²

Following this authorization, instructions cascaded through the national security agencies. Cofer Black, Coordinator for Counter-terrorism, reportedly briefed his team as follows on September 19th: “I want to give you your marching orders, and I want to make them very clear. I have discussed this with the President and he is in full agreement... I don’t want bin Laden and his thugs captured, I want them dead... They must be killed. I want to see photos of their heads on pikes. I want bin Laden’s head shipped back in a box filled with dry ice”.⁹³ Gary Schroen, in charge of the subsequent CIA incursion into Afghanistan, later recalled that it was the first time he had received an order to kill rather than seek to capture a target.⁹⁴ The CIA prepared a list of about “two dozen terrorist leaders” who could now be targeted and killed.⁹⁵ Tenet requested and received additional authorization for the CIA to add further names to this list without further presidential approval.⁹⁶ In terms of both operational substance and oversight, this represented a major rollback of key elements of the Church reforms.⁹⁷

⁹¹ George W. Bush, *Decision Points* (New York: Crown Publishers, 2010), 165.

⁹² Bush, *Decision Points*, 169.

⁹³ Trevor McCrisken and Mark Phythian, *US intelligence and the war on terror*. In Inderjeet Parmar, *Obama and the World* (New York: Routledge, 2014), 186.

⁹⁴ Gary Schroen, *First In: An Insider’s Account of How the CIA Spearheaded the War on Terror in Afghanistan Reprint Edition* (New York: Presidio Press/Ballantine Books, 2005), 38.

⁹⁵ *Chicago Tribune*, “Bush gives CIA license to kill terrorist leaders,” December 15, 2002, http://articles.chicagotribune.com/2002-12-15/news/0212150457_1_approval-for-specific-attacks-cia-and-military-effort-high-value-target-list

⁹⁶ Bob Woodward, *Bush at War* (New York: Simon & Schuster, 2002), 66; Bush, *Decision Points*, 165; Rennie, “Bush orders.”

⁹⁷ Horrock, “Ford Acts”; Mazzetti, *The Way of the Knife*, 30.

The first targeted strike outside a conventional battlefield took place in Yemen, on November 3rd, 2002, killing Qaed Salim Sinan Al-Harethi, a high-level al-Qaeda operative, and five others.⁹⁸ The president was not asked to authorize the specific strike; it was approved by “senior officials” in the CIA and military using the authority delegated to them.⁹⁹ The event also served, in a backward sort of way, to underscore the imperative for secrecy. In the immediate aftermath of the strike, Deputy Secretary of Defence Paul Wolfowitz took a celebratory public stance, praising the strike on CNN as “very successful tactical operation... One hopes each time you get a success like that, not only to have gotten rid of somebody dangerous, but to have imposed changes in their tactics and operations”.¹⁰⁰ Unwittingly, Wolfowitz triggered a diplomatic crisis with his remarks: the Yemeni government had agreed with Washington that *it* would claim responsibility and did not receive this surprise reversal well.¹⁰¹ After this singular initial misstep, however, a wall of official secrecy descended. It would be almost a decade before any high-level government official would next comment on the record regarding a targeted killing.

4.2 Technological change as driver and enabler

⁹⁸ Mark Hosenball, “The Opening Shot,” *Newsweek*, December 17, 2002, <http://www.newsweek.com/opening-shot-142611>

⁹⁹ James Risen and David Johnston, “Threats and Responses: Hunt for Suspects; Fatal Strike in Yemen Was Based on Rules Set Out by Bush,” *NY Times*, November 5, 2002, <http://www.nytimes.com/2002/11/06/world/threats-responses-hunt-for-suspects-fatal-strike-yemen-was-based-rules-set-bush.html>

¹⁰⁰ BBC, “US ‘still opposes’ targeted killings,” November 6, 2002, http://news.bbc.co.uk/1/hi/world/middle_east/2408031.stm

¹⁰¹ Hosenball, “The Opening Shot,”; Jeremy Scahill, *Dirty Wars: The World is a Battlefield* (New York: Nation Books, 2013), 94.

Unmanned aerial vehicles ('drones') were first used in non-armed form during the Balkan crisis of 1995.¹⁰² The idea of using them as a tool for targeted killing emerged gradually during the Clinton years. A CIA drone in 1999 spotted bin Laden in Afghanistan, but the five-hour preparation time required by the Pentagon to organise a missile strike allowed him to escape.¹⁰³ Following this, the project of arming drones, with Hellfire missiles, was put on fast-track. Initially, the CIA was opposed; just a week before 9/11, Director Tenet was quoted saying it would be "a terrible mistake" for the agency to take on this operational role.¹⁰⁴ This immediately changed with 9/11. In his Sep 15 Camp David presentation, Tenet briefed administration officials for the first time on armed drones.¹⁰⁵ The first armed drone mission took place in Afghanistan on October 7.¹⁰⁶

The drone strike programme during the Bush administration started slowly, with just a few strikes against high-level targets. Following the first, President Bush was sufficiently impressed to ask: "Why do we fly only one Predator at a time, we ought to have fifty of these things".¹⁰⁷ But the second took place only in the summer of 2004, in Pakistan, targeting Taliban leader Nek Mohammad. Per agreement with Washington, the Pakistani government claimed responsibility, denying American involvement as "absolutely

¹⁰² Fred Kaplan, "Killing Machine," *NY Times*, May 10, 2013, <http://www.nytimes.com/2013/05/12/books/review/the-way-of-the-knife-by-mark-mazzetti.html>; Richard Whittle, "The Unexpected History of the Predator Drone," *The Mimi Georges Show*, 2014.

¹⁰³ *CBS News*, "Hank Crumpton: Life as a spy," May 14, 2002, <http://www.cbsnews.com/news/hank-crumpton-life-as-a-spy/>

¹⁰⁴ Mayer, "The Predator War,"; Richard Whittle, "Interview: The Drone That Started It All," *Center for the Study of the Drone*, November 13, 2014, : <http://dronecenter.bard.edu/predator-drone-that-started-it-all>

¹⁰⁵ Tenet, *At the Center of the Storm*, 178.

¹⁰⁶ George Tenet, "Written Statement for the Record of the Director of Central Intelligence before the National Commission on Terrorist Attacks Upon the United States," 2004, 14.

¹⁰⁷ Whittle, "The Unexpected History".

absurd".¹⁰⁸ The campaign had gathered pace towards the end of Bush's time in office, however. By one account, the administration authorized 36 strikes in its final year, having carried out just nine (outside military combat) in all previous years.¹⁰⁹ Some targets were high-level Al-Qaeda figures, such as Ayman Zawahiri and Abu Musab al-Zarqawi; others were unknown to the wider public. According to *Long War Journal*, Bush authorized 46 drone strikes during his term in office.¹¹⁰ The New America Foundation put the count at 48, with an estimated 205-350 deaths resulting.¹¹¹ Official secrecy meant the administration refused to provide its own numbers.

A link between technological innovation and normative change has previously been noted by several scholars.¹¹² If the US had not acquired armed drone capabilities, targeted killings would still have been part of the 'war on terror'; prior to expansion of the drone programme, special forces and private contractors had been directed to prepare for such missions. But logistical difficulty and associated risk had been a discouraging factor in previous administrations' consideration of plots to kill. Drone technology altered this calculus, increasing the confidence with which policymakers could expect targeted killing operations to achieve their objectives at acceptable risk and cost. By so doing it incentivized a more permissive interpretation of rules constraining such action.

