'Are we Doing the Right Thing?' Utilising Security Governance to Reform the US Drone Program

Jane Minson
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‘ARE WE DOING THE RIGHT THING?’: UTILISING SECURITY GOVERNANCE TO REFORM THE US DRONE PROGRAM

Jane Minson

Submitted in fulfilment of the requirement for the Doctor of Philosophy

School of Arts and Sciences
Fremantle Campus

March 2022
Declaration of Authorship

To the best of the candidate’s knowledge, this thesis contains no material previously published by another person, except where due acknowledgment has been made.

This thesis is the candidate’s own work and contains no material which has been accepted for the award of any other degree or diploma in any institution.

Jane Minson
March 2022
Abstract

The use of unmanned aerial vehicles, or drones, for counterterrorism purposes by the United States within its targeted killing program has been deeply controversial. Used in each presidential administration since the terrorist attacks of September 11, 2001, drones have sparked debate, in part due to their contribution to civilian deaths; their killing of high-value terrorist targets including, on at least one occasion, a US citizen; and the heightened secrecy that has surrounded the program with little formal oversight and, as such, little accountability. This thesis uses this contextual framework – with a particular focus on the administration of President Barack Obama (2009-2017) – to examine the notion of security sector governance and its potential application to the use of drones, along with the usefulness (and limits) of domestic policy frameworks to support the better oversight of drones. Answering the question of how security governance could feasibly help to avoid the drone program’s excessive secrecy, improve oversight arrangements, and move towards the greater accountability of the US drone program, the thesis will propose a security governance framework for the improved use of drones. Such a framework could also feasibly be used in other counterterrorism contexts, too. Indeed, the security governance framework – encapsulated by six specific indicators of security governance (civilian control and accountability mechanisms; the rule of law; transparency; respect for human rights; compliance with international law; and public legitimacy) to which policy proposals can be weighed against – is particularly useful in light of the risk drones pose when used by potential future US presidents who challenge democratic norms and standards; by leaders around the world who have capitalised on the proliferation of drones without clear norms and standards in place; and the risk posed by future weapons technologies such as autonomous weapons systems. In short, the thesis will highlight that security governance can indeed provide a means through which to improve the problems associated with the drone program, to varying degrees of effectiveness, and potentially within a broader context than solely the US domestic drone program.
Acknowledgments

The vast, vast majority of this work was written with me sitting at my dining table, alone, and yet it is a body of work that has been crafted by many hands and hearts, certainly not in isolation. All that is to say, there are many people that I must thank, each of whom contributed to this thesis in some way.

First and foremost, to my supervisory team:

To my primary supervisor, Daniel Baldino, who has been an integral part of my entire university experience, right from my first year of undergraduate studies. Your guidance, edits and suggestions have shaped this thesis into something that I am really quite proud of. Thank you for helping me craft an entire PhD out of a questionable definition of what constitutes an “enemy combatant.”

To my secondary supervisor, Martin Drum, who has similarly been a part of my entire higher education experience. Your feedback on my thesis undoubtedly made it stronger, and gave me a confidence boost at a crucial time. Thank you so much.

To the broader Notre Dame community, both current and former: Joan Wardrop, for fostering the most wonderful community amongst the Arts and Sciences HDR students. Christina Colegate, whose warmth, generosity and support are unmatched. Teaching with you was such a joy. My HDR pals, notably Riley Buchanan, Elizabeth Burns-Dans, Toni Church, Alex Wallis and Tai White-Toney. There is something very special about support from people who are suffering from similar levels of imposter syndrome and stress. Thanks a bunch.

Thanks also to Notre Dame’s broader academic and support staff, both within the School of Arts and Sciences and the Research Office. Here I also acknowledge that this research was supported by the Australian Federal Government via the Research Training Program (RTP) scholarship. This PhD certainly would not exist without such assistance.

To my family:

To my siblings/sibling-in-law, Michael, Leah and Tammy – thank you for being there for the fun stuff that took my mind off of huge tasks (like writing an entire PhD). You were an integral part of my work/life balance. To my nieces and nephew, Ella, Emily, Hunter and Remmie, who were similarly an integral part of my work/life balance. Thank you for doing that wonderful thing that children do, which is to keep adults mindful and in the moment.
Finally, to the three people I love most in the world, and whose level of support really is unparalleled:

To Mum and Dad, for…everything. It’s hard to write, really, how grateful I am. I think what I am most thankful for – and what is of most relevance to something like a PhD – is that you gave me the space to craft my very own thoughts and beliefs around life’s big issues, even when I was a teenager. Not every child is fortunate enough to be given that grace, and I think it set me up well for my very long education experience. Thank you so, so much.

To my beloved partner, Wade, who really has shouldered (quite literally) the burden of all my stress tears. I hope I can eventually repay the favour of support. Thank you for being that perfect blend of utterly supportive and entirely logical – you always end up showing me that things might indeed suck, but they’re not as bad as I originally thought. Everyone needs someone like that in their life. Thank you.
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<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ACLU</td>
<td>American Civil Liberties Union</td>
</tr>
<tr>
<td>AQAP</td>
<td>Al Qaeda in the Arabian Peninsula</td>
</tr>
<tr>
<td>AUMF</td>
<td>Authorisation for the Use of Military Force</td>
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<tr>
<td>AWS</td>
<td>Autonomous weapons systems</td>
</tr>
<tr>
<td>BIJ</td>
<td>Bureau of Investigative Journalism</td>
</tr>
<tr>
<td>CIA</td>
<td>Central Intelligence Agency</td>
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<tr>
<td>CNN</td>
<td>Cable News Network</td>
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<tr>
<td>CTRC</td>
<td>Citizen Targeting Review Court</td>
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<tr>
<td>DOD</td>
<td>Department of Defence</td>
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<tr>
<td>FAS</td>
<td>Federation of American Scientists</td>
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<tr>
<td>FBI</td>
<td>Federal Bureau of Investigation</td>
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<tr>
<td>FISA</td>
<td>Foreign Intelligence Surveillance Act</td>
</tr>
<tr>
<td>FOIA</td>
<td>Freedom of Information Act</td>
</tr>
<tr>
<td>HPSCI</td>
<td>House Permanent Select Committee on Intelligence</td>
</tr>
<tr>
<td>HVT</td>
<td>High-value terrorist target</td>
</tr>
<tr>
<td>IC</td>
<td>Intelligence community</td>
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<tr>
<td>IDF</td>
<td>Israel Defence Forces</td>
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<tr>
<td>IHL</td>
<td>International humanitarian law</td>
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<tr>
<td>ILD</td>
<td>International Law Department</td>
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<tr>
<td>ISIS</td>
<td>Islamic State</td>
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<tr>
<td>JSOC</td>
<td>Joint Special Operations Command</td>
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<tr>
<td>JWT</td>
<td>Just war theory</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>NDU</td>
<td>National Defence University</td>
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<tr>
<td>NGO</td>
<td>Non-governmental organisation</td>
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<tr>
<td>NSA</td>
<td>National Security Agency</td>
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<tr>
<td>NSC</td>
<td>National Security Council</td>
</tr>
<tr>
<td>NYT</td>
<td>New York Times</td>
</tr>
<tr>
<td>OGA</td>
<td>Other government organisations</td>
</tr>
<tr>
<td>PIAB</td>
<td>President’s Intelligence Advisory Board</td>
</tr>
<tr>
<td>PIOB</td>
<td>President’s Intelligence Oversight Board</td>
</tr>
<tr>
<td>PPG</td>
<td>Presidential Policy Guidance</td>
</tr>
<tr>
<td>PSP</td>
<td>Principles, Standards and Procedures</td>
</tr>
<tr>
<td>SOF</td>
<td>Special operations forces</td>
</tr>
<tr>
<td>SSCI</td>
<td>Senate Select Committee on Intelligence</td>
</tr>
<tr>
<td>SSP</td>
<td>State secrets privilege</td>
</tr>
<tr>
<td>UET</td>
<td>Unitary executive theory</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
</tr>
</tbody>
</table>
Timeline of Events

2001
September 11  9/11 terror attacks
September 17  Memorandum of notification confers upon the CIA the right to kill members of al Qaeda in “anticipatory” self-defence
September 18  Passage of the Authorisation for the Use of Military Force

2008
Undetermined date  Signature strikes begin being used by Bush Administration
November 4  Election of Barack Obama as the 44th US President

2010
March 25  Harold Koh speech, The Obama Administration and International Law
April 6  Reports emerge that US citizen Anwar al-Aulaqi has been placed on US kill list

2011
May 5  First (failed) drone strike launched against Anwar al-Aulaqi
June 29  John Brennan speech, Ensuring [al Qaeda’s] Demise
September 30  Killing by drone of Anwar al-Aulaqi

2012
March 5  Eric Holder speech at Northwestern University School of Law
April 30  John Brennan speech, The Ethics and Efficacy of the President’s Counterterrorism Strategy
May 29  NYT publishes an article reporting that the Obama Administration considers any men of “military-age” to be enemy combatants
November 6  Re-election of Barack Obama as US President
<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>November 30</td>
<td>Jeh Johnson speech, <em>The Conflict Against al Qaeda and its Affiliates: How Will it End?</em></td>
</tr>
</tbody>
</table>
| 2013       | **March 18** Jeh Johnson speech, *A ‘Drone Court’: Some Pros and Cons*  
May 22      | Presidential Policy Guidance signed by President Obama                                      
May 23      | President Obama gives speech outlining the legality of the drone program at the National Defence University |
| 2016       | **July 1** Executive Order 13732 signed by President Obama                                  
November 8  | Election of Donald Trump as the 45th US President                                              
December 5  | Presidential Memorandum produced, directing further transparency regarding drone operations |
| 2017       | **September 21** Presidential Policy Guidance replaced by President Trump with the Principles, Standards and Procedures document |
| 2019       | **March 11** President Trump signs Executive Order 13862, revoking Executive Order 13732                                                   |
| 2020       | **November 3** Election of Joe Biden as the 46th US President                                |
| 2021       | **March 4** Reports emerge that President Biden has ordered a review of Obama- and Trump- era drone policies |
CHAPTER I – INTRODUCTION

Overview
This thesis will primarily examine the notion of security sector governance and discuss the uses and limits of policy frameworks to support oversight with regards to the United States’ (US) drone program, with a focus on the Obama White House. This period is of particular importance as the use of drones by the Obama Administration raised a number of (open-ended) concerns about the precedent being set by the US drone strike program, as well as pioneering key debate points about the appropriate benchmarks for problems related to efficacy, transparency and accountability. Additionally, the thesis will address how the United States – and, conceivably, other like-minded democratic nations – could improve the oversight of drone policy to protect national interests, to enforce basic standards of robust security governance, and to set responsible standards and models for the future use of drones. It should be noted – from the outset – that there is no single “one size fits all” model of security sector governance. However, in broad terms and as addressed in further detail later in the thesis, when applying the governance concept to US security policy-making, the term “security governance” reflects the “fragmentation of political authority into hybrid modes of political steering, into multiple levels of decision-making and to a proliferating number of public and private actors” – including, for the purposes of this thesis, an incorporation of the executive, judicial and legislative branches of government.¹

A 2012 New York Times (NYT) article is what provided the impetus for such a security governance approach to the US’s use of drones under former-President Barack Obama. This article reported that the Obama Administration was defining “enemy combatants” as being any men of military-age who had been targeted within its drone program, as a part of its broader counterterrorism policy.² Such reporting was consistent with other sources that highlighted the Obama Administration's reliance upon "signature strikes", which refers to drone strikes being launched according to patterns of behaviour, and not necessarily based on concrete intelligence.³ While such reporting was disputed by Obama and

his team at the time, little further information was offered to properly contest the claims. A new technology – the drone – was being used in ways that were considered by critics as, at best, problematic, and at worst, unethical and even illegal, and yet the secrecy surrounding the use of this technology made it difficult to challenge its use or even find out basic information about it. Such secrecy forms the core contextual background of relevance to this thesis.

The central problems with the Obama Administration’s use of drones, as identified and expanded upon within this body of work, include: the deaths of “enemy combatants” who could instead conceivably be civilians; the (rarer, but problematic) killing of US citizens on foreign soil; a drone program predominantly run by the executive branch of government (and shrouded in secrecy) with weak or compliant checks and balances from the judicial and legislative branches; and the implications of such an aggressive counterterrorism campaign being mounted outside of official warzones. Tying all of these issues together is the precedent that such a program sets for future US presidents who might inherit such norms surrounding the use of force, and the precedent that such a program might set for other nations as drones (and other forms of modern weaponry, such as autonomous weapons systems [AWS]) proliferate around the world.4

A number of observers have argued in recent years that the rules surrounding the US drone program have become less accountable, remain absent from public awareness, and continue to lack adequate oversight and related restraints.5 While not the main focus of the thesis (though it will be briefly touched on at points throughout), it is worth noting that under the Trump Administration (2017-2021), there was also a trajectory towards a less transparent

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and accountable drone program. Early signs from the Biden Administration (2021-present) have also not necessarily resulted in high expectations around a potential increase in transparency and accountability surrounding drone use, primarily because of Biden’s previous role as Obama’s Vice President – and tacit support for the drone program, as a member of that administration – and the number of Obama-era officials that he recruited and surrounded himself with during his presidential campaign and transition period. The issues explored in this thesis, therefore, have not disappeared despite President Obama having left office (though it should be noted that in January of 2022, Biden’s Secretary of Defence Lloyd Austin ‘issued a directive ordering the United States military to do more to protect civilians from harm in drone attacks and other combat operations,’ likely a response to damning reporting from the NYT highlighting civilian casualties.

Regardless, the use of armed drones for counterterrorism purposes (particularly within undeclared warzones) remains highly controversial. Therefore, this thesis will examine the drone program at its inception, looking at previous failings and drawing from existing contemporary warfare and security governance scholarship to explore how its governance can be improved. This will entail a focus on the Obama Administration (2009-2017), and an exploration of the legitimacy, efficacy, and accountability of the use of drone strikes abroad. In particular, it will critically investigate the concept of security governance in efforts to ensure transparent and accountable drone policies and practices, given efforts to meet US national security interests and foreign policy objectives. In doing so, the thesis will also provide a comprehensive overview of existing governance mechanisms in the United States related to the drone program, as well as discuss the various strengths and limitations of particular indicators that can help to measure the ongoing effectiveness of security sector governance, in conjunction with particular policies that could feasibly improve the governance of the drone program.

Overall, the Obama Administration’s approach to drone strikes, along with the search for pathways towards the construction of a robust and effective drone oversight regime and related norms and standards at a national level (that are guided by the principles of security governance), will be the fundamental focus of this PhD. Further, and as explored in more

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detail below, this will incorporate how the Obama Administration engaged in efforts to justify drone strikes and its approach to related standards for transparency and accountability that combined and intertwined with the legislative and judicial branches of government as well as Obama’s own executive approach to reform of US drone strikes. Significantly, the thesis will argue that the current patchwork approach of accountability measures and security governance mechanisms, as established by the Obama Administration, did not add up to or consolidate an effective response to gaps in accountability and transparency around US drone strikes. As such, it will be argued that reforms to drone policy are still needed and that improved accountability measures and scrutiny mechanisms remain a work-in-progress and an ongoing policy challenge.

**Investigative Task**

Relatively little critical analysis has been devoted, not only to the role and utility of accountability mechanisms in the use of drones as a means of advancing US strategic objectives, but also to the parameters of democratic standards and the utility of core governance mechanisms for enhancing effective transparency in the use and authorisation of such strikes. As such, one key question that this study intends to prompt is whether there is (and if so, to what extent) a role for various domestic oversight bodies that incorporate the executive, judicial and legislative branches of government, and realistically what this could entail.

From the rather small pool of relevant security governance literature from which to draw, the work of Ursula Schroeder has been highly impactful on the development of this thesis and its guiding question/s, providing a starting point, or baseline, from which to explore what an approach to effective security governance could look like. Schroeder’s argument that accountability mechanisms should be conferred upon both political and judicial institutions – that there is room for judicial involvement in security governance – has been of particular importance in informing the argument that frames this thesis.⁹

**Schroeder’s conception of security governance**

Schroeder’s influential work seeks to ‘pave the way towards robust measurements of the quality of security sector governance across the world,’ asking: ‘which existing indicator sets contain information relevant to the security sector?’; and ‘what contribution can these

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indicators make to the assessment of security sector governance in the world and where are their limits? As Chapter II – and indeed, the rest of this thesis – will highlight, Schroeder is not the only scholarly contributor to the security governance discussion, but her work seeking to use indicators – ‘used in social science research to measure abstract, not directly observable and often multidimensional concepts’ – against concepts such as security governance provides a useful starting point from which to explore the usefulness of such a concept against the use of drones and the broader US drone program.

Indeed, the concept of security governance – Schroeder’s encapsulation of it, especially – provides a robust analytical benchmark through which the oversight of the drone program can be judged, as consistent with the creation or reinforcement of democratic standards and ideals. Thus, the key question that this thesis will be exploring is: how can the US drone program utilise Schroeder’s concept of "security governance" to avoid excessive secrecy, improve oversight arrangements, and move towards greater accountability benchmarks? The exploration of security governance in conjunction with the drone program is relatively unexplored in the literature, and thus this thesis seeks to build on the existing scholarly debate, offering up new (and/or re-modelled) ways through which to access, oversee and judge the oversight practices of the US drone program. It will be argued that legal standards, good governance and best practice will need to be extended beyond primarily executive controls (despite any in-built safeguards that might act as an element of democratic accountability), to incorporate all three branches of government: executive, judicial and legislative.

The overarching topic of this thesis, then, is the governance of the US drone program, and how it can be improved to create a less secretive drone regime, with improved oversight arrangements and greater accountability. Thus far, the US approach to accountability (for both civilian victims of drone strikes and their families) has been ad hoc and limited. The drone program has set a precedent for an unregulated and unaccountable approach for broader national security policies, applying both to future US presidents and to those nations other than the United States that are currently developing (or have already developed) their own drone programs. Jameel Jaffer eloquently sums up aspects of this precedent, writing:

10 Schroeder, Measuring Security Sector Governance, 6.
A dangerous legacy of the Obama presidency is a legal regime in which executive branch actors are judge, jury, and executioner...It is a framework in which the government can carry out deliberate and premeditated killings on the basis of evidence that is never disclosed, and on the basis of legal rules that are neither fully articulated to the public nor reviewed by any court. And it is a framework in which the government can kill...one of its own citizens...without explaining why.\(^\text{12}\)

Much of what Jaffer refers to here, including enhanced executive power, excessive secrecy and a contested reading of the law, will be explored further within this thesis.

There are several other central pieces of information to note regarding the focus and framework of this thesis. Firstly, the specific focus on the Obama Administration is quite deliberate. The years that Obama was president form natural bookends for focus, as these years coincided with various technological developments that allowed for an increase in drone strikes to occur, along with plenty of commentaries – both in the media and the scholarly literature – on his drone program to accumulate.

Secondly, the focus of the thesis will primarily be on the Central Intelligence Agency’s (CIA) use of drones, and particularly on those strikes conducted outside of declared warzones. A contributing factor to the drone program’s controversy is the division of strikes between the military and the CIA, with the CIA taking the lead in strikes in undeclared warzones such as Pakistan, Somalia and Yemen.\(^\text{13}\) As such, US drone targeting and strikes have initiated and prompted questions and concerns surrounding ethics, due process and assassination (particularly given the CIA’s historical role in the state-sanctioned targeting of national security threats), along with the geographical limits (or lack thereof) associated with conducting modern warfare. Further, the involvement of the CIA has kept the majority of drone strikes away from the scrutiny and oversight of the judicial and legislative branches.\(^\text{14}\) These are the strikes that pertain most to the questions being addressed in this work, and thus will frame much of the research.

Finally, it is important to note – from the outset – the significance of the 2001 September 11 terror attacks (hereafter, 9/11), and associated US domestic policies and laws, within this thesis. Particular points that will be reiterated throughout include the highly elastic nature of the 2001 Authorisation for the Use of Military Force (AUMF) and its continued relevance and application, along with the expansion of both secrecy and executive power that


\(^{14}\) Boyle, 2.
was ushered in by the Bush Administration in the aftermath of the terror attacks. Such issue-areas remained relevant through the Obama Administration and as highlighted in this thesis, can be directly connected with the drone program, too.

Methodology

It is useful to clarify – definitionally – what security governance is and what is meant by it, before moving on to its methodological application within this thesis. If “governance” refers to the ‘overall setting, application and enforcement of rules that guide the exercise of political authority,’ then ‘security governance’ relates to the different ‘modes of political steering, decision-making and oversight present in the security field.’\(^\text{15}\) As will be addressed, robust security governance as pertaining to drone use has been lacking thus far, as evidenced by the secrecy surrounding almost every aspect of the program, and the ongoing lack of scrutiny regarding drone operations. Thus, methods for the better governance of the drone program (or, “effective security governance”), that exist alongside current accountability gaps, must be taken into account. “Good” security governance refers to ‘democratic forms of accountability, transparent decision-making processes and a security apparatus that is fully subordinated under the control of a civilian authority.’\(^\text{16}\)

In terms of how the research question will be approached, the thesis will investigate various policies for the reform of the drone program (one for each of the three branches of government) and will examine (using existing public policy literature) them against six principles of security governance, identified and chosen by the author based on the themes that have emerged from and recurred within the literature, in conjunction with the three core themes found in the above definition of “effective” security governance. A partial reason for this approach - the selection of principles from the existing security governance literature, inspired particularly by the work of Schroeder - is the lack of specific literature that surrounds the application of security governance to the use of drones. Security governance has the potential to be of benefit in improving the transparency and accountability of the drone program but has been little explored thus far. Therefore, this thesis has taken the existing literature (and the existing themes of security governance found within this literature) and considered how it can be of possible relevance to the drone program, by formulating the six specific principles. These principles include: civilian control and


\(^{16}\) Schroder, 10-11.
accountability mechanisms; the rule of law; transparency; respect for human rights; compliance with international law; and public legitimacy. (See Appendix 1). These are the principles that the three potential policies for drone reform (the release of more information by the executive branch, judicial review by the judicial branch, and the adoption of the military preference by the legislative branch) will be analysed against.

Civilian control and accountability mechanisms require that there be both political and judicial oversight of the security sector – an ‘obligation of security actors to report on their activities to the political and judicial institutions of the state.’ 17 In the context of the drone program, this would require the executive branch to report to the judiciary and/or the legislature on the drone program and its associated successes and challenges. The rule of law, in this security context, relates to ‘whether there are formal roles and mandates of the security bodies’; ‘what the hierarchy of authority is among the security bodies, the executive, the legislature and other oversight bodies’; ‘whether there are clear constitutional provisions and/or legislation enshrining the agreed roles, mandates and hierarchies’; and ‘if these provisions operate effectively.’ 18 Adhering to the rule of law, then, would require further transparency – the third security governance principle under consideration. Transparency in the security sector must make basic information available to those tasked with oversight and the public, but ‘the need for confidentiality should never be allowed to undermine civil oversight.’ 19 In other words, legitimate needs for secrecy should never be used as a shield by which to hinder proper oversight. Respect for human rights in the security sector requires ways through which those wronged can file complaints, but also education for those within the security sector – education with a human rights lens. 20 The latter is perhaps most feasible in relation to the drone program. Compliance for international law is related as a result of the linking of international law with human rights principles, requiring adherence to international law as well as some level of oversight so that this adherence can be properly assessed. 21

17 Schroeder, 27.
Finally, public legitimacy requires an acceptance of those within the security sector – acceptance that the security sector is responsible to the community. Again, this requires a certain level of transparency.

All of the above six principles are, and have been, challenged – to varying degrees – by the US drone program and its level of secrecy. That fulfilling these principles requires a certain amount of transparency on the part of the executive branch is significant, firstly because it highlights that the principles all work in conjunction with each other and should not be viewed independently of one another; and secondly because it signals a first step towards improving the governance of the drone program. Taken together, these six principles present a unique method through which the transparency, accountability and oversight of the drone program can be assessed, as well as a set of markers by which to measure potential policies for reform. Indeed, this will be the methodological approach of this thesis. The three policies for reform that have been identified and expanded upon in later chapters – the release of more information; judicial review; and the military preference – will all be considered and analysed with these principles in mind. These policies each correspond with one branch of government – the executive, judiciary, and legislature, respectively.

The security governance methodological framework outlined above has been informed by constructivist frameworks and the associated literature on norms. Indeed, the methodological approach will demonstrate the extent to which norms can be instrumental in studies of drone warfare and governance. The thesis will build on the relevant themes found in the literature, with a specific focus on helping to identify, advance and consolidate robust security governance norms around the use of drones.

In his work on constructivism, Alexander Wendt outlines the significance of shared ideas: that social structures are ‘defined, in part, by shared understandings, expectations, or knowledge.’ These shared understandings, expectations or knowledge can be considered norms. Martha Finnemore and Kathryn Sikkink clarify that a norm is ‘a standard of appropriate behaviour for actors with a given identity.’ The authors distinguish between regulative norms, ‘which order and constrain behaviour,’ and constitutive norms, ‘which create new actors, interests, or categories of action.’ Working from Peter Katzenstein’s

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22 England, 14.
25 Finnemore and Sikkink, 891.
now standard definition,’ Finnemore, in a separate article with Duncan Hollis, writes that there are four key elements to a norm: identity; behaviour; propriety; and collective expectations.\textsuperscript{26} Finnemore and Hollis go on to highlight that norms are social constructions: ‘they exist only because we all believe they exist.’\textsuperscript{27} This, in conjunction with their fluid and evolving nature, – norms are ‘social creatures that grow out of specific contexts via social processes and interactions among particular groups of actors’ – makes norms an ideal concept to frame the exploration surrounding the use of new technologies such as drones, and in particular how their use can be made more in line with democratic standards.\textsuperscript{28}

A theme that will be discussed in some detail within Chapter VIII is that of drone proliferation and the usefulness of the security governance framework for setting standards around the use of drones for other nations. Indeed, the risk and reality of proliferation has heightened the fact that there was a real lack of action taken – throughout the Obama Administration and also in the succeeding administrations – to establish clear norms, in line with democratic standards, pertaining to the use of drones.\textsuperscript{29} The literature highlights that there is indeed a connection between domestic and international norms: that domestic norms are ‘deeply entwined with the workings of international norms.’\textsuperscript{30} Finnemore and Sikkink explain further: ‘many international norms began as domestic norms and become international through the efforts of entrepreneurs of various kinds. Women’s suffrage, for example, began as a demand for domestic change within a handful of countries and eventually became an international norm.’\textsuperscript{31} Thus, while the policies for reform to be explored within this thesis are domestically focused, the broader implications of implementing such policies – at a domestic level – are internationally focused. That is, implementing such policies, within the framework of effective security governance, could establish norms at a broader, international level.

\textsuperscript{26} Martha Finnemore and Duncan B. Hollis, “Constructing Norms for Global Cybersecurity,” \textit{The American Journal of International Law} 110, no. 3 (2016): 438-9, \url{https://doi.org/10.1017/S0002930000016894}.
\textsuperscript{27} Finnemore and Hollis, 443.
\textsuperscript{28} Finnemore and Hollis, 427.
\textsuperscript{30} Finnemore and Sikkink, “International Norm Dynamics and Political Change,” 893.
\textsuperscript{31} Finnemore and Sikkink, 893.
Theoretical Framework

Two core theories underpin this work: the separation of powers, and the unitary executive theory (UET).

Separation of powers

Simply put, the separation of powers refers to ‘the functions of the branches [of government] and their relationship to one another.’\(^{32}\) It has been recognised as a difficult theory to define precisely, though.\(^{33}\) Regardless, the separation of powers will be referred to often throughout this thesis, and its structure is even derived from the theory, with chapters on the executive, judiciary and legislature, and the role that these branches can and could play in the drone program. Thus, the thesis is influenced significantly by Montesquieu’s conception of the separation of powers, that being a ‘tripartite vision of the state’ whereby ‘the three-way classification of state power as legislative, executive, or judicial recurs as a central feature’ as a means of implementing checks and balances on power and, therefore, ensuring accountability.\(^ {34}\) It is essential to emphasise the importance of separation itself when exploring this theory, as this is what allows for the flow-on benefits of checks and balances and accountability to occur. Indeed, as Torsten Persson, Gérard Roland and Guido Tabellini write, one of the conditions of the separation of powers – that allows for a system of checks and balances to exist – is that ‘there is a conflict of interests between the executive and the legislature.’\(^ {35}\) Furthering this is the fact that each branch has typically been made ‘answerable to different sets of constituencies and subject to different temporal demands.’\(^ {36}\) Montesquieu – as one of the greatest influences on the development of power in the United States – wrote on the matter (as cited by Jenkins):


[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor. 37

Interestingly, then, and as this chapter will explore in greater detail with the discussion of the UET, Montesquieu was concerned with the potential overreach of the judiciary when it comes to the exercise of power. The way that this has traditionally played out over time, though, is that the executive has been the branch to fight for the expansion of its power, and it has been highly successful in this regard. 38

Montesquieu’s vision also influenced the US Founding Fathers, and this was made evident early on in the democracy’s creation. The Founding Fathers used Montesquieu’s ‘idealised depiction of the English organs of public life as a paradigm of fair and balanced government’ as a blueprint. 39 Montesquieu’s conception of the separation of powers was a re-working of what had been known to the English as a "mixed regime", though. A mixed regime took the more promising aspects of monarchies, aristocracies, and democracies, retaining only those features that were perceived to be the best, and disposing of the others. 40 Combining the various forms of government was seen as a check and balance of sorts, and as Calabresi, Berghausen and Albertson note, this was essentially the parent idea of the separation of powers. 41 Here, three separate branches of government would perform the checks and balances role, rather than three different forms of government. This was enshrined within the US Constitution, which speaks ‘the language of a functional separation of powers’ by virtue of its three vesting clauses, and which divides its first three articles between the legislature, the executive, and the judiciary, respectively. 42

This tripartite division of powers has not been without criticism, even despite the theory’s position of ‘almost unparalleled global repute as a foundational tenet of liberal democracy.’ 43 Interestingly, former US President Woodrow Wilson was a high-profile critic of Montesquieu's vision of the separation of powers, arguing that the Framers of the US

41 Calabresi, Berghausen and Albertson, 531.
42 Calabresi, Berghausen and Albertson, 543.
Constitution took the tripartite division of powers too seriously, and applied them in an inappropriate context – that the separation of powers in this Montesquieuian form was intended for undemocratic states.\textsuperscript{44} There is also a growing body of literature that examines the Montesquieu model’s contemporary relevance, considering that such a “pure” separation of powers is quite rare in most modern states.\textsuperscript{45} Australia fits within this category, with its version of the separation of powers being considered more of a “fusion”, and with Haig Patapan even labelling it a “mutation” of previous models.\textsuperscript{46} Eoin Carolan also highlights that government can no longer be ‘reduced to a trinity of functions’, because of the ‘institutional fluidity which has come to characterise the administrative state’s organisational complexity.’\textsuperscript{47} That is, the structure of government in the modern age is too far removed from the realities of government back when Montesquieu’s model was first applied, and it no longer makes sense to categorise the government in such a way.

There are also critiques of the theory that revolve around the realities of current affairs, especially in the realm of counterterrorism. Certainly, the separation of powers has been challenged in the modern-day, and particularly so in the post-9/11 period. This will be explained further when this chapter moves on to discuss the UET, which will primarily focus on the increased executive power that has been witnessed in the previous two decades, via actions that ‘erode the principle of the rule of law, and have the potential of eviscerating the balance of powers constructed by the founding fathers.’\textsuperscript{48} Indeed, the separation of powers in its post-9/11 form cannot be divorced from the UET, a theory that has been said to challenge traditional understandings of the separation of powers with reference to the relationship between the executive and Congress, and also between the executive and the courts.\textsuperscript{49} The drone program certainly serves as evidence of such a statement.

The issues associated with the separation of powers – in particular, the expansion of power within the executive branch – and the post 9/11 period are encapsulated by Sarah Burns, who writes that following the 2001 attacks Congress allowed President Bush to take charge, but that in contrast to previous periods of crisis, Congress did not reassert its power after a certain period of time, allowing Bush to retain ‘remarkable discretion over foreign

\textsuperscript{45} Carolan, \textit{The New Separation of Powers}, 18.
\textsuperscript{46} Haig Patapan, “Separation of Powers in Australia,” \textit{Australian Journal of Political Science} 34, no. 3 (1999): 391, \url{https://doi.org/10.1080/10361149950308}.
\textsuperscript{47} Carolan, \textit{The New Separation of Powers}, 42.
\textsuperscript{49} Carey, “The Separation of Powers in United States of America,” 281.
Indeed, when it comes to the separation of powers and its relationship to the drone program, the expansion of executive power has been a significant challenge. The belief that the executive has increased its power at the expense of the judiciary and legislature proves to be true in this context, where the legislature has had difficulty overseeing the drone program due to the secrecy that surrounds it, and the judiciary has been constrained from ruling on drone-related matters due to traditional notions of judicial deference (to be explored in much greater detail in Chapter VI, but broadly speaking meaning the judiciary taking a step back from adjudicating on matters of national security, the military, and foreign relations).

Additionally, it is useful to look at the separation of powers, particularly when it comes to post-9/11 counterterrorism policy (including the drone program) through the lens of a related theory, and one that is also essential to understanding the content of this thesis – the UET.

**Unitary executive theory**

The UET is a theory that goes a long way in explaining the exercise of executive power over the two decades that followed the 9/11 attacks, and one that is of immense importance to this body of work. Indeed, the UET is crucial to any understanding of how the drone program has been allowed to flourish over time, utilised by conservative and progressive administrations alike.

The UET is a relatively young theory, but one whose authority, its advocates argue, is rooted in the US Constitution. Simply defined, the UET is a theory within which its presidential proponents ‘tend to make broad claims for power.’ It holds that ‘any law passed by Congress that seeks to limit the president’s ability to communicate or control executive branch relations is unconstitutional and therefore need not be enforced. The theory also posits that the president has the same authority as the courts to interpret laws that relate to the

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54 Crouch, Rozell and Sollenberger, 562.
executive branch.” Thus, it is quite simple to see why the UET has had such a prominent position in the post-9/11 political climate, and why it is of relevance to the way that drones have been used within this period. Before exploring this further, though, it is necessary to look back to the theory’s creation, in order to fully understand it in the context of its post-9/11 revival.

In discussions on the expansion of executive power – and of presidential power, in particular – the literature often looks back to the Truman Administration as the marker of when such power began to be expanded. This was, of course, the post-WWII period of Cold War concern. It was Truman who claimed the exclusive authority, under his powers as commander-in-chief, to commit armed forces to combat. Without providing a full presidential history of the UET up to the current day, it is important to note the rise of executive power from Truman right through to Nixon, who was the beneficiary of a presidency whose powers were drastically expanded from previous points in history. This resulted in various abuses of power that are beyond the scope of this thesis, but it is fair to say that what these abuses of power resulted in were a re-set of sorts, ‘where the presidency underwent an assault upon its prerogatives and privileges from the public, the media, and especially the Congress.’ This entire period will be explored in further detail within Chapter IV through the lens of the Bush Administration, but this pendulum swing of presidential power is an important starting point for the discussion of the UET because the theory was a creation of the Reagan Administration. In particular, it was the creation of conservative legal scholars who worked within Reagan’s Justice Department, tasked with the restoration of presidential power back to its Nixon Administration peaks.

58 Savage, Takeover, 21.
60 Kelley, 100.
These legal scholars used the language of the Constitution to make the theory appear more intellectually robust.\textsuperscript{61} This was done through Article II of the Constitution (which outlines the powers of the executive), with the intention of removing any distinction between “inherent” power and “exclusive” power.\textsuperscript{62} The above context – the perceived loss of presidential power in the aftermath of the Nixon Administration – is important to understand here, along with the fact that the theory was intended to be applied to domestic authority, such as the total control of and over executive branch communications.\textsuperscript{63} At its core, the UET at this time was a ‘defensive theory of presidential power designed for the purposes of protecting the president’s powers and place in the constitutional system.’\textsuperscript{64} This theory was dramatically expanded following 9/11, though, and this is where the UET begins to intersect more fully with the content and context of this thesis.

Indeed, one of the outcomes of 9/11 was the application of the UET beyond the domestic realm, to include implicit power over foreign policy decisions. It was already a theory that had been endorsed by the Bush Administration: Bush ‘advanced unitarian principles from the moment he took office in 2001,’ and he ended up explicitly referring to the UET 148 times over his entire presidency.\textsuperscript{65} Thus, the extension of such a theory that had already permeated the consciousness of the Administration following the attacks of 9/11 did not seem like such a stretch of power – it was, at first, a response to an emergency, not unlike responses taken by previous presidents including Thomas Jefferson and Abraham Lincoln.\textsuperscript{66} The key distinction between executive actions during previous emergencies and the actions taken by the Bush Administration was that ‘unlike Jefferson and Lincoln, the Bush administration did not come to Congress later for post hoc authorisation. To do so would be to acknowledge, as Jefferson and Lincoln did, that final authority and power rested with Congress, and not the executive.’\textsuperscript{67} Arguably, 9/11 provided the vehicle for the Bush Administration to further advance the theory that – as above – they had already endorsed, and

\textsuperscript{62} Savage, Takeover, 124.
\textsuperscript{63} Kelley, “To Be (Unitarian) or Not to Be (Unitarian),” 104-105.
\textsuperscript{64} Kelley, 109.
\textsuperscript{65} Kelley, 104-105.
\textsuperscript{67} Silverstein, 882.
indeed expand it within the realm of foreign policy, to add another layer of power to the UET.68

This notion – of the Bush Administration using the political climate following 9/11 to its advantage to effect the changes they wanted in terms of executive power – will be explored in much further detail in Chapter IV. For now, it is important to note the significance of the expansion of the UET to include foreign policy and issues regarding the use of the military. This had an impact on many consequential decisions, including the decision to go to war and the decision to use “enhanced interrogation techniques.” Also of relevance here is that the Bush Administration added an element of secrecy to the theory, claiming ‘exclusive access to information and power.’69 This has had a lasting legacy, most notably within the use of secrecy in the drone program that is of heightened relevance to this thesis.

