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The Future as a Concept in National Security Law

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The Future as a Concept in National Security Law

Mary L. Dudziak*

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I. INTRODUCTION

“A nation’s sense of the future, which determines long-range foreign policy as well as present diplomatic maneuvers, is based partly on its sense of the past.”

Stephen Kern, *The Culture of Time and Space*¹

With their focus on the future of national security law, the essays in this issue share a common premise: the future matters to legal policy, and the law must take the future into account. But what is this future? And what conception of the future do national security lawyers have in mind?

The future is, in an absolute sense, unknowable. Absent a time machine, we cannot directly experience it. Yet human action is premised on ideas about the future, political scientist Harold Lasswell wrote in his classic work, *The Garrison State*.² The ideas about the future that guide social

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1. STEPHEN KERN, *THE CULTURE OF TIME AND SPACE*, 1880–1918, at 277 (2d ed. 2003).

2. Harold D. Lasswell, *The Garrison State*, 46 AM. J. SOC. 455 (1941). Ideas about the future are also prominent in contemporary scholarship. See, e.g., PHILIP BOBBITT, *TERROR AND CONSENT*:

scientific work are rational predictions, he suggested.³

If law is premised on ideas about something unknowable, something that can, at best, be a prediction, then it seems important to examine what those ideas, assumptions, and predictions are. This Essay examines future-thinking in prominent works related to national security, including the ideas that the future is “peacetime,” a “long war,” a “next attack,” and a “postwar.” Drawing from scholarship on historical memory and conceptions of temporality, this Essay argues that understandings of the future depend on more than the rational empirical predictions that Lasswell had in mind. The future is a cultural construct that depends, in part, on the way we remember the past. It does not exist apart from the politics and values that inform our perceptions. The future does not unfold on its own. We produce our future through both our acts and our imaginations. Culture matters deeply in this context, for the future we imagine is a well-spring of law.

II. THE FUTURE AS “PEACETIME”

One prominent example of thinking about what the future might be is a widely noted speech by Jeh Johnson shortly before he stepped down from his position as General Counsel of the U.S. Department of Defense.⁴ Johnson predicted that the current U.S. military conflicts authorized by Congress will someday come to an end. “‘War’ must be regarded as a finite, extraordinary and unnatural state of affairs,” he argued.⁵ “Peace must be regarded as the norm toward which the human race continually strives.”⁶ In this way, Johnson suggested that the end of conflict would lead the nation to a normal state of affairs, which would be “peacetime.” “I do believe that on

THE WARS FOR THE TWENTY-FIRST CENTURY 19, 147–49, 220 (2009).

3. Lasswell, *supra* note 2, at 455–56. Reinhart Koselleck writes that the idea of the future as a prediction appeared in the fifteenth and sixteenth centuries as an alternative to the religious ideas of prophecy. REINHART KOSELLECK, FUTURES PAST: ON THE SEMANTICS OF HISTORICAL TIME 18 (Keith Tribe trans., 1985).

4. Jeh Charles Johnson, Gen. Counsel, U.S. Dep’t of Def., *The Conflict Against Al Qaeda and its Affiliates: How Will It End?*, Speech at the Oxford Union, Oxford University (Nov. 30, 2012), available at <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>. Johnson is now the Secretary of Homeland Security. See *Secretary Jeh Johnson*, U.S. DEP’T OF HOMELAND SEC. (Jan. 6, 2014), <http://www.dhs.gov/secretary-jeh-johnson>.

5. See Johnson, *supra* note 4.

6. *Id.*

the present course, there will come a tipping point,” he explained.⁷ The “tipping point” would arrive when

so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.⁸

Besides imagining a future that is peaceful, Johnson’s remarks suggest an understanding of war and temporality: that time inevitably passes from wartime to peacetime, so that wartime is always a temporary rupture, and peacetime is the normal state of affairs.⁹ This temporal structure has implications for the war powers. If wartime is always temporary, then executive war-related power would naturally ebb once normal peacetime is restored.