¹⁰⁸ Nic Robertson and Greg Botelho, "Ex-Pakistani President Musharraf admits secret deal with U.S. on drone strikes," *CNN*, April 12, 2003, http://edition.cnn.com/2013/04/11/world/asia/pakistan-musharraf-drones/?hpt=hp_t2

¹⁰⁹ John Kaag and Sarah Kreps, *Drone Warfare* (Cambridge: Polity Press, 2014), 11.

¹¹⁰ *Long War Journal*, "Charting the data for US airstrikes in Pakistan, 2004 -2014," 2014, <http://www.longwarjournal.org/pakistan-strikes>

¹¹¹ New America Foundation, "Drone Wars Yemen: Analysis," 2014, <http://securitydata.newamerica.net/drones/yemen/analysis>

¹¹² Paul Kowert and Jeffery Legro, *Norms, Identity and Their Limits: A Theoretical Reprise*. In Peter J. Katzenstein (ed.) *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia UP); Kalevi, J. Holsti, K., *Taming the Sovereigns: Institutional Change in International Politics* (London: CUP, 2004); Wayne Sandholtz and Kendall Stiles, *International Norms and Cycles of Change* (Oxford: OUP, 2009).

The development of drone technology was a double-edged sword when it came to maintaining secrecy. On the one hand, by protecting US personnel from physical jeopardy, drones eliminated the need to account for American casualties in the field should things go wrong, a common trigger for forced disclosure of violent overseas operations. On the other hand, although the technology made it easier to keep any single strike secret, it incentivised an increase in their number and frequency that made public reportage, and thus ultimate disclosure of the programme, more likely. Once disclosure *did* take place, however, technology was broadly helpful to the executive's need to keep domestic audiences on-side. By removing loss of American lives from among the possible liabilities of targeted killing operations, it removed one major prudential reason for opposing them. In addition, it provided some basis in fact for claiming that the US could strike targets with unprecedentedly high precision and low collateral damage. This might ease the concerns of those concerned primarily with effectiveness or with civilian casualties.

4.3 The legal basis

The administration's shift in practice raised important questions as to the legal basis on which it was proceeding. Gary Solis, a law professor at West Point, believed that the first targeted killings were a precedent-setting event: "Until just a few months ago, we would all have expressed abhorrence [...] of targeting individuals off the battlefield... But now...we are

taking a new approach".¹¹³ Amnesty International (2005) pointed out that the United States had historically condemned such actions.¹¹⁴ For its strikes to be carried out, the Bush administration was required to craft legal findings internally to the effect that they were permissible. With the exception of Wolfowitz's gaffe, however, the targeted killing programme went entirely unacknowledged officially for the duration of the Bush presidency. The administration did not publicly proffer any legal basis for its actions. It was therefore unclear as a matter of public record whether the executive order banning assassination had been, in any formal way, amended.

Despite the absence of official statement, however, the outline of the legal interpretations supporting the new policy, and reconciling it with existing rules, did begin to take shape in media coverage and subsequent discussion within the legal community.¹¹⁵ The foundation of the administration's legal case was the sweeping authority of the Authorization for Use of Military Force,¹¹⁶ passed one week after 9/11 with only a single member of Congress opposed. This was ground-breaking in empowering the president to target non-state actors "even to the individual level,"¹¹⁷ and shifting counterterrorism from a criminal justice framework to a "war" paradigm, in which terrorists could be designated 'enemy combatants.' This facilitated invoking self-defence as grounds for use of lethal force,¹¹⁸

¹¹³ Mark McManus, "A U.S. License to Kill," *LA Times*, January 11, 2003, <http://articles.latimes.com/2003/jan/11/world/fg-predator11>

¹¹⁴ Amnesty International, "Guantánamo and beyond: The continuing pursuit of unchecked executive power," 2005.

¹¹⁵ Barton Gellman, "CIA Weighs 'Targeted Killing' Missions Administration Believes Restraints Do Not Bar Singling Out Individual Terrorists," *Washington Post*, October 28, 2001, <https://www.washingtonpost.com/archive/politics/2001/10/28/cia-weighs-targeted-killing-%20missions/92d127df-aa07-48d5-9cab-306e6922c229/>; Rennie, "Bush orders,"; McManus, "A U.S. License."

¹¹⁶ United States Congress, "Authorization for Use of Military Force," 2001.

¹¹⁷ Matthew Weed, "The 2001 Authorization for Use of Military Force: Background in Brief," Congressional Research Service, 2013, 1.

¹¹⁸ Natalino Ronzitti, *The Legality of Covert Operations Against Terrorism in Foreign States*. In Andrea Bianchi & Yasmin Naqvi (eds), *Enforcing international law norms against terrorism* (New York: Hart Publishing), 18.

buttressed by an expansive interpretation of the concept of ‘imminence’ as it pertained to terrorist threats. The administration’s National Security Strategy, published in 2002, asserted that the US needed to “adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries”.¹¹⁹

One administration official, speaking on condition of anonymity, later explained that this legal framework was crafted precisely because the administration *did not* wish to simply rescind the assassination ban: “The self-defense exemption was a legal fabrication to save face, to say, Yes, it still applies, but just not in these cases”.¹²⁰ Deputy Secretary of State Richard Armitage later recalled that President Bush issued a further order in early 2002, supplementing his earlier authorisation of the CIA’s targeting programme: “I don’t recall necessarily the words, ‘targeted killings’, but it was clearly that. It was loosening the Executive Order 12333 against assassinations. And the reasoning as I recall was, its wartime, it’s not an assassination, its war”.¹²¹ Robert Grenier, the CIA’s leading counter-terrorism official during this period, would later acknowledge that a significant shift in legal interpretation had taken place: “Activities that before 9/11 we would have said were assassination – now we are simply exercising our sovereign right of self-defence”.¹²²

4.4 Secrecy as alternative to justification or overt innovation

¹¹⁹ US Department of State, “U.S. National Security Strategy: Prevent Our Enemies From Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction,” June 1, 2002, <http://2001-2009.state.gov/r/pa/ei/wh/15425.htm>

¹²⁰ Waterman, “Assassination ban.”

¹²¹ Chris Woods, *America’s Secret Drone Wars* (London: Hurst Publishers, 2014), 14.

¹²² Center for the Study of the Drone, “Rules of Engagement: The Legal, Ethical and Moral Challenges of the Long War,” February 21, 2014 <http://dronecenter.bard.edu/transcript-rules-engagement>

Excepting the Wolfowitz 'moment' in November 2002, the Bush administration, unlike its successor, committed fully to official secrecy regarding the targeted killing programme. Officials refused to publicly state the number of drone strikes authorized, the number of estimated casualties, or by what criteria individuals were selected for the list of targets. When journalists pressed the White House for such details, spokesman Ari Fleischer stonewalled: "There are going to be things that are done that the American people may never know about".¹²³ It similarly rebuffed international enquiries. Letters from advocacy groups, including Amnesty International, requesting clarification of such strikes' legal basis simply went unanswered.¹²⁴ Published strategic documents contained no mention of either targeted killings or drone strikes. Officially, for all externally-facing purposes, the targeted killing programme simply did not exist.