The UET is not a theory that has solely been endorsed and used by conservatives. It may have been a creation of the Reagan Administration, and frequently utilised by the Bush Administration, but both major parties in the United States have ‘embraced the unitary executive because it offers a pathway to success – success in protecting the Office and success in advancing policy.’70 For example, while President Obama might not have referred to the UET explicitly as a justification for certain actions, it is clear that he and his administration were influenced by the theory, and that they used the theory to their advantage (particularly regarding the use of drones).71 This has manifested in a different way to the Bush Administration’s embrace of the theory, as Gordon Silverstein explains:

Both [Bush and Obama] are clearly interested in maintaining strong executive power, but whereas Bush built his claims on broad constitutional arguments, insisting that the executive could act largely unhampered by the other branches of government, the Obama administration has made clear that its claims to power are built on statutes passed by Congress, along with interpretations and applications of existing judicial doctrines.72

To provide a concrete example of this that is relevant to the topic of this thesis, when it comes to the expansion of the drone program into undeclared warzones, the Obama

69 Crouch, Rozell and Sollenger, 566.
70 Kelley, “To Be (Unitarian) or Not to Be (Unitarian),” 100.
71 Barilleaux and Maxwell, “Has Barack Obama Embraced the Unitary Executive?,” 34.
Administration justified its actions by relying on the 2001 AUMF – stretching the definition of that piece of law, and expanding power at a cost to the powers of Congress concerning the decision of when to go to war, but without necessarily explicitly relying upon or referring to the UET.

At this point, it is useful to frame the theoretical discussion within the context that is of most relevance to the thesis, looking to the history concerning the use of drones in the United States to highlight how the separation of powers and the UET intersect more specifically with the drone program.

**Historical and Contextual Background**

Drones have existed in some form since at least the period of World War I (in this context, via the removal of a pilot from the aircraft, ‘turning the plane itself into a kind of flying bomb that risks no one’s life in the course of its delivery’), being utilised for close to one hundred years before eventually becoming the mainstream weapon that is known today. Following this initial period of use drones were largely used as reconnaissance, utilised in Vietnam, the Gulf War, and the Balkans. It was in the period immediately following 9/11 that drones began being used in a way that is more aligned with their current conception, when they were fitted with laser-guided missiles as the government began toying with the idea of using them for targeted killings. In the two months that followed the beginning of the Afghanistan War, 525 targets were laser-designated by drones. They quickly became a popular tool: General Tommy Franks, then-commander of all US forces in the region, thought that the Predator drone was his most capable sensor in hunting down terrorist leaders.

It is not difficult to see why the willingness to use drones skyrocketed following 9/11 – there are many advantages to their use, particularly within the context of an asymmetric war. For example, they can remain in the air for days at a time, as they are designed to be refuelled in mid-air, and they do not have the same endurance limitations as the human

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77 Singer, 33-34.
They are much cheaper than other war-fighting options, costing approximately 5-10 per cent of that of a piloted aircraft, making them expendable to a certain extent. Further, drones can kill high-value terrorist targets (HVTs) with minimal civilian casualties; and they place pressure upon terrorist groups, degrading their organisational capacity. The result of such advantages is a technology that has been used far and wide, striking in places that would otherwise be far too costly, controversial and dangerous to send troops.

Emerging alongside this new targeting technology were different targeting methods, including the aforementioned deeply controversial signature strikes, which began being used under President Bush in 2008. The thought underpinning these strikes is that they allow analysts to determine whether an individual is a terrorist based on observations of their habits and intercepted phone messages. It also means that individuals can be killed despite the United States not knowing explicitly who they are, or whether they truly pose a terror threat. This was a departure from the pre-9/11 status quo, when potential targets needed to have been involved in specific plots against the United States for such drastic action – their killing – to occur.

An indicator of just how far a departure such strikes were from the pre-9/11 norm is evident from reports of President Obama’s initial reaction to learning of such strikes. When the then-CIA Director Michael Hayden attempted to explain and defend the approach to Obama in a briefing early on in Obama’s presidency, Obama was apparently shocked and maintained that signature strikes did not meet his presidential standards. Hayden explained to Obama that this was a more effective way to tackle the problem of terrorism and that it would result in militants being too afraid to congregate, resulting in less of an opportunity to plot attacks against the United States. Hayden was evidently able to convince Obama of the

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78 Brunstetter and Braun, “The Implications of Drones on the Just War Tradition,” 337.
83 Serle, 19.
84 Serle, 19.
87 Klaidman, para. 8.
value held by signature strikes, as there was reportedly an expansion in the use of such strikes after Obama came into office, and the new president eventually became the final decision maker in such cases. This evolution in the use of drones shows an increased willingness to use the weapons, but with arguably diminished standards for the killing of terrorists. This appears to be a problem that occurred in Obama’s broader drone program and is not highlighted solely by the use and expansion of signature strikes, as this thesis will show.

Obama and drones
The use of drones was a central element of the Obama Administration’s entire approach to national security. Obama’s period as US president coincided with a rapid increase in drone technology and its capabilities. Obama himself is quoted as saying that “…this technology really began to take off right at the beginning of my presidency.” These developments in technology aligned with a changing political climate, with (for example) a struggling economy and a war-weary public also considerations to be made in any decision-making processes involving counterterrorism policy. Further, the developments in technology - plus the transformed political climate - combined with the perceived advantages of drones (as discussed above) to produce a convincing argument for their use. This perfect storm – of technological developments, the right political climate, and multiple advantages to their use – led to a massive increase in the use of drones for targeted killings after the inauguration of President Obama. Indeed, when Obama took over the presidency from his predecessor, George W. Bush, the drone program was present only in Pakistan. It later expanded to Afghanistan, Yemen and Somalia. In total over Obama’s two terms as president, there were 563 strikes in undeclared warzones, as compared with Bush’s 57 strikes.

While drone use has been a ubiquitous feature of 21st-century warfare for the United States, it has also been the source of controversy. This is particularly the case in light of the


92 Harris, “Drones Wars and State Secrecy,” para. 16.

increased use of the technology outside of declared warzones by the CIA. Such controversy stems in part because of the lack of transparency surrounding the use of drones. Jameel Jaffer explores this, maintaining that secrecy touched every aspect of drone policy, and highlighting that there was not just a lack of disclosure to the public and the press, but also to the courts and Congress (who would traditionally hold the executive branch accountable under the separation of powers structure explored above). Such secrecy was considered even more alarming after evidence emerged that drone strikes had killed a considerable number of civilians. It is difficult to find concrete figures to accompany such claims, even considering the eventual release of civilian death tolls by the Obama Administration because the Obama Administration’s method for counting civilian casualties was thought to be constructed to produce lower (and thus more “favourable”) numbers, as per that aforementioned NYT reporting regarding the Obama Administration’s categorisation of all men of military-age as enemy combatants, absent any clear intelligence that could posthumously prove their innocence. It should be noted here that the Obama Administration disputed this reporting, but the claims are largely accepted as fact across the literature. Such reporting is also consistent with the use of signature strikes.

Despite this controversial (and disputed) counting method and the questions it raises around the accuracy of civilian death toll counts, towards the end of Obama’s presidency official numbers were released concerning civilian deaths. These highly anticipated figures showed that between 64 and 116 civilians were unintentionally killed by drones in undeclared warzones. Such numbers are contested by human rights-focused non-governmental organisations (NGOs). For example – and as a comparison point – the Bureau of Investigative Journalism (BIJ) puts the figures at between 257 and 634 civilian deaths solely in Pakistan across the same period. There are then the additional civilian deaths in other

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undeclared warzones to take into consideration, such as Somalia and Yemen. (See Appendix 2). Regardless of the discrepancy between the lowest and highest figures shown from the two sources, even the official government numbers appear to be on the higher side for a weapon that the Obama Administration insisted was ‘so “exceptionally surgical and precise” that they pluck off terror suspects while not putting “innocent men, women and children in danger”’.

Indeed, the continued insistence that drones were the most precise and efficient way through which to conduct warfare, despite reports of increasing civilian deaths, raised questions concerning the scope of executive power, and the way that such power was overseen by the judicial and legislative branches. This was compounded by the secrecy that was associated with the drone program. There are, of course, valid reasons for secrecy in government. It is precisely for this reason that striking a balance between disclosure and concealment is made so difficult. Acceptable reasons for governmental secrecy will be explored in detail within Chapter IV, but briefly, full public disclosure can have an impact on the efficacy of internal operations, and there is the potential for information to ultimately fall into enemy hands. Full transparency is also an unrealistic goal, can result in the release of overly sensitive information, and can put numerous people (including intelligence sources) in danger.

Obama himself has commented on the balance (or imbalance) between transparency and secrecy, maintaining that: ‘In this new cyber age, [we are] going to have to make sure that we can continually work to find the right balance of accountability and openness and transparency, that is the hallmark of our democracy, but also recognise that there are adversaries and bad actors out there who want to use that same openness in ways that hurt us.’ It is worth pointing out that these words from Obama came in the final days of his presidency – a natural point of reflection, presumably. The comments indicate what could be perceived as a concern over the precedent that his drone program set, both for his successor and other nations. This will be a recurring focus of this thesis, as indeed the Trump White House not only continued the use of drones but also expanded the battlefields on which

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99 “Obama’s Covert Drone War in Numbers,” para. 4.
100 Jaffer, The Drone Memos, 55.
drones could be used; eased many of the combat rules intended to protect civilians; and stopped publishing data on civilian deaths caused by drones. President Trump even abandoned some of the Obama-era rules (to be discussed later in this thesis) that governed the use of drones in non-combat theatres.

Thus, the precedent set by the Obama Administration pertaining to the use of drones extends beyond that administration, including the current Biden term. This is the case for the other core themes of this thesis, too: the drone program has remained largely unregulated and unaccountable, it continues to be shrouded in secrecy, and there are still civilian deaths occurring. It remains to be seen whether these patterns will continue long-term under a Biden drone program, but some commentators are predicting – based on Biden’s silence on drones during the campaign, and the fact that he has surrounded himself with many Obama-era officials who were supportive of Obama’s drone program – that the nature and direction of the program will continue, particularly within the context of undeclared warzones.

Limitations of Research
There are, of course, challenges and limitations associated with this research project. The first limitation relates to a key issue that will be explored in the thesis – secrecy. It can be difficult to adequately analyse the drone program from both a policy and data sense, simply because a lot of the information related to it is classified. Further, the minimal information (including civilian casualty rates) that was released by the Obama Administration was contested by NGOs such as the BIJ, which claimed civilian casualty rates that were much higher than what the US government was claiming. While challenging, the existence of inconsistent figures does not negate the necessity of this work. The secrecy and lack of oversight associated with the drone program is still a problem that exists, and civilian casualties are an issue regardless of how many there are.

There are also limitations concerning the necessary narrowing of the topic, to cover primarily issues of transparency pertaining to the CIA’s use of drones during Obama’s two terms as US president. There are, of course, various other legal and ethical issues concerned

107 “Joe Biden’s Silence on Ending the Drone Wars,” para. 8.
with the use of drones, but not every aspect of their use can be addressed within this body of work. For example, the use of drones is an area of moral controversy, but this thesis will focus primarily on governance issues, concentrating on how to achieve a drone program that is accountable and transparent, and that aligns with the rule of law and due process requirements, rather than the ethical grey areas associated with drones. Drone use has become an international issue due to recent proliferation, as previously mentioned, but the thesis will not explore international reform, choosing instead to emphasise internal oversight mechanisms in the United States. Finally, the research will focus only on the use of drones by state actors (namely, the United States), rather than non-state actors (most relevantly, terrorist groups). While terrorist groups are beginning to investigate developing their own (crude) drone programs, they do fall beyond the parameters of democratic standard-setting with which this thesis is concerned. All of these areas are potential avenues for future research, though.

**Contribution of Research**

There has been relatively little critical analysis to date that focuses on the utility of security governance for increasing the effective oversight of the drone program, particularly analyses looking to the role that domestic bodies – incorporating the executive, judicial and legislative branches – could play. Given the ramifications of the status quo regarding the use of drones – stepped out in greater detail below – this is problematic. This will be the primary contribution of new knowledge that this thesis confers.

Indeed, it will be argued in this thesis that the drone program, as it currently stands, undermines the broader strategic interests of the United States, and that significant changes need to be made to the program and its governance. While targeted strikes can result in significant losses for terrorist groups, they can also gain recruits – a result of anger over drone strikes. For example, Faisal Shahzad, responsible for the failed Times Square bomb in 2010, cited US drone strikes in his justification for his actions, stating: ‘Well, the drone hits in Afghanistan and Iraq…they [do not] see children, they [do not] see anybody. They kill women, children, they kill everybody. [It is] a war, and in war, they kill people. [They are] killing all Muslims.’ This example is not given to diminish or excuse Shahzad's actions in

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any way. Rather, it is used to highlight that drone strikes can have unintended consequences, that undermine the US's counterterrorism goals. The risk of blowback is a very real one in the context of the drone program. There are other risks associated with the current use of drones, including the danger of what a drone program might look like under different US presidents, the likelihood of proliferation, and the use of alternative new weapons (such as, for example, AWS) in a world with a precedent set by the US's use of drones. These will be briefly explored here to highlight the need for the further governance of the drone program, and then will be examined in further detail within Chapter VIII.

Doing nothing to curtail the use of drones is a danger when it comes to their use by future presidents. This was a great concern towards the end of Obama's presidency when the reality of a Trump presidency became present. Many of these concerns were well-founded. For example, after a visit to the CIA headquarters in the first weeks of his presidency, President Trump made it clear that he wanted the agency to ‘take a more aggressive posture’ in the drone program, which led to ‘drone strikes that might not have been authorised under the Obama [A]dministration, including in Syria.’ Trump later went on to revoke many of the policies that were eventually implemented under Obama in an attempt to increase transparency and decrease civilian deaths (such policies will be explored in Chapter III).

This highlights a need for any potential policies – such as the policies explored within this thesis – to be grounded in law, rather than executive action.

There is also the reality of drone proliferation to contend with. For some time now the United States has (largely) had a monopoly on the technology and its use in targeted killings, but this will not remain the case for long. Many nations are now developing (or have already developed) their own drone programs, including Russia, China, Iran, Saudi Arabia and


India. While such proliferation is alarming (particularly considering the state of democracy in the aforementioned nations), it is not necessarily too late to work to improve the governance of drones at the individual nation level, in the hopes of influencing the creation of norms and standards around their use for other nations.

Finally, there is the risk of AWS being used in a similar vein to drones. AWS are considered more alarming than drones – because of their autonomous nature – and the use of drones has helped to shape “standards of appropriateness” around the use of AWS. The principles of security governance that will be examined in this thesis and held as a potential model for how to improve the governance of the drone program can be applied more widely than purely in the use of drones. Indeed, security governance can be used as a framework for the use of AWS, too, which will likely become more frequently used in the coming years.

Thus, the contribution of this research will primarily be in the framework – via those six principles of security governance – for the improved use of drones, that highlights how their future use can be best aligned with principles and norms of effective security governance. The thesis will also encourage a re-imagining of what the separation of powers could look like in a democracy, largely through the three policies for reform that will be explored with those principles of security governance. The research comes at an interesting crossroads in the history of the drone, where it is a developed enough weapon to be able to identify the issues with its use, but where these issues are not so entrenched as to be impossible to rectify, and thus this thesis will explore some possible ways to rectify what has been the so-far problematic use of a new warfighting technology.

**Chapter Structure**

The following chapter, Chapter II, looks to the scholarly literature surrounding the drone program, examining the core arguments in the literature and how they have changed over time, and identifying where this project sits in relation to the broader scholarly debate. Chapter III explores the legal framework of the drone program, in terms of domestic and international law, and outlines some of the arguments made both for and against the legality of Obama’s drone program, along with some of the guidelines eventually brought in by the Obama Administration in an attempt to improve the drone program and its transparency.

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Chapter IV addresses the history of secrecy in the modern US, and how such secrecy contributed to the use of drones. This chapter will also explore the rise of executive power, and it will see a particular focus on the Bush presidency, and on the prominent impact that both Dick Cheney and Donald Rumsfeld had in the shaping of secrecy and executive power in counterterrorism policy.

Chapter V marks the first policy-based chapter, with a particular focus on the executive branch. The chapter examines executive oversight during the Obama Administration and then looks at how such oversight could be improved through the voluntary release of more information concerning the drone program. Chapter VI moves to the judiciary, exploring the impact that the political question doctrine has had on judicial oversight before looking to the policy for the potential reform of the drone program – a "drone court". Chapter VII focuses on the third and final branch of government, the legislature. It examines legislative oversight over time, including periods of prominence and failure. The chapter then moves to the final policy for reform, examining the potential for the CIA to be removed from the drone program and for the military to take the lead on all drone strikes – the “military preference” policy.

Chapter VIII sees the examination and analysis of the policies for reform with reference to security governance, exploring how Schroeder’s conception of security governance can be used to avoid excessive secrecy, improve oversight arrangements, and move towards greater accountability benchmarks. The six principles of security governance that have been chosen by the author will be outlined in detail, and the relevant policies for reform weighed up against these principles to analyse their potential usefulness in improving the governance of the drone program. The chapter moves beyond the domestic realm, too, exploring the need for such changes to be made to the drone program in a broader sense, largely due to the proliferation of drones and the development of AWS. It explores the relevance of norms and standard-setting to the drone program.

Finally, Chapter IX concludes the thesis by exploring the current state of play when it comes to the use of drones by the United States and looking to the future of drones: how drones have been utilised in the post-Obama era, and what this could mean for the security sector without the implementation of a strong security governance agenda as outlined in this thesis.
CHAPTER II – LITERATURE REVIEW

The use of drones by the United States within its targeted killing program has been the focus of a considerable amount of scholarly debate. Much of the scholarly literature that focuses on the US drone program tends to focus on the “why and how” of an unconventional, and often unacknowledged, form of warfare. Other discussions have tended to more narrowly focus on the tactical or operational elements of a “new” type of warfare used against terrorists, or have highlighted the psychological and/or political impacts of weaponised drones in combat situations. Additionally, normative issues have also featured in the scholarly debate, feeding into important areas such as the human rights implications associated with the use of drones, and the related ethical and legal constraints on the use of force, as well as changed or applied practices related to secrecy, accountability, and security governance.

What the above helps to highlight is that the published literature that surrounds the US drone program is vast and varied. To give a clear and effective picture of the state of knowledge on the subject, this literature review will be based around six recurring and sometimes overlapping themes that are contained within the existing literature surrounding contemporary warfare and security governance. The questions and concepts that frequently recur across the literature include: warfare and technological innovation; the ethics of drone use, including discussions on assassination outside the battlefield; norms and precedents; the nature of secrecy in security operations; the growth of executive power; and the role of security governance in improving openness, transparency and accountability. In broad terms, it is intended that the six constructed groupings – that seek to incorporate or capture many core elements of overlapping and interrelated lines of inquiry on drones – will not only be used to evaluate the current state of research but will also act to place the thesis in a historical and political context. This will help to identify the likely directions and frameworks for future research. Such inquiries should support rather than undermine respect for checks and balances, while acknowledging the complex mix of dangers, opportunities and intricacies of targeted drone operations that will continue to include much secrecy and ambiguity within this particular field of study.

Overall, a review of the broad discussions on the drone debate will identify exactly where this body of work sits in relation to the current literature while – even though technological progress into the future is complex – acting to highlight this thesis’ contribution to better assess, address, and manage the risks that emerge from drone warfare. The continued discussion within the academic literature on the amount of secrecy surrounding the
US’s use of drones (and the lack of oversight surrounding the program) has highlighted ongoing democratic shortfalls and an urgent need for reform to build public confidence. Such reform should incorporate debate about the legitimacy of US operations and the potential relevance and utilisation of Schroder’s conception of security governance as a concept through which to avoid excessive secrecy, improve oversight arrangements and move towards greater accountability benchmarks. While acknowledging some operational reasons as justification for withholding drone information, the adaption and development of a security governance framework remains pertinent in situating reform within democratic norms and principles. Such reforms could even arguably be applied to other future weapons technologies other than drones, including – for instance – in the development and deployment of AWS that might select and engage targets without further intervention by a human operator. Before looking to such contemporary themes, though, it is useful to look back at the historical perspectives within the literature that frame and inform this body of work.

**War and Technology**

One of the key arguments that is put forward within the existing literature surrounding the use of drones relates to the ease with which the technology makes waging war, both in terms of resorting to war in the first place and then in terms of the actual conduct of war. Examining the decision to resort to war, Pam Bailey writes that, in the past, because of the ‘inevitability of death and destruction for the aggressor as well as the “targets”’...[there was] a strong incentive to end any war’, but that drones remove this incentive, making ‘waging war physically and emotionally painless for those who deploy them.’\(^1\) Here, it is particularly important to consider – as the literature on this matter has – the political (and, potentially, electoral) advantages of using drones as opposed to resorting to a more traditional, “boots on the ground” approach.\(^2\) Drones have been seen as a popular tool at a domestic level in the United States, largely because they are cheaper than other forms of war-fighting weapons and pose a lower risk of casualties to US soldiers (though the relevant contextual and political

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climate should also be taken into consideration when discussing these advantages, particularly that of a war-weary public two decades on from the 9/11 attacks.\(^3\)

In other words, at the very least the use of drones has the potential to avoid or negate the political and social costs of conventional military engagement. Stephan Sonnenberg presents a slightly similar argument to that of Bailey, making the case that the development and eventual use of drones ‘suggests a much higher likelihood that sovereigns will resort to armed force.’\(^4\) But, while Bailey argues that drones offer little incentive to end war, Sonnenberg argues that drones increase the incentive of going to war in the first place. Both of these arguments are compelling in terms of the decision to resort to the use of drones, and the existence of one does not negate the other.

It should also be noted that Bailey’s point regarding the physical and emotional “painlessness” for those deploying drones has been refuted by other scholars (and by some in the media, who have interviewed drone operators), who write on the toll that the drone program has on those working within remote operations. Hugh Gusterson, for example, who devotes a chapter of his book *Drone: Remote Control Warfare* to the experience of those operating drones, writes of the ‘psychological torquing created by the oscillation between the world of family domesticity and onscreen killing.’\(^5\) This is one of the more significant departures from "traditional" war that the drone program allows for in the contemporary world: the capacity to fight in a war, and then go home and be expected to perform domestic tasks and partake in family life. Sonnenberg also writes of this unique work/life situation and the purported “risk free” representation of conflict.\(^6\)

News articles relying on interviews with drone operators involved in various conflicts take a different approach, tending to focus on some of the emotional and value-layered elements relating to how drone operators attempt to cope with their actions in front of computer screens. For example, Ed Pilkington, writing about drone operator Michael Haas, highlights the abstract language that was used to describe the targets of drones: ‘cutting the

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\(^6\) Sonnenberg, “Why Drones Are Different,” 130.
grass before it grows out of control’; ‘pulling the weeds before they overrun the lawn’; or ‘fun-sized terrorists’ (this term relating to children). This does not necessarily paint drone operators in a sympathetic light, but it does point to unique coping mechanisms necessitated by unique virtual work challenges. Pilkington also writes of the rates of depression and post-traumatic stress disorder facing drone operators: similar rates to those soldiers who are deployed overseas. Despite this, drone operators can often feel as though they are looked down upon by others within the military structure. Peter W. Singer cites the words of one drone operator who stated that he and his fellow operators were perceived as ‘second-class citizens…playing video games.’ Matthew Power’s reporting reiterates this, adding that drone operators were often the ‘butt of jokes.’

Regardless of the strains that the conduct of war places upon those tasked with operating the drone program, there is a large body of literature that examines how a culture of convenient killing overlaps with the conduct of war when using drones. This is often referred to as the “PlayStation” mentality – that launching a drone is akin to playing a video game. Such arguments often incorporate questions about morality in war and perpetuating cycles of violent conflict when using drones. For example, Jai Galliott writes that drones make killing easier, in both a physical and psychological sense, allowing for it to become ‘a rather clinical and dispassionate matter, easing…moral qualms.’ Galliott’s point is also reinforced by others within the literature. Sarah Kreps and John Kaag write on drones and morality, highlighting – as did Galliott – how drones have changed the nature of war in targeting and killing individuals: that ‘killing with drones is a turning point in the ethical complexity of war’, and that ‘when it comes to war, if [it is] easy, [it is] probably not moral.’ Singer refers to Air Chief Marshal Sir Brian Burridge, who ‘describes unmanned systems as part of a move

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8 Pilkington, para. 21.
toward “virtueless war,” a result of remote soldiers’ no longer having any “emotional connectivity with the battlespace.” Noel Sharkey, meanwhile, discusses such issues under the banner of “moral disengagement.”

It is important to note that the video game comparison that surrounds drone killings has been rebutted in the literature. But such points are indicative of a wider trend in the scholarly debate that prompts questions surrounding the removal of humanity from war, asking what it means when one side is essentially removed from the equation – or at least removed from the human consequences of their actions, at an “on the ground” sense. As discussed above, this does not necessarily make the use of drones easy for those deploying them, but it does spark a broader philosophical and ethical question in the literature about the circumstances of armed drone attacks. Indeed, the removal of the “human element” to war – once perceived as an essential stopgap to all-out destruction – is a concern of others within the literature, and is closely related with the second core theme of focus within this literature review: the ethical issues associated with the use of drones.

The Ethical Issues Associated with the Use of Drones

Any discussion on morality or ethics and war will typically be grounded in just war theory (JWT): *jus ad bellum* (the rules governing the justification for war) and *jus in bello* (the rules governing the conduct of participants in war). Indeed, JWT is regularly cited in the literature that explores the ethics of drone use. This is repeatedly paired with a discussion relating to the contemporary relevance of such a historic theory, or whether drones have made the theory obsolete. Opinions are divided on such a matter. For instance, Daniel Brunstetter and Megan Braun argue that the principles of JWT are challenged by modern technologies such as drones and that there ‘must be an inevitable renegotiation of just war principles as drone technology…becomes more integrated into military strategy.’ Hamner Hill goes much further than this in his argument concerning drones and JWT, arguing that the

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20 Brunstetter and Braun, “The Implications of Drones on the Just War Tradition,” 355.
theory is inadequate in confronting modern challenges, and that ‘the changes in the nature of war are so great that JWT no longer provides a useful analytical framework.’

What such sources have in common, though, is that they are not questioning JWT primarily as a result of the theory’s age. Concerns surrounding the theory’s contemporary relevance – whether it simply needs to be updated, or whether it is altogether obsolete – are purely being raised because of the unique technology that is the drone, and the way that such a new kind of weapon tests long-standing norms and traditions. Matthew W. Hallgarth’s argument stands in stark opposition to the aforementioned arguments, though. Hallgarth stipulates that JWT remains the ‘best time-tested framework for thinking critically and morally’ about the decision to use military force. And then, to incorporate another line of argument, Adil Ahmad Haque makes the case that no war can ever be a just war – that war ‘inevitably infringes the human rights of civilians and inflicts undeserved suffering on combatants.’ Thus, it is clear that there are still plenty of contrasting opinions regarding JWT that are present within the literature. JWT has likely been long debated even prior to the advent of drones, though, and as such this should not be too surprising.

The deaths of civilians as a result of US drone use have also been a featured topic of much of the scholarly debate surrounding the drone program. Certainly, it is one of the more controversial elements of the entire debate, but there is much disagreement amongst scholars, particularly regarding distinctively conflicting civilian casualty figures from different organisations (and which figures to trust, given such discrepancies), and whether drones result in more or less civilian casualties than “traditional” wars. As a starting point, it is useful to remember the NYT reporting – discussed in Chapter I – that indicated a contentious counting method, designed to produce lower (and more favourable, for the United States)

21 Hill, “Can Just War Theory Survive the War on Terror?,” 78.
figures of civilian casualties.\textsuperscript{26} This reporting has been cited in many of the sources that express concern over civilian casualty rates.\textsuperscript{27} Aside from the debate on casualty figures, civilian casualties have likely become such a flashpoint in the academic (and political) debate precisely because of how often drones are advocated – by both government officials and scholars – as being the most precise weaponry available, resulting in fewer civilian casualties than a conventional war would. As Michael J. Boyle notes, such an argument has recently become the near-consensus position among leaders of the major government agencies involved in counterterrorism policy.\textsuperscript{28}

This is certainly the perspective of Obama’s Director of National Intelligence, James Clapper. In a 2018 interview, when asked about how he processed being a part of an administration that killed civilians – via drone – in pursuit of counterterrorism goals, he responded by making this exact distinction between drone warfare and “traditional” warfare. Clapper said:

Most military warfare is characterised by killing innocent people. Many, many millions and millions of innocent people were killed in World War II. Many, many innocent Koreans were killed in the Korean War. And many, many innocent Vietnamese were killed during that war, which I participated in. I think the difference here, at least certainly in the last administration, is the extraordinary lengths that we went to not to do that.\textsuperscript{29}

Similarly, Wayne McLean and Matthew Sussex make their case for the effectiveness of drones by drawing comparison points between drones and traditional warfare, making the distinction between civilian casualties via drone and civilian casualties from the Afghanistan War.\textsuperscript{30} McLean and Sussex’s summation is that ‘the clearest argument in favour of drones…is that they actually [do not] kill large numbers of people at all.’\textsuperscript{31} Likewise, Daniel Byman has argued in favour of the drone’s efficiency and superiority to other forms of

\textsuperscript{28} Boyle, 3.
\textsuperscript{30} “The Debate Over Military Technology,” para. 11.
\textsuperscript{31} “The Debate Over Military Technology,” para. 10.
warfare, writing that drones have killed terrorist leaders, ‘at little financial cost, at no risk to U.S. forces, and with fewer civilian casualties than many alternative methods would have caused.’

It is worth noting the counterarguments to such claims, though. Michael J. Boyle, for example, argues that the claimed advantages of drones in sources such as the ones mentioned above should not be taken at face value and that the notion that drones are effective at reducing civilian casualties ‘is based on a highly selective and partial reading of the evidence.’ Stephan Sonnenberg similarly claims that ‘the narrative of drones as low-cost precision weaponry is deceiving and ultimately devastating for civilian populations living in potential conflict zones.’ Other sources make their argument against the usefulness and precision of drones by emphasising the negative and counterproductive side-effects that can come from their use, particularly when civilians are killed. Such arguments include what is commonly referred to as blowback. As Brian Glyn Williams highlights, the death of Pakistani civilians has

led to a backlash of anti-Americanism in Pakistan. After many strikes there have been protests with hundreds of Pakistanis burning U.S. flags and chanting anti-American slogans. This has led many to question whether the killing of a few hundred Taliban and al Qaeda leaders is worth the setback in what is arguably one of the greatest battles of the War on Terror, the battle for the hearts and minds of 160 million Pakistanis.

Such a line of argument is reinforced by James Bamford, too, who cites the words of drone operators when arguing that drone strikes – and civilian casualties – fuel the ‘feelings of hatred that ignited terrorism and groups like ISIS [Islamic State], while also serving as a fundamental recruitment tool.’ Such arguments not only rebut claims that drones are a positive development of warfare, but also tie into other layers of the literature relating to not only morality but perceptions of the drone program from a law-focused point of view.

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Indeed, another central argument that is made within the scholarly literature concerning drone strikes relates to the use of language; specifically, the use of the term "assassination" as opposed to the term "targeted killing". This is heavily debated and quite contentious. Some scholars are explicit in their language, clearly arguing that drones are a tool of assassination. For example, the United States has 'for the past decade operated what is likely the most overt, technologically advanced, and prolific assassination programme the world has seen' in the words of Simon Frankel Pratt.\(^{37}\) Similarly, Warner Schilling and Jonathan Schilling refer to the use of drones as foreign policy assassinations.\(^ {38}\) Jeremy Scahill and Mark Vlasic, meanwhile, both discuss the issues that language and definitions can pose in this area of study, coming to different conclusions. Scahill highlights that a lack of clarity around the definition of assassination allows for drone strikes to be categorised as targeted killings instead of assassinations.\(^ {39}\) Vlasic similarly laments the lack of a clear definition, but conversely argues that this allows for the incorrect categorisation of legal targeted killings as assassinations.\(^ {40}\) Nils Melzer writes in a similar vein, claiming that the use of the term “assassination” (along with associated terms such as “extrajudicial killing”) is ‘widely regarded as referring to inherently unlawful conduct and, therefore, [is] equally unsuitable for an unprejudiced legal analysis.’\(^ {41}\)

Alternatively, other scholars prefer to view such hybrid ethical and legal debate points within the context of drone proliferation and precedent-setting – the weakening of laws and norms against using assassination as a policy – and it is to this literature that the chapter will now turn, along with the wider issues of precedent-setting that the drone program has posed.

**Norms and Precedent**

Literature that explores the precedent that has been set by the United States regarding the use of drones largely looks to the future, exploring what their eventual proliferation will look

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37 Simon Frankel Pratt, “Crossing off Names: The Logic of Military Assassination,” *Small Wars & Insurgencies* 26, no. 1 (2015): 11, [https://doi.org/10.1080/09592318.2014.959769](https://doi.org/10.1080/09592318.2014.959769). It should be noted here, though, that Pratt does highlight that not every drone strike could be considered an assassination – see page 14.


Some scholars explore this through the lens of assassination (and particularly, through the lens of assassination as a norm). For example, James Whibley – while discussing the proliferation of drones – asks ‘is American drone use weakening the long-standing international norm against assassination?’ Such concerns over the precedent that the United States has set regarding the weakening of laws and norms surrounding assassination in pursuit of counterterrorism goals have also been highlighted by Michael Boyle and, in the media, by Jo Becker and Scott Shane. It makes sense that the erosion of the norm against assassination is often discussed within the literature, as this is perhaps the worst-case scenario result (in terms of potential political instability) of drone proliferation. Such hypotheticals are often paired with a discussion on who is acquiring drones (or who could feasibly acquire the weapons in the future), with a particular focus on the ramifications of a non-democratic state and/or a terrorist organisation acquiring drones. Indeed, sources focusing on such a possibility tend to cite nations such as China, Russia, and Iran and highlight just how problematic it is that drones have begun proliferating to unpredictable nations, without clear guidelines set in stone.

A counterargument could be made, though, that such nations perhaps would not follow any guidelines even if they were set in stone. But the argument is still a compelling one, and does not negate the importance of the United States acting in a way that is consistent with democratic norms and standards.

While the proliferation of drones has resulted in a rich body of literature from which to draw when it comes to precedent-setting, a more remarked upon issue within the scholarly debate is that of precedent-setting for future presidents. Within the literature, it is often theorised that Obama did not see the need for (and nor did he act on) drone reform until 2012 when he saw the very real chance of a Mitt Romney presidency. Charlie Savage explains...
the result of this: ‘In early 2012, Obama was facing the prospect that he might lose reelection. He decided to institutionalise the targeted-killing procedures that had evolved over his three years in office so that he could hand it off to any successor. He also wanted to tighten up the standards for targeting.’ Lloyd Gardner makes the same argument, linking Obama’s decision to formalise standards with the prospect of a Romney presidency. He also adds that the ‘implicit belief that Obama was more trustworthy than any of his successors would be’ was ‘disturbing’. This notion of trust and trustworthiness is something that has been touched on more broadly in the literature, particularly when it comes to Obama. Charlie Savage highlights how the Obama Administration got away with claims that it was more trustworthy, and that as such it should be given free rein with regards to secretive and unaccountable foreign policy:

[S]ome liberals and Democrats...focused on those things that had changed. While celebrating Obama’s departures from Bush policies, they also tended to accept what was staying the same, changing their minds about policies they had opposed when Bush instituted them because Obama now said those policies were necessary and they trusted him more.

Other sources focus on how Obama expanded on this approach beyond lawmakers, essentially asking the American public to trust that his administration was doing the “right thing.” The pitfalls of such an approach were – evidently – made clear to Obama once he faced the prospect of no longer being the president in charge of such powers without meaningful oversight.

From the perspective of the Obama Administration, the 2012 election was a near-miss. 2016 was an entirely different matter, with the knowledge that no matter who won, a new president would be coming into the White House and inheriting Obama’s drone program. While literature focusing on the 2012 election tended to frame arguments through the lens of Obama’s concerns over the drone program that his (potential) successor would

47 Savage, Power Wars, 283.
48 Gardner, Killing Machine, ix.
49 Savage, Power Wars, 17.
inherit – with very little literature focusing on the possible ramifications of a Romney presidency; only Obama’s concerns over this – the literature focusing on 2016 took a more direct path, and explicitly raised questions and concerns over a hypothetical Trump drone program. Such arguments were no longer framed solely within the context of Obama’s concerns. What this resulted in was literature that, before his inauguration and early on in his presidency, explored Trump’s drone program with Obama’s precedent in mind, and then literature that – further on into Trump’s presidency – highlighted exactly how Obama’s precedent resulted in a worst-case-scenario, largely through increased civilian deaths and rolled-back transparency and oversight measures.

Those voices raising concerns about the potential of a Trump presidency with Obama’s precedent in mind tended to be commentators from the various transparency NGOs whose research has aided this thesis, including The Intercept and BIJ. As consistent critics of Obama’s drone program, this is not surprising: such organisations were all too aware of the long-term effects and precedents set by Obama. As Ryan Devereaux writes – harking back to the “trust us” notion discussed above – a targeted killing bureaucracy cannot and should not ‘be built on trust alone…[for] those powers would one day be handed to a new president.’