Wartime/Peacetime



The future of national security law, in this way of thinking, would focus first, on national security during wartime (with the goal of moving to peacetime), and second, on national security during peacetime. The central challenge of policy would be about how to get to the seemingly certain and inevitable future: peace. National security would be imagined as aimed at producing peace, even when peace itself is absent. This is an optimistic and positive formulation, but it has an inherent danger. The endpoint is so

7. *Id.*

8. *Id.*

9. *See id.*; *see also* MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* (2012) (arguing that a prominent way of thinking about wartime is to believe that peacetime is normal and that wartime is always a temporary rupture).

obviously good that much hardship can be justified to achieve it. The hardship is seen as reasonable because it need only last until normal peacetime is restored. The arrival of peace is thought to shift American politics and individual rights back to their normal state of affairs.

In this conceptualization, the way to overcome the negative effects of wartime is not to address those effects directly, but to bring wartime to an end. For example, historically wartime detention has lasted only until the end of a wartime.¹⁰ But there is an obstacle to the idea of a future of peacetime: regular and persistent U.S. military engagement.¹¹ In spite of the idea that peacetime is the norm, military engagements—large and small—consume the timeline of American history, at least since 1900.¹² Historically, peacetime has been elusive. This makes the idea of the inevitability of peace a dangerous illusion because there is no “peace” reset button on American war powers.¹³

In spite of the elusiveness of peacetime, President Barack Obama appears to share Johnson’s way of thinking about the future,¹⁴ and these ideas are also common in writings about American war. But national security scholarship is also driven by darker ideas about the future. Two prominent ideas are the “long war” and an inevitable “next attack.”

III. THE FUTURE AS A “LONG WAR”

As military conflict has persisted, it is not surprising that some writers have embraced the idea of the “long war.”¹⁵ The term was used by U.S.

10. See ROGER DANIELS, *PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR II* 85–87 (1993). Rosa Brooks argues that “[t]he erosion of the temporal boundaries between war and nonwar has particular significance for prisoners of war and other detainees.” See Rosa Ehrenreich Brooks, *War Everywhere: Human Rights, National Security, and the Law of Armed Conflict in the Age of Terrorism*, 153 U. PA. L. REV. 675, 726 (2004).

11. For a list of United States military engagements from 1798–2004, see RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL30172, *INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2004* (2004), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl30172.htm>.

12. See DUDZIAK, *supra* note 9, at 29; GRIMMETT, *supra* note 11.

13. See generally Brooks, *supra* note 10 (arguing that the categories of war and peace have collapsed).

14. See, e.g., Barack Obama, U.S. President, Remarks by the President at the National Defense University (May 23, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

15. See, e.g., JEFFREY MICHAELS, *THE DISCOURSE TRAP AND THE US MILITARY: FROM THE*

General John Abizaid in 2004¹⁶ and Defense Secretary Donald Rumsfeld in 2006 when he gave a speech to the National Press Club called, “The Long War.”¹⁷ Likewise, President George W. Bush said that “[o]ur . . . generation is in a long war against a determined enemy” in his 2006 State of the Union Address.¹⁸ Benjamin Wittes’s book *Law and the Long War* helped to popularize the concept.¹⁹ Use of the term in legal scholarship has increased over time.²⁰

But what is the long war? A 2008 RAND Corporation (RAND) report attempted to answer that question, but found that “policymakers, military leaders, and scholars have offered numerous, and wildly differing, definitions,” and “no consensus has been reached about this term or its implications for the United States.”²¹ Definitions have ranged from “an epic struggle against adversaries bent on forming a unified Islamic world to supplant Western dominance,”²² to simply the ongoing “Global War on Terror.”²³ For some, fighting the long war will require “specialized tactical

WAR ON TERROR TO THE SURGE 38 (2013); CHRISTOPHER G. PERNIN ET AL., RAND CORP., UNFOLDING THE FUTURE OF THE LONG WAR: MOTIVATIONS, PROSPECTS, AND IMPLICATIONS FOR THE U.S. ARMY 5 (2008), available at http://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG738.pdf.

16. PERNIN ET AL., *supra* note 15, at 5.

17. MICHAELS, *supra* note 15, at 38.

18. George W. Bush, U.S. President, State of the Union Address (Jan. 31, 2006), available at <http://georgewbush-whitehouse.archives.gov/stateoftheunion/2006/>; see also MICHAELS, *supra* note 15, at 38.

19. BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* (2008).

20. A LexisNexis search of law review articles with the phrase “long war” and “military” anywhere in the article turned up an average of 7.8 articles a year from 1998 to 2002, an average of 26.2 a year from 2003 to 2007, and an average of 52.8 a year from 2008 to 2012. These numbers are based on a search conducted by my research assistant Parker Guthrie in the LexisNexis database for law reviews and journals on August 3, 2014, for use of the phrase “long war” and “military” anywhere in a law review or journal article.

21. PERNIN ET AL., *supra* note 15, at 1.

22. *Id.*

23. For The Long War Journal, the long war is “also known as the Global War on Terror.” *About The Long War Journal*, LONG WAR JOURNAL, <http://www.longwarjournal.org/about.php> (last visited Jan. 10, 2015). Benjamin Wittes appears to adhere to this definition in *Law and the Long War*. WITTES, *supra* note 19. Robert D. Sloane argues that the ambiguity of the military threat made “The Long War” a better fit than other usages like “Global War on Terror.” See Robert D. Sloane, *Taking Stock Ten Years In: Coin, Casualties and Costs in the Long War—An Introduction*, 30 B.U. INT’L L.J. 565, 566–67 (2012).

groups of well-trained forces that roam the world in a hunt for terrorists.”²⁴ For others, it is an important security challenge to be handled in the context of broader U.S. foreign policy objectives.²⁵

As the term went into use in the military, ambiguity remained. For example, the 2006 Quadrennial Defense Review addressed the long war extensively, but “provide[d] little to go on in terms of ‘winning’ in the long war, or ‘defeating decisively’ the threat that the United States faces.”²⁶ The Army, Joint Forces Command, and Special Operations Command held a Nature of the Long War Seminar in 2006 with the goal of identifying what the long war is; however, “no single definition emerged that was broadly accepted” at this workshop.²⁷ Even the military commanders leading the fight in the long war do not seem to agree on what war they are fighting.²⁸

Opposition to the term long war emerged in military and political circles, in part, because of the temporal quality of the long war.²⁹ A House Armed Services Committee memo sought to have the term removed from future legislation.³⁰ Army Chief of Staff General George Casey suggested that “persistent conflict” would be a better term.³¹

Discussions at RAND did not produce consensus about the proper definition of the term, but instead “highlighted the difficulty of producing a single term capable of describing the complex nature of the situation facing the United States.”³² We appear to be left with a concept that emphasizes that we will be in something for a very long time, even though there is no agreement on what it is that we are in.

Wittes takes a practical approach to this ambiguity. The task at hand, he argues, is “designing a law for a long war, a war that isn’t quite a war, but isn’t quite anything else either, a war we have still not compellingly defined and may never fully define and yet will need to regulate and prosecute anyway.”³³ Long after the September 11 attacks, and “who knows how long

24. PERNIN ET AL., *supra* note 15, at 1.

25. *Id.*

26. *Id.* at 5–6.

27. *Id.* at 6–7.

28. *Accord* MICHAELS, *supra* note 15, at 40.

29. *See* PERNIN ET AL., *supra* note 15, at 7–8.

30. *Id.* at 8.

31. *Id.*

32. *Id.* at 11.

33. WITTES, *supra* note 19, at 260.

before the next catastrophic strike,” Wittes urged that it was “far too late to tarry longer.”³⁴

IV. THE “NEXT ATTACK”

Some post-September 11 scholarship is haunted by a particular idea: that a “next attack” is inevitable.³⁵ Bruce Ackerman titled a 2006 book, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*,³⁶ and Jack Goldsmith turns to the idea of “the next catastrophic attack” in his 2012 book, *Power and Constraint: The Accountable Presidency After 9/11*.³⁷ Ackerman uses the specter of a future attack as the basis for arguing that legal reform must be taken in advance so that the right balance between government power and the protection of civil liberties will be maintained in the future.³⁸ The underlying idea is that the next attack will upset normal politics, causing American leaders to favor security over liberty, thereby weakening constitutional limits.³⁹ For Ackerman, it is better to create a framework for emergency governance ahead of time, so that the use of emergency powers will be limited.⁴⁰ He proposes an “emergency constitution” that allows for emergency presidential power, including the preventive detention of terrorist suspects, but also places time limits on this power, and requires subsequent approval by Congress.⁴¹

34. *Id.*

35. *See, e.g.*, BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* (2006); JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012); DANIEL BENJAMIN AND STEVEN SIMON, *THE NEXT ATTACK: THE FAILURE OF THE WAR ON TERROR AND A STRATEGY FOR GETTING IT RIGHT* (2005).