As noted earlier, one motive for this secrecy was diplomatic. Permission from the Pakistani and Yemeni governments for US strikes on their territory was predicated on an American commitment not publicly claim them. As awareness of the strikes widened through media reporting, however, the utility of secrecy as a tool for deflecting awkward questions became apparent. The US had previously condemned the Israeli policy of targeted killing, but how did this new US programme differ? The administration had no credible answer ready for public consumption. Privately, however, administration officials would admit the US policy rested on the same legal rationale as Israel's,¹²⁵ the difference being only of "scale and

¹²³ Walter Pincus, "US Nails Six In Yemen," *Washington Post*, November 07, 2002.

¹²⁴ Amnesty International, "Yemen/USA."

¹²⁵ Mayer, "The Predator War."

frequency”.¹²⁶ Anonymous officials occasionally offered indirect assurances that the process for selecting targets and carrying out strikes was careful: “We have more lawyers than Predator pilots,” one was quoted saying.¹²⁷ But no outsider had access, via any official route, to the information required to evaluate such claims. With such opacity at the official level, Strawser¹²⁸ argues, each strike “might as well be considered an assassination or just plain murder”.

5. The Obama administration: quasi-secrecy and normalization

5.1 *Inheriting and expanding targeted killing*

On taking office, President Obama quietly inherited the secret targeted killing programme without public statement. On December 9, 2008, CIA Director Michael Hayden briefed the president-elect on all classified missions run by the agency, “the nature of those actions, and the written findings from Bush and other presidents”.¹²⁹ Four days before his inauguration, Obama met the outgoing president, who advised him that the drone strike programme was one of two he would find most valuable (the other was preparation for a

¹²⁶ Hosenball, “The Opening Shot.”

¹²⁷ McManus, “A U.S. License.”

¹²⁸ Bradley J. Strawser, *Killing by Remote Control: The Ethics of an Unmanned Military* (Oxford: OUP), 183.

¹²⁹ Bob Woodward, *Obama's Wars* (New York: Simon & Schuster, 2011), 5.

cyber-attack on Iran's nuclear programme).¹³⁰ The appeal of targeted strikes for Obama can be readily understood in light of his positions as a candidate. He had been highly critical of large, costly military deployments such as that in Iraq. He had promised to make the US military "more stealthy, agile, and lethal in its ability to capture or kill terrorists".¹³¹ He had also promised action in Pakistan: "If we have actionable intelligence about high-value terrorist targets and President Musharraf won't act, we will."¹³²

The new administration almost immediately increased the frequency of drone strikes. Three days after Obama's inauguration, the CIA carried out a targeted strike inside Pakistan. This hit the wrong target, resulting in "a tense back-and-forth over the CIA's vetting procedures for drone attacks" between the President and CIA Director Michael Hayden.¹³³ But despite this, "there was no serious disagreement with the decision to continue the program."¹³⁴ Less than a month later, the CIA launched another attack, targeting Pakistani Taliban leader Baitullah Mehsud, which killed more than 30 people.¹³⁵ President Obama ended his first year having authorized 52 strikes, more than Bush had in eight years.¹³⁶ Those killed included high-value militants, such as Mehsud, Osama bin Laden's oldest son Saad bin

¹³⁰ David E. Sanger, "Obama's Secret Wars," *World Affairs Council of Northern California*, 2012.

¹³¹ Barack Obama, "Speech at Woodrow Wilson Center," *Council on Foreign Relations*, August 1, 2007, <http://www.cfr.org/elections/obamas-speech-woodrow-wilson-center/p13974>

¹³² Obama, "Speech at Woodrow Wilson".

¹³³ Daniel Klaidman, "Drones: The Silent Killers," *Newsweek*, May 28, 2012, <http://www.newsweek.com/drones-silent-killers-64909>

¹³⁴ Peter Baker, "Obama's War Over Terror," *NY Times Magazine*, January 4, 2010, http://www.nytimes.com/2010/01/17/magazine/17Terror-t.html?_r=0

¹³⁵ Pir Zubair Shah, "U.S. Airstrike Kills 30 in Pakistan," *NY Times*, February 14, 2009, http://www.nytimes.com/2009/02/15/world/asia/15pstan.html?_r=2&; Hafiz Wazir, "U.S. missile strike kills 25 militants in Pakistan," *Reuters*, February 14, 2009, <http://www.reuters.com/article/2009/02/14/us-pakistan-missiles-idUSTRE51D0XH20090214>

¹³⁶ BJJ, "Revealed."

Laden, and Tahir Yuldashev, leader of the al-Qaeda-associated Islamic Movement of Uzbekistan.¹³⁷

The following year, the number of strikes doubled, to 128.¹³⁸ CIA requests for wider zones of permitted targeting in Pakistan and more armed UAVs were approved.¹³⁹ This information was not released publicly; the programme remained shrouded in official secrecy. Public records were instead compiled by outsiders, such the New America Foundation (NAF) and the Bureau of Investigative Journalism (BIJ), counting and detailing drone strikes to the best of their abilities using information gleaned from other sources.¹⁴⁰ By the end of Obama's two terms in office, the BIJ's numbers suggested he had authorized a total of 563 strikes in Pakistan, Somalia and Yemen.¹⁴¹ NAF estimated 355 strikes carried out in Pakistan, with between 1,933 and 3,095 estimated killed, 129 to 162 thought to be civilians.¹⁴²

In addition to being more *capable* of carrying out targeted killings thanks to drone technology, the Obama administration had a further incentive. Obama had criticised both

¹³⁷ Joby Warrick, "One of Osama Bin Laden's Sons Reported Dead After CIA Missile Strike," *Washington Post*, July 24, 2009, <http://www.washingtonpost.com/wpdyn/content/article/2009/07/23/AR2009072301966.html>; Bill Roggio, "Tahir Yuldashev confirmed killed in US strike in South Waziristan," *Long War Journal*, October 4, 2009, http://www.longwarjournal.org/archives/2009/10/tahir_yuldashev_conf.php; Hamid Ismailov, "Feared' Uzbek militant in Pakistan," *BBC*, October 3, 2009, http://news.bbc.co.uk/1/hi/world/south_asia/8287714.stm

¹³⁸ BIJ, "Revealed."

¹³⁹ Jack Goldsmith, "How Obama Undermined the War on Terror," *New Republic*, May 1, 2013,

<http://www.newrepublic.com/article/112964/obamas-secrecy-destroying-american-support-counterterrorism>

¹⁴⁰ An important side-point should be noted here: NAF and BIJ counted 'drone strikes'. Not all these were 'targeted killings' by our criteria; some were so-called 'signature strikes', authorized based on observed behavior or circumstances without individual identity being known. Though the number of both increased during these years, separating the two without official confirmation of targets is challenging. Both are in turn distinct from killing by US military personnel operating in conventional combat spaces, though issues of secrecy and disclosure can also be relevant to these. See for example the controversial July 12, 2007 Baghdad airstrikes, and the subsequent release of helicopter footage of the incident by Wikileaks. Chris McGreal, 'Wikileaks reveals video showing US air crew shooting down Iraqi civilians', *Guardian*, April 5, 2010. <https://www.theguardian.com/world/2010/apr/05/wikileaks-us-army-iraq-attack>

¹⁴¹ BIJ, "Obama's covert drone war in numbers: ten times more strikes than Bush", January 17, 2017,

<https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-ten-times-more-strikes-than-bush>

¹⁴² New America Foundation, "International Security Data Site," January 10, 2017, <http://securitydata.newamerica.net/>

extrajudicial detention and 'enhanced interrogation', i.e. torture, as practiced by the Bush administration. Targeted killing could obviate the need for either, while still acting to neutralise the perceived threat. Hayden, who concluded his tenure as CIA Director in February 2009, believed this partly motivated the incoming administration's enthusiasm for the programme.¹⁴³ Likewise former CIA General Counsel John Rizzo, who judged that the administration "never came out and said they would start killing people because they couldn't interrogate them, but the implication was unmistakable".¹⁴⁴ We might also surmise that an increase in the number of drones deployed, and advance in their technological capacities boosted US capacity to identify new targets, without the need for detention and interrogation to provide intelligence on the identity and location of hostile actors.