Jack Serle and Abigail Fielding-Smith of the BIJ also wrote – one day before the inauguration of Donald Trump – that ‘Obama developed and expanded a defining policy architecture which…Trump now inherits: the ability to kill suspected terrorists anywhere without US personnel having to leave their bases.’

Making the same point, Dale Sprusansky writes that Obama handed Trump ‘executive authorities [including the drone program] on a gold platter.’ Writing in the Washington Post, though, Jack Goldsmith – Assistant Attorney General in the Bush Administration – opined in 2012 that public support for the drone program ‘no doubt reflect[s] the fact that some Americans trust…Obama more than they did…Bush to execute aggressive counterterrorism policies.’ Goldsmith went on to argue that such support also derived from

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a robust system of checks and balances, that has ‘worked extraordinarily well in the past decade to legitimise these policies.’

Goldsmith was writing here about the transition from Bush to Obama, though. He has since written a book on how President Trump ‘operated the presidency in ways that reveal its vulnerability to dangerous excesses of authority and dangerous weaknesses in accountability.’ While Trump would likely always have been inclined to exercise power in such a way, it is hard to dismiss those above arguments that highlight exactly how easily Obama set up the exercise of power via drone for President Trump.

Once Trump was more firmly established in his new role as president, and clear patterns began emerging, the literature tended to focus on how Trump chose to roll back some of Obama’s more restrictive policies regarding the drone program. Sarah Margon writes that the changes that the Trump Administration made – in secret – ‘will inevitably lead to less transparency and accountability and more civilian deaths.’ This is reinforced separately by Heather Hurlburt, Simon Frankel Pratt, and Milena Sterio. As Saskia Brechenmacher and Steven Feldstein write, such moves ‘highlight a real risk that important lessons learned over the past eight years will be discarded and costly mistakes repeated.’ Such discussions often refer to two of the major transparency developments that occurred during Obama’s presidency: the 2013 Presidential Policy Guidance (PPG) (or “playbook” for the use of drones); and 2016’s Executive Order 13732, which – among other things – contained a reporting requirement on civilian casualties.

As such, there is also a sub-section of the literature – often coming from rights-based organisations and/or transparency-focused organisations – that looks to this topic but focuses on the role that Obama played in creating this reality: how Obama failed to set up – and entrench in law – clear guidelines surrounding the use of drones, which resulted in President

55 Goldsmith, 23.
Trump being able to come into office and loosen important (and hard-fought) restrictions.\textsuperscript{60} Hina Shamsi – Director of the American Civil Liberties Union’s (ACLU) National Security Project – writes: ‘When the Obama administration put in place guidelines meant to restrain lethal drone and other killings abroad, we were concerned that they set too low a bar, and that even a low bar could easily be overturned.’\textsuperscript{61} Or, as Ted Jeory puts it, ‘Trump will inherit a military drone targeted assassination programme for which Barack Obama failed to put any effective rules in place.’\textsuperscript{62} Letta Taylor is just as critical, writing that ‘flaws in the existing targeted killing policy, crafted under President Barack Obama, helped pave the way for…Trump to kill more civilians.’\textsuperscript{63} Here, what the literature indicates is that Obama has not been let off the hook for his drone program. While Trump may have come into power and embraced drones wholeheartedly, making numerous concerning changes in terms of disregard for civilian deaths and transparency requirements, scholars and other commentators have not forgotten that Obama’s failings – primarily in terms of not entrenching positive changes regarding the drone program into law – played a considerable role in such a reality eventuating.

**Secrecy**

One of the most explored topics within the academic literature on Obama’s drone program relates to the secrecy that surrounds the use of drones, along with the associated questions of whether further transparency is needed (through the executive branch) and whether further oversight is needed (by the judiciary and/or legislative branches). As Nancy Kassop so succinctly puts it, ‘mostly, this is a tale of three branches: one, the executive, which has taken the lead in pushing beyond its boundaries, and the other two, the legislative and judicial,


which have been remiss in their monitoring function." 64 Certainly, the secrecy that surrounded nearly every aspect of the drone program for the better part of Obama’s presidency was considered one of the more problematic elements to the program, as it led to a belief that there must be something to hide. 65

The first sub-section of academic literature focusing on the secrecy of the drone program tends to focus on the perceived perpetrator of such secrecy: the executive branch. What such sources have in common is an argument for greater transparency, while highlighting where the executive branch has gone wrong. Rosa Brooks, for example, writes:

> At the moment, the United States itself – as the globe’s only military superpower – is the sole arbiter of its own actions: with zero transparency, it determines which laws to apply and it comes up with its own interpretation of core concepts. Or, to put it in more familiar terms, the United States is judge, jury, and executioner all rolled into one. 66

Such an argument – right down to the use of the phrase “judge, jury, and executioner” is reinforced by Jameel Jaffer, who highlights that this is one of the more concerning legacies of the Obama Administration. 67 Other sources make the important point that while further transparency is needed, it should not be absolute – recognising that there are valid needs for governmental secrecy, at times. 68

While there is plenty of literature that focuses on the executive's failings when it comes to transparency (or lack thereof) surrounding the use of drones, there are also a significant number of sources that narrow in on the lack of oversight of the drone program conducted by the other two branches of government, the judiciary and the legislature, and this forms the second sub-section of academic literature focusing on the secrecy of the drone program.

67 Jaffer, The Drone Memos, 55.
Literature focusing on the lack of oversight that the judiciary has afforded the drone program tends to centre on the reasons why the judiciary faces challenges in this area. Such arguments centre around the fact that ‘courts have historically been reluctant to intrude upon military matters.’ Indeed, there is a large body of literature devoted to a discussion on the “political question” doctrine that helps to explain this reluctance. The political question doctrine will be explored in detail within Chapter VI, but as a brief definition to contextualise the literature here, the doctrine refers to areas that should be excluded from judicial review and includes some of the issue-areas of most relevance to this thesis, such as national security, the military and foreign relations. Much of the relevant literature’s discussion is critical, not seeing a place for the political question doctrine in the modern-day – largely because, as Joshua Andresen notes, ‘some interpretations of the political question doctrine run the risk of implying that military conduct is wholly beyond the reach of law.’ Such an argument is backed up by Samuel Adelsberg and by Reprieve lawyer Shelby Sullivan-Bennis. Discussions of how the judiciary could help to improve the oversight of the drone program also tend to focus on the potential for a “drone court” – to be explored in Chapter VI – as this is one of the more robust ideas for reform in this area. (Though it should be noted that there are plenty of sources that are critical of such a reform mechanism, which will also be explored further in Chapter VI). Such discussions focusing on the need for a drone court

71 Gunneflo, 85.
tend to refer back to the failings in transparency from the executive branch, and how this signals a need for further oversight. For example, Amos Guiora and Jeffrey Brand write that the drone program is ‘devoid of robust judicial review and transparency,’ while Adelsberg argues that the executive operates ‘under a publicly lawless regime.’ While there can be frustration expressed with the judiciary in some sources, the overall message that is conveyed appears to be one of understanding – a recognition that the judiciary’s hands are essentially tied on the matter, largely as a result of the political question doctrine.

While literature focusing on the judiciary tends to focus on the practical challenges obstructing the branch from properly overseeing the executive, literature focused on the legislature tends to cast a more critical eye, narrowing in on how Congress needs to perform better oversight. There is a similar focus on the role that the executive plays here, but also more of a recognition that Congress has historically played an oversight role, as well as arguments made that this role has been neglected in the post-9/11 period. For example, as Sarah Burns argues:

The perennial debate over the balance of power in the political branches came to the fore once again after 9/11…Historically, Congress allows the president to take the lead in times of crisis, but it reasserts itself, checking presidential action, either during or at the conclusion of wars. Oddly, after more than a decade of unpopular wars and limited evidence of increased security, Congress has yet to reassert itself. The president retains remarkable discretion over foreign policy.

Similarly, Amy Zegart writes that ‘Congress…has struggled to bolster its own intelligence oversight capabilities for years…Congress has not strengthened its own oversight tools.’

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While Christopher Ford agrees, they see it as evidence of a broader pattern – not only a relic of the post-9/11 moment. Ford writes that this pattern involves ‘long periods of executive autonomy punctuated by short bursts of congressional oversight grounded in public revelations of impropriety or illegality in the Intelligence Community [IC],’ citing Watergate and the Vietnam War as two examples of instances of a “burst” of congressional action.\(^79\)

Thus, while congressional oversight has indeed been lacking post-9/11, it was not necessarily brought on within this era.

While there is plenty of literature exploring the three branches of government and what each uniquely contributes in an oversight sense, there are also arguments – highlighted in the scholarly debate – that are made expressing a more hostile approach to further oversight, or, at the very least, highlighting that further oversight and/or increased transparency would not be a cure-all for the drone program. There is, first, the common argument that there is an ‘occasional, legitimate need for government secrecy.’\(^80\) Such an argument is even backed up by government secrecy critic Steven Aftergood, who distinguishes between ‘genuine national security secrecy’ and other categorisations, such as bureaucratic secrecy (the hoarding of information by bureaucrats) and political secrecy (secrecy for political advantage).\(^81\) There are more forceful arguments made in this vein too, though. Mark Fenster notes:

Disclosure requirements create costs to government operations and the public in a number of ways: by forcing disclosures that actually harm national security, military actions, and law enforcement; by inhibiting deliberative decision-making; and by imposing administrative costs incurred through opening meetings and disclosing documents.\(^82\)

\(^79\) Christopher M. Ford, “Intelligence Demands in a Democratic State: Congressional Intelligence Oversight,” *Tulane Law Review* 81, no. 3 (2007): 725, https://findit.library.nd.edu.au/permalink/61UONDA_INST/1ntajja/cdi_gale_infotracacademiconelinefile_A164122691. Such “bursts” of congressional action will be explored in further detail within Chapter VII, which will highlight changes in legislative oversight over time.


It must be highlighted here, though, that Fenster was writing on transparency and national security in a broad sense, not specifically concerning the drone program. Jennifer Kibbe adds on to Fenster's argument, writing that 'critics of strengthening legislative oversight argue that it is too cumbersome and slows down the targeting process, thus handicapping U.S. counterterrorist efforts.'³ This core argument of efficacy is also made by Heidi Kitrosser.⁴ Finally, it must be noted that the literature indicates that even increased transparency should never be absolute – transparency does not (and cannot) mean pure openness.⁵

Expansion of Executive Power

A further significant debate point within the broader literature that has informed this thesis concerns executive power, and in particular, how executive power has expanded in the post-9/11 period, allowing for the drone program’s more problematic aspects to take hold. Such explorations often refer to the UET, and its significance in US domestic and – eventually – foreign policy. For instance, Jeffrey Crouch, Mark Rozell and Mitchel Sollenberger make the case for the UET becoming “mainstream” during the Bush Administration, helping to ‘develop a template for his successors to follow.’⁶ Indeed, the authors highlight how the Obama and Trump administrations were also influenced by the theory, directly or indirectly.⁷ Similarly, Ryan Barilleaux and Jewerl Maxwell – writing only on Obama, in this case – highlight how Obama followed the precedent set by Bush regarding executive power.⁸ Jeremy Scahill, in a similar vein, states that the drone program forms a part of the end result of Bush’s policies – that Bush helped to set the program up.⁹ Such a program could not have existed (and been expanded on, by Obama) without the existence and prominence of the UET within the Bush Administration.¹⁰

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⁴ Heidi Kitrosser, “Congressional Oversight of National Security Activities: Improving Information Funnels,” Cardozo Law Review 29, no. 3 (2008): 1065, https://findit.library.nd.edu.au/permalink/61UONDA_INST/1ntajja/cdi_gale_infotracacademiconefile_A229747146. It is also an argument that is often made in relation to a potential drone court to review drone strikes before the fact – that courts are not efficient enough to deal with matters of national security.
⁵ Fenster, “The Opacity of Transparency,” 936; Brunstetter and Braun, “State of the Union,” 93.
⁷ Crouch, Rozell and Sollenberger, 571.
⁹ Scahill, Dirty Wars, 520.
The focus of other authors extends past a discussion on theory, highlighting the practical ways in which executive power has expanded in the post-9/11 period. There tends to be a large focus here on the killing – by drone – of US citizen Anwar al-Aulaqi, as an indicator of just how concerning executive power can be when wielded in certain ways. Scott Shane writes on the significance of this, highlighting that Aulaqi was killed by his government ‘on the basis of secret intelligence and without criminal charges or a chance to defend himself in court’.91 (Indeed, proponents of the aforementioned “drone court” often cite the Aulaqi case to further the argument that suspected [US] terrorists should be able to have their day in court).92 Other sources also express concern over the killing of Aulaqi, largely over the use (or misuse) of power and the precedent set by it.93 However, in contrast, Michael Stokes Paulsen argues that such a use of executive power is valid:

The President of the United States, in his capacity as military Commander in Chief of the nation’s armed forces in time of constitutionally authorised war, has the plenary power and discretion under the U.S. Constitution to target and kill specific individuals that he in good faith determines to be active enemy combatants engaged in lawful or unlawful hostilities against the United States.94

Of course, this argument is easier to make when the target of such an action is a bona fide terrorist, such as Aulaqi. Paulsen does not speak to more ambiguous hypothetical scenarios – who constitutes a terrorist? Could such actions ever be taken against a different category of criminal? – in his defence of executive-sanctioned killing. Further, while the president might have the legal capacity to take such actions, Paulsen’s argument does not speak to the associated ethical problems of such killings, nor the precedent that such actions would (and, in fact, do) set.

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Security Governance and Accountability

A glance at the security governance literature can offer up some confusing – and contrasting – definitions. Indeed, the concept of security governance pre-dates the use of drones by the United States and therefore was not created with this context in mind, with the result of this being a body of literature that does not easily make links between security governance and the drone program. Some of the earlier literature on the topic refers to the fragmentation of the security sector, particularly following the Cold War. Elke Krahmann writes:

Although the new structure appears to have several centres, these centres no longer seem to be states, but regional and subregional institutions through which an increasing range of public and private actors organise their common or competing interests in international security. The membership of and relations among these institutions are varied and overlapping, and so are their functions and obligations.\(^{95}\)

Krahmann goes on to explain that such a change ‘can be understood in terms of an emerging shift from “government” to “governance”.’\(^{96}\) Simply put, the literature highlights the eventual inclusion of non-state actors in security policy, once only the domain of government. Such an argument is also highlighted by Hans-Georg Ehrhart, Hendrik Hegemann and Martin Kahl in their 2014 article on the subject.\(^{97}\) The authors also highlight an interesting and important pattern in the literature: the attention paid to the European Union in such discussions on security governance.\(^{98}\) As they write, this is due to its ‘open borders, dense network of institutions, shared risks and fusion of internal and external security.’\(^{99}\) Emanuel Adler and Patricia Greve also focus on Europe in their article, and they note a clear distinction between security governance when used in a domestic setting as compared to the international sphere: that in domestic terms, it is useful to think of security governance in terms of the aforementioned shift from government to governance, but in international politics what security governance relates to is ‘the move from (realist) “anarchy” to “governance”.’\(^{100}\)

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\(^{96}\) Krahmann, 5-6.


\(^{98}\) Ehrhart, Hegemann and Kahl, 146.

\(^{99}\) Ehrhart, Hegemann and Kahl, 146.

is where security governance becomes relevant to this thesis, as it offers up a framework for governing what was previously ungoverned (or perhaps, ungovernable).

Indeed, the use of security governance in international politics offers up a clearer view of how the concept can be used within the context of drone use and leads the literature into the direction of “preventive security governance.” This is a fascinating conceptualisation of security governance that relates directly to the use of weapons such as drones and appears to be an emerging point of discussion in the literature. Denise Garcia makes the case for the concept, writing that it could be a strategy to curtail uncertainty in the preservation of stability and international order. I define ‘preventive security governance’ as the codification of specific or new global norms, arising from existing international law that will clarify expectations and universally agreed behaviour on a given issue-area. Such issue-area is characterised by no rules or by the imprecision of extant rules.¹⁰¹

On the face of things, this appears like the perfect concept to apply to the use of drones and indeed, Garcia later goes on to explicitly link preventive security governance with the US drone program.¹⁰² One of the advantages of such a framework is that it is flexible and can be applied to new technologies that are rapidly challenging and transforming existing norms. Garcia herself highlights this in a later article that makes the case for preventive security governance to be applied to the use of artificial intelligence.¹⁰³

As Chapter VIII will demonstrate, such a preventative framework helped to shape the creation of the six principles of security governance that should be adhered to when using drones for targeted killings. Such principles were also devised using another sub-section of the security governance literature too, though, and this sub-section tends to focus on the idea of security sector reform and democratic principles. This literature tends to be published in the form of reports and highlights priority areas for security sector reform and how it can be achieved. Common threads do appear to be related to concepts such as transparency, accountability, the rule of law, oversight and adherence to international law.¹⁰⁴ Thus, such

¹⁰² Garcia, 96.
literature also played a significant role in shaping the eventual framework that was developed for use within this thesis. The majority of such literature was written in a different period, though. While such principles remain ever relevant, their linking with a newer concept such as preventive security governance is necessary. Indeed, the discussion of such principles in relation to the drone program is currently lacking within the literature. While there are plenty of arguments made for the greater oversight of the use of drones, or further transparency from the executive branch, few sources frame this within the context of security governance. This will be the contribution of this thesis: to develop a security governance framework – informed by the literature and adding to Garcia's "preventive" security governance framework – that can be applied to the use of drones, and that is flexible enough to be further applied to new and emerging technologies as they arise.

**Conclusion**

As of December 2021, the current body of literature on drones is very much concerned with what President Biden will do (and has already begun doing) with the drone program. Such literature touches on many of the broad discussion points that have been explored in this literature review, for two central reasons: first, because Trump exacerbated many of the existing issues with Obama’s drone program; and second, because President Biden was – of course – Obama’s Vice President, and he has surrounded himself with several Obama-era alumni.\(^{105}\) Thus, those existing patterns that existed in the Obama-era literature, particularly relating to those issues of secrecy, oversight and the exercise of executive power are replicated, with calls for Biden to improve the drone program – to perhaps pick up where Obama left off with his Administration’s reforms and transparency witnessed at the end of 2016, to be explored in the next chapter.\(^{106}\) What this highlights is that the issue-areas and debate-points explored within this chapter – and within this thesis – have not disappeared. There is still a need for the reform of the drone program, regardless of who the president is.

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The scholarly literature pertaining to the drone program is full of debate on important and complex issues, including discussions on how drones have changed the nature and ethics of war, discussions on assassination, and discussions on secrecy and the expansion of executive power. While such arguments are of course always contested, an overwhelming argument expressed in the literature is that Obama’s drone program had serious ethical and legal issues associated with it. The next chapter of this thesis will turn to some of these important and complex issues, exploring the legal framework of Obama’s drone program and how it posed both domestic and international law challenges, along with some of the guidelines that were brought in by the Obama Administration in an attempt to improve the transparency (and broader governance) of the drone program.
CHAPTER III – THE LEGAL FRAMEWORK OF THE DRONE PROGRAM

Introduction

Drones have presented (and continue to present) a unique challenge to the law because drone use is not easily applied to existing and long-standing domestic and international laws. Indeed, rapidly evolving drone technology and its application can be seen as repeatedly outpacing past legal (and ethical) frameworks. For example, the use of drones (along with other weapons that have resulted in transformed warfare) regularly contests the meanings and interpretations of legal concepts such as “necessity”, “self-defence”, and as highlighted in Chapter I, “enemy combatant.” As such, this chapter will highlight the relationship between drone use on the battlefield and domestic/international laws, as well as some of the ways in which core notions and principles in governing the use of force, such as anticipatory self-defence, have been re-interpreted in the modern era. Thus, a partial focus of this chapter is the relevant domestic and international laws and related US policy guidelines pertaining to counterterrorism, largely since 9/11 and with a particular focus on those laws and principles that were relevant to the operation of the US drone program under Obama. This will form the first section of the chapter. The focus will then shift to an examination surrounding the legality of Obama’s drone program, and some of the safeguards and rules that were put in place by the Obama Administration in response to criticism (from, for example, NGOs, academics and lawyers) of the program’s (il)legality and (im)morality – guidelines that were largely informed by those pertinent domestic and international laws surrounding military warfare, to be discussed in the first section of the chapter.

While the crux of this thesis is not related to the legality of the drone program per se, issues of legality intersected heavily with the issues of transparency raised by Obama’s drone program, largely because questions were raised as to whether the drone program was so secretive because there were so many debate points surrounding its validity and legality. In other words, was Obama’s drone program deliberately shrouded in secrecy to evade fair and valid questions related to its legality? There were also concerns raised as to the legal-political complexities regarding the state-sponsored assassination of non-state actors, the boundary

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between combatants and civilians, and the stretching of past legal scaffolds surrounding the use of armed force to implement a range of controversial counterterrorism adjustments in the wake of 9/11.\(^3\) It should be highlighted, though, that such issues of legality will be explored through a political science lens. A fair amount of work has already been done in re-thinking the drone war from a strictly legal perspective, by legal scholars with the requisite expertise.\(^4\) This chapter will explore the various intertwined legal debate points that the drone program raises, providing multiple perspectives related to the drone program’s legality in a political context. It will also briefly discuss Israel’s assassination program and point out its importance to the US’s targeted killing program, particularly in the development of its legal framework.

While drone warfare does present many new legal and ethical problems, the Obama White House (and the successive Trump Administration) consistently emphasised its belief in executive prerogatives and the merits and legality of the US drone program.\(^5\) This policy position was grounded in several interpretations of relevant laws, the redefinition of military actions or situations, and related reference to domestic safeguards, to be outlined within this chapter. It is worth noting, as a snapshot of the Biden context, that in March of 2021, the Biden Administration disclosed a set of rules that had been secretly issued by President Trump (in 2017) for counterterrorism “direct action” operations that merged the use of drone strikes.\(^6\) The Biden White House then immediately ordered a review of how both Obama- and Trump-era policies had worked to combat threats, and the requirements for lethal drone strikes. As noted in the NYT, many ‘Obama-era national-security officials have returned in the Biden administration, raising expectations that Mr. Trump’s changes would be at least

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3 Brunstetter and Braun, 352-53.
partially rolled back.\textsuperscript{7} Such an outlining of the current legal context also helps to reiterate the highly elastic nature of the domestic laws and guidelines that frame the US drone program and the changes over time that such elasticity can provoke – as this chapter will highlight.

**Domestic Law**

**Assassination**

The application of the word “assassination” to the US drone program has been highly controversial and has been particularly contested by government officials.\textsuperscript{8} At its core, though, assassination can be simply defined as the ‘premeditated killing of a specific individual to realise political objectives.’\textsuperscript{9} Thus, assassination is often associated with the killing of political figures, enemy fighters, and related HVTs.\textsuperscript{10} At the same time, targeted killings have become a staple of US counterterrorism operations in a post-9/11 era.\textsuperscript{11} This has led to a linking between the two concepts.\textsuperscript{12} As explored below, though (and as explored within Chapter II), the use of lethal drone force for targeted killings has been differentiated from assassination by some scholars and government figures.

Importantly for the focus of this thesis, the use of assassination within the United States is routinely linked with the CIA.\textsuperscript{13} The practice and pace of such political violence has been routinely restrained with attempts to introduce various principles and laws to halt, shift, or clarify such practices.\textsuperscript{14} This is reflected in the fluctuating history of US standards towards assassination, the practice of which appeared to end with the complete banning of assassination in President Gerald Ford’s Executive Order 11905.\textsuperscript{15} This Order stated that ‘no

\textsuperscript{7} Savage, para. 21.


\textsuperscript{13} Kutz, “How Norms Die,” 435.


employee of the United States Government shall engage in, or conspire to engage in, political assassination’. Before this modification, the United States had not fully disengaged from the act of assassination, and Ophir Falk provides a neat summary:

During WWII, Japanese Admiral Isoroku Yamamoto and his plane were targeted. In the 1950s and ‘60s, the CIA contemplated the assassination of Fidel Castro on eight different occasions. In 1970, the United States allegedly took part in the attempted assassination of Chilean General Rene Schneider. The [Church Committee] reported in 1975 that it had found evidence of assassination plots against President Ngo Dinh Diem of South Vietnam, and that during the Vietnam War, the Phoenix Program planned the assassination of Viet Cong leaders and many sympathisers. In 1986, President Ronald Reagan ordered Operation El Dorado Canyon, which included an air raid on the residence of Libyan ruler Muammar Qaddafi.

Since Ford’s executive order, every US administration has contested the assassination ban's scope and, most critically, its meaning. The above Executive Order 11905 was soon modified and superseded by President Jimmy Carter’s Executive Order 12036, and finally by President Ronald Reagan’s Executive Order 12333. Thus, it is Executive Order 12333 that is often referred to in discussions on the banning of assassination within the United States. It is also worth noting that the term “assassination” itself was not clearly defined within this Order.

Consequently, the language of the ban on assassination – undefined and therefore leaving political and legal interpretations open to debate – began to be circumvented, particularly as transnational terrorism gained prominence in the 1990s. This was evident with President Bill Clinton’s memorandum of notification, which denoted a broader view of presidential power, allowing for potential lethal counterterrorism actions against a list of certain targets including Osama bin Laden. These amendments to the assassination ban continued following the attacks of 9/11 under the authority of President Bush, but with the incorporation of the international legal right to self-defence. For example, a September 17, 2001 memorandum of notification conferred upon the CIA the right to kill al Qaeda members in anticipatory self-defence. The Obama Administration continued this trend to limit or traverse legal obstacles to drone strikes as it actively reinterpreted the assassination ban,

including via strikes outside of Afghanistan, such as in the border regions of Pakistan. As Matthew Spurlock writes, though, analysis of Obama’s actions in this realm is difficult, as a result of his administration’s fixation on secrecy: ‘we know little about how the Obama administration interprets the assassination ban, let alone how its interpretation differs from those of previous administrations.’

Significantly, as outlined below, self-defence is of immense importance in international law (as outlined in Article 51 of the UN Charter), but at the level of domestic law, the addition of words like “anticipatory” transforms the principles underlying executive directive and produces many grey areas – offering up an example of the aforementioned challenges to long-standing legal concepts. Indeed, there is ‘no universal agreement on the legality of “anticipatory” self-defence.’

Essentially, this “self-defence” memorandum of notification initiated by Bush and inherited by Obama permitted the CIA to form paramilitary teams to kill certain individuals anywhere in the world, done without technically (or arguably, legally) lifting the ban on assassination. In fact, the Bush Administration held that the ban could not apply because lethal actions in a time of war could not amount to assassination – as above, it was anticipatory self-defence. This is a consequential argument in light of the ongoing continuation of the AUMF, explored below – if the United States is in a state of perpetual war, and has been since 9/11, this creates a very broad pretext (and precedent) legitimising expansions in drone targeting. Simply put, the US evaluated that targeted killing, while a form of killing carried out by governments, was not the same thing as an assassination. The historical context to the stated policy rationale, legal reasoning and political frameworks about the use of lethal force highlights some of the factors that had merged with the Obama Administration’s view of the assassination ban and its drone policy actions – alongside assurances that targeted killings were not assassinations, and instead were analogous to (anticipatory) self-defence against conventional attack.

Of course, there are plenty of counter-arguments – as expressed in the literature on this topic and highlighted within Chapter II – that oppose this perspective, and that openly

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24 DeYoung, para. 34.
label the drone program as a program of state-sponsored assassination. Simon Frankel Pratt’s argument, outlined in Chapter II, can be reiterated here: that the United States is operating the most ‘prolific assassination program the world has seen.’ Lloyd C. Gardner also specifically links the two concepts, writing of Richard Clarke’s (counterterrorism advisor to Presidents Clinton and W. Bush) recollection of the CIA and Pentagon “shying” away from the use of drones. Clarke ‘did not say the reason was the previously issued executive orders against assassination, but that seems the logical explanation.’ Further, with counterterrorism seen via a military lens, Gardner has also written that the aforementioned September 17 memorandum forever changed the role of the CIA in American life: that the Agency gained blanket authority for its actions and that ‘the thin grey line that had once separated legal and illegal actions became a mile-wide freeway for lethal actions.’ This thesis does not necessarily wish to put forward an argument one way or another as to whether the drone program is in contravention of US assassination laws, but it is important to note the differing perspectives from within government and the scholarly literature.

Additionally, it is important to highlight here that parallels can be made in comparing US responses with other nations, such as Israel, who have engaged in assassination practices, resulting in changes to ethical or regulatory judgments – and that has fed into US perceptions of executive force in an increasingly wide range of theatres.

Israel

Israel will feature quite prominently in the discussion on the judiciary's potential involvement in the drone program, within Chapter VI. This is because of the adoption of the practice of judicial review in Israel, relating to its cultural and institutional settings to help direct and oversee its targeted killing program. Israel is also an important case-study consideration to be made regarding key elements related to the merits of targeting standards and the overall legality of the drone program, though, because the arguments made by Israel within its targeted killing program were later adopted by the United States as part of its counterterrorism operations. In short, the history of Israel’s targeted killing program, along with Israel’s case for the legality of its targeted killing program, is integral to the development of the drone program within the United States. Israel’s targeted killing program dates back to 1947 with the launch of Operation Zarzir, a program directed against the

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26 Gardner, Killing Machine, 128.
27 Gardner, 129.
Palestinian leadership. In 2000, Israel began openly admitting to the previously clandestine targeted killing program, and this was initially met with condemnation by the United States. Importantly, Israel defended its program by placing it within new legal avenues of action and maintaining that fighting terrorists was akin to fighting a war. This allowed Israel to directly use open force against terrorists as self-defence, who were perceived as members of an enemy military sometimes operating in “safe havens” abroad.

While this line of defence (especially against HVTs) would eventually come to be embraced by the United States within its targeted killing program, at the time – in 2000 – it was not well received by the United States. Former US Senator George Mitchell even led an international commission into Israel's targeted killing program and explained to members of the International Law Department (ILD) within the Israel Defence Forces (IDF) that terrorists were criminals and not enemy combatants: that they could be arrested as a policing problem, but not killed as a military problem. The United States’ point of view was changed following 9/11, and there were reports that the Bush Administration was anxious to discover the finer details of Israel’s legal justification for its targeted killing program, even seeking out the Israeli government’s counsel when it came to the development of new technology and the creation of their drone strike defence. The legal defence for counterterrorism actions made in response to 9/11 largely came in the form of the AUMF. Indeed, the fine print of the AUMF – that has no time or geographical limits – is closely related to shifts to better navigate around the assassination ban in the post-9/11 era.

Authorisation for the Use of Military Force

The AUMF, it can be argued, is one of the most consequential pieces of statutory authority to be passed in the post-9/11 counterterrorism arena, issued one week after the terror attacks. The AUMF is a highly broad-based executive power that allows the US President to target

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29 Elliot, “Where Precision is the Aim,” 115-116.
31 Sterio, “The United States’ Use of Drones in the War on Terror,” 200.
enemy combatants with “necessary and appropriate force” and without the usual authorisation from Congress. Still existing (and being used) to this day, the text of the AUMF reads:

[T]he President is authorised to use all necessary and appropriate force against those nations, organisations, or persons he determines planned, authorised, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organisations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organisations or persons.\(^ 36\)

As alluded to above, no expiry date was put on this law, and it is still commonly referred to as justification for counterterrorism actions, either real or potential. For example, the AUMF as an inherent right to self-defence was referred to as recently as 2019 as a justification for potential military action against Iran by the then-Trump Administration.\(^ 37\) It has also been used as justification for increased executive discretion and related drone campaigns taken against terrorist groups – including covering groups that did not exist at the time the AUMF was originally passed, such as al Qaeda in the Arabian Peninsula (AQAP).\(^ 38\)

There is an argument that the AUMF is no longer relevant, given how much has changed politically since 9/11 within the war on terror, in conjunction with questions about the conditions of fighting a perpetual global war. Graham Cronogue expands on this, writing that the AUMF:

gave the president the authority to use force against those involved in the 9/11 attacks and their allies, but the war on terror has moved beyond this mandate. In 2001, al-Qaeda, the Taliban, and Osama bin Laden were clearly the ‘enemy’. The AUMF addressed this threat by providing domestic authorisation for the use of force against all entities closely tied to 9/11. However, ten years after the attacks, bin Laden is dead and the Taliban is a shadow of its former self. Yet the United States still uses the AUMF to justify the use of force against new terrorist and extremist groups, many of which were not closely involved in 9/11 and may not have even existed in 2001.\(^ 39\)

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Shoon Kathleen Murray adds to this assertion, writing that the AUMF has taken on ‘a life of its own’ and has been ‘stretched in a manner that threatens long-term use of the war authority.’

Earlier, it was argued that the passage of the AUMF contributed to the circumvention of the US assassination ban in the backdrop of self-defence rationales and purported laws of armed conflict. Adding to this, former CIA Director Michael Hayden has stated that the AUMF is the closest thing to an unequivocal declaration of war that the United States will ever see again, and that he believes that the key difference between targeted killings and assassination is grounded in the AUMF. Similar to the above-outlined argument on the part of Israel, in the eyes of Hayden and other AUMF supporters, the declaration of war against al Qaeda meant that its members around the world were enemy combatants – not potential victims of assassination. As such, according to the viewpoint of the United States, figures such as Osama bin Laden could legally be killed, in a way that did not contravene the ban on assassination, due to the passage of the AUMF.

The AUMF retained its relevance throughout Bush’s two terms as president, and – importantly – was also used throughout Obama’s presidency to justify the legality and logic of his administration’s drone program, solidifying its place in American law despite some limited congressional resistance: a ‘protean foundation for indefinite war against an assortment of terrorist organisations in numerous countries,’ in the words of Curtis Bradley and Jack Goldsmith. In a speech at the National Defence University (NDU) in 2013, Obama stated that the United States’ actions in using drone strikes were valid because Congress had authorised the use of force towards al Qaeda, the Taliban, and their associated forces immediately following 9/11, in the form of the AUMF. As such, according to Obama, the use of drones was a proportionate response, waged in self-defence: a just and legal war. Here, Obama is linking US domestic law with international law – the drone program is legal under US domestic law, and is, therefore, a just war – and is thus in alignment with international law, because international law is derived from the theory of just war. This linkage is a problematic conclusion, though, and therefore the chapter will turn to an

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42 Whipple, 61.
45 “Remarks by the President at the National Defence University,” para. 32.
examination of the relevant international laws surrounding US drone policy, in part to
determine whether there is any accuracy to what Obama has affirmed in the above
sentiments.

**International Law**
The relevant international law that applies to drone strikes can vary depending on the context
in which the strike takes place.\(^46\) If a conflict is deemed to be an armed conflict (when
‘violence reaches a significant threshold and the armed group has the capacity to abide by the
laws of war’) then it is international humanitarian law (IHL) that applies.\(^47\) In contrast to this,
if actions are taken in an environment where there is no armed conflict, the relevant national
laws, along with international human rights law, apply (instead of IHL).\(^48\) Statements made
by the Obama Administration indicate that they believed their drone strikes against al Qaeda,
the Taliban and other “associated forces” to be part of an armed conflict, and as such all
strikes would need to adhere to IHL.\(^49\) Former UN Special Rapporteur on the promotion and
protection of human rights and fundamental freedoms while countering terrorism (hereafter
“Special Rapporteur”), Ben Emmerson, agrees with this characterisation, stating in a UN
report that the majority of the Obama Administration’s drone strikes had occurred within the
context of armed conflict as defined by IHL.\(^50\) Thus, the focus of the chapter will shift to
IHL. First, though, the concept of just war will be explored, due to the theory’s prominence in
the creation of IHL.

**Just war theory**
JWT attempts to determine how war can be waged according to principles of morality.\(^51\) JWT
is a compromise, of sorts: a recognition that war is a reality of life, but that it should not
necessarily be uncontrolled, and that despite the pull of pacifism ‘force might sometimes be

law#2.%20What%20international%20law%20is%20applicable%20to%20targeted%20killings.

\(^{47}\) “Q&A: US Targeted Killings and International Law,” para. 5. IHL is also referred to as the law of armed
conflict, and the laws of war, but for the purposes of this thesis will be referred to solely as IHL.

\(^{48}\) “The Use of Armed Drones Must Comply with Laws,” International Committee of the Red Cross, published
May 10, 2013, para. 6, https://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-
ihl.htm.

\(^{49}\) “The Use of Armed Drones Must Comply with Laws,” para. 6.

\(^{50}\) Ben Emmerson, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and
Fundamental Freedoms while Countering Terrorism (United Nations General Assembly, September 18, 2013),

necessary to allow right to prevail.'

The theory is deeply rooted in the Catholic tradition and dates back to the times of St. Augustine and Thomas Aquinas. Thus, JWT has a long history. It has also been highly consequential, informing the creation of IHL and as such is perceived as being quite a robust theory: as James Turner Johnson argues, ‘this was not an abstract body of moral theory; nor was it a moral frame superimposed onto reality.’ Rather, it acted as a theoretical framework for later developments in ways of thinking about war.

JWT is guided by two core rules: *jus ad bellum* (rules governing the justification for war) and *jus in bello* (rules governing the conduct of participants in war). *Jus ad bellum* sets out the criteria that must be met before the use of force. What this holds is that war may only be used: for a just cause; under legitimate authority; with the right intention; if there is a reasonable likelihood of success; with proportionality in mind; and only as a last resort. *Jus in bello*, on the other hand, directs how combatants should act once war has commenced, and stipulates that the principle of discrimination must apply to a just war. That is, war must not be directed at civilians, who did not create the war that they find themselves in. Further, a just war should consider the principle of proportionality: ‘the force used must be proportional to the wrong endured, and to the possible good that may come.’