36. ACKERMAN, *supra* note 35.

37. GOLDSMITH, *supra* note 35, at 249.

38. *See* ACKERMAN, *supra* note 35, at 142–68.

39. *Id.*

40. *Id.* at 1–9.

41. *Id.* at 4–5, 77–100. Under Ackerman’s proposal, emergency provisions would initially require a majority vote in Congress, but over time would require increasing supermajorities. He calls this the “supermajoritarian escalator.” *Id.* at 80–82.

Legal commentators have critically evaluated Ackerman’s creative proposal. *See, e.g.*, Martha Minow, *The Constitution as Black Box During National Emergencies: Comment on Bruce Ackerman’s Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism*, 75 *FORDHAM L. REV.* 593 (2006) (arguing that security is enhanced by protecting rights, not through the restrictions of an emergency regime); Kim Lane Scheppelle, *We Are All Post-9/11 Now*, 75 *FORDHAM L. REV.* 607 (2006) (praising Ackerman’s use of examples from other nations, but offering alternatives that do not concentrate emergency powers in the executive). In this essay, I do

Works assuming the next attack do not presume to know precisely what it will actually look like. But the idea of a next attack builds on assumptions about temporality, law, and the workings of American politics. The word “next” suggests a sequence of like items. The September 11 terrorist attacks are part of the sequence, so an event that would count as a next attack is not any act of terrorism, but something that shares important characteristics with 9/11.

Ackerman begins by asking readers to think about the future, to imagine “waking up the morning after the next terrorist attack.”⁴² Although September 11 and the nation’s immediate reaction to it is his starting point, Ackerman warns that the attacks were merely “a pinprick” compared to the “one hundred thousand innocents” who might be killed and maimed in “[t]he next major attack.”⁴³ His focus, however, is on what the attack would do to American politics. “After each successful attack, politicians will come up with a new raft of repressive laws that ease our anxiety by promising greater security—only to find that a different terrorist band manages to strike a few years later.”⁴⁴ American politics would spiral downward, with increasing repression generated by the crisis of each new attack.⁴⁵

This is a bleak future indeed, which helps explain why Ackerman proposes a dramatic corrective of constitutional emergency powers. The justification for these powers is his prediction—not only of future attacks, but also of the pattern of crisis-and-response that he sees as characterizing the September 11 experience. This illustrates the way that an account of the next attack as a focal point for national security law requires analysis of the paradigmatic moment that scholars depart from. We need to understand September 11 itself in order to understand what the impact of repetitions would be.

This requires that we consider what September 11 was. If this seems to be so obvious that there is no need to inquire, then it is important to reflect on the nature of historical memory. As Marita Sturken describes it, a culture’s memory “is a narrative rather than a replica of an experience that

not revisit this debate, but instead take up Ackerman’s starting point: his assumptions about the future that drive the perceived need for an emergency constitution.

42. ACKERMAN, *supra* note 35, at 1.

43. *Id.* at 2.

44. *Id.*

45. *Id.*

can be retrieved and relived.”⁴⁶ Memory is formed in part by forgetting, for it would be overwhelming to attempt to construct a narrative of all the micro events of lived experience. “A desire for coherence and continuity produces forgetting,” and what a culture remembers is tied to contemporary imperatives.⁴⁷

The “September 11” that informs the next attack literature is such a memory. The events of September 11, 2001, were not accompanied by a uniform and stable understanding of their meaning. As the day itself unfolded, many experienced profound confusion.⁴⁸ Even individuals who evacuated from Ground Zero itself said that they did not understand what had happened until they later watched television or read the newspaper.⁴⁹ In the days and months afterward, a narrative of war became the Bush administration’s way of framing the terrorist attacks, but this was challenged by legal scholars and others who argued that terrorism was not war, and that other models for redressing the attack were superior.⁵⁰ Among differing accounts, one narrative cut across political divides: the idea that September 11 had “changed everything.”⁵¹ The events that day were of such a character that they were thought to break time itself, to usher in a new era. This thinking was so ubiquitous that it soon generated its own form of slang, as high school students adopted a new insult: “That’s *so* September 10.”⁵²