5.2 From secrecy to quasi-secrecy: selective disclosure and strategic leaks

During its first years, the Obama administration maintained its predecessor's approach to secrecy, keeping the targeted killing program tightly under wraps. Following the first strike of the Obama presidency, White House press secretary Robert Gibbs refused to officially acknowledge the event, saying only: "I'm not going to get into these matters".¹⁴⁵ This would become a routine response. During this period, the rule book for targeted strikes was

¹⁴³ Interview with Hayden, 2016

¹⁴⁴ Mazzetti, 2013, p.281

¹⁴⁵ Jeffrey Smith, Candace Rondeaux, and Joby Warrick, "2 U.S. Airstrikes Offer a Concrete Sign of Obama's Pakistan Policy," January 24, 2009, *Washington Post*, Available at: <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/23/AR2009012304189.html>

considered so highly classified it was “hand-carried from office to office rather than sent by e-mail”.¹⁴⁶ “We didn’t even know if we were allowed to write the word ‘drone’ in an unclassified e-mail,” one State Department official reported.¹⁴⁷ After leaving office, Gibbs revealed that “when I went through the process of becoming press secretary, one of the first things they told me was: “You are not even to acknowledge the drone program. You’re not even to discuss that it exists.”¹⁴⁸

Behind the wall of official silence, there was disagreement on the merits of such strict secrecy,¹⁴⁹ especially as the increasing frequency of operations made public reportage of strikes inevitable. Secretary of State Hillary Clinton privately complained that blanket denial made it impossible to rebut exaggerated accusations about civilian casualties.¹⁵⁰ Leon Panetta, who oversaw the programme for years as CIA Director, confirmed later that some officials advocated “full public explanation of each operation,” and that he also felt President Obama should be “far more transparent” in explaining the policy.¹⁵¹

With time, however, secrecy came into tension with another imperative: securing credit for waging an effective counterterrorism campaign. This led to numerous instances where

¹⁴⁶ Scott Shane, “Election Spurred a Move to Codify U.S. Drone Policy,” *NY Times*, November 24, 2012, http://www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html?_r=0

¹⁴⁷ Coll, “The Unblinking.”

¹⁴⁸ Michael Calderone, “Robert Gibbs Told Not To Acknowledge Drone Program Exists As White House Press Secretary,” *Huffington Post*, February 24, 2013, http://www.huffingtonpost.com/2013/02/24/robert-gibbs-drones-white-house_n_2753183.html

¹⁴⁹ Julian E. Barnes, “U.S. Rethinks Secrecy on Drone Program,” *Wall Street Journal*, May 17, 2002, <http://www.wsj.com/articles/SB10001424052702303879604577410481496895786>; Michael Hirsh and Kristin Roberts, “Why the Drone Memos Are Still Secret,” *The Atlantic*, February 22, 2013, <http://www.theatlantic.com/international/archive/2013/02/why-the-drone-memos-are-still-secret/273436>

¹⁵⁰ Scott Shane, “U.S. Attacks, Online and From the Air, Fuel Secrecy Debate,” *NY Times*, June 7, 2012, http://www.nytimes.com/2012/06/07/world/americas/drones-and-cyberattacks-renew-debate-over-security.html?_r=0; Hilary Clinton, *Hard Choices* (New York: Simon & Schuster, 2014), 690.

¹⁵¹ Leon Panetta, *Worthy Fights* (New York, NY: Penguin Press, 2014), 388-391.

officials sought walked the line of publicly praising the programme's effectiveness while simultaneously refusing to directly acknowledge its existence. Two months into the Obama drone campaign, Chairman of the Joint Chiefs of Staff Mike Mullen was asked in an interview about the apparent increase in strikes under the new president. He declined to confirm details, but stated that threats in Pakistan "need to be addressed, have been addressed, and will continue to be addressed".¹⁵² In similar fashion, John Brennan, then deputy National Security Advisor for counterterrorism, refused to directly address the programme but offered the assurance that all counterterrorism operations were 'legal,' 'highly effective', and 'very focused'.¹⁵³ CIA spokesman Paul Gimigliano refused to acknowledge targeted killings, stating only that tools used by the agency were "exceptionally accurate, precise and effective".¹⁵⁴ CIA Director Panetta, questioned at the Pacific Council in 2009, adopted a similar approach: "Obviously because these are covert and secret operations I can't go into particulars. I think it does suffice to say that these operations have been very effective because they have been very precise in terms of the targeting and it involved a minimum of collateral damage".¹⁵⁵ In another interview, he praised the CIA's counterterrorist efforts as the "most aggressive" in history, yet stopped short of stating what methods exactly he was referring to.¹⁵⁶

¹⁵² Fox News, "Transcript: Adm. Mullen on 'FOX News Sunday,'" March 2, 2009, <http://www.foxnews.com/on-air/fox-news-sunday-chris-wallace/2009/03/02/transcript-adm-mullen-fox-news-sunday>

¹⁵³ Spencer S. Hsu and Joby Warrick, "Obama Plans to Use More Than Bombs and Bullets to Fight Terrorism," *Washington Post*, August 6, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/05/AR2009080503940.html>; Peter Finn and Joby Warrick, "Under Panetta, a more aggressive CIA," *Washington Post*, March 21, 2010, <http://www.washingtonpost.com/wpdyn/content/article/2010/03/20/AR2010032003343.html>

¹⁵⁴ Scott Shane, "C.I.A. to Expand Use of Drones in Pakistan," *NY Times*, December 4, 2009, http://www.nytimes.com/2009/12/04/world/asia/04drones.html?adxnli=1&pagewanted=all&adxnli=14_27983392-XmSow7thnPvtaUwoslbDqw; Scott Shane and Eric Schmitt, "C.I.A. Deaths Prompt Surge in U.S. Drone Strikes," *NY Times*, January 22, 2010, http://www.nytimes.com/2010/01/23/world/asia/23drone.html?_r=0

¹⁵⁵ Leon Panetta, "Director's Remarks at the Pacific Council on International Policy," May 18, 2009,

<https://www.cia.gov/news-information/speeches-testimony/directors-remarks-at-pacific-council.html>

¹⁵⁶ Joby Warrick and Peter Finn, "CIA director says secret attacks in Pakistan have hobbled al-Qaeda," *Washington Post*, March 18, 2010, http://www.washingtonpost.com/wpdyn/content/article/2010/03/17/AR2010031702558.html?sid=ST2010_031703003