These rules are important, and as above, have informed the creation of IHL. JWT can be neatly summarised with the statement that the ‘overall good of war must outweigh the (absolutely necessary) harm caused by it.’ Despite the theory's important and long history, though, JWT faces modern-day challenges. The theory's age – as explored in Chapter II – is one of these challenges: JWT was created in a world in which war was incredibly different from what it is now. Indeed, JWT is sometimes seen as irrelevant in the current context of war, first because of the altered nature of modern war (for example, the prominence of asymmetric warfare); and second because of developments in weapons systems (such as


55 Johnson, 453-454.

56 Hill, “Can Just War Theory Survive the War on Terror?” 78.

57 Hill, 78-79.

58 Hill, 79.

59 Hill, 79.

60 Hill, 79.

drones). Regardless, it is an important concept to briefly explore, because of how it intersects with IHL.

International humanitarian law

Indeed, JWT has informed the creation of IHL. IHL seeks to ‘balance legitimate military objectives with humanitarian considerations in the context of armed conflict.’ The rules surrounding IHL are contained within the Geneva Conventions (1949), along with its two Additional Protocols. There are three core principles of IHL, which should apply to the US drone program: necessity, distinction, and proportionality. The United States’ adherence to these standards has been cause for a slew of legal disputes and political debate, particularly in the post-9/11 period. Necessity requires a killing to have either a tactical or strategic purpose. The use of any military force must have the intention of achieving a ‘valid military purpose.’ Distinction divides combatants and civilians: civilians can only be targeted if they are either participating in combat or taking active steps to do so. This is considered ‘one of the most fundamental principles of IHL – integral to the raison d’être of this body of law…’ Proportionality requires that reasonably foreseeable collateral damage should not be disproportionate to the military objective. Attacks deemed ‘excessive in relation to the concrete and direct military advantage anticipated…[are] prohibited.’

As stated above, there is considerable debate, within the literature and amongst various other commentators, as to whether the United States is adhering to these core principles and procedural due process protections. Predictably, the United States deems itself

62 Brunstetter and Braun, “The Implications of Drones on the Just War Tradition,” 355; Hill, “Can Just War Theory Survive the War on Terror?,” 78.
64 “Q&A: US Targeted Killings and International Law,” para. 5.
as upholding IHL.⁷² Others point out the more problematic aspects of the drone program and associated conceptualisations of executive war powers, including the erroneous loss of life via the use of signature strikes, as evidence that the opposite is occurring. For example, Kristina Benson states that signature strikes do not (and cannot) distinguish between enemy combatants and civilians, resulting in civilian casualties, along with psychological damage.⁷³ Resultingly, the principles of distinction and proportionality are at risk of not being adhered to in these types of killings by drone.⁷⁴

There are two other core arguments identified within the IHL literature that raise questions around the adherence to these three core principles: the involvement of the CIA in the absence of formal charges and standard criminal process; and the contemporary relevance of IHL in light of new technologies such as drones.⁷⁵ The involvement of the CIA is also inextricably linked with transparency issues and the employment of secretive, internal procedures, too: as the Centre for American Progress highlights, the CIA can – when authorised by the president – violate international law, and it is not trained in the same way that the military is (according to IHL, for example).⁷⁶ Other contributors to the scholarly debate argue that the United States is not violating IHL, but rather reinterpreting it to sidestep legal and political roadblocks: ‘the intellectual authors of the counterterrorism war paradigm…have engaged in an interpretive project to construct legal rationales to evade and deny the applicability of IHL rules and norms to counterterrorism warfare, and this interpretive labour has generated new propositions of what is legal in war,’ writes Lisa Hajjar.⁷⁷ This notion of interpretation is of relevance to the second and central area of international law related to the drone program: self-defence.

Self-defence

Self-defence has been relied upon heavily by the United States as justification for their counterterrorism actions in the post-9/11 period. Self-defence is defined by Yoram Dinstein as the ‘lawful use of force under conditions prescribed by international law, in response to a

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⁷³ Benson, “’Kill ’Em and Sort it Out Later’,” 18.
⁷⁴ Benson, 36.
⁷⁵ See, for example: “Are U.S. Drone Strikes Legal?,” para. 2; Sterio, “The United States’ Use of Drones in the War on Terror,” 212; Bernard, “Delineating the Boundaries of Violence,” 5.
previous use of force.'\textsuperscript{78} It is a right that is conferred upon states through Article 51 of the UN Charter, which reads:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.\textsuperscript{79}

Self-defence can be interpreted in various ways by different nations and/or actors. For example, outside of the United States, a restrictive approach is often taken to self-defence.\textsuperscript{80} This leaves little room for flexibility, only permitting states to use force after another state has launched an armed attack of a magnitude significant enough to satisfy the required threshold for military retaliation.\textsuperscript{81} In contrast, a less restrictive reading of self-defence – and one that has become relevant post-9/11; used particularly by the United States – is the inclusion of self-defence as justification for a response to an imminent threat of attack from another state: self-defence before the fact (the “anticipatory” self-defence mentioned above).\textsuperscript{82} Such different interpretations were exemplified in the actions of the United States following the 9/11 attacks. For example, self-defence was largely considered a legitimate argument to be made with regards to actions taken in Afghanistan but was far more controversial as a justification for the actions taken in Iraq.\textsuperscript{83} The actions taken in Afghanistan fit quite neatly within the aforementioned restrictive interpretation – the United States was acting in retaliation to a wrong committed against them – but the actions taken in Iraq were not as clear a case of self-defence, by any stretch of the imagination.\textsuperscript{84}

In defending the legality of the drone program, officials in the Obama Administration regularly cited the right to self-defence.\textsuperscript{85} At the same time, in May 2013, Obama conceded to

\textsuperscript{78} Yoram Dinstein, \textit{War, Aggression and Self-Defence} (Cambridge University Press, 2005), 176-178.
\textsuperscript{79} UN Charter, Article 51, \url{https://www.un.org/en/about-us/un-charter}.
\textsuperscript{81} Banks and Criddle, 67.
\textsuperscript{82} Banks and Criddle, 68.
\textsuperscript{83} John Ehrenberg et al., \textit{The Iraq Papers} (New York: Oxford University Press, 2010), xxii.
\textsuperscript{85} DeYoung, “Secrecy Defines Obama’s Drone War,” para. 6.
many of the past (as well as ongoing) concerns about the drone program and self-defence in a speech at the NDU. Obama stated that:

As was true in previous armed conflicts, this new technology raises profound questions – about who is targeted and why; about civilian casualties, and the risk of creating new enemies; about the legality of such strikes under U.S. and international law; about accountability and morality…To say a military tactic is legal, or even effective, is not to say it is wise or moral in every instance. For the same human progress that gives us the technology to strike half a world away also demands the discipline to constrain that power – or risk abusing it. And [that is] why, over the last four years, my administration has worked vigorously to establish a framework that governs our use of force against terrorists – insisting upon clear guidelines, oversight and accountability that is now codified in Presidential Policy Guidance that I signed yesterday.

Similarly, Harold Koh– legal advisor for the State Department under Obama and respected human rights academic – reinforced that the use of drones for targeted killings was an act of self-defence, albeit not without its complications. Nonetheless, it was not unlawful, according to Koh.

Despite such positions, many questions continued to be raised concerning the applicability and operation of drone strikes – “lawful” still had a vague meaning. For instance, it remained ambiguous as to whether the self-defence argument could hold when a drone was used outside of a traditional warzone, and/or in those circumstances where a nation was not consenting to the presence of drones. And indeed, this is one of the most troubling points at hand, here: how should legal frameworks be applied within the unprecedented use of drones outside of declared warzones? Moving beyond such ambiguities, some scholars even make the argument that self-defence does not apply to the drone program at all. Amos Guiora writes that the drone policies adopted by the Obama Administration are ‘the antithesis of lawful, aggressive self-defence that must be at the core of a targeted killing/drone policy.’

86 “Remarks by the President at the National Defence University,” para. 30. This PPG will be expanded upon and explored below when the chapter turns to the policy guidelines of the Obama Administration.
88 Rogers and McGoldrick, 786.
an act of self-defence. Further, it is difficult for governments to legitimise claims of self-defence when specific details supporting that position are not made readily available – a further problematic aspect of the drone program’s secrecy, especially compounded because statements were not always clear about the legal justification for deliberately targeting and killing individuals outside operations in Afghanistan at that time.

In addition to the more concrete domestic and international laws that consistently frame the use of drones, there were several Obama-specific guidelines that applied to the drone program during his presidency, and which are also important to consider when looking at the frameworks that surrounded the drone program and its legality during this period of concern.

**Obama Administration Policy Guidelines**

The Obama Administration relied heavily upon the loosely worded AUMF as the authority for ongoing military drone strike operations, and this was controversial to those who viewed the AUMF as being too expansive. However, Obama’s drone program was also not necessarily unrestrained or without requirements: there were processes in place to guide the CIA and the military. Such processes were improved upon following the 2012 presidential election – as will be outlined in further detail – but even Obama’s first term as president should be included and explored here. Properly analysing the processes that guided the program from 2009-2012 is quite difficult, though: such information was largely kept secret, the rules on drone strikes changed often over time, and public debate on the effects, costs, and effectiveness of drone strikes was therefore curbed. There was some information that was made public, however, and before the chapter turns to the eventual transparency mechanisms adopted to rectify the secrecy issues that encompassed the drone program, it is useful to look to the guidelines that originally surrounded the program, as a more accurate indicator of the environment the program was conceived in – even if such guidelines existed for only a relatively limited period.

In a 2012 interview with the Cable News Network (CNN), Obama broke down – in his own words – the five core rules that guided his administration’s drone program. Obama

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stated: ‘It has to be a target that is authorised by our laws’; ‘It has to be a threat that is serious and not speculative’; ‘It has to be a situation in which we [cannot] capture the individual before they move forward on some sort of operational plot against the United States’; ‘[We have] got to make sure that in whatever operations we conduct, we are very careful about avoiding civilian casualties’; and ‘That while there is a legal justification for us to try and stop [American citizens] from carrying out plots…they are subject to the protections of the constitution and due process.’

This was one of the first occasions in which Obama spoke publicly on the drone program, and these core principles and rules are notable because they did end up framing the eventual “official” guidelines that were put into place by the administration – as explored below.

Obama also spoke of a need for values-based and ethical considerations – a need to ‘set up structures and institutional checks so that you avoid any kind of slippery slope into a place where [we are] not being true to who we are.’

For instance, there was an internal Obama Administration process for how targets ended up on the drone program’s “kill list.”

Alberto Gonzales writes that early on in the Obama Administration, there was a committee of over 100 national security members who deliberated on proposed targets for one to two months, and then this body recommended the names that should appear on the kill list, due to the presence of an “imminent threat,” alongside the names that no longer posed an imminent threat.

Following these categorisations, the list would be presented to John Brennan (at this time, Deputy National Security Advisor for Homeland Security and Counterterrorism). Brennan would pass those names along to President Obama, who would personally approve each individual placed on the list. After this presidential approval, the kill list would be passed along to a small group of CIA agents, charged with carrying out the strikes when there was “near-certainty” that the intended target would be eliminated.

This partial view of the legal and policy framework that underlined drone practice was one that the Obama Administration was willing to divulge. Behind closed doors – and not to be made public for some time – other discussions were being had concerning the drone program and how far it could be expanded as a central component of US counterterrorism.

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95 “Obama’s Five Rules for Covert Drone Strikes,” para. 1.
98 Gonzales, 8.
99 Gonzales, 8.
policy. This included the signature strikes that have already been referred to within this thesis – individuals being killed without the United States necessarily knowing their identity based on, in part, “pattern of life” analysis or intelligence intercepts.\textsuperscript{100} The Obama Administration was also discussing and debating the use of drones to kill US citizens abroad. President Obama later commented on this (in 2013, shortly after the killing of Anwar al-Aulaqi was declassified), stating that if a US citizen travelled abroad to wage war against the United States and its citizens, and if the United States was not in a position to capture this citizen, then his citizenship should not serve as a shield or hindrance to efficient drone operations.\textsuperscript{101}

Particularly relevant in this context is the apparent emphasis on the killing of HVTs by the Obama Administration. In 2011, after a drone strike in Pakistan went wrong and killed 41 people (all believed to be local tribesmen), Obama ordered the CIA to temporarily suspend drone strikes.\textsuperscript{102} There was one exception to this temporary suspension, though: the CIA could still strike if they located an HVT.\textsuperscript{103} But it is – again – not clear how the CIA concluded somebody was an HVT as this process was not made publicly available, and public debate was distorted by secrecy and selective disclosure.\textsuperscript{104} An educated assumption could be made, though, that HVTs at the very least would include leaders and high-ranking members of terrorist organisations such as al Qaeda and the Islamic State (ISIS). Paul Lushenko, writing on the practice of HVT targeting, further clarifies:

High value targeting…is a counter-terrorism practice that includes lethal strikes, direct action raids, and cyber operations designed to capture or kill adversarial personnel or assets. The practice of high value targeting is predicated on the belief that the loss of key personnel or assets is capable of degrading a terrorist group’s capabilities, leading to its eventual demise.\textsuperscript{105}

\begin{itemize}
\item[\textsuperscript{100}] “Should We Be Scared of Trump’s Drone Reforms?” Al Jazeera, published March 20, 2017, para. 27, \url{http://www.aljazeera.com/indepth/opinion/2017/03/scared-trump-drone-reforms-170319074243420.html}.
\item[\textsuperscript{101}] “Remarks by the President at the National Defence University,” para. 46.
\item[\textsuperscript{102}] Coll, “The Unblinking Stare,” \textit{The New Yorker} 90, no. 37 (2014): 98, \url{https://findit.library.nd.edu.au/permalink/61UONDA_INST/1m1taja/cdi_proquest_miscellaneous_1634241675}.
\item[\textsuperscript{104}] Coll, 98.
\end{itemize}
This exception to the suspension raises many questions, including what a temporary suspension means when there is flexibility (or, at the very least, ambiguity) around who an HVT is. In other words, was the HVT designation being exploited or misused as a useful lever to justify targeted killings during this period of suspended CIA strikes?

Research conducted by the Stanford and New York University law schools indicates that HVTs were not always the only targets for deliberate and premeditated killing. For example, in Pakistan, the majority of individuals killed by drone strikes were low-level alleged militants or insurgents – not HVTs that posed a direct threat to US national security.\(^{106}\) In short, these targets (albeit often linked to al Qaeda and associated forces) were not considered by some to have the means of posing a serious or imminent threat to the United States.\(^{107}\) A Reuters report from 2010 is consistent with this, maintaining that the CIA had killed low-level targets 12 times more than they had killed HVTs in Pakistan.\(^{108}\) It must be noted, of course, that this was early on in Obama's presidency, and the reporting occurred before the implementation of additional safeguard measures such as the ones to be outlined below to limit abuse and mistake. Giving weight to the claims that it was not always HVTs being targeted by the United States is a 2014 investigation conducted by Reprieve lawyer Jennifer Gibson. Gibson discovered that Fahd al Quso, al Qaeda leader and \textit{USS Cole} bombing suspect, had been reported killed in a 2010 drone strike, and then apparently reported killed again in 2012.\(^{109}\) Gibson found that this was an established pattern for the United States: in a study of 41 kill list targets, each man had "died" an average of three times before actually being killed.\(^{110}\) In attempting to kill these 41 men, as many as 1,147 people may have been inadvertently killed.\(^{111}\) Adding to criticisms that these strikes were unlawful and counterproductive, many of those killed were children.\(^{112}\)

Such drone practices – compounded with how difficult it was to find out about the existence of issues like collateral impact – was met with widespread and sustained criticism


\(^{107}\) \textit{Living Under Drones}, 31.


\(^{110}\) Gibson, 4.

\(^{111}\) Gibson, 6.

\(^{112}\) Gibson, 6.
from various groups and outlets who had serious concerns about the efficacy and counterproductive nature of drone strikes. This incorporated organisations such as the aforementioned Reprieve, and also NGOs such as the ACLU and the BIJ.\textsuperscript{113} This type of external backlash about the need to ensure better transparency and accountability, in conjunction with the 2012 election, led to a host of changes to the transparency of the drone program. Indeed, as early as 2012, the Obama Administration had aimed to better outline the legal basis for targeted killing that complied with international laws in the event of an election loss: they wanted any new president ‘to inherit clear standards and procedures.’\textsuperscript{114} The result of this was several more formalised guidelines (and it must be stressed here that these were guidelines – not entrenched in law) surrounding the drone program, largely informed and inspired by the laws and precedents discussed above. It is to these guidelines that the chapter will now turn.

\textit{Presidential Policy Guidance}

One of the first significant documents that the Obama Administration produced relating to the drone program was the 2013 \textit{Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities} (PPG). It aimed to establish standard operating procedures for when the United States took direct counterterrorism actions, which referred to both lethal and non-lethal uses of force. The PPG was also referred to as the “playbook” that guided drone strikes, specifying the conditions required for any operations as well as the bureaucratic processes for approving direct action.\textsuperscript{115} Such operations were identified as being conducted in places like Yemen and Somalia, as opposed to traditional warzones with US combat forces on the ground, like in Afghanistan. Overall, the document consisted of guidelines that aimed for harmonising policies and procedures and related factors to considering any proposed operational plan, such as the implications for the broader regional and international political interests of the


United States. It also set out the guidelines for determining a drone strike’s legality to ensure that such action may be conducted against any individual consistent with US laws. The PPG outlines that:

CT [counterterrorism] actions, including lethal action against designated terrorist targets, shall be as discriminating and precise as reasonably possible. Absent extraordinary circumstances, direct action against an identified high-value terrorist will be taken only when there is near certainty that the individual being targeted is in fact the lawful target and located at the place where the action will occur. Also absent extraordinary circumstances, direct action will be taken only if there is near certainty that the action can be taken without injuring or killing non-combatants.

There is also a requirement that lethal action only be taken if an individual’s actions pose a continuing and imminent threat to the United States. The PPG does permit the president, though, to authorise a drone strike that does not adhere to this standard, in the event of an “extraordinary” case. An extraordinary case could include using force against a person who poses an imminent threat to the people of another country. It is unclear whether or not President Obama ever bypassed the PPG in the event of an extraordinary case. There is no further explanation within the PPG as to circumstances in which its requirements could be shifted aside, and the document does not outline potential consequences if its requirements are not adhered to. The PPG also stipulates that there must be near-certainty both that the individual being targeted is the correct target and that the action can be taken without injuring or killing non-combatants.

The PPG was not declassified until 2016, in response to Freedom of Information Act (FOIA) litigation and after a federal judge expressed doubts that the Obama Administration

117 Brechenmacher and Feldstein, 63.
118 “Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities,” 227.
119 “Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities,” 241.
121 Siemion, 1210.
124 “Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities,” 227.
could withhold the document under a claim of executive privilege. This makes it difficult to get a sense of how the PPG was responded to and received in the moment, especially by critics of the drone program. Later detractors of the PPG, though, argued that the changes the Obama Administration made with the adoption of the PPG guidelines made it more difficult for counterterrorism teams to fulfill their mission of eliminating threats to US interests: ‘some military and intelligence professionals chafed under…Obama’s system, saying it was too bureaucratic.’ There were also concerns about the key language of the PPG. For instance, former Senior Director for Counterterrorism within the National Security Council (NSC) Luke Hartig identified two aspects of the PPG as being particularly vulnerable to future changes: those aforementioned “continuing, imminent threat” and “near-certainty” standards. According to Hartig, the continuing and imminent threat standard was weak because – and as critics maintained – it was an open-ended legalistic approach, while the “near-certainty” high standard could easily be dismissed by future administrations.

This prediction on the part of Hartig turned out to be quite prescient, given that under President Trump, the central planks of the PPG were adjusted or pointedly abandoned. Indeed, early on in his presidency, President Trump ‘ordered a review of policy constraints on the use of force, reportedly removed some of the procedural requirements for White House approval, and, at least temporarily, designated areas of Yemen and Somalia “areas of active hostilities” to which the PPG did not apply.’ The Obama Administration had consistently referred to the PPG and its standards, and particularly on its focus on preventing civilian casualties from drones. But the PPG was replaced in late 2017 by the Trump Administration, with the Principles, Standards and Procedures document (PSP). Ominously, the PSP modified the higher threshold set for the use of force adopted by Obama, removing the “continuing and imminent threat” requirement to allow for the targeting of those people who ‘contribute to the operations of terrorist networks without themselves being on the verge of launching fatal attacks…’ The developments (or regressions) taken regarding the drone program during the Trump era in “streamlining” bureaucratic review and related processes

126 Savage, “Trump’s Secret Rules for Drone Strikes Outside War Zones are Disclosed,” para. 21.
once again helps to highlight the limitations of ad hoc policy constraints when it comes to the use of drones.130

The PPG was a symbolic and arguably important “best practices” first step forward for the Obama Administration in terms of transparency and an oversight architecture, particularly in terms of taking care to prevent civilian casualties. In fact, post-2013 – following the PPG’s creation – civilian casualties in undeclared warzones did decrease.131 Yet a patchwork of executive prerogatives and overlapping policies that, for instance, applied different standards to different locations signalled the ongoing value of – and need for – establishing clear governing principles and robust parameters for overarching security governance benchmarks regarding the use of force. Further, the fact that the PPG was not entrenched in law meant that it could not transform the drone program in any consequential, institutionalised way beyond the Obama Administration. Further, it should also be reiterated here that the PPG was not made immediately available to the public. While the PPG was certainly an indicator of an internal effort to tighten the standards and processes surrounding the drone program, its original classification again captured sharp issues of executive decision-making and transparency, in and of itself.

Executive Order 13732
The matter of drone reform was reignited in 2016, which saw a flurry of activity from the Obama Administration on the matter. This was captured in a new executive order in 2016 – Executive Order 13732, United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force. This Order stated that: ‘As a Nation, we are steadfastly committed to complying with our obligations under the law of armed conflict, including those that address the protection of civilians, such as the fundamental principles of necessity, humanity, distinction, and proportionality.’132 It can be argued that the re-emergence of ideas around drone reform and the decisive use of force in pursuit of US national interests was likely driven from two key areas: first, the contemplation about a new President and White House staff that might be inclined to advance the

discriminate use of force in various operational contexts; and second, the (presumably) natural reflections and lessons learnt that come with the end of two terms as president.

Indeed, in an interview reflecting on his presidency, Obama spoke of his fears for the future of the drone program: that, ‘without Congress showing much interest in restraining actions with authorisations that were written really broadly, you end up with a president who can carry on perpetual wars all over the world, and a lot of them covert, without any accountability or democratic debate.’\(^{133}\) In addition to executive responsibilities, towards the end of his presidency, Obama also acknowledged that there were few rules or processes controlling drone use, signalling the need for potential oversight improvements.\(^{134}\) For example, in 2016 Obama stated, with direct reference to drones, that ‘the decision-making was not ad hoc, but it was embedded in decisions that are made all the time about a commander leading a military operation, or an intelligence team trying to take out a terrorist. And there [was not] enough of an overarching structure.’\(^{135}\) In part, this backdrop can help to explain the release of Executive Order 13732. This Order that promised to review or investigate incidents involving civilian casualties was released in conjunction with official numbers on combatant and non-combatant deaths resulting from US drone strikes – a move that carried out some earlier promises for further transparency about assessments of deaths from strikes against terrorist targets.\(^{136}\)

Overall, Executive Order 13732 outlined three major policies: first, the implementation of measures to reduce the risk of civilian casualties, primarily by better training personnel; second, the acknowledgment of responsibility for any civilians killed by US strikes (and the provision of \textit{ex gratia} compensation payments to their families); and third, the release of an annual report from the Director of National Intelligence outlining the total number of strikes outside of declared warzones, along with casualty numbers and an explanation of any discrepancies between government casualty figures and NGO casualty figures.\(^{137}\) These policies applied to all drone strikes, regardless of whether they were


\(^{135}\) Serle, 29.


conducted in a declared warzone or not, but the specific focus of the order was on undeclared warzones, highlighting the unique challenge such operations pose.\textsuperscript{138}

A fact sheet released alongside the Executive Order helps to explain the Administration’s broad philosophy behind the document:

As President Obama has said, ‘All armed conflict invites tragedy. But by narrowly targeting our action against those who want to kill us and not the people they hide among, we are choosing the course of action least likely to result in the loss of innocent life.’ In that spirit, this Executive Order applies to all of our operations…and underscores that our legal and policy commitments regarding the protection of civilians are fundamentally consistent with the effective, efficient, and decisive use of force in pursuit of our Nation’s interests.\textsuperscript{139}

Executive Order 13732 can be seen as a positive step towards more transparent and accountable policy frameworks. It was arguably one of the more transformative attempts at oversight in the context of the drone program. According to some White House insiders, it was a direct response to sustained pressure from NGOs to take better executive measures to mitigate the likelihood of future civilian casualties.\textsuperscript{140} The Order arguably reflected a desire for there to be a more robust precedent set for future presidents, but as an executive order, it did run the risk of being simply overturned by future presidents, too. Indeed, this is exactly what ended up happening under President Trump.\textsuperscript{141} In 2019, Trump overturned the policy standards on the protection of civilians in US military operations against alleged terrorists by revoking Section 3 of the Executive Order, which related to ‘congressionally-mandated civilian casualty reporting requirements.’\textsuperscript{142} However, early signs from the Biden Administration indicate a tightening of standards: in March of 2021 the administration placed

\textsuperscript{139}“Fact Sheet,” 289.
\textsuperscript{140}“Trump, Obama and the Future of Targeted Killing,” para. 21.
temporary limits on the use of drone strikes in undeclared warzones. According to administration officials, this was a “stopgap” to allow the Biden White House to review Trump’s drone program and ascertain what its own policies would look like.

Interestingly, under Obama, many discrepancies existed between US post-strike counts of civilian deaths on the one hand and NGO’s reporting on the other. Publicly released alongside the 2016 Executive Order were the internal civilian casualty figures for the years between 2009 and 2015. This included only those strikes that had occurred outside of areas of active hostilities – countries other than Afghanistan, Iraq and Syria. The figures estimated that between 64 and 116 civilians were accidentally killed within this period. In contrast, the Long War Journal, New America, and the BIJ (three of the independent organisations tracking civilian deaths) estimate the figure to fall anywhere between 212 and 801 civilians. So, while the release of these figures from the Obama Administration was intended to improve oversight outcomes and address potential weaknesses in the drone program, the official US policy figures raised several major concerns, including that the numbers differed so greatly from NGO estimates. Further, there was no data provided for individual strikes, but rather clustered data over a period of six years encompassing strikes across three countries.

Taking into account relevant information from all available sources, it should be noted that there was additionally no clarity relating to how the Obama Administration had tracked and calculated casualty figures. In contrast, NGOs such as the BIJ have outlined the comprehensive methodology that they use to input multiple sources, reconcile sometimes contradictory materials and arrive at casualty figures in some detail, as well as other active information on casualties such as name, gender, age, tribal affiliation and other identifying

144 Savage and Schmitt, para. 3.
149 Serle, Naming the Dead, 5.
The political context above highlights the oversight challenges when the battlefield is no longer clearly defined, as well as the possible limited capabilities available to drone operators to distinguish the accuracy of drone strikes. But it also illustrates the highly nuanced nature of transparency that is required of governments in public discussions about drone efficacy and legality: in this case, it is not enough to release some figures and then tell the public to essentially trust the exactitude of the government’s data, modelling and methodology. Transparency related to the use of lethal force requires more than just the release of blanket figures without context, regardless of any general statements or promises that strikes are – or will be – carried out in a precise manner.

2016 Presidential Memorandum

The next significant transparency measure was the December 2016 Presidential Memorandum, *Steps for Increased Legal and Policy Transparency Concerning the United States’ Use of Military Force and Related National Security Operations*. This memorandum directed the relevant security departments and agencies to share further public information relating to the frameworks within which the United States uses military force and conducts related national security operations.\(^{151}\) There were two central components to this effort: a formal report that would describe the key legal and policy frameworks guiding the United States’ use of military force and related operations; and a requirement that, on an annual basis, NSC staff would appropriate and coordinate a review and update of the above report.\(^{152}\) These legal and policy frameworks related to US operations would apply in "key" theatres of engagement – Afghanistan, Iraq, Syria, Libya and Yemen.\(^{153}\) This Memorandum resulted in the December 2016 publication of the 66-page *Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations*.\(^{154}\) This report stressed the inherent right to self-defence and the significance of

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the AUMF, and also reiterated the claim that self-defence was not restricted to threats posed by States:

Even before the September 11th attacks, it was clear that the right of self-defence applies to the use of force against non-State actors on the territory of another State. For centuries, States have invoked the right of self-defence to justify taking action on the territory of another State against non-State actors...Moreover, States may use force in self-defence against non-State actors either individually or collectively; for example, the United States is currently using force against ISIL in Syria in the collective self-defence of Iraq (and other States).155

It also argued that ‘in some cases, international law does not require a State to obtain the consent of the State on whose territory force will be used against a non-State armed group.’156

In the foreword to the above report, Obama emphasised what he sees as the long-held tradition (citing the examples of the Lieber Code and the US’s leadership during the Nuremberg Trials) of the United States enforcing ‘all conceivable legal aspects’ or justifications for the use of military force.157 He also reinforced that he had highlighted the importance of such a framework since his first days in office, to demonstrate the legitimacy of US actions and to strengthen relationships with allies and partners.158 Obama continued:

Far from eroding our nation’s influence, I have argued, adherence to these standards strengthens us, just as it isolates those nations who do not follow such standards. Indeed, as I have consistently emphasised, what makes America truly remarkable is not the strength of our arms or our economy, but rather our founding values, which include respect for the rule of law and universal rights.159

As for the body of the report, there are three key focuses of the section dealing with targeted killing:

(1) the law of armed conflict framework underlying U.S. targeting efforts; (2) two key topics relevant to the legal framework – constitutional constraints on the targeting of

U.S. persons and law of armed conflict rules applicable to the targeting of money and revenue-generating objects; and (3) key policies concerning targeting military objectives and reducing incidental civilian casualties.  

As a result, the report made clear the overriding US position that its drone targeting actions were consistent with IHL, and it explicitly stated that the US’s actions targeting enemy forces in the context of current hostilities did not constitute assassination. 

Another significant inclusion in the 2016 report was the outlining of the criteria that must be fulfilled before a strike could be made against a target who was also a US citizen: first, the target must pose an imminent threat to the United States; second, capture must be infeasible; and third, such operations must be consistent with IHL. The report concluded that all three of these criteria were met when it came to the killing of Anwar al-Aulaqi: 

Anwar al-Aulaqi posed an imminent threat of violent attack on U.S. persons. He was the chief of external operations of AQAP, one of the most dangerous regional affiliates of al-Qa’ida…[B]efore carrying out the operation that killed al-Aulaqi, senior officials conducted a careful evaluation of the circumstances at the time and determined that it was not feasible to capture al-Aulaqi…[S]enior officials determined that the operation would be conducted consistent with applicable law of armed conflict principles. 

This report marked a conclusion of sorts for the Obama Administration regarding drone strikes and targeted killings, serving as a final documented act to govern and limit the use of force. This incorporated the policy position that before any lethal action might be taken, the United States must have “near certainty” that the terrorist target is present and that non-combatants will not be injured or killed. It was released one month before the inauguration of President Trump, and its intention was conceivably to serve as a roadmap of sorts for the incoming administration. Indeed, President Obama noted in issuing the memorandum that he ‘encourages future Administrations to build on this report and carry forward the principles of transparency it represents.’ Yet, as mentioned, Trump went on to abandon some of the very
important policy constraints that Obama had insisted upon. Perhaps more cynically, it could be argued that the release of the report might also have been a pre-emptive attempt to limit criticisms that legal limits and policy scaffolds themselves during the Obama era had been insufficiently transparent. Nonetheless, the report was the result of a prolonged period of discomfort over the drone program and questions about its legality and the killing of civilians in pursuit of terrorist targets. It set out a detailed legal and policy framework for a program whose existence had once been denied entirely by the government, and it built on a long line of public speeches and statements during the Obama presidency.

It is important to highlight that, while worthy and a step in the right direction, the various and more formalised guidelines that have been explored above still did not make the drone program – or the use of drones – a more ethical one. Reflecting on the adjustments that the Obama Administration made, through the lens of the Biden Administration, Christian Enemark notes that these new guidelines were kept largely secret at the time, and that they ‘formed part of an ongoing attempt by the US government to control and legitimise a largely unprecedented form of extraterritorial state violence.’\textsuperscript{165} That is, there are ethical challenges associated with the ‘legal innovation’ that came with such a tinkering of the guidelines, not least the legitimisation of technological violence for security purposes.\textsuperscript{166}

**Conclusion**

The process of increasing oversight and transparency, including declassifying sensitive documents, is always complicated and intricate and will involve a range of policy and legal considerations, at the very least, to reinforce the process of democratic decision-making. As this chapter highlights, the laws (both domestic and international), safeguards and guidelines surrounding the drone program and “new” types of conflict are complex and multi-faceted. Such complexities in working through trade-offs and risks are heightened for several key reasons, including the rise of unconventional non-state threats and the fact that traditional conceptions of what constitutes an “imminent” threat must be understood in light of the modern-day capabilities as well as the involvement of groups like the CIA within the drone program and the overall secrecy that surrounds intelligence operations, given the utmost consideration that is required to protect sensitive information. Yet the Obama Administration also revealed that some increased transparency in security-related policy was possible, in a

\textsuperscript{166} Enemark, 304.
manner consistent with US laws and values, including the release of the PPG to help to bridge the divide on legal and policy frameworks to further the legitimacy of US drone operations. At the same time, Obama was unable to achieve any consistent consensus on the application of such frameworks to improve the effectiveness and transparency of the drone program, and underlying legal and political infrastructures did often have room for much improvement to address discrepancies and shortfalls in engaging in direct drone strike actions.

The issues of secrecy that have been touched upon in this discussion of the law and guidelines surrounding the drone program are of great importance within the broader context of this thesis and thus the next chapter (Chapter IV) will focus on the history of secrecy within the United States - with a particular focus on the secrecy surrounding the counterterrorism actions of Obama (and, earlier, Bush) that did not allow better oversight and public scrutiny of operations. This debate will help to contextualise the need for ongoing reforms, which is a central focus of the overall thesis, in looking to potential policies that each branch of government could develop to assist more robust and cogent oversight and accountability mechanisms regarding future drone programs.
CHAPTER IV – A POST-9/11 HISTORY OF SECRECY AND EXECUTIVE POWER AND HOW EACH HAVE CONTRIBUTED TO THE DRONE PROGRAM

While the previous chapter was focused on the relevant policy (and legal) background to the US drone program, the focus of this chapter is on the relevant contextual and historical background to the drone program – the national security exceptionalism of the period, and the ongoing tension witnessed between a transparent government and the maintenance of proper levels of secrecy. In particular, the chapter will provide an analysis of the context that allowed for the formation of a highly secretive drone strike program. As with so much of this thesis – and broader studies of counterterrorism – the post-9/11 environment is of great importance, as it witnessed the expansion of both government secrecy and the use of executive powers and orders. Certainly, in a world of transnational terrorist threats, increased government secrecy and executive power have sometimes been considered the “price to be paid” for enhanced national security.¹ This was highlighted in myriad ways through the Bush and then Obama Administrations, and thus these two administrations will form the focal point of this examination of secrecy. Indeed, the central argument that this chapter will make is that the Bush Administration created a framework of sorts for the use (or misuse) of secrecy and executive power and that this framework was inherited and continued by Obama, proving particularly useful to shield the drone program from proper and robust forms of accountability. The potential enduring legacy of such a framework poses a challenge to the question of how Schroeder’s conception of security governance can be utilised to avoid excessive secrecy, improve oversight arrangements, and move towards greater accountability benchmarks.

The fact that the aforementioned Bush and Obama Administrations are the post-9/11 administrations is also of importance in the debate about drones and whether greater transparency can lead to a more efficient and effective government in a milieu of national security concerns. While government secrecy and expanded executive power has long existed within American democracy – as will be briefly explored – the most relevant context to this broader body of work and related policy questions is that of a more permissive post-9/11 secrecy and executive power security environment, with seemingly boundless geographic scope. Such a security-focused environment is imperative because it allowed for the

formation of the secretive US drone program, along with permitting the implementation of some of the more contentious aspects of its existence that this thesis has already outlined, such as signature strikes and the killing of US citizens.

The focus of this chapter will essentially be twofold. First, the Bush Administration and its approaches to secrecy and executive power will be examined. It is important to begin with this (recent) history, as it cannot be divorced from the drone program and its secrecy provisions: the Bush Administration’s attitudes towards secrecy and executive power helped to create a particular culture within the executive branch that resisted the need for a well-informed public on security matters, that then influenced the attitudes and goals of President Obama once he came into office. Indeed, one of the most important tasks within this chapter is to explore the mindsets and ideologies of major Bush Administration officials, including US Vice President Dick Cheney and Secretary of Defence Donald Rumsfeld, to highlight the exponential impact that certain government officials had on shaping the course of US foreign policy. This will again be evidenced in the second main section of this chapter, which will emphasise Obama’s initial criticism of the Bush Administration’s exercise of secrecy and executive power when he was a presidential candidate, as then contrasted with how differently he acted once in the presidency. This will primarily be examined with reference to the drone program.

Before moving to the case study exploration of the Bush and Obama Administrations, though, some of the principles behind government secrecy will be discussed, along with an exploration of secrecy and executive power in the pre-Bush and Obama US experience.