The perceived cultural break and transformation that is thought to have accompanied September 11 is the central characteristic that Ackerman expects to be repeated. This is why a new attack would generate repressive security politics. What drives this account is not tangible events in the physical world, like explosions, but what happens in the minds and hearts of

46. MARITA STURKEN, *TANGLED MEMORIES: THE VIETNAM WAR, THE AIDS EPIDEMIC, AND THE POLITICS OF REMEMBERING* 7 (1997).

47. *Id.* at 7–8.

48. See Mary L. Dudziak, *Introduction to SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT?* 1–2 (Mary L. Dudziak ed., 2003) [hereinafter *Dudziak Introduction*]. For narratives of September 11, see THE SEPTEMBER 11 DIGITAL ARCHIVE, <http://911digitalarchive.org/> (last visited Nov. 26, 2014).

49. See DUDZIAK, *supra* note 9, at 97–98.

50. See, e.g., Bruce Ackerman, *This is not a War*, 113 *YALE L.J.* 1871 (2004); see also Laurence R. Helfer, *Transforming International Law After the September 11 Attacks? Three Evolving Paradigms for Regulating International Terrorism*, in *SEPTEMBER 11 IN HISTORY*, *supra* note 48, at 180 (arguing that three existing legal paradigms applied to the attacks: terrorism as crime, terrorism as armed conflict, and terrorism as atrocity).

51. *Dudziak Introduction*, *supra* note 48, at 2.

52. *Id.*

Americans: the perception that the world has changed, that time has broken yet again, and hence, that new and repressive laws are called for. This illustrates the way that the idea of the next attack depends not only on an idea of the future (that there is a repeat), but also on a set of ideas about September 11 itself—that it was transformative. September 11 is in this way reified as the paradigmatic event against which the future will be measured.

The emergence of 9/11's assumed transformative status has parallels in the way Reinhart Koselleck describes the evolution of the concept of "revolution." He argues that after the French Revolution, the concept of "revolution" has effectively been condensed to a *collective singular* . . . which appeared to unite within itself the course of all individual revolutions."⁵³ It is not simply that diverse experiences were wrapped into a consistent whole. Rather, an understanding of the past affected the way new episodes were understood. "Revolution" became "a metahistorical concept," separated from its origins and "henceforth charged with ordering historically recurrent convulsive experiences."⁵⁴

In perhaps a more modest way, September 11 became a paradigmatic concept that, to borrow from Koselleck, became "charged with ordering historically recurrent convulsive experiences."⁵⁵ For national security law scholars, this historical framing is a way of anticipating a future. The future is thought to play out within the September 11 paradigm. In this rendering, the future will not simply be filled with violence. It will be a future with September 11-type events—events that will evoke a culture and politics of transformation.⁵⁶

As with peacetime and the long war, the future is more than a rational prediction. Because the idea of the next attack is tied to the historical memory of September 11, the imagined future is inflected with the narrative of transformation that we have made about September 11.

53. KOSELLECK, *supra* note 3, at 50.

54. *Id.*

55. *Id.*

56. There is, of course, an irony in this conceptualization: the idea that an event will be repeated and that the repeats will be experienced as so new that they are moments of transformation. This is the future as a continuous loop, as in the film *GROUNDHOG DAY* (Columbia Pictures 1993).

V. THE FUTURE AS “POSTWAR”

If peacetime is illusory, if the long war is indeterminate, and if the next attack is our projection of historical memory, is there a more satisfying way to think about the future? Robert Chesney offers a conception of the future that might seem reassuring: the future as a “postwar.”⁵⁷

As it is often used, postwar is a nostalgic and ironic concept. Postwar is the name given by many history books for the years after World War II—years that have been full of war.⁵⁸ This helps us to see that postwar has not meant an era with no war. It is instead an era ridden with armed conflict and defined by the aftermath of an iconic war: World War II.