Most controversially, the administration further engineered favourable coverage by means of anonymous leaks to the media. In 2011, David Ignatius of the *Washington Post* reported that the White House was willing to discuss the top-secret drone campaign with him, but only when resulting coverage promoted the precise and effective nature of the programme.¹⁵⁷ “These rules about covert activities can be bent when it becomes politically advantageous,” he explained. Jonathan Landay of Reuters reported a similar experience, noting that when information worked in administration’s favour, “you get quite a detailed readout”.¹⁵⁸ Leaks such as these allowed officials to advance, for public consumption, information carefully selected to portray the efficacy and legality of the programme in the most favourable possible light. Philip Alston, the UN Special Rapporteur on extrajudicial executions, maintains that leaks “played a powerful role in legitimizing the targeted killings program”.¹⁵⁹ Meanwhile the regime of official secrecy retained in parallel provided a protective barrier behind which officials could step at any moment of their choosing. This was especially useful when faced with the most difficult questions arising from targeted killing, such as the outer limit of the legal authority to kill claimed by the executive, or the details of targeted strikes gone awry. In this way, the antagonistic incentives for secrecy and disclosure faced by the administration interacted such that the programme became, as Mark Phythian has observed, “neither fully covert nor overt”.¹⁶⁰

¹⁵⁷ Tara McKelvey, “Inside the Killing Machine,” *Newsweek*, February 13, 2011, <http://www.newsweek.com/inside-killing-machine-68771>

¹⁵⁸ McKelvey, “Inside the Killing.”

¹⁵⁹ Alston, “The CIA,” 89.

¹⁶⁰ Phythian, “Between Covert and Overt Action”: 286.

5.3 The gradual, partial official 'opening up'

In 2010, State Department Legal Adviser Harold Koh, presented an assessment to the American Society of International Law, a few paragraphs long, of how targeted killings could fall within the laws of war.¹⁶¹ Prior to the speech, he had resisted engaging publicly with legal debates on the subject.¹⁶² An administration lawyer later stated that Koh's public defence was the end result of an "unbelievably excruciating process of crafting a public statement that all the agencies can agree on".¹⁶³ The UN's Philip Alston welcomed the statement as "a good start," but noted that his agency had "been asking for a legal rationale for quite a long time" and Koh's statement failed to answer key legal questions.¹⁶⁴

2011 was an inflection point in intensifying pressure on the administration to account in some on-the-record way for the programme and its legal basis. This was because it contained perhaps the two highest-profile killings to occur during the Obama presidency. First, on May 2, Osama bin Laden, for whose location the US had been hunting since before 9/11, was killed by a Navy SEAL helicopter raid on a compound in Abbottabad, Pakistan, to which he had finally been traced. This was not a typical instalment in the targeted killing programme as we have defined it here, for two reasons. First, it was carried out under the command of the US military rather than by intelligence operatives or contractors (though of

¹⁶¹ Harold Hongju Koh, "The Obama Administration and International Law," *United States Department of State*, March 25, 2010, <https://www.state.gov/documents/organization/179305.pdf>

¹⁶² Ari Shapiro, "U.S. Drone Strikes Are Justified, Legal Adviser Says," *NPR*, March 26, 2010, <http://www.npr.org/templates/story/story.php?storyId=125206000>

¹⁶³ Tom Junod, "The Lethal Presidency of Barack Obama," *Esquire*, August 12, 2012, <http://www.esquire.com/news-politics/a14627/obama-lethal-presidency-0812/>

¹⁶⁴ *Democracy Now*, "UN Special Rapporteur Philip Alston Responds to US Defense of Drone Attacks' Legality," April 1, 2010, <http://www.democracynow.org/2010/4/1/drones>

course the CIA was intimately involved). Second, it was immediately announced by the President as a major success and reported in detail by the press, with government assistance. Though obviously planned secretly, it was not a covert operation, in that there was no intention to maintain deniability after it had been carried out. Nevertheless, after the initial wave of celebratory reaction, the raid did give rise to pointed questions regarding the legal basis for bin Laden's apparent summary execution.¹⁶⁵ The administration generally avoided addressing the point, though Attorney General Eric Holder, who found himself before the Senate Judiciary Committee on May 4, responded under questioning that "the operation in which Osama bin Laden was killed was lawful. He was the head of al Qaeda, an organization that had conducted the attacks of September 11. He admitted his involvement... It was justified as an act of national self-defense."¹⁶⁶ The Bin Laden execution thus drew unprecedented attention to some of the key underlying legal issues pertaining to the CIA drone strike programme. But at the same time the ad hoc, one-off nature of the Abbottabad raid and the singularly high public profile of the target, not to mention the direct connection to 9/11, gave the Bin Laden killing a *sui generis* quality.

The next substantive public articulation of justification for the broader programme from the administration came at Harvard on Sep 16, 2011, when counterterrorism advisor John Brennan offered a defence for killing beyond 'hot' battlefields based on an expansive understanding of 'imminence' of threat.¹⁶⁷ He disclosed no operational facts not already in the public domain, but in combination with Koh's prior statement, Brennan's remarks began

¹⁶⁵ Owen Bowcott, 'Osama bin Laden: US responds to questions about killing's legality', *Guardian*, May 3, 2011, <https://www.theguardian.com/world/2011/may/03/osama-bin-laden-killing-legality>

¹⁶⁶ Jeremy Pelofsky, James Vicini, 'Bin Laden killing was U.S. self-defense: US', *Reuters*, May 4, 2011,

¹⁶⁷ John Brennan, "Strengthening our Security by Adhering to our Values and Laws," *Harvard Law School*, 2011.

in earnest the process of presenting, on the record, an official legal and normative case for what the executive had been doing for the past decade. At the time of these limited steps, however, official secrecy regarding the very existence of the programme to which this legal reasoning pertained remained in place, leading to a degree of self-conscious absurdity. Asked directly “Does the CIA have a drone program?”, Brennan refused to plainly acknowledge it, replying jokingly: “If the agency did have such a program, I’m sure it would be done with the utmost care, precision...”.¹⁶⁸ The *New York Times* report of the event records that the conclusion of Brennan’s sentence “was garbled by the laughter of the audience.”

Brennan’s speech came just 14 days before the second landmark targeted killing in 2011, that of Anwar al-Awlaki, by CIA drone strike in Yemen, on Sep 30. This placed further strain upon secrecy for two reasons. First, because the president was eager to publicly claim al-Awlaki’s elimination as a counterterrorism success.¹⁶⁹ Second, because he was American-born, and this raised the constitutional stakes regarding the executive’s asserted right to target and kill.