**Reasons For and Against Government Secrecy**

The core argument contained within this chapter is that excessive government secrecy and enhanced executive power have led to troubling outcomes and precedents, creating the environment needed for the drone program to exist. It must be acknowledged, though, that secrecy can be a necessary tool for governments to use, and that there are advantages to its use: ‘democratic demands for transparency are tempered by an understanding that some government-held information is not plausibly related to the public interest.’ In other words, some information is best kept secret. One of the more forceful arguments for secrecy – often cited in the literature – is that it helps governments protect national security, preventing...

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enemies from gaining potentially harmful information.\(^3\) This was the argument that was given by the Trump Administration as it rolled back Obama-era drone transparency measures following Trump’s 2017 inauguration.\(^4\) As Heidi Kitrosser highlights, another core reason for governmental secrecy relates to efficacy:

> [D]isclosures hinder the efficacy of internal executive branch operations and deliberations and thus ultimately hurt national security. This is a subset of more general executive branch concerns to the effect that candour and efficacy in intra-executive branch deliberations are impacted negatively by participants’ awareness that they might be disclosed.\(^5\)

And indeed, this goes back to the attitudes of the likes of Cheney and Rumsfeld (which will be explored in this chapter), who expressed similar sentiments.

A further consideration that must be made is that intelligence agencies do require a certain amount of allowed secrecy to successfully carry out their work, without such work being undermined by enemy actors.\(^6\) This much is clear, but rather than taking such an argument and allowing it to result in the expansion of the secretive drone program, perhaps it should be more indicative of just how ill-suited the CIA is to be carrying out a paramilitary role via the drone program. That is, the answer to the uncontroversial statement that the CIA requires a certain level of secrecy to carry out its intelligence operations is to make sure that such intelligence operations do not stray beyond traditional boundaries.

Despite such reasons for governmental secrecy, it is evident that secrecy within the drone program has been (and continues to be) a serious and urgent problem that needs to be

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rectified. In terms of the cons of secrecy, one of the more compelling arguments against excessive secrecy from the government is that a certain amount of transparency can be beneficial to the government in the long run. Indeed, the argument has been made that if the Obama Administration had publicly described its efforts to reduce civilian casualty rates, the drone program may have been more palatable to its critics. Steve Coll continues: ‘It might have investigated reported errors and compensated survivors, as the U.S. military has done routinely since 2005 whenever it mistakenly kills civilians in Afghanistan. Instead, the law and the logic of secrecy surrounding the C.I.A. campaign silenced the Administration.’ And further – by embracing Bush’s secrecy framework and withholding key parts of information – an anti-drone message was able to take hold. That is, the negative elements of drone use were able to be emphasised by critics. As Christine C. Fair argues, ‘this [the drone] is the least indiscriminate, least inhumane tool we have…but until there is complete transparency, the public will not believe that.’ And indeed, the public was largely encouraged to think the worst of the drone program, with the overwhelming image conveyed being that of the executive branch acting as judge, jury and executioner.

But perhaps the most robust argument against secrecy has to do with the importance of transparency for keeping government accountable, and for promoting democratic norms and standards. The secrecy witnessed in the Bush and then Obama Administrations – combined with enhanced executive power – have helped to entrench the problem, passing from administration to administration. This is troubling for democratic principles but is also a concern for the conduct of foreign policy and counterterrorism. Such high-stakes potential consequences help to highlight the case against government secrecy, as well as legitimise the need for the more robust governance of mechanisms such as drones.

Such contrasting arguments help to highlight that there is a balance that must be struck between secrecy and transparency – that absolutes on either end are not a workable solution. As Sidney A. Shapiro and Rena I. Steinzor capture:

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8 Coll, 98.
10 Shane, para. 34.
Claims that the executive branch needs extensive secrecy to operate effectively are troublesome because of the important role transparency plays in the American constitutional system of checks and balances. When secrecy becomes sufficiently pervasive, it becomes difficult, even impossible, for Congress and the public to determine what is going on in the executive branch. Government failures are hidden and the public interest suffers. Indeed, it is not an exaggeration to say that pervasive secrecy can fatally undermine the structure of our constitutional government by allowing the executive branch to withhold crucial information from the other two branches and, as important, a free press. Nevertheless, absolute transparency is neither a realistic nor an appropriate goal. The release of some types of information can do more harm than good…The difficult public policy issue, of course, is striking an appropriate balance between openness and secrecy.  

As will be explored, though, such a balance has not been easy to strike within the United States, particularly in the post-9/11 era.

A Brief History of Secrecy and Executive Power in the United States

Secrecy

Excessive governmental secrecy has been perceived by some scholars as essentially antithetical to democratic standards, shielding the government from robust oversight and other forms of checks and balances. Indeed, the standard of “government by the people” is challenged when democratic citizens are not able to find out and evaluate what their government is doing in the people’s name. In broad terms, the rules governing how best to protect government secrets, while still ensuring that the American public has access to information on the operations of its government, has shifted along with various political changes and historical settings. Of course, attitudes towards transparency can change over time. But the merits of transparency – or the need for an open and accountable government – can be found in many definitions of legitimate democracies (and is also one of the relevant indicators of security governance that frames this thesis) and can be considered an essential attribute for a democracy to function legitimately and effectively. Transparency promotes accountability.

Yet at the same time, as Katlyn Marie Carter highlights, perceptions of secrecy do differ when definitions of democratic standards (and definitions and perceptions of executive privilege and representative democracy) fluctuate, especially in crisis conditions. As such, secrecy can either ‘bolster or undermine the government’s legitimacy as an instrument of popular sovereignty.’

Carter continues: ‘For instance, the use of secrecy to pass an unpopular policy in Congress could be considered either crucial to ensuring the people’s best interest was secured despite unpopularity, or as a subversion of the people’s will.’

Even factoring in such differences in perception that Carter writes of, governmental secrecy has always existed in some form, including within democratic nations such as the United States. Many presidents have adopted policies to address the tension between government transparency and the protection of – for instance – sensitive information. This heralds back to the earliest days of the US democracy, where within many of the colonies legislative affairs and proceedings were kept entirely confidential, even though state officials had been elected as representatives of the people.

As Michael Schudson highlights, this was not necessarily received with pushback from citizens:

In the Commonwealth of Massachusetts, a political entity with an elected assembly, legislative proceedings were confidential, even including how one’s representative voted on particular measures. It is hard to imagine a matter more central to democracy than the availability to voters of a public record of how their representatives vote, but this was not something the people of Massachusetts in the 1700s demanded.

And as Schudson notes in a later (2020) journal article, the assumption that transparency was ‘a value inherited from America’s founders…[is] simply not true.’ In fact, transparency did not begin to be something that was pressed for until the 1960s and 1970s. The Framers of

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17 Carter, 414.


19 “The Right to Know vs the Need for Secrecy,” para. 9.


21 Schudson, 1672.
the US Constitution ‘vowed to keep the contents of their deliberations strictly among themselves.’\(^{22}\)

Schudson’s point that transparency began to be more deliberately pushed for in the 1960s and 1970s provides a helpful starting point for discussions about the rise of secrecy in the modern presidential era. The claim that the 1960s are an important decade in such conversations can be reinforced by the 1966 passage of the FOIA.\(^{23}\) The vital essence of this act, according to the US Supreme Court, was to ensure an ‘informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.’\(^{24}\) James D’Angelo and Brent Ranalli likewise date the modern push for transparency back to the 1970s, with the advent of “sunshine reforms” that would ‘make legislators more accountable to their constituents.’\(^{25}\) What such reforms meant in a practical sense was that legislator votes were recorded, and members of the public could attend open congressional committee meetings.\(^{26}\) The 1970s also saw the introduction of requirements mandating ‘the disclosure of campaign contributions.’\(^{27}\) It is important to note the role that political (presidential) administrations likely played in the creation of calls for greater transparency. That is, a push for further transparency in this period could arguably have been prompted as a reaction to the executive excesses of the Nixon Administration. As Charlie Savage highlights, ‘the Nixon administration…went further than any predecessor in centralising power and eroding democratic checks and balances, [and] made expanding secrecy a major part of its strategy.’\(^{28}\)

What this brief history of secrecy in the United States serves to highlight is that while secrecy has long existed in democracies, arguments can be mounted that it was not something of widespread concern until much later in the democratic experiment. This development


\(^{26}\) D’Angelo and Ranalli, 155.


\(^{28}\) Savage, Takeover, 89.
could potentially be partially explained by the unique intersection of secrecy and executive power that was witnessed in the 1960s and 1970s decades.

Executive power
Views on the nature of executive power in the days of the US’s founding link strongly to the experiences of power in England, namely via the “tyrannical” monarch. As a result of this early experience, it can be argued that the Americans ‘well understood the threat that strong executive power poses to democracy. In their attempts to halt the execution of such unrivalled power, the US Founders aimed to establish four core mechanisms: limited government; the rule of law; the separation of powers; and checks and balances. As such, oversight plays a key role in a democratic system of checks and balances. The separation of powers is also of particular importance. Legitimate democracies are seen to require a separation between the executive, judicial and legislative branches of government to ensure that there are appropriate checks and balances placed upon each branch. An important consideration to be made is also each branch’s co-equal status. Many scholars have written on the rise of executive power and the negative impact that this can have on normative standards and democratic deliberations. For example, maintains that increased secrecy and deference to the executive have weakened core democratic standards over time, including allowing the scope of presidential power to act as an absolute shield against accountability.

As with the secrecy discussion, it is useful to look back to the 1960s and 1970s era, and particularly at the Nixon “imperial” presidency, a presidency ‘whose powers to act beyond the will of Congress were greatly inflated when compared with those the office held

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29 Savage, 14.
30 Savage, 14.
33 Carolan, 41.
throughout most of American history.footnote{36} And indeed, such excesses did result in some congressional pushback and a reining in of executive power: ‘Watergate and the fall of Richard Nixon led to widespread distrust of the presidency and to resounding calls for limiting presidential power.’footnote{37} After Nixon resigned from the presidency, Congress further acted in an attempt to curtail future abuses of presidential authority as well as fundamental principles of the rule of law, largely through the passage of the War Powers Act, the Foreign Intelligence Surveillance Act (FISA), and the Independent Counsel Act.footnote{38} In the wake of the findings of the Church Committee (explored below), Congress also created permanent intelligence oversight committees in both the Senate and the House of Representatives.footnote{39}

Despite such actions to halt unchecked authority, a feature of the post-9/11 political climate has been the pull towards a centralisation of power in the executive branch of government (particularly in the hands of the president and vice-president), along with deliberately enhanced secrecy around executive decisions, especially when “engaging the enemy.”footnote{40} The Bush Administration – which included some key players from the Nixon Administration – expanded executive power, making claims for authority by appealing to the terrorism environment, fighting al Qaeda and dealing with “enemy combatants.” Acting on the precedent (and perhaps, arguably, emboldened by it) set by the Bush Administration, this template of exclusive executive power had a direct impact on the succeeding Obama presidency, with Obama embracing executive power and secrecy surrounding decision-making, especially in national security matters.footnote{41} Such use of executive power did not originally stem from the Bush Administration, though, with much of the literature highlighting the role that the Church Committee played in unearthing executive abuses in this important 1960s and 1970s climate.

footnote{36} Savage, Takeover, 21.


footnote{40} Baker, “Guarding the Parchment Barrier,” 54. Exactly how this occurred will be outlined within the administration case studies, outlined in this chapter.

footnote{41} Jeremy Scahill, Dirty Wars: The World is a Battlefield (London: Serpent’s Tail, 2013), 246.
Loch Johnson provides a neat contextualisation of the political climate in the mid-1970s, maintaining that – as a result of the withdrawal from the Vietnam War and the resignation of a president for the first time in history – it was a ‘time of great turmoil and Americans’ confidence in their institutions of government began to plummet.’ 42 In particular, ‘Watergate [had] shocked the American public and spurred many of its representatives in Congress to demand an investigation into the past activities of [the FBI, CIA,] NSA [National Security Agency] and others.’ 43 The response to such a confluence of events was the 1975 creation of the Church Committee, a Senate Select Committee that was tasked with investigating the US intelligence agencies (including the CIA). 44 The investigation was a robust one, uncovering – among other revelations – assassination plots, spying on American citizens, and the infiltration of a variety of US groups, including religious organisations. 45

In addition to uncovering such revelations of executive abuse of power, the Church Committee acted to implement a number of reforms that would prevent such abuses of power from occurring again, resulting in a shift in outlooks regarding oversight – ‘a sea change in attitudes within the United States about the need for supervision of the intelligence agencies.’ 46 The most notable outcome of the Church Committee, as mentioned, was likely the creation of a permanent Senate Committee on Intelligence. 47 The Committee was created by the Senate in 1976 to:

…“oversee and make continuing studies of the intelligence activities and programs of the United States Government,” to “submit to the Senate appropriate proposals for legislation and report to the Senate concerning such intelligence activities and programs,” and to “provide vigilant legislative oversight over the intelligence

43 Thomas Young, “40 Years Ago, Church Committee Investigated Americans Spying on Americans,” Brookings Now (blog), Brookings, May 6, 2015, para. 2, https://www.brookings.edu/blog/brookings-now/2015/05/06/40-years-ago-church-committee-investigated-americans-spying-on-americans/.
activities of the United States to assure that such activities are in conformity with the Constitution and laws of the United States.”

Additionally, in 1980, ‘Congress enacted a law that required the White House to report on all of its spy programs to the new intelligence committees.’ It is important to note here that during this time, both Dick Cheney and Donald Rumsfeld were working in government, having witnessed the rise and subsequent fall of executive power, largely brought about by the Church Committee. This will be unpacked in further detail shortly, but briefly: ‘the end result of the Church investigation was a nightmare for Cheney and his executive power movement.’ Yet this executive power movement arguably came back in full force following 9/11, and thus the chapter will now turn to an examination of this period, through the lens of the Bush Administration, and in particular its reliance upon enhanced secrecy and expanded executive power.

Bush and Secrecy

There are several important points to note before discussing the Bush Administration’s approach to secrecy and executive power – points that have largely informed and shaped the discussion contained within this chapter. The first is that the political context of Bush’s two administrations cannot be divorced from the broader discussion on his Administration’s approach to executive power and secrecy. 9/11 occurred early on in Bush’s presidency, and having such devastating terror attacks occur at such a pivotal time ultimately helped to shape the direction that his presidency took for the following seven years. The second important point is related to Bush’s (often commented-upon) relative lack of experience, particularly within the realm of foreign policy. For example, soon after taking office, Bush reportedly said to Condoleezza Rice (then-National Security Advisor) that he had “no idea” about

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48 “About the Committee,” U.S. Senate Select Committee on Intelligence, para. 1, https://www.intelligence.senate.gov/about.
49 Scahill, Dirty Wars, 10.
50 Scahill, 10.
foreign affairs. This arguably allowed for more powerful figures within his administration (including Dick Cheney and Donald Rumsfeld) to put forward their ideologies and attitudes regarding a program of expanding executive power in the area of foreign policy – ideologies and attitudes that were shaped from their experience in the Nixon Administration and the resulting Church Committee.

Third relates to Bush’s governing style itself, which is closely linked with his perceived lack of experience. Much has been written about Bush’s reported preference to delegate tasks, including that he often failed to give detailed and specific guidance along with such delegations. This open-ended approach has been posited as coming from his background in business, where he had absorbed the belief that a successful chief executive should allocate tasks to others. This leads to the fourth notable point to be borne in mind here: that Bush surrounded himself with figures whom he trusted, including some who had also served in his father’s presidential administration (again most notably, Dick Cheney and Donald Rumsfeld). As Chris Whipple writes, ‘Bush’s cabinet looked like homecoming week for his father’s friends from the Gulf War.’ This governing style, along with those people that Bush surrounded himself with, almost certainly influenced the decisions that the president went on to make following 9/11, including the decisions to go to war with Afghanistan and Iraq.

As alluded to, two of the more significant influences on Bush regarding secrecy and executive power were Vice President Dick Cheney and Secretary of Defence Donald Rumsfeld, whose ways of thinking are essential to explore to understand the United States’ response post-9/11. Jeremy Scahill writes a clear introduction to such ways of thinking:

For decades, Cheney and Rumsfeld had been key leaders of a militant movement…Its mission was to give the executive branch of the US government unprecedented powers to wage secret wars, conduct covert operations with no oversight and to spy on US citizens. In their view, Congress had no business overseeing such operations but should only fund the agencies that would carry them out. To them, the presidency


54 According to Ilan Peleg, this was the case either because of Bush’s conviction, weakness, inexperience, or all three: Peleg, The Legacy of George W. Bush’s Foreign Policy, 9.

55 Tyson, ‘“Stuff Happens”,’ 330-332; Scahill, Dirty Wars, 351.

56 Tyson, 330-332.


59 Pallitto and Weaver, Presidential Secrecy and the Law, 5.
was to be a national security dictatorship, accountable only to its own concepts of what was best for the country.\(^{60}\)

At this point, it is also useful to refer back to the UET that was outlined in Chapter I. David Gergen, Advisor to Presidents Nixon, Ford, Reagan and Clinton, highlights the pervasive nature of such a theory within the Bush Administration: ‘My own interpretation is that they came in, spurred by Dick Cheney, to have an enlarged sense of the presidency, to have a penchant for secrecy, to basically have a view that the Congress, in effect, works for us, not with us; that [we are] the lead branch, not a co-equal branch.’\(^{61}\) As the following discussion points will highlight, this was arguably a fair assessment.

**Cheney**

Dick Cheney’s first foray into government was as an aide in the Office for Economic Opportunity during the Nixon Administration; he was hired by Donald Rumsfeld.\(^{62}\) Cheney later served as Chief of Staff to President Gerald Ford, and thus had a front-row seat to the various changes in accountability and executive power that occurred between the two administrations. Such changes came largely through the Church Committee that was referred to above. Many of the discussions following the Committee’s report revolved around greater transparency and oversight of the intelligence sector, to counter potential abuses of power.\(^{63}\) Enabling Congress to have more authority and be more effective in carrying out their oversight responsibilities was arguably not something that sat comfortably with Cheney, who reportedly believed that such oversight was unrealistic from a political standpoint – that too much transparency resulted in a poor quality of advice being imparted to presidents, and that secrecy was required so that a president’s advisors could speak freely and openly about important issues, without fear of the public knowing and making premature judgments.\(^{64}\) This point of view would only have been strengthened by the Church Committee, and the ways through which it curtailed executive power, including through requiring intelligence agencies to report to Congress. An avowed critic of the Church Committee, Cheney’s attitudes towards

\(^{60}\) Scahill, *Dirty Wars*, 9.


\(^{63}\) Scahill, 10.

both this reform process and executive power had major implications for his final stint in
government, as vice president.65

Following his roles in the Nixon and Ford Administrations, Cheney served as George
H.W. Bush's Secretary of Defence and thus came into the vice-presidency familiar (and
friendly) with George W. Bush.66 He took control of the transition team (delegated to him by
Bush, who was focused on the vote in Florida) and filled positions with friends and allies
such as David Gribbin, David Addington, and his daughter, Liz Cheney.67 These friends and
allies shared similar views to Cheney, including on presidential power and the downsides of
counterbalancing the power of the executive branch.68 While the full extent of Cheney’s
ideologies is not the primary focus of this thesis, what such a backdrop suggests is that debate
about executive policy that might be seen as unethical, illegal or resistant to oversight is not
necessarily a new phenomenon arising out of 9/11. Rather, 9/11 provided the impetus for
such ideas about the structure and authority of the executive branch – in the form of the UET
– to be more fully realised. Indeed, Cheney’s pre-existing vision of executive power became
evident on 9/11:

He persuaded Bush not to return to the White House even after Bush had publicly
announced that as his destination. When told that an unidentified plane was heading to
Washington, D.C., Cheney ordered the military to shoot it down. Cheney’s chief of
staff, Lewis ‘Scooter’ Libby, later said Cheney had responded to that historic request
for authority ‘in about the time it takes a batter to decide to swing.’69

Cheney was also a fierce proponent of executive secrecy, ‘thriving in darkness, operating
by stealth within the government, and making a cult of secrecy.’70 He thought that
transparency would result in a lesser quality of advice being offered to the president for fear
of the public finding out, and he would rarely write anything down, refusing to even use an
email account.71 Shirley Anne Warshaw summarises some of the implications of this insular

65 Scahill, Dirty Wars, 10.
66 Joel K. Goldstein, “Cheney, Vice Presidential Power, and the War on Terror,” Presidential Studies Quarterly
938.
67 Goldstein, 109.
68 Goldstein, 130-131.
69 Goldstein, 106.
70 “The Imperial Vice Presidency,” para. 6.
71 Savage, Takeover, 90. Shirley Anne Warshaw argues against Cheney’s vision of what transparency means for
the quality of advice being offered, maintaining that Cheney’s failures in his key portfolio areas likely stemmed
from his operating in secrecy, failing to seek advice from other government officials: Shirley Anne Warshaw,
mindset once Cheney’s secretive tendencies began being applied to national security decision-making, outlining that he would circumvent other important administration officials when making decisions (such as, for example, the Secretary of State when it came to making the case for the war in Iraq). He was also one of the central figures associated with developing enhanced interrogation techniques as a policy. Warshaw concludes that secrecy was ‘essential to the imperial co-presidency he was creating.’ Cheney was not acting alone, though: it is also important to consider the role of Donald Rumsfeld here.

**Rumsfeld**

Like Cheney, Donald Rumsfeld is another Bush-era figure who has had a profound influence on the prominence of executive power and secrecy post-9/11. Similar to Cheney in a variety of ways, including in his attitudes towards executive power, their relationship extended back to their days together in the Nixon Administration. One significant comparison point between the two men relates to their shared attitude towards the Church Committee; Rumsfeld was also a strong critic. In the period immediately following the Church Committee, for instance, Rumsfeld lamented the then-recent focus on civil liberties, believing the new approach to be overly deferential. Rumsfeld was also a secretive Secretary of Defence, working in a way that ‘allow[ed] him to increase control over information but that acted to distort and complicate the policy-making process.’ As Stephen Benedict Tyson writes (focusing on the specifics of how secrecy was achieved by Rumsfeld rather than any ideological reasoning behind it):

Rumsfeld operated in a secretive fashion, one that did allow him to increase control over information but that acted to distort and complicate the policy-making process. A tactic repeatedly employed was to forbid the taking of notes in meetings, and to tightly control the distribution of briefing slides, charts, and information. Often, fewer packets of information than there were attendees at a meeting would be brought, and Rumsfeld would in any case have them all collected back at the end.

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72 Warshaw, 177.
73 Warshaw, 177.
74 Warshaw, 177.
75 Scahill, *Dirty Wars*, 9.
77 Tyson, “‘Stuff Happens,’” 333.
78 Tyson, 333.
One of the more significant controversies to have occurred during Rumsfeld’s tenure as Secretary of Defence is the Abu Ghraib scandal, which was executed through secret memos. The Abu Ghraib scandal refers to the systematic abuse of detainees at the Abu Ghraib Prison in Iraq, perpetrated by both soldiers and IC members. There was a plethora of evidence confirming the existence of such abuse, including graphic photographs. After the photographs depicting the torture were released, Rumsfeld described the abuse as an “isolated” case. As Alette Smeulers and Sander van Niekerk convey, though, this was not quite true; rather, it was proof of a broader pattern, but this was the only case in which there was photographic evidence released to the public. Further, Rumsfeld signed off on some of the tactics used. On December 2, 2002, for example, Rumsfeld signed off on a memo in which he authorised the use of techniques such as sleep and sensory deprivation, forced grooming and forced nudity. Rumsfeld added a handwritten note after signing this memo, referring to the use of prolonged periods of standing as an “enhanced interrogation technique”: ‘However, I stand for 8-10 hours a day. Why is standing limited to 4 hours?’

Significantly, as Karen Greenberg and Joshua Dratel highlight, it is important to consider that the use of secret memos – or any form of secretive, unilateral power when making policy – is likely to fail or be calamitous, because it excludes the necessary viewpoint of others, thus creating ‘policies distorted by only a single, subjective point of view.’ Indeed, such a statement is reinforced by Shirley Anne Warshaw, who uses Cheney’s policy failings to highlight the pitfalls of not seeking out further expert advice.

While Cheney and Rumsfeld were undoubtedly incredibly influential with regards to the exercise of the enhanced executive power and secrecy that characterised the post-9/11 years, it would be incorrect to suggest that these two figures are the only reason that the Bush Administration embraced secrecy and executive power in the way that it did. That is, George W. Bush was not manipulated by these men; he had his own attitudes concerning secrecy and executive power that need to be borne in mind. It is not fair to say that the policies of the

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81 Hersh, para. 6.
83 Smeulers and van Niekerk, 328.
84 Smeulers and van Niekerk, 336.
85 Greenberg and Dratel, The Torture Papers, 237.
86 Greenberg and Dratel, xxiii.
immediate post-9/11 period were “Cheney policies” or “Rumsfeld policies” – they were the policies of the broader Bush Administration, and the individual who must ultimately bear the brunt of policy consequences is the president himself. And indeed, James Pfiffner affirms that Bush was not manipulated, writing that the ‘Bush management style is marked by secrecy, speed, and top-down control.’88 While many scholars argue that Bush was essentially Cheney's puppet, Pfiffner argues that Cheney was implementing Bush’s policies, delegated to him by the President: ‘President Bush has articulated a bold vision, set priorities, and then delegated the implementation to his vice president…and his loyal staff team.’89 When reviewing Bush, Cheney and Rumsfeld’s opinions on executive power and secrecy, it is also important to consider the overarching ideology that informed such opinions (and broader administration policy), which in this case included neo-conservatism.

Neo-conservatism

Many of the key players in the Bush Administration shared an adherence to the neo-conservative ideology, which played a significant role in the expansion of secrecy and executive power and sat alongside a scepticism about the ability of international law and related institutions to solve serious security problems. These ideas crystallised in specific policy proposals and ultimately shaped foreign policy itself. Definitionally, neo-conservatism is a ‘right-of-centre ideology that emphasises American exceptionalism and calls upon the United States to act, even militarily and unilaterally, in order to establish hegemonic control abroad.’90 Ilan Peleg writes that it encompasses eight major ideas:

(1) assertive nationalism (or patriotism); (2) radicalism (reflected in complete rejection of the status quo); (3) militarism, especially in terms of switching from a defensive posture of deterrence and containment to an offensive posture of preemption and prevention; (4) exceptionalism; (5) a mixture of optimism and Hobbesian pessimism; (6) imperial universalism in the name of two different but connected ideas, democratisation and benevolent hegemony; (7) evangelism; and (8) unilateralism.91

89 Pfiffner, 7. For arguments relating to Cheney’s manipulation of Bush, see: Goldstein, “Cheney, Vice Presidential Power, and the War on Terror,” 105; Edelson, Emergency Presidential Power, 126.
90 Peleg, The Legacy of George W. Bush’s Foreign Policy, 3-4.
91 Peleg, 51.
Neo-conservatives dominated the Bush Administration, led by Cheney and Rumsfeld but also including the likes of Paul Wolfowitz, Scooter Libby, Condoleezza Rice and George Tenet. For this group, 9/11 presented a ‘golden opportunity, a uniquely powerful temptation to revolutionise the matrix of world politics in a fundamental way.’ Such a tradition of neoconservative thinking advocated a more forceful utilisation of American power while those falling outside of the neo-conservative in-group were quickly silenced, sidelined or ignored. For example, Bush-era counterterrorism expert Richard Clarke warned of the danger of al Qaeda as early as April of 2001. Paul Wolfowitz, then-Deputy Secretary of Defence, asked: ‘Why are we talking about [al Qaeda]?,’ stating that the terrorist group was incapable of mounting an attack without Saddam Hussein’s assistance. This reinforces an impression of highly insular decision-making that does not result in good policymaking, particularly considering the eventual decision to invade Iraq. Adding neo-conservatism to the mix, with “in-groups” of those who adhere to it and “out-groups” who do not, further complicates this.

Along with the aforementioned discussion points that allowed for the expansion of executive power and secrecy in the modern era (9/11; Bush’s governing style and lack of experience; the influence of Cheney and Rumsfeld; the adherence to neo-conservatism) there were two other central ways through which executive power and secrecy were heightened during the Bush Administration: through the use of emergency powers, and through the use of the state secrets privilege (SSP). Of course, such avenues were also utilised by the Obama Administration, too, and thus will be discussed with reference to both administrations.

Emergency powers

Emergency powers are of immense importance to presidents. In broad terms, such powers are ‘meant to give the government a temporary boost until an emergency passes or there is time to change the law through normal legislative processes.’ The US Constitution ‘includes no comprehensive separate regime for emergencies’ – such actions stem from implied
presidential powers contained within the Constitution. Nonetheless, emergency powers act as a ‘parallel legal regime [that] allows the president to sidestep many of the constraints that normally apply.’ This parallel regime comes into effect the moment a president declares a national emergency – vesting in them a broad and undefined executive power – at which time more than 100 special provisions become available to them. These inherent powers as they are known today date back to the 20th century, which is when Congress began to legislate on the matter of the specific boundaries of the president’s constitutional authority during emergencies. Over time, statutory authorities and old states of emergency piled up until there were hundreds of statutory authorities (and four obsolete states of emergency) in effect. For example, the national emergency that President Truman had declared in 1950, during the Korean War, had remained in place and was later used in an attempt to justify US involvement in the Vietnam War. In an attempt to rein in this proliferation, the National Emergencies Act of 1976 was passed. This aimed to set out core rules surrounding the use of emergency powers: that the president should specify which powers they intended to use; that they should issue public updates if any additional powers were to be invoked; that they should report to Congress on expenditure related to the emergency every six months; that the state of emergency should expire after one year unless renewed; and that Congress should meet every six months to reconsider a vote on the termination of an emergency.

The central premise underlying the notion of emergency powers is that in times of crisis, existing powers available to a president may not be sufficient, and to pass legislation expanding powers would take an unreasonable amount of time. In theory, these powers are only temporary – in effect until the national emergency passes. The emergency powers can be used in a variety of contexts, though, and how they are used (or not used) can be indicative of a particular administration's wider approach towards executive power. For example – following 9/11 – the Bush Administration quickly gained congressional approval for military action in Afghanistan in the form of the AUMF, as discussed in Chapter III. However, a memorandum from Bush Administration lawyer John Yoo claimed that Bush did not require

97 “The Alarming Scope of the President’s Emergency Powers,” para. 9.
100 “The Alarming Scope of the President’s Emergency Powers,” para. 12.
this approval, because such a decision was for the president and the president alone.\textsuperscript{106} This differed markedly from previous uses of presidential power in response to emergencies. For example, in 1861, President Abraham Lincoln raised troops to respond to the threat posed by Confederate sympathisers, using emergency powers to do so.\textsuperscript{107} Lincoln then sought retroactive approval from Congress for this limited response.\textsuperscript{108} In contrast, Yoo’s memo suggested that congressional approval was not necessary, as it was merely a formality when compared with the president’s inherent power to wage war.\textsuperscript{109} Given the prominence of the UET within the broader administration, it is unlikely that Yoo was the only Bush Administration official to hold this belief.

In total, Bush used the emergency powers 14 times over the course of his presidency, including in response to the 9/11 attacks and Hurricane Katrina (2005).\textsuperscript{110} Of course, the exercise of certain powers that may be applied in the event of threats from crisis, exigency, or emergency circumstances is not necessarily a reflection of an abuse of executive power, and that is not the central argument being made here. The use of emergency powers to deal with a terror attack on the scale of 9/11, or to help respond to a natural disaster as destructive as Hurricane Katrina, is not a problem, per se. What is a potential problem – and what should be robustly debated – is instead how such powers are used; how long they are used for; and how their use affects the balance between individual rights and national security. It should also be noted here that despite the focus of the chapter thus far, the use of emergency powers has not been the exclusive domain of the Bush Administration, or even the Republican Party more broadly: various Democratic presidents have also utilised such powers. For example, in 1979 President Jimmy Carter declared a national emergency to deal with the threat posed by Iran during the hostage crisis.\textsuperscript{111} In 1995 President Bill Clinton declared a national emergency in response to the threat posed by Colombian narcotics traffickers.\textsuperscript{112} Obama utilised the emergency powers almost as many times as Bush did, using them 12 times throughout his presidency, including during the H1N1 influenza pandemic, and for targeting individuals

charged with human rights violations (essentially, the implementation of sanctions) in nations such as Burundi, Venezuela and South Sudan. Again, this is not to suggest that these individual uses of the emergency powers were not valid or necessary; but rather that the powers are broad and open-ended in terms of governmental role and authority, and could be used to further enhance executive power, for a variety of purposes.

State secrets privilege
A second method through which executive power and secrecy were upheld and expanded in the Bush Administration was via the use of the SSP. As explored below, it has been suggested that ‘the privilege has been overused by the executive branch to prevent disclosure of its own questionable, embarrassing or unlawful conduct – particularly with respect to the “war on terror”’. The SSP is an evidentiary privilege, which permits the government to refuse the disclosure of information during litigation when there is the potential for such disclosure to be harmful to the nation’s national security. The SSP was first affirmed by the Supreme Court in 1953, in United States v Reynolds. This case was brought by three widows, who sued the government for negligence after their husbands died in the mid-air explosion of a B-29 bomber. The widows wanted access to several documents, including the official incident report. Louis Fisher summarises the outcome (and long-term impact) of the case:

The manner in which the Court held for the government greatly weakened the duty of the judiciary to analyse executive assertions and protect the right of private plaintiffs who challenge government abuse and illegality. The government warned the Court that disclosure of the accident report would do grave damage to national security. A half century later, after the government had declassified and released the accident report, it was evident that the report contained no state secrets. Instead, it revealed that the government had acted negligently, such as failing to install proper equipment to reduce the risk of engine fires.

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115 Liu, “The State Secrets Privilege and Other Limits on Litigation Involving Classified Information,” 70.
117 Fisher, 474.
118 Fisher, 474.
According to Fisher, the opinion appeared more like one designed to meet political needs, at the cost to the rights of litigants and constitutional principles.\textsuperscript{119} In this sense, it set a concerning precedent.

The Bush Administration invoked the SSP repeatedly in the aftermath of 9/11, in cases relating to torture, extraordinary rendition, and warrantless surveillance.\textsuperscript{120} One quite prominent example of the privilege being used occurred in 2004, when Khaled el-Masri (a German citizen of Lebanese descent, mistakenly believed to be a member of al Qaeda) was handed over to CIA agents, transferred to a secret prison in Afghanistan, and held for five months where he underwent beatings and various other “interrogation techniques.”\textsuperscript{121} El-Masri later sued the US government for this treatment, and the Bush Administration claimed that the entire case should be dismissed because it would reveal state secrets.\textsuperscript{122} Despite el-Masri’s protests that the details of his case were widely known and would therefore not reveal any state secrets, the court sided with the Bush Administration, maintaining that to go ahead with the case would require the ‘disclosure of information regarding the means and methods by which the CIA gathers intelligence.’\textsuperscript{123} Arguing for the dismissal of entire cases (rather than the protection of only limited amounts of classified information) based on the SSP was a pattern for the Bush Administration.\textsuperscript{124} Such a claim was reinforced by a 2004 report by the House (Minority) Committee on Government Reform, which found that:

> there has been a consistent pattern in the Administration’s actions: laws that are designed to promote public access to information have been undermined, while laws that authorise the government to withhold information or to operate in secret have repeatedly been expanded. The cumulative result is an unprecedented assault on the principle of open government.\textsuperscript{125}

The issues discussed thus far in this chapter – largely, the expansion of executive power and excessive secrecy – should not be discussed with exclusive reference to the Bush Administration. This is because, as Susan N. Herman writes, the ‘excesses of the War on

\textsuperscript{119} Fisher, 480.
\textsuperscript{121} Edelson, Emergency Presidential Power, 247-248.
\textsuperscript{122} Edelson, 247-248.
\textsuperscript{123} Edelson, 247-248.
\textsuperscript{124} Edelson, 248.
Terror decade did not end when its architects-in-chief left the White House. This was made quite clear once the new President Obama settled into the presidency.

**Obama and Secrecy**

On the campaign trail, then-presidential candidate Obama was incredibly critical of the Bush Administration’s approach to national security. He expressed his belief that Bush had overstepped executive bounds in several areas (primarily foreign policy, and in particular within the realm of counterterrorism), and presented himself as the solution to the executive overreach issues that Bush’s presidency raised. For example, in a national security campaign address in 2007, Obama stated that the Bush-Cheney Administration ‘puts forward a false choice between the liberties we cherish and the security we demand. I will provide our intelligence and law enforcement agencies with the tools they need to track and take out the terrorists without undermining our Constitution and our freedom.’

It should of course be noted here that there is a political context to this statement: 2007 was the primaries season for the 2008 election, and Obama would have wanted to differentiate himself from his opponent, Hillary Clinton. Further, as Charlie Savage writes, this primary campaign was, in part, ‘a contest to see who could attack Bush the most vigorously, and Obama designed his message to make liberal voters cheer.’ This could be a partial explanation for why – as will soon be discussed – Obama eventually backflipped on such positions.

Obama seized on the discomfort that many felt towards the end of Bush's second term, and he used his past as a constitutional law professor to assure voters that he would be different from his predecessor and that his more moderate views on executive power would guide him as president. He also pledged to align his counterterrorism policies with the constitution and to return to a more moral foreign policy that was based on consensus and cooperation.

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126 Herman, *Taking Liberties*, 161-162.
130 Savage, 54-55.
values as diligently as we protect our safety with no exceptions' while promising to be more transparent and more respectful of democratic ideals than Bush was. Further – continuing from the above discussion relating to the Bush Administration – Obama came into office promising an end to what he viewed as the excessive use of the SSP by the Bush Administration. He largely believed that it had been overused by the previous administration, and stated that ‘we must not protect information merely because it reveals the violation of a law or embarrassments to the government.’