In an article simply titled *Postwar*, Chesney takes up the legal consequences of the way we characterize the future after the conflicts authorized by Congress under the two post-September 11 Authorizations for the Use of Military Force have expired.⁵⁹ His starting point is Jeh Johnson’s “tipping point” speech and the positive reaction to it by critics of post-9/11 policies.⁶⁰ If these critics assumed an idealized peacetime without extensive drone strikes and the ongoing use of force, Chesney suggests that they are mistaken.⁶¹ Instead of firm legal limits on the use of force, in a future postwar “the legal framework the government most likely would apply in the absence of the armed-conflict model is considerably less restrictive than one might expect.”⁶²

The reason that critics hope for a future with stronger legal limits on the use of force is that they misunderstand the past, Chesney argues.⁶³ In the years before September 11, the Reagan Administration developed a “continuous-threat” model in the aftermath of the 1983 Hezbollah bombing

57. See Robert M. Chesney, *Postwar*, 5 HARV. NAT’L SEC. J. 305 (2014).

58. See generally DUDZIAK, *supra* note 9, at 26–32 (arguing that war has been persistent in U.S. history, and not confined to time-limited wartimes). For examples of the use of “postwar” in history books, see NOT JUNE CLEAVER: WOMEN AND GENDER IN POSTWAR AMERICA, 1945–1960 (Joanne Meyerowitz ed., 1994); ROBERT O. SELF, AMERICAN BABYLON: RACE AND THE STRUGGLE FOR POSTWAR OAKLAND (2003); and THOMAS J. SUGRUE, THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT (rev. ed. 2005).

59. See Chesney, *supra* note 57.

60. *Id.* at 307–11.

61. See *id.* at 318–24.

62. *Id.* at 318.

63. See *id.* at 305–06.

of the U.S. Marine Barracks in Lebanon and other terrorist acts.⁶⁴ A fierce debate erupted after Oliver North, a National Security Council staff member, “proposed that the CIA should train and field a small group of foreign operatives to kill Hezbollah’s leadership.”⁶⁵ Chesney writes that the debate was ultimately resolved when the CIA General Counsel wrote an opinion, “the thrust of which was to categorize the proposed operation as national defense rather than assassination, on the theory that the organization in question had already attacked Americans and was capable of and willing to do so again.”⁶⁶ This continuous-threat model ultimately was not relied on at the time, but a “1986 successor to this underlying presidential authority stayed on the books, available should future occasions present a similar continuous-threat scenario involving terrorism.”⁶⁷ Importantly, the legal basis for acting was not the law of armed conflict (LOAC), but a robust understanding of the concept of self-defense.⁶⁸ Later, when al Qaeda emerged as an important threat during the Clinton Administration, “[i]ts decisions reinforced the Reagan model in which continuing terrorist threats could be met with lethal force, quite apart from any claim of an armed conflict.”⁶⁹

Like the Reagan/Clinton model, the future or the postwar for Chesney is an era in which the persistent use of force is not principally governed by an armed conflict/LOAC model, but is based on a non-LOAC, self-defense rationale.⁷⁰ The underlying circumstance that will justify the use of force is the existence of a continuous threat. LOAC would not disappear from the future.⁷¹ It could be called upon when armed conflict rose to a sufficient level.⁷² Most important, the future in this model would be a time when presidents can continuously use armed force without Congress declaring or authorizing war.

64. *Id.* at 324–25.

65. *Id.* at 324.

66. *Id.* at 325.

67. *Id.*

68. *See id.* at 324–26.

69. *Id.* at 326.

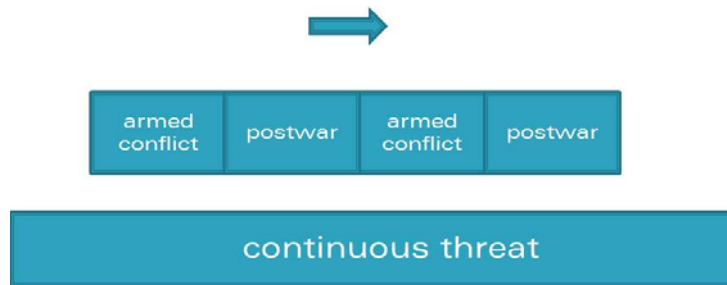
70. Chesney discusses the difference between these two legal regimes in *Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate*, 5 J. NAT’L SEC. L. & POL’Y 539 (2012).