McKelvey (2013) notes a surge in press scrutiny from mid-2011 onward:

¹⁶⁸ Arthur S. Brisbane, “The Secrets of Government Killing,” *NY Times*, October 8, 2011,

http://www.nytimes.com/2011/10/09/opinion/sunday/the-secrets-of-government-killing.html?_r=0

¹⁶⁹ White House, “Remarks by the President at the “Change of Office” Chairman of the Joint Chiefs of Staff Ceremony,” September 30, 2011, <https://obamawhitehouse.archives.gov/the-press-office/2011/09/30/remarks-president-change-office-chairman-joint-chiefs-staff-ceremony>

[From] July 2011 to July 2012, the *New York Times*, the *Washington Post*, and the *Christian Science Monitor* published roughly 120 articles, or more than four times the number of articles from a comparable period in the previous twelve months, that looked at legal aspects of the drone program. In addition, these newspapers published 33 articles that looked at moral aspects of the program, more than three times the number of articles during the previous twelve-month-long period.¹⁷⁰

Responding to this pressure, Brennan addressed an audience at the Wilson Center in 2012, and finally unequivocally admitted: “Yes, in full accordance with the law, and in order to prevent terrorist attacks on the United States and to save American lives, the United States Government conducts targeted strikes against specific al-Qaida terrorists”.¹⁷¹ He further noted that he was speaking following an instruction from President Obama “to be more open with the American people about these efforts”,¹⁷² and proceeded to set out elements of its underlying legal basis. Brennan’s speech was a landmark moment in the administration’s public handling of the program. Soon after, several high-level officials, including Secretary of Homeland Security Jeh Johnson,¹⁷³ Attorney General Eric Holder,¹⁷⁴ and CIA General Counsel Stephen Preston¹⁷⁵ followed suit by engaging in public defence of administration’s use of drones. Finally, in 2013, the president himself delivered a speech at

¹⁷⁰ Tara McKelvey, “Media Coverage of the Drone Program,” *Harvard University, Joan Shorenstein Center on the Press, Politics, and Public Policy*, May 2, 2013, <https://shorensteincenter.org/media-coverage-of-the-drone-program/>

¹⁷¹ John Brennan, “The Efficacy and Ethics of U.S. Counterterrorism Strategy,” *Wilson Centre*, April 30, 2012, <https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy>

¹⁷² Brennan, “The Efficacy.”

¹⁷³ Jeh Charles Johnson, “National Security Law, Lawyers, and Lawyering in the Obama Administration”, *Yale Law & Policy Review* 141 (2012).

¹⁷⁴ Eric Holder, “Attorney General Eric Holder Speaks at Northwestern University School of Law,” *US Department of Justice*, March 5, 2012, <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law>

¹⁷⁵ Stephen Preston, “CIA General Counsel Stephen Preston's Remarks on the Rule of Law,” *CIA*, April 20, 2012, <https://www.cia.gov/news-information/speeches-testimony/2012-speeches-testimony/cia-general-counsel-harvard.html>

the National Defense University seeking to clarify the administration's approach to counterterrorism, especially with regard to targeted drone strikes.¹⁷⁶

In these public statements aimed at legitimating the programme, arguments put forward included: the 'state of exception' created by a new type of terrorist threat; the unconventional nature of terrorists as non-uniformed armed combatants; the inaccessible locations of those targeted, which put them beyond the reach of capture or law enforcement; the US Government's duty to prioritise the lives of the American population; the high risk of imminent attack if the US did not act; the precision of the technology now available for targeting; and the seriousness and professionalism with which the president and other officials undertook the responsibility of targeting.

With regard to the norm against assassination, the administration fell somewhere, to use Keating's terminology (see section 2), between offering justification and advocating innovation. "Assassination", administration officials said, was "repugnant", "unlawful", and not something that the US practiced or supported.¹⁷⁷ But these killings were not assassinations. "The use of that loaded term is misplaced," said Attorney General Eric Holder.¹⁷⁸ In his speech, Homeland Security Secretary Johnson (2012) directly addressed the relevant history, contending that there was a substantial difference between the US government assassination plots of the 1970s and present practice. "Lethal force against a

¹⁷⁶ White House, "Remarks by the President at the National Defense University," May 23, 2013, <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>

¹⁷⁷ Holder, "Attorney General"; Johnson, "National Security."

¹⁷⁸ Holder, "Attorney General."

valid military objective, in an armed conflict is consistent with the law of war,” he noted, asserting that the current strikes qualified as such.¹⁷⁹

Key to the administration’s justification was the expansive definition of ‘imminence’. As noted earlier, this was first sketched officially and publicly by Brennan in his 2011 Harvard speech:

We are finding increasing recognition in the international community that a more flexible understanding of ‘imminence’ may be appropriate when dealing with terrorist groups, in part because threats posed by non-state actors do not present themselves in the ways that evidenced imminence in more traditional conflicts[...] Over time, an increasing number of our international counterterrorism partners have begun to recognize that the traditional conception of what constitutes an ‘imminent’ attack should be broadened in light of the modern-day capabilities, techniques, and technological innovations of terrorist organizations”.¹⁸⁰

Brennan was to put it mildly, putting a positive spin the matter of world opinion. Former CIA Director Michael Hayden, intimately involved in the drone programme during the Bush years, was more frank: “there isn’t a government on the planet that agrees with our legal

¹⁷⁹ Johnson, “National Security.”

¹⁸⁰ Brennan, “Strengthening our Security.”

rationale for these operations, except for Afghanistan and maybe Israel”.¹⁸¹ Nevertheless, this position was codified in a Justice Department memo stating that:

The condition that an operational leader present an 'imminent' threat of violent attack against the United States does not require the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future [...] By its nature...the threat posed by Al Qaeda and its associated forces demands a broader concept of imminence...¹⁸²

5.4 Resisting scrutiny and oversight: the limits of openness

Throughout the Obama administration's time in office, the American Civil Liberties Union (ACLU) struggled persistently, using the Freedom of Information Act, for greater transparency regarding targeted killing operations and their legal basis. The White House, in response, fought tenaciously to withhold documents and information. In 2010, the ACLU opened its first lawsuit, asking for “disclosure of the legal basis, scope, and limits on the targeted killing program”.¹⁸³ In 2012, three additional cases were filed: a lawsuit challenging the killing of al-Awlaki; an information request about 2012 targeted killings in Yemen; and

¹⁸¹ Dolye McManus, “McManus: Who reviews the U.S. 'kill list'?", *LA Times*, February 5, 2012, <http://articles.latimes.com/2012/feb/05/opinion/la-oe-mcmanus-column-drones-and-the-law-20120205>

¹⁸² *US Department of Justice*, “Lawfulness of Lethal Operation Directed Against a U.S. Citizen Who Is A Senior Operational leader of Al Qaeda or an Associate Force,” 2013, http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf

¹⁸³ ACLU, “Freedom of Information Act,” 2010, <https://www.aclu.org/files/assets/2010-1-13-PredatorDroneFOIARequest.pdf>

an additional request to disclose information about a drone strike in the al-Majalah region in Yemen.¹⁸⁴ Aside from one minor ACLU victory in 2013¹⁸⁵, the executive generally succeeded in resisting such demands for disclosure.

The administration also successfully minimised the role of Congress. In 2012, 26 Congressmen signed a request for greater transparency, arguing that targeted killings carried major implications for the United States and the public had the right to know what was being done in their name.¹⁸⁶ When such requests failed to produce results, members of Congress used confirmation hearings as a forum to press for more information. In 2011, the Senate Select Intelligence Committee held a hearing on the nomination of General David Petraeus to be CIA Director. Roy Blunt, Republican of Missouri, used the occasion to press the general for details on targeted killings by drones. In response, Petraeus carefully and cannily focused on drone operations in Afghanistan, where such missions operated in an entirely different legal context from those in Pakistan, Yemen and Somalia. In so doing, he highlighted only the positives: “I would note that the experience of the military with unmanned aerial vehicles is that the precision is quite impressive, that there is a very low incidence of civilian casualties in the course of such operations”.¹⁸⁷

In 2013 the committee pressed Brennan, Obama’s nominee to replace Petraeus, harder about programme, since in his previous role he had been one of its chief architects. In his

¹⁸⁴ ACLU (2012) “Drones,” <https://www.aclu.org/blog/tag/drones>

¹⁸⁵ US Court Of Appeals, “*American Civil Liberties Union and American Civil Liberties Union Foundation, Appellants V. Central Intelligence Agency*,” 2013.