Despite such promises, once Obama became president, he behaved very much like his predecessor, in myriad ways. The secrecy framework set up by Bush, at least initially, continued. It is difficult to definitively claim whether such a backflip in belief and opinion was due to the rigidity and long-lasting impact of this secrecy framework; whether it was because Obama changed his mind once confronted with the realities of being the president; or whether it was some combination of the two factors. But many of the Bush Administration’s more divisive policies remained intact following Obama’s inauguration, including warrantless wiretapping, indefinite detention, and a reliance on the SSP (indeed, Obama also applied the privilege to completely new assertions of executive power). Controversially, Guantanamo Bay remained open. Further, Obama expanded contentious policies in the counterterrorism and national security realm – most notably, the targeted killing program and the use of drones on both citizens and non-citizens. In fact, in this policy area, the Obama Administration went further than the Bush Administration could have imagined, according to Daniel Klaidman, engaging with and embracing national security exceptionalism. This remained the case even after Obama had settled into the job, with his White House advocating the (arguably neo-conservative) notion of the entire world as a US battlefield, necessitating a global war on terror in which ordinary legal and constitutional constraints would not apply. Ronald Krebs writes that the continuity between the two administrations

133 McCrisken, 781-83.
135 Fisher, 189.
136 The eventual implementation of transparency measures by the Obama Administration towards the end of his presidency should be borne in mind here, as discussed in Chapter III.
139 Scahill, Dirty Wars, 246.
141 Scahill, Dirty Wars, 351.
is striking, particularly in the realm of national security.\textsuperscript{142} Indeed, by his third year in office, Obama had ‘approved the killings of twice as many suspected terrorists as had ever been imprisoned in Guantanamo Bay.’\textsuperscript{143}

Echoing many of those arguments made by the Bush Administration, Obama aggressively attempted to control the public drone strike narrative, arguing in part that national security objectives would be harmed or jeopardised with a more open discussion.\textsuperscript{144} Doyle McManus refers to some of the core pre-election promises of Obama – to be more transparent, to not distort the rule of law and to be mindful of individual rights – and how contradictory it was that such rights-based promises never quite played out.\textsuperscript{145} For instance, the Obama Administration refused to answer questions about the drone program due to it being a covert operation and kept secret the arguably abusive program to shield the administration from accountability, while publicly taking credit for victories when they occurred.\textsuperscript{146} Charlie Savage writes that such inconsistencies can be explained by bearing in mind the fact that ‘consistently, Obama framed his criticism of Bush in ways that led casual listeners to conclude that he opposed Bush’s programs altogether, when in fact a close reading shows that he was often attacking the way Bush had put them into place unilaterally back in his first term.’\textsuperscript{147} This context – the secrecy of the drone program – is essential to the research question at hand, and Obama’s role in using the classified nature of the program to shield itself from media inquiry and wider accountability should not be understated.

One central method through which Obama and his team institutionalised such secrecy was through the continued use of the SSP (despite Obama's statements before the election). Speaking in May of 2009 at the National Archives, Obama affirmed his belief that the privilege had been "over-used" by the previous administration, and announced a review of the privilege, pledging to 'apply a stricter legal test to material that can be protected under the state secrets privilege.'\textsuperscript{148} However, the SSP continued to be consistently used within the context of the drone program. Lawyers for the Obama Administration tended to either claim

\textsuperscript{143} Klaidman, “Drones: The Silent Killers,” 38.
\textsuperscript{146} McManus, para. 9.
\textsuperscript{147} Savage, \textit{Power Wars}, 54-55.
that information on the use of drones for targeted killing was a state secret, or that it was a “political question” (as outlined in Chapter II, and referring to those core areas that the judiciary tends to shy away from, including national security and foreign affairs) that could not and should not be decided by the judiciary.\textsuperscript{149} Sometimes, the two doctrines – SSP and political question – could combine, highlighting their pervasiveness in setting the parameters of the drone program. Indeed, in the court case of Anwar al-Aulaqi – brought to the judiciary by Aulaqi’s father in an attempt to get an injunction to stop his son’s killing by the government, and to be expanded upon in Chapter VI – the Obama Administration argued for the SSP, but the case ended up being dismissed by the court, based on political question grounds.\textsuperscript{150} Such a result was a continuation of Bush-era secrecy patterns: the use of the SSP in an attempt to block information about entire cases, rather than blocking minuscule amounts of relevant information. Indeed, as Chris Edelson argues:

The Obama administration has invoked this privilege as a powerful tool designed to seal off executive branch decisions from review and to block litigation aimed at cutting through layers of secrecy to determine whether controversial decisions are constitutionally justified. It has argued for a state secrets privilege that can be used to win dismissal of entire cases, rather than simply protecting confidential information from disclosure during a lawsuit.\textsuperscript{151}

In fact, Edelson’s argument continued, Obama and his team likely relied on the SSP even more than Bush’s did.\textsuperscript{152}

Any discussion on the broad invocation and application of the SSP also serves as a helpful transition point towards a broader discussion on secrecy, and in particular how it was used by the Obama Administration with regards to matters of national security exceptionalism and related policy standards, especially the drone program. As a starting point for a broader analysis of secrecy, for most of Obama’s first term as president, the secrecy surrounding the drone program was such that the reality of using drone strikes for targeted killings in the name of counterterrorism was not initially admitted to on the record by the


\textsuperscript{150} Windsor, “Is the State Secrets Privilege in the Constitution?,” 899.

\textsuperscript{151} Edelson, \textit{Emergency Presidential Power}, 242-43.

\textsuperscript{152} Edelson, 249.
White House. Instead, small and selective pieces of information that alluded to the program’s existence – but only with a positive spin (‘cherry-picked facts’, in the words of Jameel Jaffer, as expanded on in the quote below) – were leaked (by anonymous intelligence officials) or discussed with the media.

Government officials release information about the killing of suspected terrorists but withhold information about bystander casualties. They tell the public that lethal force is used only when capture is infeasible, but they decline to say how feasibility is assessed. They release a Cliffs Notes version of their legal theory, but not the legal memos – let alone the factual ones – on the basis of which the killings actually take place. They release facts meant to reassure, but they withhold facts that might unsettle.

This rationale changed – somewhat – in 2012 when John Brennan stated in no uncertain terms (and officially for the first time) that the United States had conducted drone strikes against specific al Qaeda targets. Following this, other bits and pieces of information began to emerge. A 2013 court document – an appeal based on an earlier ACLU FOIA case – helps to provide a more detailed understanding of the government-sanctioned drone program following Brennan’s revelation:

Senior government officials [have] made a series of on-the-record disclosures about the targeted-killing program…Since that time, government officials – including the President and some of his closest advisors – have made additional disclosures. Through these disclosures, they have defended the program’s legality, effectiveness, and necessity, and have dismissed concerns about civilian casualties. They have described the CIA’s role in the program. They have acknowledged that the U.S. government carried out the strike that killed Anwar al-Aulaqi, and they have outlined the government’s reasons for having done so. The government’s disclosures about the program have been selective and self-serving, and they leave the public record about the targeted-killing program incomplete in crucial respects.


The fact that the Obama White House disclosed only self-serving information has been reflected by others in the literature, particularly regarding who had been killed by drone strikes. Indeed, before the 2016 disclosure of civilian casualty figures (as discussed in previous chapters; flawed in its own ways), US officials had rarely mentioned civilian deaths when they occurred.\footnote{Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan (International Human Rights and Conflict Resolution Clinic [Stanford Law School] and Global Justice Clinic [NYU School of Law], 2012), 29, \url{https://law.stanford.edu/publications/living-under-drones-death-injury-and-trauma-to-civilians-from-us-drone-practices-in-pakistan}.} On those infrequent occasions where they were publicly mentioned by the government, officials would typically provide low casualty estimates that differed significantly from the estimates offered by independent bodies, such as the various transparency organisations that have been utilised in this thesis (BIJ and the Long War Journal, for example).\footnote{Living Under Drones, 29.}

The impacts of such secrecy, in a short-term sense, largely pertain to accountability. In other words, the lack of information and detail that was released by the government regarding the drone program meant that there was not the requisite public debate that was needed around the use of drones for “imminent” threats, particularly after the death of Osama bin Laden and the continuation of the war on terror into a second decade. As Steve Coll wrote in the \textit{New Yorker}, ‘secrecy…defeated public candour and accountability’ in both the Bush and Obama Administrations.\footnote{Coll, “The Unblinking Stare,” 98.} When it comes to the long-term consequences for national security exceptionalism, it is quite straightforward: just as Obama inherited Bush's secrecy framework, so too did Trump inherit Obama's (and more recently, so too did Biden inherit Trump’s).

Finally, when it comes to secrecy and its consequences, the contributing role of the CIA (as well as the Joint Special Operations Command [JSOC], a secretive military structure that will be explored in following chapters) should not be ignored, even in stated times of emergency. The CIA’s general functions as an intelligence organisation allow (and often necessitate) it to act ‘under a fog of secrecy.’\footnote{Daniel Brunstetter and Megan Braun, “The Implications of Drones on the Just War Tradition,” \textit{Ethics \\& International Affairs} 25, no. 3 (2011): 352-53, \url{https://doi.org/10.1017/S0892679411000281}.} Brunstetter and Braun explain further:

\begin{quote}
[T]he clandestine nature of the CIA program continues to prevent officials from speaking openly about alleged drone strikes. This, coupled with the dramatic increase in the number of such strikes since Obama took office has, according to one national security expert, ‘prevented journalists or researchers from consistently reporting on
\end{quote}
each individual strike. Thus, it is impossible to...evaluate whether the most recent drone attacks have met their intended political and military objectives.\footnote{Brunstetter and Braun, 353.}

The above framing – that officials are prevented from speaking openly – is important to consider. That is, problems with the CIA and its secrecy must be viewed through the lens of how the White House uses the intelligence organisation for its necessary secrecy, and not viewed solely through the lens of the CIA. In short, the CIA often acted as a convenient vehicle for White House secrecy.

**Conclusion**

Responsible government, including questions regarding secrecy, requires a democratic process of oversight. Secrecy and executive power have long been issues to contend with in the US democratic experiment, and there is a complex history that reflects this. In the context of modern presidential history, it is useful to reflect on the Nixon Administration as a starting point for discussions on secrecy, oft cited as a high point for enhanced secrecy and excessive executive power. Coincidentally (or, perhaps, not) some of the recurring figures in the secrecy and executive power witnessed during the Bush-era – namely, Cheney and Rumsfeld – started their political careers in this period, and the post-Nixon actions taken by the legislature (including the Church Committee) to rein in the excesses of the executive branch undoubtedly informed their beliefs and understandings on the matter. It is difficult not to conclude that this period would go on to shape the two decades that followed the attacks of 9/11.

The aforementioned arguments against secrecy, plus the evident patterns from both Bush and Obama Administrations, serve to highlight shortfalls in accountability arrangements – and related moral, legal and policy parameters – of the expanded use of drones for targeted killings. George W. Bush and Barack Obama were wildly different presidents in numerous ways, including party affiliation; domestic policy; and how they chose to fight war. When it comes to the prominence of secrecy and expanded executive power, though, there were obvious similarities – a pattern of executive exceptionalism was being followed. As Scott Shane writes:

\begin{quote}
Both Bush and Obama, operating on the basis of secret legal opinions from the Justice Department, had taken steps unprecedented in American history – in Bush’s case, approving interrogation methods the United States had long considered torture; in
\end{quote}
Obama’s, ordering the killing of an American citizen without trial. Both presidents defended the extraordinary measures as necessary to meet the terrorist threat… the parallel was undeniable.¹⁶³

And just as the parallel was undeniable, so too is the impact the post-9/11 presidents have had on invocations of broad executive power and the rise of excessive secrecy, especially in the realm of counterterrorism and the ongoing dynamics of the drone program. The background contained within this chapter (and indeed, within the previous three chapters, too) has helped to signal the underlying backdrop and context that highlights the validity for further exploring the priorities and norms of security governance that will sit alongside the creation of robust oversight norms and standards regarding the challenge of continued drone strikes. At the very least, and perhaps given a return to a non-emergency “war on terror” footing for US governments, increased oversight can help to provide constitutional and international legitimacy to US drone activities. As such, the focus of the thesis will now shift to an exploration and analysis of policies for the viable and effective reform of the drone program. This will first be done with reference to the executive branch itself.

CHAPTER V – THE EXECUTIVE

Introduction
Now that the relevant historical context and legal frameworks underpinning the drone program have been outlined (and now that the central problems related to the US’s use of drones under Obama have been explored in some detail), the focus of this thesis will shift. The focus of this chapter – and the following two chapters – will be a more detailed examination and analysis of the role of the separation of powers regarding US drone actions. This will, primarily, include the analysis of several specific policies and methods that could potentially improve and enhance the oversight and accountability benchmarks of the drone program, within the context of a robust security governance agenda as set out by Schroeder; policies that could help to reform the problems associated with the US’s use of drones as identified within this thesis. Each of these policies will correspond with the branch of government that could enact and/or play a role in implementing such a policy for reform. The guiding principle behind such an approach largely stems from the idea that democratic accountability frameworks should entail a range of institutions and actors and should embody executive control as well as judicial and congressional oversight.

With this backdrop in mind, this chapter will explore the argument that the executive can play a more pronounced – albeit limited, and perhaps even insufficient when compared with the other branches – role in the creation of a more transparent and accountable drone program. The chapter will, therefore, investigate the role that the executive branch plays in overseeing other elements of the executive branch (primarily, the IC), and the current limitations in its ability to do so, and explore a proposed policy that has the potential to improve the governance of the drone program: the voluntary release of further information on the drone program, by the executive branch. To achieve meaningful and effective change, such information releases would have to be narrow and quite specific, and therefore this chapter explores the release of information in four key areas: the release of information on targeting processes and standards; the release of information after a drone strike has occurred; the publishing of the financial costs associated with the drone program; and the publishing of the kill list that guides the drone program.

The chapter will first explore the current nature and feasibility of internal executive oversight in the United States (both broadly and with specific reference to the drone program), highlighting how bodies under examination within this chapter, such as the NSC, the President’s Intelligence Advisory Board (PIAB) and the President’s Intelligence
Oversight Board (PIOB) have been challenged in exercising their responsibilities. Each of these bodies is tasked with oversight of the CIA, and each has arguably displayed shortcomings in their oversight requirements, failing to produce concrete legal restraints or display a consistent trajectory towards more transparency in the drone program.\(^1\) Secondly, the chapter will highlight the Obama Administration’s interaction with the voluntary release of information, exploring public speeches given by executive officials on the drone program. What will be identified is that while these speeches often did shed some light on the drone program, this was only done in a very particular way that was of benefit to the Obama Administration. Importantly, such speeches relied heavily upon the 2001 AUMF in their justifications, as explored in Chapter III, and the significant role that this domestic law played in broader oversight will also be unpacked. The third and final central focus of this chapter will explore and analyse a potential solution to the problem of executive branch oversight, looking at the types of information that could feasibly be released by the executive branch, and identifying the correct balance between the release of information that would lead to further oversight but not risk the counterterrorism efforts of the United States.

The Problem: Internal Executive Oversight, How It Ought to Be, and How It Is

As a starting point, it is important to differentiate between the IC and the White House when considering the entire executive branch and its oversight arrangements. Both are labelled as members of the executive branch, but they are not one and the same.\(^2\) That is, the implementation of internal executive oversight would not simply mean the White House acting as a check on the White House: the executive structure is broader than that. As Michael Kraft and Edward Marks explain, the IC is comprised of various executive branch agencies and organisations, with numerous federal agencies, boards, commissions and committees forming one part of that larger executive branch.\(^3\) Indeed, the US IC is made up of 18 organisations, including the CIA.\(^4\) And here it is also necessary to signal that the reason why intelligence oversight forms such a large component of this chapter is because of the


central role that the CIA – as a principal member of the IC – plays in conducting (secret) drone strikes and, therefore, advancing the aggressive use of drone powers.

According to Gillian Metzger, internal executive oversight (or internal separation of powers, as it is sometimes referred to) is characterised by seeking to achieve goals of accountability by ‘operating within the confines of a single branch’ – in this case, the executive. In other words, the executive branch is checked by bodies within the executive branch of government. Such a form of oversight is arguably more controversial than other, more familiar forms of oversight (such as congressional checks and balances), and thus this section of the chapter will look at the literature surrounding internal executive oversight, exploring both the cases against and for it, before moving on to examine the matter in a practical sense, exploring some of the existing internal oversight mechanisms. As a starting point, though, it should be noted that there are various forms of internal oversight mechanisms in place within other contexts (that still, in no way, mitigate the very real need for proper external accountability measures). Policing provides an example here, via the internal affairs model of oversight, as explained by Ishmael Mugari:

Under the internal affairs model, the police department is responsible for receiving complaints alleging misconduct by police officers or complaints about police policies, practices, and procedures. The mechanisms for internal oversight are generally provided for in terms of regulations governing the police, and disciplinary procedure is one of the key aspects of the internal affairs model.

Such internal forms of oversight are complemented by other external accountability mechanisms, as this thesis argues for within the context of the drone program. This is because, as Mugari expands in relation to policing, ‘there have been concerns over the lack of objectivity in internal investigations of officer misconduct.’ The need for parallel internal and external forms of oversight in policing is reinforced across the literature, and provides a useful complementary example in relation to the drone program – which will be expanded upon below – that highlights that such internal policy proposals are not necessarily infeasible.

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7 Mugari, 3.
8 Declan Brooks-Crew, Nikki Rajakaruna and Pamela J. Henry, “Predicting Police Officer Reported Compliance and Willingness to Cooperate with Internal Affairs Units: Application of the Relational Model of Authority,”
The case against internal executive oversight

Perhaps the foremost problem to contend with regarding the notion of internal executive oversight is the dramatic post-9/11 increase in executive power and secrecy – which was often coupled with diminished judicial and legislative oversight – and how such changing circumstances have enabled executive overreach and a range of power abuses. Arguably, this has made it harder to build the case that the executive should be trusted to be involved in the placing of checks and balances upon itself. As already argued within earlier chapters, the drone powers under Obama were broad, inviting future abuse or recklessness. Indeed, the drone program was initially shrouded in secrecy. The post-9/11 dominance of the UET is also one that should be considered here. The role that the UET has played indicates that the executive is unlikely to self-regulate satisfactorily, because adherents of the theory do not see a strong executive as a problem that needs to be resolved.

There has also been a tendency to dismiss the potential robustness and effectiveness of internal executive oversight, primarily because of the potential for a conflict of interest – the question that tends to be asked is why the executive would act in good faith when it comes to holding itself accountable, and whether it could even do so successfully. Other relevant questions include whether the internal mechanisms to check the executive could feasibly push back against presidential power – and assertions of authority – and whether the limited gains that it could make in the oversight space could actually be counterproductive; whether they could ‘obscure the extent of accumulated presidential power.’ This is an important question to consider, certainly: internal forms of oversight within the executive branch could make it look like checks and balances are being placed on the branch, without any tangible or valid oversight being effected, allowing actual breaches and/or a stretching of...
power to occur. There is also an assumption that the executive ‘is and ought to be an object, not a source, of intelligence oversight’ – the ‘idea of entrusting the President to oversee intelligence is deeply counterintuitive.’ It is arguable that the various objections to internal forms of oversight by the executive branch, such as these ones, have also stemmed from the various bad faith power grabs witnessed in the post-9/11 period, as outlined in the previous chapter. Such a context cannot be separated from this discussion.

Other scholars highlight that there are indeed benefits of internal executive oversight but pose the argument that the potential upsides to internal executive oversight (such as the ones explored below) do not necessarily mean that the executive would be an appropriate check on itself. Gillian Metzger makes the argument that internal executive oversight only appears to be a feasible option when explicitly compared with the poor oversight that has been conducted by the legislature and the judiciary – that ‘the case in favour of internal mechanisms is in part comparative.’ That is, in the context of a legislature and judiciary with reduced influence and power, internal checks on the executive can be seen as more favourable than they otherwise would be. The case for internal oversight is reflective of the post-9/11 times, with executive power having increased to the detriment of the other two branches of government.

The case for internal executive oversight
The argument has been posed by some scholars and commentators that internal oversight can result in an effective form of accountability – that, in theory, some of the ‘most effective checks and balances on government operations, including new public disclosures of formerly secret information, take place through the process of internal oversight.’ Internal executive oversight also has the potential to correct classification errors, and result in the greater disclosure of information. For example, writing on a body not entirely related to the drone discussion, but of relevance when regarding the potential of internal executive oversight more broadly, Steven Aftergood highlights that:

An entity called the Interagency Security Classification Appeals Panel (ISCAP) has overturned more executive branch classification decisions than any court or legislative action has. Since it was established in 1995 it has ordered the declassification in whole or in part of the majority of documents that have been presented for its review

13 Rascoff, “Presidential Intelligence,” 636.
16 Aftergood, 848.
Further (and significantly), internal executive oversight could serve as a reflection of the nature of executive power in the modern (post-9/11, in particular) world, updating traditional understandings of legislative versus executive oversight to accommodate a changed structure – an executive branch ‘that subsumes much of the tripartite structure of government.’ At the very least, internal executive oversight could set a normative standard of transparency for the executive branch, while also suggesting a genuine commitment to principles of democracy and accountability. This is heightened by the fact that such measures are proactive, as opposed to reactive. Further incentives could include that:

[Intelligence oversight by the Executive is potentially more important than oversight by Congress, if for no other reasons than the great disparity between the resources available to the Executive and those available to Congress, as well as the Executive’s ability to develop effective and sustainable oversight procedures. Even more importantly, the President is directly accountable to the people for the actions of the intelligence community and thus has a strong political incentive to maintain effective intelligence review.]

The reality and existence of secrecy within the executive branch should also be considered when examining the potential upsides to internal oversight: because of the nature of secrecy and executive power in the post-9/11 world, in particular, the executive branch is the branch with the information most pertinent to achieving oversight, and this is seldom disclosed (voluntarily) to the other two branches, most notably to the legislature. As Dawn E. Johnsen writes, ‘by its nature, secrecy undercuts the efficacy of external checks.’ As such, the executive’s oversight ‘has the greatest impact on intelligence, because of the branch’s role in developing and implementing policy.’ It may not be a perfect form of oversight, but it could

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17 Aftergood, 848.
be one way to respond to the realities of the intelligence environment (and drone warfare) when considering its oversight. Indeed, and as discussed in Chapter III, Obama did make some changes to the drone program’s rules and secrecy in an attempt to rectify this aforementioned issue, which could help to advance the argument that some scope of self-regulation (combined with oversight by the other two branches of government) could be of benefit.

Existing internal oversight mechanisms
Looking beyond the literature exploring the possibilities and downsides for internal executive oversight, it should be noted that several mechanisms are already in place for the internal oversight of the executive branch. Such mechanisms include the NSC, PIAB, and PIOB. These already functioning, in-built oversight mechanisms could potentially be further utilised to examine drone activities, though a range of literature points to significant flaws existing within each body that could hinder such a function. Nonetheless, these three bodies have been chosen as central discussion points within this chapter because they have each been identified by the CIA as the executive bodies that oversee and examine its activities, and the CIA – of course – was a central player in Obama’s drone program.22

The NSC dates back to 1947 and was initially tasked with advising the President ‘with respect to the integration of domestic, foreign, and military policies relating to the national security,’ reviewing, guiding and directing ‘all national foreign intelligence and counterintelligence activities.’23 The NSC has become more empowered over time – as explored below – and little has been done by the judiciary or the legislature to rein in the NSC’s increased power.24 Further, as the NSC has become larger in both size and scope, and resultingy more powerful, it has been viewed less as a tool for oversight and more as a body that needs overseeing itself.25 This viewpoint has been strengthened since the advent of drones, a result of the extensive role that the NSC plays in the program. Indeed, the NSC is an active participant in the drone program, ‘sifting through raw intelligence, vetting lists, and selecting the names of targets for final approval.’26 As a drone-specific example of how the

NSC has become more empowered over time, and particularly within the Obama Administration:

The NSC has long had a role in deciding who will ultimately be added to the U.S. government’s “kill list”, but some of the most crucial decision-making previously took place in interagency meetings chaired by the military. Indeed, until 2011, a committee led by the chair of the Joint Chiefs of Staff had generally coordinated the process around drone killings outside of recognised battlefields…Starting in 2011, however, the NSC began pulling those discussions more firmly under its grip. By 2012, the White House altogether eliminated the redundancy between the Department of Defence and the NSC in vetting the names on U.S. target lists, favouring the NSC for that role.27

The reasoning behind such a shift was purportedly to create some separation between the military – the ones pulling the trigger on drone strikes – and the target selection process.28 If separation (or independence) is a concern, though, this raises serious questions about the NSC taking on such a role and increasing its powers, considering the CIA’s involvement in also pulling the trigger on strikes, along with the fact that the NSC should be overseeing the CIA.

The PIAB was created slightly after the NSC, being formed in 1956. This body is tasked with reviewing:

the performance of all government agencies engaged in the collection, evaluation, or production of intelligence or in the execution of intelligence policy. It also assesses the adequacy of management, personnel, and organisation in intelligence agencies and advises the President concerning the objectives, conduct, and coordination of the activities of these agencies.29

In short, the PIAB ‘oversees the Intelligence Community’s compliance with the Constitution and all applicable laws, Executive Orders, and Presidential Directives.’30 Yet according to Philip Alston, ‘oversight in a critical sense has apparently not been high on its agenda.’31 Indeed, its focus has been broken down into three core areas: ‘the impact of new technologies on intelligence’; ‘analysing the significance of foreign political developments’; and

https://findit.library.nd.edu.au/permalink/61UONDA_INST/1ntajja/cdi_gale_infotracacademiconefile_A383043377.
27 Cox and Kassem, 371-72.
28 Cox and Kassem, 372.
29 “Executive Oversight of Intelligence,” para. 2.
30 “President’s Intelligence Advisory Board and Intelligence Oversight Board,” The White House: President Barack Obama, https://obamawhitehouse.archives.gov/administration/eop/piab.
31 Alston, “The CIA and Targeted Killings Beyond Borders,” 381.
‘evaluating crisis management responses.’ While oversight may not have been much of a concern, according to Alston, the PIAB’s focus on the impact of new technologies on intelligence points to the potential efficacy of this body when it comes to the use of drones. Oversight would have to be a central consideration in any focus on technology, though, for this to be of benefit.

The case can be made that the type of person (and their background) who is eventually appointed to the Board is of importance for the overall quality of oversight. While the PIAB can play a significant role in the intelligence oversight process, this is somewhat dependent upon the qualifications of those nominated to serve. Presidents have historically appointed political supporters to PIAB, some without the requisite experience (relating to the legality of intelligence, along with related privacy and civil liberties activities) to justify being given such a position. Indeed, in the case of former President Trump’s selections, this largely resulted in the appointment of members who had had long careers within the business sector, but little to no relevant security-related experience or knowledge. This raises serious questions about the quality of oversight such a body can realistically perform regarding the intelligence sector.

Such appointments – of presidential supporters and campaign donors – have been one of the major critiques of the PIAB, along with the perception that it serves as a duplicate of other bodies – a part of a “bloated bureaucracy” – and that it tends to align itself with the IC’s agenda, rather than engaging in serious oversight. Another significant problem with the PIAB is that presidents have sometimes been slow to utilise the body, neglecting to promptly appoint members. For example, six months into Obama’s presidency he had not appointed any members, and counsel to PIAB Homer Pointer stated that this meant the body was ‘kind of running on autopilot.’ Trump waited even longer, not appointing board members until

32 Alston, 381.
35 “Trump’s Secretive Intelligence Advisory Board Takes Shape With Security Pros and GOP Donors,” para. 19.
36 Alston, “The CIA and Targeted Killings Beyond Borders,” 381.
37 “White House Intel Advisory Board Has No Members,” paras. 1-3. In 2013, the PIAB was then shrunk, with the White House dismissing 10 members, which meant there were just four left: “Obama Upends Intel Panel,” Politico, published August 15, 2013, para. 2, https://www.politico.com/story/2013/08/obama-intelligence-panel-095589.
late 2018 (almost two years after his inauguration). All in all, such problems have led Philip Alston to conclude that ‘there is little in the historical record, nor any recent information, which would suggest that the PIAB is at all likely to be in the business of seeking to exact accountability from the intelligence agencies in relation to an activity such as targeted killings.’

The PIOB was formed in a different political climate, in 1976 – part of a decade of great importance for transparency measures, including the Church Committee, as explored in the previous chapter. The PIOB is given ‘oversight responsibility for the legality and propriety of intelligence activities.’ Its functions include: ‘informing the President of any intelligence activities believed to be in violation of the Constitution or any law, order, or directive’; ‘forwarding to the Attorney General reports of intelligence activities believed to be unlawful’; ‘reviewing the internal guidelines of each member of the Intelligence Community’; and ‘reviewing the oversight practices and procedures of the Intelligence Community inspectors general and general counsels.’ The PIOB was weakened significantly under President Bush, who stripped the board of a great deal of its authority through executive orders. This was one step of many that sought to roll back the achievements of the post-Watergate era, as consistent with those UET beliefs of Cheney and Rumsfeld. Indeed, at the time that this was occurring, Tim Sparapani of the ACLU said that it was ‘clear that the Bush administration officials who were around in the 1970s [were] settling old scores now,’ maintaining that the end result of such actions was ‘preventing oversight within the executive branch.’ Similar to the PIAB, Alston concludes that it is unlikely that the PIOB could be further utilised to oversee the drone program in any meaningful way:

A recent review of the Board’s role in supervising reported intelligence violations by officers of the Federal Bureau of Investigation [FBI] concluded that, ‘it seems unlikely that the IOB diligently fulfilled its intelligence oversight responsibilities for most of the past decade.’ There is thus no reason to conclude that the IOB has been,

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40 “Executive Oversight of Intelligence,” para. 3.
41 “Merge the President’s Intelligence Oversight Board with the President’s Foreign Intelligence Advisory Board,” Federation of American Scientists, para. 4, https://fas.org/irp/offdocs/npr/intel06.html.
43 Savage, para. 2.
44 Savage, para. 3.
or is likely to be, in the business of providing meaningful oversight of the targeted killings programs undertaken by U.S. intelligence agencies.45

More broadly, Alston – writing on the NSC, PIAB and PIOB concerning the drone program and in light of their various shortcomings – makes the argument that it is not likely that the three bodies can effectively oversee and scrutinise the drone program in their current forms.46 A major contributing factor to this conclusion is that ‘the activation of the relevant bodies remains at the discretion of the President.’47 When the president plays such an integral role in executing the drone program – as Obama did – this is very important to keep in mind. Related to this point is the fact that the NSC is an active participant in the drone program, primarily in the form of kill list selection.48 As the CIA itself says in Agency reports, ‘only the President can direct the CIA to undertake a covert action. Such actions are usually recommended by the National Security Council.’49 So, the NSC makes a recommendation on who should be added to the kill list, the president signs off on that recommendation, and the CIA is then directed to carry out the strike.50 Such a lack of independence raises serious questions about the nature of oversight, and how robust the oversight the NSC (in particular) provides could possibly be. The current forms of internal executive oversight are arguably not working to their full potential, adding to the argument that reform is needed in this area. Overall, based on the above, there are many reasons to be sceptical of executive self-regulation of drones being carried out by these three bodies. Effective security governance does depend, in part, on an institutional and legal framework as well as government security policies and strategies that clearly allocate responsibility for security provisions, management and oversight. The above three components within the executive office appear to have fallen short in this area. The executive branch must engage with further reform and transparency measures to improve the governance of the drone program, including via the policy option to be outlined and explored within this chapter.

46 Alston, 384.
47 Alston, 384-85.
49 The Work of a Nation, 55.
The Problem: How the Obama Administration Interacted with Internal Executive Oversight and the Release of More Information

As previous chapters have affirmed, the Obama Administration often shielded essential drone warfare facts from public examination. This led to calls for further transparency from the executive branch, which will form the final focus of this chapter. But before moving on to a discussion of the specific types of information that could have been released by the Obama Administration (or that could be released by current and future administrations) to improve the transparency of the drone program, it is important to highlight how the Obama Administration interacted with notions of executive oversight, executive secrecy and ideas of transparency. Such interactions largely came in the form of public speeches given by key Obama Administration officials. These officials appear to have made some efforts to both enhance accountability and effectiveness, as well as justify the drone program, largely by explaining the legal framework that underpinned it and offering up examples to highlight how the Administration was adhering to such a framework. Several significant speeches were given by key administration officials between 2010 and 2012, and these are central to an understanding of the evolution of executive branch opinion on the drone program. While the speeches may not have signalled a specific and concerted interaction with the drone warfare policies to be outlined in this thesis, such statements did, at the very least, act as a modest step towards transparency.

With this said, the speeches were still missing key pieces of information regarding the drone program and its intricacies, reflective of the fact that speeches are inherently selective in the types of information that they convey - that is, speeches are used to broadcast and promote a very particular message that is of benefit to the speech-giver. Thus, while the speeches may have been indicative of small steps towards the release of further information from the Administration on the drone program, there was not a great deal of information released within them that was not already known by journalists and critics of the drone program by the point at which the speeches were given. Further, as the below will highlight, there was still a considerable amount of “cherry-picking” when it came to what information was released, with most of the detail being favourable to the government.

Harold Koh was the Legal Adviser for the State Department during Obama's first term as president. Koh had acted as a human rights official during the Clinton Administration and
was the Dean of the Yale Law School before his position in the Obama Administration. Koh’s human rights experience and opinions are important to consider here, as they arguably changed quite dramatically between administrations. For example, Koh was incredibly critical of the Bush Administration and its policies in the post-9/11 period, once claiming that the United States ‘would find itself on the “axis of disobedience” along with North Korea and Iraq for its brazen disregard of international law.’ Importantly, Koh was no proponent of excessive executive power. This could go some way in explaining his criticisms of the Bush Administration but prompts questions when considering the role that he would later play in Obama’s drone program.

Indeed, Koh went on to play a significant role in the creation of the legal framework surrounding the drone program, perhaps indicative of an initial discomfort with it: he had been one of the early adopters of concerns regarding the program’s lack of legal justification, compounded by concerns over the extension of the AUMF to new battlefields, in particular to Yemen and Somalia. As a result of this, he pushed for ‘narrower definitions of who was covered by the AUMF and, therefore, who could be detained or targeted by drone strikes.’ It is important to note here that Koh did not have a problem with the use of drones to target senior members of al Qaeda; he took issue, though, with authorising targeted strikes against other terrorist groups whose al Qaeda links were not so clear. Such groups included al Shabaab, based in Somalia. Koh’s hesitations about the drone program led him to examine the laws surrounding it, asking questions of himself such as whether lower-level figures (such as financiers or facilitators) could be lawfully targeted; which terrorist groups could be considered a part of al Qaeda; and how far the battlefield could extend. He reached out to international law experts and slowly began to develop the legal framework for the drone program.

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52 Klaidman, 139-140.
54 Klaidman, Kill or Capture, 140.
55 Klaidman, 140.
56 Klaidman, 208.
57 Klaidman, 219.
58 Klaidman, 211.
59 Klaidman, 211.
This legal framework – or parts of it, at least – was laid out in a 2010 speech given by Koh to an association of international lawyers. The general crux of his speech – *The Obama Administration and International Law* – was that Koh believed that the drone program adhered to the principles of the laws of war:

> With respect to the subject of targeting, which has been much commented upon in the media and international legal circles, there are obviously limits to what I can say publicly. What I can say is that it is the considered view of this Administration – and it has certainly been my experience during my time as Legal Advisor – that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.  

In the speech, he explicitly stated the Obama Administration’s legal reasoning behind its drone program. This reasoning was, he affirmed, that the United States was in an armed conflict with al Qaeda, the Taliban and their associated forces; that their members could therefore be targeted as enemy combatants; and that any use of force by the United States was carried out in self-defence.  

Such remarks turned out to be consequential in the context of the transparency of the program, as they provided guidance and a precedent for the other officials who eventually also went on to give detail on the drone program in the public arena. There is also a significance behind it being Koh who was the first figure to outline the legal framework to the drone program and engage in greater transparency about its legal (and geographic) scope. That the State Department Legal Advisor known for his advocacy of human rights – and criticism of Bush Administration policies – had become such a vocal defender of the drone program was a significant shift, and this history made his support all the more valuable to the Obama Administration and its justifications – legal and otherwise – for its drone program.

John Brennan was the Assistant to the President for Homeland Security and Counterterrorism during Obama’s first term as president, and Director of the CIA during Obama’s second term. Before this, he had had a 25-year career with the CIA, serving as a

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63 Klaidman, 22.
top aide to former director George Tenet. Brennan has been described as a ‘priest whose blessing ha[d] become indispensable to Mr. Obama’; a figure who shared Obama’s apparent commitment to just war principles in conducting warfare. Here, a connection can be made between Brennan and Koh and the attempted softening of perceptions of the drone program by putting deeply respected individuals in positions of authority – one a human rights lawyer, the other an experienced CIA official and advocate of just war. However, Brennan has been considered both the architect and the primary defender of the drone program. He is also thought to be the person who made Obama comfortable with carrying out drone strikes within the broader context of the targeted killing program, according to the former director of the National Counterterrorism Centre Michael Leiter. Leiter said: ‘I [do not] think going in, a lot of people thought that President Obama would be more aggressive, more on the offence than President Bush was, in that region, and he has been…And a big reason he has been, in my view, is because John [Brennan] made him comfortable that those were the means necessary to accomplish the goal.’