71. *See Chesney, supra* note 57, at 331–33.

72. *See id.*

Interestingly, Chesney's concept of the future retains an episodic quality, including both continuous threats and the episodic experience of "boots-on-the-ground" armed conflict.⁷³ It is a multilayered future, with time running in two different ways at the same time. Presidents would be expected to seek congressional authority only for episodic conflicts that rise above continuous threats.

Chesney on the future in "Postwar"



Because of the persistence of continuous threats, Chesney suggests that a formal shift to postwar will make little difference as a legal matter.⁷⁴ The shift is not irrelevant, however. Chesney argues that moving away from armed conflict to postwar will have an impact on domestic political constraints.⁷⁵ During a postwar, he believes that the American people will be less tolerant of war-like policies.⁷⁶ In this respect, Chesney and Johnson share the view that a cultural idea (the belief that the nation is in a peacetime or postwar) can serve as a political reset button.

The traditional wartime/peacetime model sees time as episodic, with war periodically breaching normal peacetime. Because "peace" is popularly understood as an absence of armed conflict, the concept of peacetime invokes an idealized future, which tends to rest on an idealized understanding of the past.⁷⁷ Chesney's future is grittier and more consistent with the history of U.S. armed conflict. It is reminiscent of the writer

73. *Id.* at 324–28, 334.

74. *See id.* at 331.

75. *See id.* at 331–33.

76. *See id.*

77. *See* DUDZIAK, *supra* note 9, at 26–32.

George Orwell's prediction about the original postwar.⁷⁸ Believing that superpowers would monopolize nuclear weapons and divide the world between them, he thought the years after World War II would be a "cold war," which would be a "peace that is no peace."⁷⁹

For all of the realism in Chesney's conception of a future of violence, his sense of political restraints turns on the historic way the impact of wartime on American society is understood. Entering an era of war is traditionally thought of as generating a strong political reaction, enhancing presidential power.⁸⁰ After the Japanese attack on Pearl Harbor, for example, there was wide popular support of military engagement, which was seen as essential to President Franklin Roosevelt's extensive use of presidential war power during World War II.⁸¹ Political engagement could also undercut presidential power, for example, in the way a widespread, anti-war movement during the later years of the War in Vietnam limited the options President Richard Nixon thought were politically feasible.⁸² But much has changed in the intervening years. Unlike World War II and Vietnam, American soldiers are no longer drafted, and the use of military contractors has enabled the United States to project force with fewer American military personnel.⁸³ Technological developments, especially the use of armed drones, have meant that deadly force can be deployed without American personnel being placed in harm's way.⁸⁴

The consequences of changes in military service are revealed in a Pew Research Center Report showing that "[a] smaller share of Americans currently serve in the U.S. Armed Forces than at any time since the peace-

78. *Id.* at 66, 68.

79. *Id.*

80. See Chesney, *supra* note 57, at 331–33.

81. See JAMES T. SPARROW, WARFARE STATE: WORLD WAR II AMERICANS AND THE AGE OF BIG GOVERNMENT 49–55 (2011).

82. See JEFFREY KIMBALL, THE VIETNAM WAR FILES: UNCOVERING THE SECRET HISTORY OF NIXON-ERA STRATEGY 26–27 (2004); see also JEFFREY P. KIMBALL, NIXON'S VIETNAM WAR (1998).

83. See generally BETH L. BAILEY, AMERICA'S ARMY: MAKING THE ALL-VOLUNTEER FORCE (2009) (detailing the history of the all-volunteer armed forces); LAURA A. DICKINSON, OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS (2011) (describing the prevalence of military contracting and discussing the legal implications).