¹⁸⁶ Chris Woods, “A journey into moral depravity’ – US Congressman Dennis Kucinich on covert wars,” BIJ, June 29, 2009, <https://www.thebureauinvestigates.com/stories/2012-06-29/a-journey-into-moral-depravity-us-congressman-dennis-kucinich-on-covert-wars>

¹⁸⁷ C-Span, “CIA Director Nomination,” June 23, 2011, <https://www.c-span.org/video/?300180-1/cia-director-nomination>

opening statement, he noted that there was a “widespread debate” within the administration about counterterrorism, and that policymakers “wrestled with” lethal operations, but at the same time he defended the practice by pointing out that the US was at war with al-Qaeda.¹⁸⁸ Senator Ron Wyden of Oregon complained that the committee had never seen a full list of countries in which the CIA carried out lethal operations.¹⁸⁹ Further, it had seen only “two of an estimated 11 legal opinions” on the programme.¹⁹⁰ The hearing as a whole served to expose just how little information Congress had, prompting Committee Chair Diane Feinstein to tell reporters afterwards: “I think that this has gone about as far as it can go as a covert activity”.¹⁹¹

In November 2013, the Committee voted by 13-2 to require the CIA to reveal how many individuals it believed to have been killed or injured in its strikes.¹⁹² By April 2014, however, this was thwarted when the Senate as a whole removed this specific demand from the relevant bill. Director of National Intelligence James Clapper led administration lobbying against the requirement by arguing that: “To be meaningful to the public, any report including the information described above would require context and to be drafted carefully so as to protect against the disclosure of intelligence sources and methods or other classified information”.¹⁹³ Official numerical data regarding strikes and casualties would not

¹⁸⁸ United States Senate, “Select Committee on Intelligence: Open hearing on the nomination of John Brennan,” February 7, 2013, <https://www.intelligence.senate.gov/hearings/open-hearing-nomination-john-o-brennan-be-director-central-intelligence-agency>

¹⁸⁹ US Senate, “Select Committee.”

¹⁹⁰ Chris Anders, “Obama’s drone killing program slowly emerges from the secret state shadows,” *Guardian*, March 23, 2013, <http://www.theguardian.com/commentisfree/2013/mar/26/obama-drone-killing-program-secret-state>

¹⁹¹ Mark Mazzetti and Scott Shane, “Drones Are Focus as C.I.A. Nominee Goes Before Senators,” *NY Times*, February 7, 2013, <http://www.nytimes.com/2013/02/08/us/politics/senate-panel-will-question-brennan-on-targeted-killings.html>

¹⁹² Mark Hosenball, “Senate panel approves beefed-up oversight of drone attacks,” *NBC News*, November 8, 2013, <http://www.nbcnews.com/news/other/senate-panel-approves-beefed-oversight-drone-attacks-f8C11566192>

¹⁹³ Spencer Ackerman, “US senators remove requirement for disclosure over drone strike victims,” *Guardian*, April 28, 2014, <https://www.theguardian.com/world/2014/apr/28/drone-civilian-casualties-senate-bill-feinstein-clapper>

ultimately be released by the administration until July 2016, and the figures provided then were markedly lower than those compiled by outside organisations. This led the *New York Times* among others to complain that they “answer few questions, and raise many”.¹⁹⁴

The administration was similarly resistant to disclosure of its detailed legal reasoning. It only shared with Congress the memos providing its legal rationale for targeted killing of al-Awlaki when one of its co-authors, David Jeremiah Barron, had his nomination for the 1st US Circuit Court of Appeals blocked until the administration yielded. It then “allowed lawmakers from a secure room in the Senate, to view copies of two memos written by Barron”.¹⁹⁵ The administration declined to share them with the press or public. In 2016 a Stimson Center report accused the administration of “obstructing efforts to develop greater oversight and accountability mechanisms and reinforcing the administration’s culture of secrecy surrounding the use of armed drones”.¹⁹⁶

6. The normalisation of targeted killing

¹⁹⁴ Scott Shane, “Drone Strike Statistics Answer Few Questions, and Raise Many,” *NY Times*, July 3, 2016, <https://www.nytimes.com/2016/07/04/world/middleeast/drone-strike-statistics-answer-few-questions-and-raise-many.html>

¹⁹⁵ Azmat Khan, “The unexpected way Congress is making the drone program more transparent,” *Al-Jazeera*, May 23, 2014, <http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/5/23/the-unexpected-waycongressismakingthedroneprogrammomoretransparent.html>

¹⁹⁶ Stimson Center, “Grading progress on US drone policy: Report card,” February 23, 2016, <http://www.stimson.org/content/grading-progress-us-drone-policy>

The preceding sections have demonstrated that a substantial shift in government practice took place during the Bush and Obama presidencies. A category of killing that had been treated as forbidden between 1976 and 2001 became routine practice. This occurred first in secret, then became more widely known under the Obama administration, as the scale of the killing programme increased.

A shift of this kind had self-evident potential to generate controversy and opposition. We know, however, that the Obama administration was ultimately successful in securing and maintaining public support for its actions. A 2012 *Washington Post* poll found 83 percent support for Obama's targeted killing policy.¹⁹⁷ A year later, a different survey taken by Gallup showed that almost two-thirds of Americans (65 percent) approved of the government striking individual targets in Pakistan, Yemen and Somalia.¹⁹⁸ While there were fluctuations over subsequent years, majority support was consistent.¹⁹⁹ This was true among both Republicans and Democrats, and held even when respondents were prompted to consider strikes against American citizens living overseas, or reminded of the distinction between drone strokes carried out by the CIA as opposed to the US military.²⁰⁰ The reasonable conclusion from this is that public acceptance of the practice was by this time active, not merely premised on ignorance. Organisations dedicated to civil liberties, such as the ACLU, of course continued to object strongly. But notwithstanding this, the executive

¹⁹⁷ Scott Wilson and Jon Cohen, "Poll finds broad support for Obama's counterterrorism policies," *Washington Post*, February 8, 2012, http://www.washingtonpost.com/politics/poll-finds-broad-support-for-obamas-counterterrorism-policies/2012/02/07/gIQAfrSEyQ_story.html

¹⁹⁸ Gallup, "In U.S., 65% Support Drone Attacks on Terrorists Abroad," March 25, 2013, <http://www.gallup.com/poll/161474/support-drone-attacks-terrorists-abroad.aspx>

¹⁹⁹ Pew Research Center, "Public Continues to Back U.S. Drone Attacks," May 28, 2015, <http://www.people-press.org/2015/05/28/public-continues-to-back-u-s-drone-attacks>

²⁰⁰ Micah Zenko, 'U.S. Public Opinion on Drone Strikes', *Council on Foreign Relations*, Mar 18, 2013, <https://www.cfr.org/blog/us-public-opinion-drone-strikes>

was also successful in obtaining consent from the overwhelming bulk of the political elite and governmental institutions. Congress, regardless of majority party, took no meaningful steps to obstruct the policy. Neither did the courts.