In his 2011 speech Ensuring [al Qaeda’s] Demise, Brennan referred to the expansion of the warzone to nations such as Yemen and Somalia:

[U]ltimately defeating al-Qa’ida also means addressing the serious threat posed by its affiliates and adherents operating outside South Asia. This does not require a “global” war, but it does require a focus on specific regions, including what we might call the periphery – places like Yemen, Somalia, Iraq, and the Maghreb. This is another important distinction that characterises this strategy. As the al-Qa’ida core has weakened under our unyielding pressure, it has looked increasingly to these other groups and individuals to take up its cause, including its goal of striking the United States.

Brennan also justified the expansion of the battlefield by stressing the fact that groups such as al Qaeda and the Taliban had what he labelled as affiliates and adherents: those who shared similar goals or were part of their networks. Essentially, what Brennan said in this speech

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64 Klaidman, 22.
65 Jaffer, The Drone Memos, 30.
69 “Remarks of John O. Brennan,” para. 20.
was that the expansion of the battlefield had occurred because al Qaeda itself had expanded, in the form of affiliated terrorist groups – and there was nothing in the AUMF restricting the use of military force within only Afghanistan.

Thus, importantly, despite the 2001 AUMF initially applying only to al Qaeda – as the perpetrators of the 9/11 attacks – and its affiliates, it has also been able to be extended and used to authorise military action against a number of groups (including AQAP and al Shabaab) who were not involved in 9/11 (or even in existence at that time). This was primarily due to the loose wording of the AUMF. Brennan’s own words seek to explain such a justification:

As a matter of international law, the United States is in an armed conflict with al-Qa’ida, the Taliban, and associated forces, in response to the 9/11 attacks, and we may also use force consistent with our inherent right of national self-defence. There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unwilling to take action against the threat.70

Such a sweeping justification from Brennan has remained relevant in the post-Obama period: there were reports in 2019 that suggested that Secretary of State Mike Pompeo could potentially use the AUMF to legitimise military action against Iran.71 (Such reports did not come to fruition, it should be noted). Significantly, in June 2021 President Biden – in a Statement of Administration Policy – signalled his Administration’s support for a House attempt to repeal the AUMF.72

While the aforementioned two speeches referred to the existence of the drone program by exploring the Administration's legal arguments behind such a program, the literature points out that it was not until 2012 that an unequivocal statement on the use of drones for targeted killings was made.73 This was done in Brennan’s 2012 speech to the Wilson Centre, The Ethics and Efficacy of the President’s Counterterrorism Strategy, in which Brennan

70 “Remarks of John O. Brennan,” para. 34.
argued that drones were both lawful and ethical, and that civilian deaths were a rare result.\textsuperscript{74} He also stated, in no uncertain terms, that the United States conducted drone strikes against specific al Qaeda targets:

So let me say it as simply as I can. 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 Qaeda] terrorists, sometimes using remotely piloted aircraft, often referred to publicly as drones. And [I am] here today because President Obama has instructed us to be more open with the American people about these efforts.\textsuperscript{75}

Brennan continued his speech by noting that the Obama Administration would continue to strengthen the standards surrounding the drone program, in part to set a good example for other nations developing their drone programs.\textsuperscript{76} This speech has been considered as a ground-breaking one in terms of transparency – the ‘most elaborate and open statement yet by the administration on the policy.’\textsuperscript{77} An arguable contributor to this is the significance of the fact that Brennan noted Obama’s own desire for and steps towards further transparency surrounding the drone program, and because he acknowledged the program’s existence in such an unambiguous way.\textsuperscript{78} However ground-breaking in terms of transparency it was considered by some, though, others saw it as much of the same that had previously been offered by the Obama Administration: a very small (and insufficient) step towards increased transparency, and one that did not add much new detail to the wider discussion, nor interact with common criticisms of the program.\textsuperscript{79}

Another important speech offering up information on the drone program (or at least, information on how the executive branch conceptualised the drone program and its management) came from Obama’s Attorney-General Eric Holder. Holder, in his 2012 speech to the Northwestern University School of Law, chose to focus on the characterisation of targeted killings as assassinations. Holder maintained – as did the broader Obama Administration – that the targeting of al Qaeda’s operational leaders (along with those

\textsuperscript{74} Jaffer, \textit{The Drone Memos}, 199.
\textsuperscript{76} “Text of John Brennan’s Speech on Drone Strikes Today at the Wilson Centre,” para. 79.
\textsuperscript{77} Martin, “Obama Administration Fails to Address the Legality of Targeted Killing,” para. 1.
\textsuperscript{79} “Further Reflections About John Brennan’s Targeted Killing Speech,” para. 2; Martin, “Obama Administration Fails to Address the Legality of Targeted Killing,” para. 3.
operational leaders of other associated terrorist groups) was legal under IHL. In particular, Holder stressed, there was historical precedent for the United States doing so with the shooting down of the plane carrying Admiral Isoroku Yamamoto during World War II.80 Holder also reiterated the government’s line that the targeted killing program was conducted in self-defence, and was therefore not in contravention of Executive Order 12333, the order banning assassination that was referred to in Chapter III:

[W]e must also recognise that there are instances where our government has the clear authority – and, I would argue, the responsibility – to defend the United States through the appropriate and lawful use of force. This principle has long been established under both U.S. and international law. In response to the attacks perpetrated – and the continuing threat posed – by al Qaeda, the Taliban, and associated forces, Congress has authorised the President to use all necessary and appropriate force against those groups. Because the United States is in an armed conflict, we are authorised to take action against enemy belligerents under international law. The Constitution empowers the President to protect the nation from any imminent threat of violent attack. And international law recognises the inherent right of national self-defence. Nothing of this is changed by the fact that we are not in a conventional war.81

Holder echoed central elements of Brennan’s 2011 statement in his speech, stipulating that the battlefield could not be limited to solely Afghanistan, as the enemy of the United States was a stateless one, ‘prone to shifting operations from country to country.’82 As evidence of this, Holder cited several (unsuccessful) al Qaeda attacks that had been launched against the United States from countries other than Afghanistan.83 Commenting on the speech and the information it revealed (or failed to reveal), Hina Shamsi of the ACLU maintained that while the speech did mark a move towards greater transparency, it was ultimately a defence of the government’s drone policy as it stood, without detailed review or scrutiny.84 That is, as Brennan’s before it, the speech did not offer much in the way of new information, or alleviate concerns around good governance regarding drone strike policy.

81 “Attorney General Eric Holder Speaks at Northwestern University School of Law,” paras. 35-6. Here, Holder also bemoaned the use of the term “assassination” over “targeted killing.”
82 “Attorney General Eric Holder Speaks at Northwestern University School of Law,” para. 37. While true, this affords an extraordinary amount of power to shift the definition and scope of the battlefield.
Jeh Johnson was the General Counsel for the Department of Defence (DOD) during Obama’s first term as president. Johnson reckoned with the legality of the drone program, eventually recommending to Obama that targeting members of al Shabaab was not, in his legal opinion, covered under the AUMF; Johnson shared this opinion with Koh, as outlined above. In his 2012 speech, *The Conflict Against al Qaeda and its Affiliates: How Will It End?*, Johnson echoed the sentiments expressed in the other speeches that have been mentioned in this chapter, choosing to highlight the various ways that al Qaeda had changed over time to continue presenting a threat to the United States and its allies. He maintained that while al Qaeda had indeed been degraded and weakened, there were now more local franchises to contend with, such as AQAP and al Qaeda in the Islamic Maghreb. He maintained that the United States must use conventional legal principles to fight an unconventional enemy: ‘we refuse to allow this enemy, with its contemptible tactics, to define the way in which we wage war. Our efforts remain grounded in the rule of law. In this unconventional conflict, therefore, we apply conventional legal principles – conventional legal principles found in treaties and customary international law.’ Johnson also defended the continued use of the AUMF. Once more, these remarks do not offer much in the form of new information on the drone program, but rather serve as a defence of it from the Administration.

Taken together, these speeches outlined above provide a particular degree of insight into the drone program and the Obama Administration’s approach towards it, particularly its views on the program’s legality and its views on executive power. Each of the outlined speeches (partially) contributed to increased transparency throughout the Obama Administration, and indeed, could be seen as a promising sign that the Administration recognised the need for further information to be released about the drone program. Taken as a whole though, the overall (and overwhelming) pattern is that the Obama Administration moved ‘at a glacial pace’ towards greater transparency. This transparency was not complete, by any stretch of the imagination, particularly in light of the favourable information that was cherry-picked by the government to serve as a defence of the program’s

85 Klaidman, *Kill or Capture*, 212-213.
88 “Jeh Johnson Speech at the Oxford Union,” para. 21. This defence must have been made in a narrow sense, considering that he did not think that the AUMF should be extended to incorporate actions made against al Shabaab.
legality. Thus, while the above speeches did mark a small step forward regarding the transparency of the drone program, there was little extended interaction with how to further improve the oversight of the drone program, whether that be externally – through the other two branches of government – or internally, as discussed above, via groupings such as the NSC. Thus, it can be argued, the continued practice of releasing only information that was pre-approved by a narrow subset of the executive branch reinforces that a more effective form of security governance – a better approach to transparency – could entail elements such as the release of information in those four specific categories outlined at the beginning of this chapter; categories where secrecy under Obama remained prevalent and arguably unjustified.


As mentioned, the implementation of oversight and transparency policies by the executive branch itself is conceivably a more appealing way to effect change, in the eyes of the executive, particularly because the branch does not often like to have its unique powers and privileges impeded upon (especially in the field of national security). Having the executive branch (self) instigate this oversight also has the potential to set the tone for the other branches of government and arguably creates a culture of transparency in government – ‘any effort towards greater transparency is only as strong as the will of the current administration.’

Conversely, as Gillian Metzger notes, it is ‘important not to exaggerate the ability of internal separation of powers mechanisms to check presidential authority.’ Undeniably, there is a lack of incentive for presidents to voluntarily cede power, especially when the norm post-9/11 has trended in the opposite direction. Yet a potential measure that has been floated to increase the transparency of the drone program is the release of more information by the executive branch. Across the literature, and as stated at the beginning of the chapter, four key themes emerge in terms of examples of information that could realistically be released to varying degrees of impact: the release of information about targeting processes and standards; the release of information after a strike has occurred; the publishing of the financial costs associated with the drone program; and the publishing of the kill list that the executive branch works from. This is a seemingly simple (yet possibly effective) change in current secrecy trends that could be made for the benefit of transparency

91 Metzger, “The Interdependent Relationship Between Internal and External Separation of Powers,” 441.
92 Metzger, 441.
and other principles of effective security governance. Indeed, it appears to be a common-sense approach: to increase the drone program’s transparency, release more information on it. At the very least, it could be a useful starting point before the potential implementation of the other, harder to implement, separation of powers reforms that this thesis will explore.

The release of more drone-related information is an idea for reform that has been interacted with by the US Congress itself, along with concerned citizens and journalists. For example, in 2014 the Senate Intelligence Committee passed a bill authorising intelligence operations, which would have required the president to issue a report – to the public on an annual basis – that outlined both combatant and non-combatant deaths by drone strike. But this aspect of the bill was removed before it went to the Senate floor for a vote, after a letter was sent to the Committee by the then-Director of National Intelligence, James Clapper. Clapper wrote that the Obama Administration had already been exploring ways that it could be more transparent about the drone program, but that the disclosure of such a report would lack the context required for the public: ‘To be meaningful to the public, any report including the information described above would require context and be drafted carefully so as to protect against the disclosure of intelligence sources and methods or other classified information.’ Significantly, the blocking of information being released – by an executive branch official – highlights the challenges associated with the adoption of such an oversight policy, but it can also point to the worthiness of having clear, delineated boundaries of what can and should be released to the public (as opposed to simply what should not).

As such, the release of further, specific information on the drone program via the executive branch itself, as a form of internal executive oversight, should be a measured approach. That is, it must take what Clapper refers to above into consideration, along with taking into account those legitimate reasons for secrecy such as the protection of sources and the withholding of information from potential enemies. This thesis has already touched on the fact that, in some ways, the Obama Administration did begin to work on this secrecy issue

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towards the end of its second administration, evidenced by some of the reforms that were outlined within Chapter III, as well as the speeches from Administration officials that were outlined earlier in this chapter. But such reforms still have more room for improvement – particularly in light of some of the failings and limitations of the NSC, PIAB and PIOB in properly overseeing the CIA’s use of drones, as discussed above.

**Example 1: targeting processes and standards**

The release of more information on the targeting processes and standards guiding government when conducting drone strikes could help to shed light on the steps that are taken before a strike occurs. Such a form of disclosure could conceivably include a whole host of details, including information on which bodies take part in the process of approving a target; whether there is a review process in place, and if so what it is like; an explanation of the “imminent threat” requirement; more detail on when it would be infeasible to capture a target; what constitutes combat functions and civilians participating in hostilities; what evidence is required to target an individual in a signature strike; and the role that Congress plays in reviews.97

Publishing the targeting processes and standards that the government follows would not require the detailing of every aspect of the program, but it could – at the very least – give general information about who the targets were, and what such a target did to merit their inclusion on the kill list.98 This could feasibly result in more broad support for the drone program from the public, as well as a reduction in potential mistakes via an added layer of accountability, with the public knowing exactly who was being targeted and whether any targeting mistakes had been made. Any such information released would also ideally explain the strategic goals that are sought through the targeted killing program, as well as how the targeting processes and standards meet such goals.99 This would go a long way in rationalising and validating the broader drone program.

Of course, there are potential problems associated with the release of such information, though. As Chapter IV detailed, some contexts exist in which blanket secrecy might be necessary for national security purposes – one example given in favour of secrecy was that it can help to withhold sensitive information from enemies.100 So, releasing

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97 Lewis and Vavrichek, *Rethinking the Drone War*, 54-55.
99 McNeal, 788.
100 Kitrosser, “Congressional Oversight of National Security Activities,” 1065.
information on targeting processes and standards could be especially problematic for this potential occurrence because, as Larry Lewis and Diane Vavrichek point out, ‘terrorists might be able to use this information to be better able to thwart intelligence-gathering and strike operations.’ However, the 2016 declassification of the PPG (created in 2013) highlighted that some of this information – primarily, approvals processes – could in fact be safely released. At least in principle, this PPG governed much of US direct action operations in Obama’s second term. Thus, the PPG arguably serves as an evidence-based benchmark regarding the details on standards and processes that could be made available to the public, in part, as an added accountability and transparency mechanism.

Example 2: information after a strike
The release of information after a strike would entail the release of specific information about the strike, including the target, the terrorist group with which the target was affiliated, and the activities that they had engaged in that made them an appropriate drone target. Under such a policy proposal, the release of the information would only occur if the information could be released without harming future operations and collection of intelligence. Some stated examples of information that could possibly be released include an explanation as to a target’s ties to terrorism; an explanation of the necessity of the strike, and why the target posed an imminent threat; and an explanation as to why capture was not a feasible option. From a strategic perspective, this aspect of the release of further information – releasing information after a strike – is perhaps more realistic than the aforementioned release of information on targeting processes and standards. This is because it would occur after the fact, and it would involve information relating more to a particular individual, rather than US drone policy as a whole: it could help to serve as justification for why a target needed to be killed, at least in the executive’s determination.

However, while such a release of information might seem more feasible, the aftermath of the Anwar al-Aulaqi killing (as discussed in previous chapters), and the secrecy that accompanied this, challenges such potential transparency advantages. The fact that Aulaqi was a US citizen is important to consider here, though: his killing by drone, even though he

101 Lewis and Vavrichek, Rethinking the Drone War, 63.
103 Lewis and Vavrichek, Rethinking the Drone War, 55-56.
104 Lewis and Vavrichek, 55-56.
105 Lewis and Vavrichek, 55-56.
was a self-professed terrorist, was a controversial one, purely because of his citizenship. In fact, this could help to explain why the government was so secretive in this instance. That is, the secrecy surrounding his death does not necessarily negate the potential significance nor likelihood of such a policy option, but it is a factor to consider.

**Example 3: financial costs**

The total costs of the US drone program are difficult to properly assess. Publishing the costs for government activity can be seen as a valid accountability method, though, primarily because taxpayers have a direct interest in seeing where their money is directed to, and how it is spent.106 For example, while US citizens might understand and accept the dollar cost that comes with killing a key AQAP figure such as Anwar al-Aulaqi by drone, they might be less understanding of the cost that is associated with killing the lower-level targets that are regularly killed over such HVTs.107 If the executive branch were to publish the cost and the total number of strikes that have resulted from the corresponding dollar cost, a greater form of accountability – via public pressure – could be achieved without having to sacrifice valuable classified information.108

While such an argument is convincing, it is worth noting that drones are certainly much cheaper than their war-fighting alternatives, operating at US$3,250 per hour of flight time, as opposed to the F-35 Joint Strike Fighter, operating at close to US$16,500 per hour of flight time.109 These figures are based on 2014 data, and therefore could be much lower in 2021 based on technological developments. As Wayne McLean highlights:

> Many of the common objections to drones, such as their ambiguous place in humanitarian law, become second-tier issues when the cost benefits are laid out. For strategic military planners, cost efficiencies mean that economic outputs can be more effectively translated into hard military power. This means that good intentions concerned with restricting the use of drones are likely to remain secondary.110

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110 “Drones are Cheap, Soldiers are Not,” para. 2.
The 2018 fiscal year budget request from the DOD allowed for US$6.97 billion, up 21% from the 2017 budget. The 2019 budget request was higher, at $9.39 billion.

The release of information such as this could possibly lead to a change in public opinion on the drone program (along with, perhaps, increased public interest in the program as a whole), and could be a simple way to improve the transparency – and overall democratic governance – of the drone program, without revealing its *modus operandi*.

**Example 4: kill list**

The publishing of the kill list (or “disposition matrix” as the Obama Administration termed it) would help to alert people as to whom the United States was targeting and give some understanding (or open up debate) regarding whether they could be considered legitimate targets or not. One of the major potential benefits to publishing the kill list is that it could help to improve the accuracy of strikes:

Publishing the kill list might improve accuracy both by increasing the level of care that the administration uses when selecting targets and by eliciting exculpatory information from those named… [P]ublishing a list would help bring any errors to light… Without our suggested reforms, it is possible that somebody other than al-Awlaki is on the kill list but does not belong there. It is also possible that this person has no idea that a classified, interagency process has designated him to be killed.

The case of Bilal Abdul Kareem is a relevant one to raise here. Kareem, a US citizen based in the Middle East because of his work as a reporter, has narrowly missed at least five drone strikes launched in proximity to him and has come to believe that his is one of the names on the US kill list. This has not been confirmed by the US government. This controversial case study example will be discussed in further detail in Chapter VI, but for the purposes of this chapter – and for this specific category of potential information to be released – the

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114 Murphy and Radsan, 866.
release of the kill list could allow him to at least know for certain whether he is on the list or not, and potentially allow for him to try to profess his innocence in a court of law, and attempt to remove his name from the list. This could be an incredibly meaningful change to the functioning of the drone program. Indeed, Kareem has been attempting to use the legal system to get an injunction to stop his killing, but the government has asked for the case to be dismissed because Kareem could not have any way of knowing whether his name was on the kill list or not – that he ‘could not substantiate his claims given the secrecy surrounding targeting decisions.’ The release of the kill list would allow for a more formal legal evaluation of evidence, allowing Kareem to prove his claims of being a government target as plausible or not.

More generally, publishing the kill list could help to enhance the legitimacy of the drone program – it would identify those targets deemed high-value by the United States, and help to show that the drone program is neither unaccountable nor uncontrolled. Yet there are potential downsides to such a policy, too: along with effectively giving notice to targets, it could feasibly harm intelligence sources, if those named could ascertain how they ended up on the kill list. It would also give notice to targets (who, it must be remembered, are potentially terrorists), who could then adjust their behaviour to escape drones. Such a concern is touched upon by Lewis and Vavrichek, who conclude that such concerns do indeed present ‘a significant risk to the military effectiveness of drone strikes that should be taken into account when analysing options.’ Thus, a delicate balance must be struck between releasing information that could make meaningful change in the drone program – allowing those mistakenly placed on the kill list to properly profess their innocence, but bearing in mind that there are legitimate terrorists who are placed on the kill list, and giving them access to too much information could be counterproductive and even detrimental to counterterrorism efforts.

Broadening the discussion to look at the release of more information in a general sense, an added difficulty is that such a policy would challenge the UET, which generally assumes that any actions made to curtail executive power – or force the executive branch to

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118 Murphy and Radsan, “Notice and an Opportunity to be Heard Before the President Kills You,” 866.
119 Murphy and Radsan, 868.
120 Murphy and Radsan, 868.
121 Lewis and Vavrichek, Rethinking the Drone War, 63.
be more transparent – are unconstitutional.\textsuperscript{122} The release of further information would require the executive branch to divert from what has been the status quo in the post-9/11 period. This is perhaps the greatest weakness or challenge to the reforms that have been explored here: when the habit of post-9/11 administrations has been to increase executive power and secrecy while prioritising military action, relying on the UET, dramatically shifting executive opinions and attitudes about drones will remain extraordinarily challenging. This does not mean it is not worth trying, though, particularly in light of the proliferation of drones to other nations and the absence of clear norms and standards surrounding their use.

**Conclusion**

Executive reform in a world characterised by the proliferation of armed drones is a constructive, worthwhile starting point when it comes to attempts to improve the governance of the drone program – reform beginning from within, before moving on to explorations of how the other two branches of government can play a role in overseeing the drone program. While there are a variety of existing mechanisms that could be further utilised to improve the oversight of the drone program – namely, the NSC, PIAB and PIOB – another option revolves around the voluntary release of information on the drone program by the executive branch, in the above stated four key areas. Writing on the release of more information in a broad sense, John Podesta provides a compelling argument for such a reform, making the case that Americans have a right to know what their government is doing, along with the criteria that justify targeted killings.\textsuperscript{123} While it may seem counterproductive on the face of things, the release of more information can also be beneficial to the executive itself. Publishing specific information can help to increase political support for drone policy from voters, by demonstrating that the government is willing to go on the record to defend the rationale and credibility of its national security policies.\textsuperscript{124}

It should once again be noted, though, that with Trump’s 2019 Executive Order 13862 rolling back Obama’s Executive Order 13732, the trend through the Trump Administration


was the release of less information, not more.\textsuperscript{125} While still too early to make a full assessment, there have been more promising signs under President Biden (primarily, the disclosure of Trump-era drone rules and a review into Obama- and Trump-era drone policies), but the Trump experience highlights the difficulties associated with attempts to achieve robust reform in this area: the release of more information is considered one of the more straightforward ways to implement change, yet difficulties appear in the consideration of any of the aforementioned examples of how further information (in areas such as targeting processes and standards; post-strike information; associated financial costs; and the kill list itself) could or should be released.\textsuperscript{126}

As such, while better self-governance within the executive branch could be beneficial and constructive, the release of further information is not necessarily likely to be forthcoming – particularly given the trends that were witnessed throughout the Trump Administration. Given such an impact, this is why the application and assertion of the other two branches of government, and the compliance and management roles that they could potentially play in the governance of the drone program, remains of essential importance. Drone usage constantly and consistently tests political norms and democratic standards. The following chapter will explore this further through the lens of a branch that has traditionally been sidelined or even shut out of evaluating executive branch foreign policy decisions, looking to the role of the judiciary, and the potential for a "drone court" to be involved within the drone program for its improved governance.


CHAPTER VI – THE JUDICIARY

Introduction
The previous chapter outlined the ways through which the executive branch could play a role in the drone program’s governance. There are merits to the internal oversight of the executive branch, but additional checks – other than solely the executive branch – are also arguably required to meaningfully improve the oversight of the drone program (and to meet effective standards of security governance). In applying principles of good governance to the provision, management, and oversight of security regarding drone strikes, the executive cannot be expected – or relied upon – to act as a sole check on itself. This was highlighted in Chapter V's discussion on various oversight bodies such as the NSC, PIAB and PIOB. This has been captured by Schroeder, too, who has affirmed the role that both political and judicial institutions should play in avoiding excessive secrecy, improving oversight arrangements and moving towards greater accountability benchmarks.\(^1\) The perception that the executive cannot exclusively perform its own oversight has been echoed by Judge Rosemary Collyer, who in 2013 rejected the assertion by government lawyers that the executive branch provided an extensive review of the drone program.\(^2\) Collyer’s response to this was to say: ‘No, no, [I am] sorry. The executive is not an effective check on the executive when it comes to an individual’s constitutional rights. [It is] not that I intend to disrespect any person in the executive branch from you all the way up. But you cannot ask a Judge to say okay, well, the executive will check himself.’\(^3\)

This is a sentiment that some others in the judiciary appear to agree with when it comes to the legislative branch’s oversight functions, with some judges also questioning the effectiveness of legislative oversight and one even deriding congressional oversight as a “joke.”\(^4\) Indeed, the judicial branch has, at times, been highly critical of its co-equal partner branches when it comes to the drone program and its oversight. Thus, this chapter will focus on the judiciary, and in particular, on the idea of judicial review as a framework for analysing drone oversight and related policy options, operating from the mindset that without

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significant judicial reform, the use of drones will continue to remain highly covert, unregulated, and unaccountable. The chapter will begin with an examination of the separation of powers in relation to the political question doctrine, before moving on to look at the political question in action. This will be achieved by exploring three key cases in which the doctrine was invoked by the Obama Administration: the Aulaqi case, the Kareem case, and the Jaber case. The focus of the chapter will then move on to the Obama Administration’s interaction with the notion of judicial review of the drone program, before the shift to the policy for reform being examined here. It will provide an introduction to these potential policy changes based on notions of judicial oversight, as well as a detailed discussion of some of the pros and cons associated with those changes.

The specific policy that will be explored concerning judicial involvement in the drone program is a concept commonly referred to in both the literature and the media as a "drone court." Several different models have been put forward as an example of such a policy, but typically a drone court refers to a court that would predominantly 'oversee the use of armed drone strikes against suspected terror targets worldwide.' This would be done to ensure that drone policy was conducted according to the rule of law – whereby ‘the laws are public knowledge, are clear in meaning, and apply equally to everyone.’ Such a court would presumably, then, address some of the more problematic aspects of drone strike practice, such as signature strikes. It is worth highlighting that judicial review in the form of a drone court is one of the more controversial policy options for reform. This is largely because of the prominence of the “political question” doctrine, which will be expanded upon within this chapter, but which – briefly defined – refers to those matters in which the judiciary tends not to get involved, including matters relevant to the drone program, such as national security. It is also controversial because – depending on the model – judicial review is seen as impeding

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5 In the cases of Kareem and Jaber, these legal fights extended into the Trump Administration, too.
upon the president’s status as commander-in-chief, which could impact the policy’s feasibility as a measure for increased and improved accountability.9

If judicial review was implemented though, it could arguably be one of the more effective mechanisms for the governance of the drone program. Indeed, it will be argued that if designed with transparency in mind, judicial review could help to bring the drone program out of the shadows and add a layer of credibility (and legality) to it. Two potential models for a drone court will be explored in this chapter, both of which have real-life analogues: a model based on the FISA Court, and a model based on the Israeli Supreme Court’s review of targeted killings. The existence of such mechanisms reinforces that, at the very least, the security sector is not beyond the need for review, nor possible room for improvement.

The Problem: Judicial Review and the Political Question Doctrine

One conception of the separation of powers is that power should be structured in such a way that each branch plays a role in the decision-making that can influence a person’s life or liberty.10 One of the greatest hindrances to the separation of powers being structured in such a way is the aforementioned “political question” doctrine, which has traditionally led to judicial deference. Political questions are considered to be affairs relating to national security, the military and foreign relations.11 According to this doctrine, these areas are (or should be) excluded from judicial review, with such matters better suited to either the executive or the legislative branches.12 The executive, in particular, has a pronounced role within this doctrine, as per the Constitution that gives this branch authority over military affairs and covers all political and technical aspects of security.13

However, as Michael Eshaghian notes, this authority should not be absolute: war is not a “blank check” that should come at the expense of individual rights.14 Further, as Supreme Court Justice Anthony Kennedy wrote in 2007, ‘the exercise of…[executive]

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11 Gunneflo, Targeted Killing, 85.
12 Gunneflo, 85.
14 Eshaghian, 194.
powers is vindicated, not eroded, when confirmed by the Judicial Branch.' This is a viewpoint that is arguably shared by Israel’s Supreme Court, which is involved in the review of Israel’s targeted killing program. Former Chief Justice of this Court, Aharon Barak, preferred not to defer to the executive branch, instead believing that he had a duty to rule in such cases, particularly if it was perceived that human rights were at stake. As this chapter will later highlight, this duty was realised – particularly within the realm of targeted killing.

In broad terms, criticism of the political question doctrine is common across the literature. It is seen as an extraordinary defence within a democracy, essentially excluding the judiciary from analysing the merits of the most controversial presidential decisions. Joshua Andresen writes that ‘some interpretations of the political question doctrine run the risk of implying that military conduct is wholly beyond the reach of law.’ Others make the point, however, that while the judiciary might be barred from analysing the merits of such decisions, it is not necessarily barred from analysing the legality of such decisions. In practice though, taking the case of Anwar al-Aulaqi as an example, the judiciary tends to reaffirm the political question doctrine. In this case, the court determined that the questions surrounding the constitutionality of killing an American citizen were best left to the executive branch – the branch that, of course, deemed it necessary to kill Aulaqi. This was a case that shocked some of those closely following the drone program, and thus the advent of drones has sparked further debate on the political question doctrine, largely because of how inconsistent it appears to be with modern weapons and modern warfare - that is, it is a historic doctrine that might need adjustment for the modern era. This has been openly

15 Boumediene v. Bush (2007), 797, https://www.supremecourt.gov/opinions/boundvolumes/553bv.pdf. Kennedy also goes on to write that ‘few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.’ It would be fascinating to hear Kennedy’s opinion on challenging the authority of the Executive to kill a person.


discussed by members of the judiciary, too. For example, Judge Janice Rogers Brown writes of the relevancy of the political question doctrine in the modern age:

Our latest phase in the evolution of asymmetric warfare continues to present conundrums that seem to defy solution. Today, the Global War on Terror has entered a new chapter – in part because of the availability of ‘sophisticated precision-strike technologies’ like drones. Yet the political question doctrine insures that effective supervision of this wondrous new warfare will not be provided by U.S. courts.21

In this same dissent, Judge Brown adds:

In other liberal democracies, courts play (or seem to play) a significant supervisory role in policing exercises of executive power. In this country, however, strict standing requirements, the political question doctrine, and the state secrets privilege confer such deference to the Executive in the foreign relations arena that the Judiciary has no part to play. These doctrines may be deeply flawed. In fact, I suspect that technology has rendered them largely obsolete, but the Judiciary is simply not equipped to respond nimbly to a reality that is changing daily if not hourly.22

In this judgment, Judge Brown concedes to the criticism that has led to the outright dismissal of judicial review – that courts are too slow-moving to respond "nimbly" to issues of national security – but also provides a strong and convincing rebuttal of the political question doctrine and its ongoing relevance.

The example of Anwar al-Aulaqi – referred to above – is an influential one in the greater discussion on judicial involvement in matters relating to national security. It will therefore be explored in further detail, along with the Kareem and Jaber cases. These, of course, are not the only examples of the political question doctrine in action, but they are those cases most pertinent to the drone program, and thus worthy of further exploration here to more fully explore how the political question doctrine could very well block any notion of judicial review of the drone program.

Political question case studies
The three case studies outlined here have been chosen not only for how they exemplify the political question doctrine in action but also because of the way that the presiding judges made their discomfort and displeasure with the way that the drone program was operating

21 Jaber v. United States, 17.
22 Jaber v. United States, 17.
clear, questioning the lack of oversight and transparency associated with the program. While these are only three cases – a small sample size – they do indicate a growing concern on the part of judges, who were willing to publicly state that their hands continue to essentially be tied on this matter.

Anwar al-Aulaqi
The significance of the political question doctrine was highlighted by the court case that preceded the 2011 killing of Anwar al-Aulaqi. Aulaqi – a US citizen – was killed by his government without a chance to defend himself in a court of law. He is presumed to be the first American to fit within this category since the Civil War.\(^{23}\) Upon finding out that his son had been placed on the “kill list” that guided lethal drone strikes, Aulaqi’s father Nasser sought an injunction to stop the killing from occurring.\(^{24}\) Nasser argued that the targeted killing program violated his son’s constitutional and international law rights.\(^{25}\) In its argument brief, the Obama Administration claimed that the proposed injunction would be an ‘unprecedented, improper, and extraordinarily dangerous interference with the President’s military powers.’\(^{26}\) The case was eventually dismissed on several grounds, including lack of standing on the part of Nasser, and the political question doctrine.\(^{27}\) Judge John Bates wrote in his judgment:

> To be sure, this Court recognises the somewhat unsettling nature of its conclusion – that there are circumstances in which the Executive’s unilateral decision to kill a U.S. citizen overseas is ‘constitutionally committed to the political branches’ and judicially unreviewable. But this case squarely presents such a circumstance. The political question doctrine requires courts to engage in a fact-specific analysis of the ‘particular question’ posed by a specific case, and the doctrine does not contain any ‘carve-out’ for cases involving the constitutional rights of U.S. citizens. While it may be true that ‘the political question doctrine wanes’ where the constitutional rights of U.S. citizens are at stake, it does not become inapposite.\(^{28}\)

Judge Bates continued:


\(^{28}\) *Al-Aulaqi v. Obama*, 78.
Because decision-making in the realm of military and foreign affairs is textually committed to the political branches, and because courts are functionally ill-equipped to make the types of complex policy judgments that would be required to adjudicate the merits of plaintiff’s claims, the Court finds that the political question doctrine bars judicial resolution of this case.  

Writing after the Aulaqi judgment was handed down, Ruairi McDonnell stated that the case could ‘one day be seen as a blatant failure of the judiciary to confront the executive on a crucial matter of constitutional law.’ Indeed, this was a controversial decision and sent a clear message to other courts that they should reconsider any desire to express opinion or judgment on the actions of another government branch. This message was heeded by judges, and the case of Kareem arguably highlights this.

Bilal Abdul Kareem
The aforementioned kill list that the Obama Administration worked from reportedly sorted targets into three categories: capture, interrogation, or kill. One of the disadvantages of the secrecy surrounding the drone program is that targets have no way of knowing for certain if they are on the kill list. If they do suspect that they are on the list, the political question doctrine makes it difficult to challenge their inclusion within the court system. This has been the case for Bilal Abdul Kareem. Kareem is a US citizen, and a TV reporter working in the Middle East. Based on reporting, and accurate as of December 2021, Kareem has survived five attempted drone attacks. In 2016 he was tipped off by a source that he had been placed on the US kill list and worried about how he could challenge his inclusion on it. The United States has never publicly confirmed nor denied whether Kareem is on the kill list. Rather, Kareem assumed that he was on the list, based on his five close calls with

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29 Al-Aulaqi v. Obama, 80.
33 “How to Survive America’s Kill List,” para. 175.
34 “How to Survive America’s Kill List,” para. 18.
35 “How to Survive America’s Kill List,” para. 28.
drones in the past. In 2017 he sued the government (which had, by this stage, transitioned to the Trump Administration), hoping to get an injunction to stop his killing.\textsuperscript{37}

There are echoes of the Aulaqi case here, but a key difference between the two is that Aulaqi was a self-professed terrorist, while Kareem claims not to be a terrorist, but rather a journalist trying to do his job.\textsuperscript{38} Government lawyers asked for the courts to throw the case out, relying on two key justifications: that Kareem had no way of knowing his place on the kill list because of the secrecy surrounding it; and that the executive branch has the exclusive authority in military operations overseas – invoking the political question doctrine.\textsuperscript{39} Of course, Kareem would not need to speculate as to his placement on the kill list if the government were less secretive, or if it believed itself to have a responsibility to inform those citizens who do end up on the kill list.\textsuperscript{40} Judge Collyer pushed back on the arguments made by government lawyers, asking: ‘Are you saying a U.S. citizen in a war zone has no constitutional rights?...If a U.S. person is intentionally struck by a drone from the U.S., does that person have no constitutional rights to due process…no notice, anything?’\textsuperscript{41} The case was later thrown out after the government invoked the SSP – perhaps answering Judge Collyer's question in the affirmative.\textsuperscript{42}

The Jaber case

Also relevant to the broader discussion on judicial involvement in national security is the Jaber case. This is the shorthand name for the case surrounding the killing of Ahmed Salem bin Ali Jaber (Salem) and Waleed bin Ali Jaber (Waleed). The plaintiffs in this case were family members of the deceased, who argued that their relatives were collateral damage in

\textsuperscript{37} Ahmad Muaffaq Zaidan and Bilal Abdul Kareem \textit{v. Donald J. Trump et al.}, Columbia (2017), 3, \url{https://www.politico.com/f/?id=0000015b-2107-d4bd-a5df-bbd7ec5b0001}.


\textsuperscript{40} “The American Who Says He’s Been the Target of Five Air Strikes,” para. 13.


the execution of a signature strike.\textsuperscript{43} They sought an apology from the government, along with a declaration that the attack was unlawful.\textsuperscript{44} The case was dismissed on political question grounds, but there was an important (and forceful) argument made in a concurring judgment made by Judge Janice Rogers Brown. Brown denounced the lack of oversight surrounding the drone program in her judgment, saying that the government was 'passing the buck' and that congressional oversight was a 'joke.'\textsuperscript{45} Brown concluded:

Our democracy is broken. We must, however, hope that it is not incurably so...The spread of drones cannot be stopped, but the U.S. can still influence how they are used in the global community – including, someday, seeking recourse should our enemies turn these powerful weapons 180 degrees to target our homeland. The Executive and Congress must establish a clear policy for drone strikes and precise avenues for accountability.\textsuperscript{46}

That Brown felt the need to sound the alarm on democracy is what makes this judgment significant within the literature. It is commentary rather than legal precedent, but it is also a condemnation of the current oversight system from a branch of government that is typically accustomed to deference.