84. See generally TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD (Claire Finkelstein et al. eds., 2012) (discussing the use of drones in targeted killing).

time era between World Wars I and II.”⁸⁵

During the past decade, as the military has been engaged in the longest period of sustained conflict in the nation’s history, just one-half of one percent of American adults has served on active duty at any given time. As the size of the military shrinks, the connections between military personnel and the broader civilian population appear to be growing more distant.⁸⁶

Military service is now more concentrated in certain families: “Veterans are more than twice as likely as members of the general public to say they have a son or daughter who has served (21% vs. 9%).”⁸⁷ Overall, what the report calls a “military-civilian gap” is more pronounced among younger people.⁸⁸

The Pew report suggests that various political opinions are correlated with connections to family members who have served in the military.⁸⁹ Additionally, the report suggests that the more distant and isolated Americans are from their nation’s wars, the less they are politically engaged with American war policy.⁹⁰

There are implications of this growing military-civilian divide for political engagement on questions of war and peace, and ultimately political restraints on the war powers. Historian Marilyn Young has argued that continuous lower-level conflict enables war to be normalized.⁹¹ As a result, those not directly

85. Pew Research Ctr., *The Military-Civilian Gap: Fewer Family Connections*, PEW RES. CTR.’S SOC. & DEMOGRAPHIC TRENDS PROJECT, Nov. 23, 2011, <http://www.pewsocialtrends.org/2011/11/23/the-military-civilian-gap-fewer-family-connections/>. See generally THE MODERN AMERICAN MILITARY (David M. Kennedy, ed., 2013) (discussing the growing isolation of most Americans from military service).

86. Pew Research Ctr., *supra* note 85 (footnote omitted). The data reveals “a large generation gap.” *Id.* According to the report, “more than three-quarters (77%) of adults ages 50 and older said they had an immediate family member—a spouse, parent, sibling or child—who had served in the military.” *Id.* In contrast, for people under 50, “57% of those ages 30–49 say they have an immediate family member who served. And among those ages 18–29, the share is only one-third.” *Id.*

87. *Id.*

88. *Id.*; see also SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY (Peter D. Feaver & Richard H. Kohn eds., 2001).

89. See Pew Research Ctr., *supra* note 85.

90. See *id.*

91. See, e.g., Marilyn B. Young, *Limited War, Unlimited* (unpublished paper) (on file with author) [hereinafter *Young Paper*]; Marilyn B. Young, *Historian & Professor*, N.Y. Univ., *Limited*

involved in the fighting eventually no longer notice that the conflict still persists.⁹² This is consistent with Chesney's idea that there will be less political mobilization during a period of continuous threat without large-scale armed conflict. But there is no reason to believe that larger conflicts will generate the kind of sustained political engagement that has happened in earlier eras because the burdens of large-scale war are no longer widely shared. Because of this, presidential war power would seem to be continuous, whether future generations experience "postwars" or armed conflicts.

VI. CONCLUSION

As Stephen Kern has written, a nation's understanding of its future is an element of foreign policy, and it "is based partly on its sense of the past."⁹³ The past that figures in national security law is a historical memory, filtered in the way that all memories are. Fears, emotions, and ideas help to generate the conception of the future that national security law is responsive to. The future is not a straightforward prediction, and arguments about national security law's future will sometimes turn on disagreements about how to understand the past. The future as a concept in national security law is, in essence, like the concept of a "usable past" and is subject to its promise and perils.⁹⁴ Cass Sunstein, in defending the search for a usable past by constitutional lawyers, conceded the necessity of interpretation, for "human beings see history through their own filters, including their own assumptions, and the result is, inevitably, something other than unmediated access to what happened before."⁹⁵ Understanding that there are limits to our ability to grasp the future should not undermine the effort to craft forward-looking law, however. This realization shows that there are different future paths, some darker or more hopeful, and brings with it the responsibility to work to shape a humane and livable future.

War, Unlimited, Lecture at the Library of Congress (July 8, 2009) [hereinafter Young Lecture], available at http://www.loc.gov/today/cyberlc/feature_wdesc.php?rec=4683; see also MARY A. FAVRET, *WAR AT A DISTANCE: ROMANTICISM AND THE MAKING OF MODERN WARTIME* (2009).

92. See Young Paper, *supra* note 91; Young Lecture, *supra* note 91; see also FAVRET, *supra* note 91.

93. KERN, *supra* note 1, at 277.

94. See Casey N. Blake, *The Usable Past, the Comfortable Past, and the Civic Past: Memory in Contemporary America*, 14 *CULTURAL ANTHROPOLOGY* 423 (1999).

95. Cass R. Sunstein, *The Idea of a Useable Past*, 95 *COLUM. L. REV.* 601, 601 (1995).