Support within the relevant executive agencies was not unanimous. Elliot Ackerman, a CIA officer during the Obama administration, notes the presence of internal dissent, even when official lawyers had carefully articulated for internal purposes a distinction between ‘targeted killing’ and ‘assassination’ and blessed the legality of the former. “The discomfort of my colleagues, where it existed, didn’t stem from the act itself [...] The discomfort existed because it felt like we were doing something, on a large scale, that we’d sworn not to. Most of us felt as though we were violating Executive Order 12333 [the ban on assassination]. Everybody knew what was happening – senior intelligence officials, general officers, the administration, even the American people, who ostensibly would not tolerate assassinations carried out in their name”.²⁰¹ Similarly, Cameron Munter, Obama’s Ambassador to Pakistan, resigned from his post, complaining privately that “he didn't realise his main job was to kill people”.²⁰² Yet such objections were marginalised, and could not obstruct the programme’s operation.

A major indicator of how fully the practice was normalised was the extent to which the targeted killing programme altered the structures and activities of the CIA itself. Locating

²⁰¹ Elliot Ackerman, “Assassination and the American Language,” *New Yorker*, November 20, 2014, <http://www.newyorker.com/news/news-desk/assassination-american-language>

²⁰² Clive Stafford Smith, “We are sleepwalking into the Drone Age, unaware of the consequences,” *Guardian*, June 2, 2012, <http://www.guardian.co.uk/commentisfree/2012/jun/02/drone-age-obama-pakistan>

and targeting militants on a global basis became the agency's primary task.²⁰³ "We went from a purely espionage organization to more of an offensive weapon, a paramilitary organization where classic spying was less important," a senior officer explained.²⁰⁴ From having 300 employees before 9/11, the CIA's Counterterrorism Center grew to 2,000.²⁰⁵ Mazzetti estimates that more than half of those joining the agency after 9/11 era focused exclusively on manhunt and targeted killing operations.²⁰⁶ While Obama did not initiate this institutional shift, he did accelerate it, propelled by technological advance. Under his authority, the CIA modernized Bush-era targeting practices, turning the 'kill list' into a more sophisticated, constantly-updated database in which "biographies, locations, known associates and affiliated organizations" were catalogued.²⁰⁷ Updating the target list became a routinized bureaucratic process, with more than 100 members of the national security apparatus vetting whom should be targeted and where.²⁰⁸ Targeted killings were no longer exceptional or rare. On the contrary, they were routine, and administered systematically.²⁰⁹

The administration could have sought legitimacy for this shift at the outset through, in Keating's terminology, either overt justification or innovation: that is, through open and active advocacy for the proposition that targeted killing was compatible with established

²⁰³ Cogan, "Hunters not Gatherers," 316.

²⁰⁴ Greg Miller, "CIA closing bases in Afghanistan as it shifts focus amid military drawdown," *Washington Post*, July 23, 2013, https://www.washingtonpost.com/world/national-security/cia-closing-bases-in-afghanistan-as-it-shifts-focus-amid-military-drawdown/2013/07/23/7771a8c2-f081-11e2-a1f9-ea873b7e0424_story.html?utm_term=.b6eda00c9375

²⁰⁵ Greg Miller and Julie Tate, "CIA shifts focus to killing targets," *Washington Post*, September 1, 2011, http://www.washingtonpost.com/world/national-security/cia-shifts-focus-to-killing-targets/2011/08/30/gIQA7MZGvJ_story.html

²⁰⁶ Mazzetti, *The Way of the Knife*.

²⁰⁷ Greg Miller, "Plan for hunting terrorists signals U.S. intends to keep adding names to kill lists," *Washington Post*, October 23, http://www.washingtonpost.com/world/national-security/plan-for-hunting-terrorists-signals-us-intends-to-keep-adding-names-to-kill-lists/2012/10/23/4789b2ae-18b3-11e2-a55c-39408f6e6a4b_print.html

²⁰⁸ Jo Becker and Scott Shane, "Secret 'Kill List' Proves a Test of Obama's Principles and Will," *NY Times*, May 29, 2012, http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=1&ref=politics

²⁰⁹ Richard Adams and Chris Barrie, "The bureaucratization of war: moral challenges exemplified by the covert lethal drone," *Ethics & Global Politics* 6:4 (2013): 248.

norms, or else that those norms should be updated to render it permissible. Alternatively, it could have sought to keep the killings secret, thus evading the need for legitimation and the risk of failure and backlash entailed in seeking it.

The case detail we have presented here makes it clear that in practice the administration declined to make a straight choice between these alternatives, pursuing instead a hybrid path to legitimation via 'quasi-secrecy'. That is: it maintained a formal regime of official secrecy, but combined it with the simultaneous, often unofficial, release to the public of limited information designed to portray the efficacy and legality of the programme in the most favourable possible light. Such disclosures served to allow the public to become accustomed over time to the existence of targeted killing as a government practice, and this contributed to the goal of normalizing the executive's actions in the eyes of key domestic audiences. At the same time, official secrecy relieved officials of the need to publicly address inconvenient or unpleasant facts arising from operations, or tackle the ultimate logical implications of the programme's underpinning legal reasoning and locate definitively the outer limits of the executive's prerogative to kill.

The administration's success in all this suggests we should consider secrecy not as a binary – and, as some have argued, temporary and counterproductive – alternative to legitimation. Rather, blended with selective disclosure in a strategy of quasi-secrecy, it can be part of a highly effective mechanism for normalising potentially controversial innovation. By the time the Obama administration finally officially avowed the targeted killing programme, articulated its legal basis, and began to present an overt case in support of its legitimacy, the

core operational facts of the programme had been *de facto* publicly known, and painted in a positive light, for years. Consequently, its ultimate, belated official acknowledgement was received by the public not as the shocking announcement of a highly controversial innovation, but merely as confirmation of a long-established government practice, the legal and normative merits of which a reasonable but non-expert observer might suppose had already long since been debated and settled.

The 'moment' at which, in an overt-advocacy-centred model of legitimation, targeted killing should have been pitched to the public as a major but desirable shift in practice meriting serious consideration simply never occurred. At the time when the shift in practice took place and became *de facto* publicly known, and for many years thereafter, the executive's position was that official secrecy prevented officials from debating its merits, or even frankly acknowledging its existence. By the time the administration was prepared to officially avow the operational facts of its actions and the legal reasoning underlying them – a *sine qua non* for meaningful debate – they had ceased to seem sufficiently novel to generate what energetic public engagement they once might have. To the observer's eye, targeted killing appeared to move directly from 'outside the bounds of official discussion', to 'uncontroversial long-established practice' with no way-stations in between. It was for years apparently not yet the right time to litigate openly the merits of the policy, until all at once it was too late. The utility of quasi-secrecy lies precisely in facilitating this move: it advances the goal of legitimation by cultivating a widespread impression that open debate, resulting in consent, must surely have occurred at an earlier moment, while in fact serving to avert its occurrence at any point. In this way, even a norm of substantial weight may be killed

sufficiently softly that the precise moment of its passing fails to register. The ethical and political virtues of such a strategy are – clearly – open to question. This case, however, provides proof of concept for its efficacy. This will no doubt be of interest to government officials interested in adopting and legitimating controversial new practices. Those who identify more with the audience than with the executive branch in this story, however, may consider it a warning of manoeuvres for which they should remain vigilant.