Brown’s thoughts are not necessarily reflected by members of the Obama Administration, who have also voiced their opinions on the matter, which is where this chapter will soon turn. First, though, it should also be noted that the case of Bilal Abdul Kareem continued to travel through the court system during Trump’s presidency, and judges continued to push back against the political question doctrine and the extraordinary power that it affords the executive branch.\textsuperscript{47} In January of 2021, though, Kareem’s case against the government was dismissed on appeal, for lack of standing.\textsuperscript{48} What the cases outlined above help to clarify is that the political question doctrine has remained a sticking point for some judges, who are willing to question it but are unable to affect much further change, without a rethinking or recalibration of perceptions surrounding judicial review and associated elements of effective security governance.

\textsuperscript{43} \textit{Jaber v. United States}, 3.
\textsuperscript{45} \textit{Jaber v. United States}, 6.
\textsuperscript{46} \textit{Jaber v. United States}, 6. Indeed, Collyer’s point here is the point that this broader thesis is trying to make.
The Problem: How the Obama Administration Interacted with Judicial Review and a Potential Drone Court

As will soon be outlined, several figures from within the Obama Administration publicly explored the idea of a drone court in detail. Yet despite the focus that some within his administration placed upon the drone court proposal, President Obama himself interacted with it only in a very limited sense, making very few public comments on the matter. He did, however, happen to refer to such a policy during a speech that he gave to the NDU in May of 2013. Here, Obama affirmed that he had asked his administration to investigate a variety of proposals that could increase and enhance drone oversight. He stated: ‘the establishment of a special court to evaluate and authorise lethal action has the benefit of bringing a third branch of government into the process, but raises serious constitutional issues about presidential and judicial authority.’ This was one of the rare occasions that Obama publicly interacted with the policy, and it is notable because he conceded to the belief that bringing in the third branch of government – the judiciary – would be of benefit. However, there was not much further interaction with the proposal. While others within the Obama Administration engaged with the notion of a drone court too, which was significant, it can be argued that the lack of meaningful and continued engagement with such a policy proposal at the highest level of government does not send a clear message that the drone court was an oversight option that President Obama was pushing for. This does not necessarily make a drone court an infeasible idea though, nor does it exclude it from further examination. Certainly, the amount of time and energy that others from within the Obama Administration spent publicly engaging with the issue of judicial oversight helps to highlight this fact.

When discussing judicial involvement in the drone program, Obama officials often echoed the judicial deference line and advocated for the executive branch’s supremacy over the other two branches of government. For example, in March 2012, Attorney-General Eric Holder spoke to the Northwestern University School of Law on Aulaqi and the issue of a drone court, responding to claims from critics of the drone program that only a court or a similar judicial body could take the life of a US citizen. Holder affirmed that the

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Constitution affords due process and not judicial process, and that the two are not the same thing. That is, due process does not need to be achieved through a judicial process. He said:

The conduct and management of national security operations are core functions of the Executive Branch, as courts have recognised throughout our history. Military and civilian officials must often make real-time decisions…all of which depend on expertise and immediate access to information that only the Executive Branch may possess in real-time.

This is a compelling argument – the argument that courts do not move fast enough to adjudicate “real-time” on matters of national security – that is repeatedly referred to in discussions on judicial review, but it is an argument that can be rebutted.

Indeed, one common criticism levelled against the idea of a drone court is that judges are not equipped to deal with such imminent pressures, as Holder expressed in the above quote. An incredibly important aspect pertaining to the legality of the targeted killing program is the requirement of imminence: that a terrorist must pose a continuing and imminent threat to the United States and its interests. This is also of supreme importance when it comes to the creation of a drone court. Critics of drone courts (or the drone court idea) question whether a court is an appropriate mechanism to use, arguing that courts typically take a long time to assess evidence and pass judgment. This would not necessarily be appropriate for all circumstances a drone is used, as sometimes decisions will need to be made in a faster manner than a court could provide. And of course, this is a legitimate concern – courts do move slowly, and this was pointed out several times in the written media covering the drone court proposal. As Barela points out though, ‘the Bush and Obama

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52 “Attorney General Eric Holder Speaks at Northwestern University School of Law,” para. 51. The case that Holder is referring to here is that of Anwar al-Aulaqi, which will be explored in further detail within this chapter.


administrations have redefined “imminence” in a manner that no longer includes “immediacy”.56 The case of Aulaqi highlights this newfound definition of "imminence." Aulaqi was first placed on the US kill list in April of 2010, and the first failed strike against him occurred in May of 2011 before he was finally killed in September of that year.57 Thus, concerns that involving a court in the process would take too long are not necessarily well-founded, as the definition of "imminence" concerning Aulaqi was quite flexible. While this one case might not necessarily serve as evidence of a wider pattern, it is a compelling example given Aulaqi’s prominence.

John Brennan echoed Holder’s concerns in 2013, during his Senate confirmation hearing to become CIA Director. Brennan stated that while such a court could be quite attractive, it would also raise serious questions and concerns over areas that have traditionally been within the realm of the executive branch.58 More encouraging for those hoping for further oversight, Brennan assured the Senators that every available option was worth considering and that it was important to get detail on any such proposal.59 He also confirmed that the Obama Administration had held internal talks focusing on a potential drone court and its feasibility, but this was not spoken widely of after this statement and it is not known how seriously it was discussed.60

Jeh Johnson (Obama’s General Counsel for the DOD) has been a vocal sceptic of the drone court idea, arguing that ‘courts exist to resolve cases and controversies between parties, not to issue death warrants based on classified, ex parte submissions.’61 Therefore, to Johnson, the military is the body most capable of conducting targeted killings, with no need for a court to weigh in on the matter.62 Nonetheless, Johnson explored both sides of the argument in a 2013 speech (“A ‘Drone Court’: Some Pros and Cons”). Speaking to the potential benefits, Johnson had four key points: first, that a drone court could provide added

59 “Nomination of John O. Brennan to be Director of the Central Intelligence Agency,” 73.
60 Shane, “Debating a Court to Vet Drone Strikes,” para. 11.
62 “Jeh Johnson, Drone Court ‘Sceptic,’ Argues Targeted Killing Best Left to the Military,” Foreign Policy, published March 18, 2013, para. 2, https://foreignpolicy.com/2013/03/18/jeh-johnson-drone-court-skepti-argues-targeted-killing-best-left-to-military/. The problem with this, of course, is that it is not only the military conducting targeted killings: the CIA conducts them too.
credibility, independence and rigour to the drone process; second, that judges are known and respected for their independence; third, that a drone court could set a high standard for other nations; and fourth, that a drone court could provide a layer of “authority” over controversial decisions.63

Conversely, Johnson had five key points against a potential drone court. First, that any proceedings would likely be secretive, and that many applications would be granted (as is the case with the FISA Court, to be explored later within this chapter); second, that judges might not want such a responsibility placed upon them; third, that judges could either be underworked (if the proposed court covered only US citizens), or overworked (if the proposed court covered all drone strikes); fourth, that judges are not used to dealing with changing circumstances, but rather tend to deal with an established set of facts; and fifth, that such a court would pose constitutional issues, as the president is the commander-in-chief of the armed forces.64 These points made by Johnson are all valid ones and will be further interacted with in the final part of this chapter.

In addition to these speeches, the academic literature has engaged with ideas around judicial review of the drone program in a meaningful way, providing several policy proposals for how such a court could operate within the United States. This will be the focus of the next section of this chapter, which will look at two proposed models in particular.

A Potential Solution? The Feasibility of a Drone Court

Across the literature on judicial involvement in national security (and more specifically, involvement in the drone program), several core themes have gained prominence. Broadly, these themes have resulted in discussions around first, the inconsistency that a court order is needed to eavesdrop on a person, but not to kill them via drone in an overseas location (when killing is the more “extreme” action); second, the frightening precedent that the United States has set for other nations to potentially follow when it comes to targeted killings, including the killing of a nation’s own citizen; third, the rise of executive power, as highlighted in Chapter IV; and fourth, that involving the judiciary in the drone program would pose too many

63 “Jeh Johnson Speech on ‘A “Drone Court”: Some Pros and Cons’,” Lawfare, published March 18, 2013, from para. 17, https://www.lawfareblog.com/jeh-johnson-speech-drone-court-some-pros-and-cons. On the point of judges being known and respected for their independence, Garrett Epps provides a fascinating counterpoint: ‘Americans love courts and judges. But they trust them because, in our system, they are independent of elected officials – not part of the political machine…Federal courts decide cases; they do not fight wars, collect the garbage, or set health-care policy. And most particularly, they may not become an advisory agent of the executive branch.’ “Why a Secret Court Won’t Solve the Drone-Strike Problem,” para. 4.

64 “Jeh Johnson Speech on ‘A “Drone Court,”’ from para. 22.
constitutional issues. Nonetheless, these broad themes have led to the conclusion (on the part of various legislators, policymakers and academics) that a drone court of some shape or form is necessary not only to improve the optics of the drone program – how it is perceived – but to also improve the program itself.

As outlined earlier within the chapter, a drone court refers to a court that would oversee the use of drones against terror targets. The reasoning behind the proposal of a drone court is the belief that no American should be imprisoned or executed without the order of a judge or a jury. This is a principle that should at least apply to all Americans, whether they be a terrorist or a civilian. It should immediately be noted that while a drone court could open up a discussion around the use of drones for targeted killing, and could clarify questions around the program’s legality, it would not necessarily achieve much in terms of reducing secrecy – it would be a layer of accountability, but it would not result in radical transparency and/or accountability, because the proposed models involve secretive processes. Thus, it might curtail the problem of excessive executive power, but not the issue of secrecy.

Nonetheless, Steven Barela writes on the “imperative” of a drone court, noting that the exclusion of the judiciary and the legislature from the targeted killing program strikes at the heart of the government and its legitimacy. He concludes that a drone court is necessary to restore the separation of powers to its position of prominence within democracy. Regardless of this certainty on Barela’s part, judicial review is a highly controversial proposition, and it is not one without its problems. The earlier reference to Johnson’s speech outlining the pros and cons of a drone court examined this. Further to this exploration of Johnson’s speech, a drone court is likely to lack government support, but it is also conceivable that it would lack support from the public, being seen as unnecessary. This is

68 “The Imperative of a ‘Drone Court,’” para. 1.
69 “The Imperative of a ‘Drone Court,’” para. 7.
particularly the case when the public believes itself to be in a perpetual state of emergency, brought about by transnational terrorism.\textsuperscript{70} There is also the added factor of the drone program’s popularity amongst the US population.\textsuperscript{71} Despite this, some commentators view judicial review as a responsibility, especially in such situations of "emergency," where controversial policies are likely to be given indiscriminate support from segments of the citizenry (for example, many of the policies pursued in the name of the “war on terror”).\textsuperscript{72}

It should be noted that arguments against a form of judicial review are not exclusively applied to the drone program. Judicial review exists in other governance contexts, including in relation to individual rights, and as Tiberiu Dragu and Oliver Board highlight, there is a variety of academic literature that has explored the matter (not relating to the drone program):

Judicial review is a widely adopted institutional method of checking the legality of policies, including the consistency of governmental action with the rights and liberties of individuals. Given its importance in the constitutional structure of developed and, increasingly, developing democracies, scholars have studied the effect of judicial review from a variety of theoretical perspectives, including the effect of judicial review on policy durability, the effect of judicial checks on elected politicians’ incentives to pander to public incentive, the effect of judicial oversight on bureaucratic incentives to exert effort, the effect of different types of judicial rulings on policy, the effect of judicial review on legislative-judicial relationship, and the conditions under which legal limits and judicial ruling can be self-enforcing, among other topics.\textsuperscript{73}

That is to say, while judicial review is a policy option that has sparked a considerable deal of debate, much of this debate can also be applied more broadly to judicial review in other contexts. Judicial review is not a new concept - only its possible application to the drone program is.

There are two distinct drone court models identified across the literature that could serve as a form of judicial review: one model that would look at drone strikes before they occur, and another model that would look at them after they occur. The first would be modelled on the court that operates under FISA. The second could be modelled on the briefly aforementioned Israeli-style court, which would evaluate strikes after the fact, looking at how


\textsuperscript{71} Scahill, \textit{Dirty Wars}, 353.


\textsuperscript{73} Tiberiu Dragu and Oliver Board, “On Judicial Review in a Separation of Powers System,” \textit{Political Science Research and Methods} 3, no. 3 (2015): 474, \url{https://doi.org/10.1017/psrm.2014.44}.
they adhered to the law. There are several reasons why these two models, in particular, have been chosen. A court modelled on the FISA Court is a policy proposal that has been discussed in the literature (most notably within Larry Lewis and Diane Vavrichek’s *Rethinking the Drone War*), but that has also been discussed by officials within the Obama Administration. The Israeli-style court model was not explicitly referred to by the Obama Administration, but it was explored within *Rethinking the Drone War*. It is included in the discussion because it is more analogous to the US situation – this is a court that deals explicitly with targeted killings, rather than with warrantless wiretappings (as the FISA Court does), and thus serves as a useful case study example.

Proposed models and what they are based on

FISA

The period immediately following the Nixon presidency saw a host of oversight mechanisms such as the Church Committee that has been referred to within this thesis, and also including the creation of congressional permanent intelligence committees. Another of these oversight mechanisms was the FISA Court. The FISA Court was born of the post-Nixon era, set up as ‘a response to President Richard Nixon’s misuse of federal resources to investigate U.S. citizens.’ FISA established ‘a special court and congressional oversight procedures to review intelligence collection activities against Americans and foreigners.’ This court approves warrants that then permit US intelligence agencies to collect evidence relating to foreign intelligence and terrorism. It is presided over by federal judges, and presumably, these judges would also be the ones to oversee the drone program if such a court were established. These judges are appointed by the Chief Justice of the Supreme Court, they may serve for a maximum of seven years, and the role is performed on a rotating basis – it is not a full-time role.

There are drawbacks to this court: the FISA Court is considered lacking because of the secrecy that accompanies its decisions (exactly the opposite of what is truly intended with

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77 Lewis and Vavrichek, *Rethinking the Drone War*, 50.
78 Lewis and Vavrichek, 50.
79 “3 Questions About the FISA Court Answered,” para. 16.
robust forms of oversight over the use of drones); the limitations of its actual scrutiny of government; and the ‘breadth of the permissions it has given for government surveillance.’

And indeed, limitations to the court are found within the data. According to Neal Katyal, the FISA Court rejected just 11 out of more than 32,000 government requests between 1979 and 2011.81 More recently, in 2016, just 34 out of 1,485 requests for surveillance were rejected.82 As Lacey Wallace writes, ‘since the proceedings of the court are secret, it is unclear why these denials occurred or why so few cases were denied.’83 This has led to claims that the court is nothing more than a “rubber stamp.”84 A similar issue could plague any potential drone court and as such must be created with safeguards in place to ensure its independence.85

The analogue of this court for drones would be a court that is approached before a strike takes place, and where strikes would be approved as legal or not.86 Of the two models outlined within this chapter, the FISA-style court is considered more problematic. This is because it would require the executive branch to come to the court before the fact, essentially seeking approval for a strike it wishes to carry out. What makes this so problematic, of course, is that the US president is the commander-in-chief of the armed forces – one of the constitutional issues raised within the literature.87 In situations of armed conflict, a court in this form would intrude into important areas of decision-making, and turn the concept of "imminent threat" on its head.88 Further, the court would ‘be asked to render advisory opinions rather than rule on actual cases and controversies.’89

Such a court, though, would also allow for all three branches of government to coexist within the decision-making process surrounding the targeted killing program: the executive would approach the court, and the court would be overseen by the legislature, just as the

82 “3 Questions About the FISA Court Answered,” para. 19.
83 “3 Questions About the FISA Court Answered,” para. 21.
84 “Jeh Johnson, Drone Court ‘Sceptic,’ Argues Targeted Killing Best Left to the Military,” para. 7.
85 Guiora and Brand, “Establishment of a Drone Court,” 326.
86 Lewis and Vavrich, Rethinking the Drone War, 50. An interesting question that arises from this is what happens after a strike is approved as legal or not: if the answer is that it is not legal, would the court have the power to stop the strike from going ahead? Or is the approval more of a symbolic one?
87 Of course, there is an interesting discussion that could be had around the idea of the commander-in-chief in situations where the CIA is in control of the drone program – does this remain a constitutional problem in this situation?
88 Lewis and Vavrich, Rethinking the Drone War, 96-97. However, this chapter has already considered “imminence” and the various ways in which it can be interpreted and applied, such as in the case of al-Aulaqi.
89 How to Ensure that the U.S. Drone Program Does Not Undermine Human Rights, 6.
FISA Court currently is. This is arguably a return to the Founders’ vision, who saw the balancing act between security and liberty as a traditional role of the judges. As Samuel Adelsberg notes in a more modern context, judges can be incredibly knowledgeable, and have experience in dealing with sensitive security matters. The combination of these two factors makes them 'ideal candidates' to adjudicate on matters of targeted killing. Continuing from this, Adelsberg proposes a court that fits within this FISA Court category, naming the proposed model the “Citizen Targeting Review Court” (CTRC). This proposed court would be presided over by a (Senate-confirmed) judge with recognised expertise in national security. This judge would ‘issue opinions to establish standards and guide future decisions,’ and ‘redacted versions of these opinions would be released to the public.’ Adelsberg further notes that there should also be expert defence counsel present as representation for the accused citizen. This would be done to avoid the above criticisms of the FISA Court: namely, that it acts as nothing more than a rubber stamp. Adelsberg’s CTRC model is a worthwhile one; one that takes into consideration some of the more compelling arguments against a drone court and offers up ways to counteract such problems.

As above, this FISA model has received pushback because it would necessitate the executive branch to essentially "ask for permission" before a strike was carried out. As such, it is necessary to review and explore a different oversight model, where the courts would become involved after the fact, which could be a more compelling model for judicial review over the US drone program.

Israeli-style
This chapter earlier outlined that the political question doctrine has not been as prominent in Israel as it has been in the United States, largely due to standing beliefs and attitudes about the role of judges, particularly within the realm of human rights. Indeed, it appears as though US ideas and understandings surrounding national security and the judiciary’s need to defer on such “political” issues have not been adopted in Israel, whose Supreme Court has

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90 “A Court for Targeted Killings,” para. 7.
92 Adelsberg, 445.
93 Adelsberg, 445.
94 Adelsberg, 446-447.
95 Adelsberg, 446-447.
96 Adelsberg, 447.
97 Adelsberg, 447.
managed to evolve into a major participant in the supervision of such issues. Israel’s Supreme Court reviews targeted killings conducted by the Israeli Defence Forces to assess their legality while paying appropriate respect and deference to military judgment. After a targeted killing occurs, the precision of the strike is investigated, along with the circumstances of the attack. Importantly, this form of review and its outcomes is not made available to the public – it is a secretive form of oversight. But, it is an added layer of oversight, which could function as at least a promising start for the further and improved governance of the drone program. While this will be explored within the security governance chapter that will analyse these policies, it should be noted from the outset that this is a real drawback to the model, unless it was designed with safeguards in place to ensure that the US version was not as secretive.

The legal precedent for judicial review within Israel was set with the 2006 judgment *Public Committee Against Torture in Israel v. The Government of Israel* (referred to within the literature, and hereafter within this chapter, as the *Targeted Killings* case). This judgment is considered one of the ‘most interesting and comprehensive judicial pronouncements on the rules of international humanitarian law governing military operations against non-state military groups during armed conflicts.’ The judgment sets out that when reviewing matters relating to the military, the court should ask itself if a reasonable military commander would have made the same decision. If the answer to that question is yes, then the court should not intervene. It also makes clear that the rule of law should take precedence over counterterrorism policies. That is, the Court recognises the policy as a legitimate form of conducting warfare but notes that it should be subject to checks and balances. This form of review emerged from the controversy that came with the development of Israel’s targeted killing program. Ronen Bergman explains that the criticism and controversy that followed

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100 Lewis and Vavrich, *Rethinking the Drone War*, 51.
101 Lewis and Vavrich, 51.
104 Guiora and Brand, “Establishment of a Drone Court,” 330.
Israel's targeted killings necessitated the justification of each strike to help legitimise it, and thus ‘disclosing details of the victims’ misdeeds [established] that Israel had sufficient cause to respond.¹⁰⁶

A US drone court modelled on the Israeli-style approach would review drone strikes after they had occurred.¹⁰⁷ Like with the FISA Court, it could be presided over by federal judges, although as Lewis and Vavrichek point out, this would raise questions and concerns as to ‘legality and whether the judges would necessarily have the appropriate national security expertise.’¹⁰⁸ Alternatively, this is a “court” that could be run from within the executive branch, perhaps more in the vein of oversight bodies such as the PIAB or PIOB, as discussed in Chapter V.¹⁰⁹ It should be noted here, within the discussion on federal judges and federal court involvement in the drone program, that the above case studies – of Aulaqi, Kareem and Jaber – were decided in district courts. The judges in these cases tended to side with the political question doctrine. Implementing a drone court raises questions around whether a higher court – such as a federal court – would also be wedded to the political question in the same way, and whether these judges would feel comfortable engaging in judicial review when it goes against long-standing judicial norms.

There are a variety of ways through which a court based on the Israeli system could be implemented, each with differing levels of transparency.¹¹⁰ Depending on the implementation, such a court could increase the accountability of the drone program.¹¹¹ A popular opinion within the literature appears to be that such a model would be preferable over a FISA-style court. Review after the fact is seen as more desirable, largely because it would not stop the executive branch from exercising its power, nor would it stop the president from exercising his or her powers as commander-in-chief.¹¹² It also allows for a considered analysis of the events, without imminence pressures.¹¹³ As Stephen Vladeck writes:

’Such review is best provided after the fact, rather than ex ante, in a similar manner as the wrongful death actions recognised by virtually every jurisdiction. After-the-fact

¹⁰⁷ Lewis and Vavrichek, Rethinking the Drone War, 98.
¹⁰⁸ Lewis and Vavrichek, 52. A workaround of this issue could be found in the Adelsberg CTRC model referred to on p. 163, where judges would have previous national security experience.
¹⁰⁹ Lewis and Vavrichek, 52.
¹¹ Lewis and Vavrichek, 98.
¹¹ Lewis and Vavrichek, 98.
¹¹³ Vladeck, 24.
review avoids the serious logistical, prudential, and potentially constitutional concerns that ex ante review would raise because it does not stop the government from acting at its own discretion, and it allows for more comprehensive consideration of the issues ‘removed from the pressures of the moment and with the benefit of the dispassionate distance on which judicial review must rely.’

Finally, as Lewis and Vavrichek note, a drone court could be beneficial to the government, too: depending on viewpoint, it could either compel or allow the government to prove to the public that their targets are guilty, legitimising the policy through transparency. As above, this has been the case in Israel, though it is not likely that all US drone court critics would be convinced.

According to Eileen Kaufman, Israel's targeted killing court can be considered a success. Kaufman writes that judicial oversight has strengthened the rule of law within Israel and that the process has actually played ‘a major role in reining in governmental excesses in times of war.’ This is largely because senior members of the military are wholly aware of the fact that their actions are likely to be reviewed by the Supreme Court, in contrast with the situation in the United States, where such review is unlikely to happen. The tangible (positive) effect that judicial review has had within Israel presents a compelling case for the adoption of judicial review within the United States, but the adoption of such a form of oversight would not necessarily be a simple task. Indeed, while it can be helpful to look to Israel and its approach to the review of its targeted killing program, it has been suggested that the US legal system will never be able to change in such a way due to the prominence of the political question doctrine.

There are also core differences between the US's and Israel's Supreme Courts. For example, the Israeli Supreme Court often hears cases in real-time, while the US Supreme Court will hear cases long after an event. This helps to explain why a court for targeted killings has emerged in one country and not the other. Relatedly, Israel tends to reject both the political question doctrine and the SSP, unlike the United States.

What these differences mean is that each court has a remarkably different ability and desire to

114 Vladeck, 24.
115 Lewis and Vavrichek, Rethinking the Drone War, 52.
117 Kaufman, 158.
119 Kaufman, “Deference or Abdication,” 96.
120 Kaufman, 96.
hear national security cases. That is, the Israeli Supreme Court is often willing, while the US Supreme Court is rarely willing.121

Also of great relevance to the matter at hand is the political context of Israel. As Galit Raguan explains, Israel’s Supreme Court has long been accustomed to applying international law to government policy within areas of military occupation, including the Gaza Strip.122 This is because Israeli domestic law typically does not apply to such territories, which has led to a greater willingness on the part of the Court to adjudicate on national security affairs.123 Conversely, in the United States the notion of judicial involvement within the area of national security is a fraught idea, as explained through the discussion on the Aulaqi, Kareem and Jaber cases. It should be noted, though, that advocacy on the part of the public could also be a contributing factor to this difference: the level of public support for the Palestinian cause, while not necessarily overwhelming, is certainly higher than the level of support and/or advocacy for targets of US drone strikes or, more broadly, for terrorist groups such as al Qaeda. While each court can be different, there are also matters where there are similarities between the two. For example, both Israel and the United States have referred to the separation of powers – and specifically, to judicial deference – within the realm of human rights. Israel tends to hold that judicial deference is inappropriate at times where human rights are at stake, while the US Supreme Court has at least stated that there is a role for all three branches of government in matters relating to individual liberties.124 Such agreements aside, it can be argued that the core differences between the two courts do indicate that a drone court modelled on the Israeli style might not necessarily be easily or straightforwardly transferred over to a US context.

Conclusion
When considering questions about a more transparent and accountable US drone policy, the political question doctrine has been remarkably influential in complicating effective oversight, and this chapter has argued that executive overreach has aligned with a broad pattern of deference on the part of the judiciary – particularly in those matters most pertinent to the drone program, including national security and military matters. Drone debate was

121 Kaufman, 96.
123 Raguan, 65-66.
also, of course, distorted by secrecy and selective disclosures on the part of the executive branch, as explored in Chapter IV. In exploring standards for transparency and accountability, and returning to the broader example of a drone court (as opposed to the two specific examples outlined above), judicial review via a drone court is – as such – one pathway to potentially address questions of the legitimacy and efficacy of the US drone program, albeit a contentious one. At the very least, though, it can be argued that from a robust security governance perspective, the drone program (and any future drone programs) requires a robust legal and bureaucratic infrastructure beyond the executive branch itself. But there are many legal questions that the implementation of any proposed drone court raises, including exactly what the court could rule on (was the target part of al Qaeda; did they pose an imminent threat?); and whether the court could cover US citizens who were not members of al Qaeda but did pose an imminent threat.\footnote{125} Legislators would also have to clarify exactly how any proposed court would interact with and/or contradict the constitutional powers of the president as commander-in-chief.\footnote{126} Further complications could include that the court might not necessarily result in less secrecy and that it could just be a rubber stamp like the FISA Court, though if designed with transparency in mind – at the forefront of the design – such complications could be negated.

Thus, judicial involvement within matters of national security raises many questions, legal and otherwise. These will be explored in further detail within Chapter VIII, which will look at how this policy stands against the specific indicators of security governance that have been formulated for this thesis. Before this, though, and given some of the examined weaknesses present within judicial oversight systems, the thesis will now turn to the third and final branch of government under review – the legislature – and its potential in playing a critical role in promoting an effective and accountable drone program, via the “military preference.”

\footnote{125} “Drone Court Considered,” CNN, published February 9, 2013, paras. 12-13, \url{http://security.blogs.cnn.com/2013/02/09/legislators-consider-new-court-to-oversee-drone-strike-decisions/}.
\footnote{126} “Drone Court Considered,” para. 14.
CHAPTER VII – THE LEGISLATURE

Introduction

The previous two chapters, focusing on the executive and judicial branches of government, were in some ways offering up controversial – as recognised across the literature; as explored within those chapters – policies for oversight reform. The reason for such oversight reform policies – such as the voluntary release of further information by the executive branch, and the review of the drone program by the judiciary, via a "drone court" – being controversial is that they would each involve shifting the dominant understandings of the separation of powers (at least in the sense that they have been perceived since 9/11). This is a modern-day period that has, of course, seen a real extension of executive power and prerogatives in US counterterrorism policies. This has been paired with a lack of reform and effective oversight, resulting in an unregulated and unaccountable vehicle for the United States to deploy lethal force with impunity. So, this chapter will instead focus on a more traditional check on executive power: the legislative branch, and the ways in which this branch of government could utilise Schroeder’s concept of security governance to avoid excessive secrecy, improve oversight arrangements, and move towards greater accountability benchmarks.

The legislature is considered a more traditional check on power due to the chain of accountability framework: that (with the author writing in an Australian context) ‘Parliament is directly accountable to the people through regular elections, but the executive government is accountable to the Parliament.’ Simply put for any context, the executive is accountable to the legislature, while the legislature is accountable to the people. Although reforming US drone strike policies will remain difficult, due to challenges of and stresses on the chain of accountability, placing the use of drones on a more legitimate and defensible footing will necessitate an ongoing role via the US Congress. As such, this chapter will explore the legislative branch of government and its oversight functions, arguing overall that these functions have largely failed in the post-9/11 period, particularly when it comes to the oversight of the drone program, and that therefore further reform is needed. It will be highlighted that the relevant congressional committees became almost entirely silent on drone strategy and tactics and failed in many essential features of oversight during the Obama era.

This argument will unfold in three core sections. First, the chapter will look at legislative oversight via Congress and how it has changed over time; examining the legislature’s oversight functions according to the US Constitution, and how this has played out practically over time. This will include periods in which the legislature has asserted its traditional oversight powers, but also those periods where the legislature has withdrawn from such responsibilities, whether of its own accord or the executive’s accord. Second, the chapter will look at how the Obama Administration interacted with both legislative oversight and the policy for reform that will be examined in this chapter, looking mainly to primary sources, including transcripts from Intelligence Committee hearings, to achieve this. Finally, the chapter will move to an examination of the policy that will be explored for the potential further involvement of the legislative branch, the so-called “military preference.” As a starting point, the military preference would involve a shift in the practice of drone strikes, with responsibility for launching such strikes shifting from the CIA to the military. Such a reform approach has primarily been chosen because of its rejection by the legislative branch, despite support for it from the executive branch. This section of the chapter will look at the pros and cons of such a policy, along with its feasibility, and the following chapter will analyse it in conjunction with the other two policies outlined in the previous two chapters, according to the specific principles of security governance that have been developed for use within this thesis.

The Problem: Legislative Oversight and Changes Over Time

The legislature’s oversight functions according to the Constitution

The first three articles of the US Constitution are split between the legislature, executive and judiciary, respectively. Such a distribution of power was a deliberate choice by the Constitution’s Framers to place the separation of powers in a position of prominence, reflective of a desire to avoid absolute power and the ‘monarchical tyranny embodied by Britain’s King George III.’ Indeed, the ‘prior American political experience served to impart a practical understanding of certain of the finer points of the doctrine and its operations.’ Thus, Article I of the Constitution contains the powers of the legislature, and Article II

contains the powers of the executive. Yet there is a sense of ambiguity in the document and even a blending of powers between these two branches. For example, there is a fair amount of detail that is outlined about Congress’s powers in Article I, but Article II contains ‘only a brief statement of the authority of the president.’ Douglas Kriner and Eric Schickler describe this, fittingly, as a ‘paucity of formal powers enumerated in Article II,’ but point out that despite this, the legislature is still at a power disadvantage when compared with the executive. Discrepancies in how certain branch’s powers are defined have opened the Constitution up for debate over “implied” powers (those powers not explicitly referred to and/or delegated within the Constitution), and this is particularly prevalent within the realm of foreign policy.

Such overlap and interpretative openings also go a long way to understanding why legislative oversight has ebbed and flowed over time, not remaining at a static or consistent standard, as will be illustrated below. Jonathan Masters notes that presidents are likely to rely on constitutional clauses that use the language of "executive power" or "commander-in-chief" because these tend to allow for a stretching of power, which can vary according to political context and climate. The use of power following the events of 9/11 is, of course, a recent prominent example of this. Indeed, as James Pfiffner explains:

The Bush Administration made much of the authority of the president as commander in chief, and some of the most sweeping assertions of presidential prerogatives are based primarily on the commander-in-chief clause of Article II. For instance, a memorandum drafted by John Yoo and signed by Jay Bybee asserts that the president’s authority as commander in chief can supersede any law.

Of course, another important “implied” power that is conferred through the Constitution – implied because it is not explicitly referred to within the Constitution – is that of legislative oversight. Article I of the Constitution confers a considerable deal of power upon the legislature, including the right to appropriate funds; to declare war; and to impeach and try

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6 “U.S. Foreign Policy Powers,” para. 12.
7 “U.S. Foreign Policy Powers,” para. 12.
the president and/or vice president, among other powers. The scope of these powers necessarily means that the legislature needs to be able to access information about the executive and its undertakings, as L. Elaine Halchin and Frederick Kaiser point out, particularly regarding ‘whether officials are obeying the law and complying with legislative intent.’ In other words, Congress’s role can be seen as of ‘paramount importance on matters of national security activities, which in large measure are classified and thus shielded from public scrutiny because of the need to protect sensitive sources and methods.’

The above point is fundamental because this is where the 'periodic tug-of-war between the president and Congress' plays out. The executive branch stretches power – as witnessed throughout history, including post-9/11 – and the legislature struggles to use its implied or assumed powers due to factors such as ‘information asymmetries, steep transaction costs in coalition building, and the looming threat of a filibuster or presidential veto.’ At the very least, meaningful legislative oversight should require that the overseers have ‘access to sufficient information about the activity being overseen and the means to influence the activity going forward.’ The result of the challenges described above, though, has achieved the opposite result in practice, hindering the proper and effective oversight of the executive branch by Congress, including oversight of the drone program.

The legislature’s oversight performance in practice
The congressional committee system is of immense importance when exploring the role of the legislature in overseeing the executive branch, both with regards to the drone program and more broadly, too. Colton Campbell and Roger Davidson argue that Congress has long utilised the committee process to ‘shape policy, to create parliamentary strategy, to disentangle complexity and, most importantly, to partition the institution’s workload into more manageable portions.’ The authors also note Woodrow Wilson’s observation that ‘the

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13 “U.S. Foreign Policy Powers,” para. 4.
14 Kriner and Schickler, Investigating the President, 5.
15 “Congress Perhaps?,” para. 3.
committee system is the very heart of the lawmaking process of Capitol Hill.' As this chapter will explore, the committee process is incredibly significant within the context of the drone program, both in terms of its oversight and its potential reform, particularly due to the power that such relevant committees hold. Lee Hamilton writes that ‘power in Congress shifts not only from one era to the next but also from one election to the next, as party strength and committee alignments change, and even from one issue to the next. One proposal might move through Congress because [it is] the priority of a powerful committee chair or is strongly supported by the administration.’ As this chapter will soon highlight, the opposite of this can also be true: a proposal can be blocked because it is the priority of a powerful committee chair.

Before moving on to the performance of the legislature and legislative committees regarding oversight, there is an important distinction that must be made between broad oversight of the executive branch – of the type discussed above – and oversight of the IC, as a subset of the executive branch. This is particularly important when issues of national security are involved. The reason for this distinction is that the IC has largely been treated as a separate entity, not to be subjected to the same checks and balances as the broader executive branch. It is useful to keep in mind here the types of operations that the IC carries out: secret operations that are, to some, ‘simply too fragile, too dependent on secrecy, for the normal strictures of oversight.’ Indeed, when the CIA was created in 1947 with the passage of the National Security Act, the legislation did not include provisions for the legislative oversight of the Agency. Instead, the CIA was given ‘considerable leeway to carry out unsavoury duties without the usual elevations…of programs, personnel, and budgets by lawmakers, presidential aides, and the judiciary.’ This latitude was arguably taken advantage of by the CIA (and other bodies within the IC), as came to light with Seymour Hersh’s 1974 revelations in the NYT that the CIA had engaged in spying on US citizens.
This reporting resulted in the creation of the Church Committee, as explored in Chapter IV and also below.

While the IC has typically been excluded from traditional forms of legislative oversight, the broader executive branch has often found ways to evade oversight from the congressional branch. As mentioned, legislative oversight has ebbed and flowed over the years – sometimes being forceful; sometimes weak – and as such, certain periods of prominence (or, periods of note) have emerged as being important to understanding the history of legislative oversight within the United States.

The Church Committee
A telling sign of just how prominent the Church Committee (and its impacts) – as discussed in Chapter IV concerning how it shaped and informed the executive power beliefs of Cheney and Rumsfeld – has been within the history of legislative oversight is the fact that oversight has been divided into two distinct periods by L. Britt Snider (former Inspector General of the CIA): the pre-Church period, and the post-Church period.24 This is because of the noteworthy and substantial reforms that were urged by the Committee through the uncovering of various forms of abuse on the part of the intelligence agencies. Indeed, ‘prior to the establishment of the Senate Select Committee on Intelligence (SSCI) and the House Permanent Select Committee on Intelligence (HPSCI) in 1976 and 1977, respectively, Congress did not take much interest in conducting oversight of the Intelligence Community.’25 Examples of the abuses uncovered by the Committee included:

Assassination plots against foreign leaders; illegal mail openings; wiretaps; and international cable interceptions; intelligence files on over a million American citizens; improper drug experiments; the unlawful sequestering of prohibited lethal chemical and biological materials; a master spy plan to conduct surveillance against Vietnam War dissenters in the United States; intelligence infiltration of a range of groups in American society, from universities to religious and media organisations; the incitement of violence within African American groups; and covert actions abroad aimed not just at autocracies but democratically elected regimes as well.26

In short, the Church hearings ‘revealed the possible extent of the abuse of authority by the IC and the need for permanent committee oversight focused solely on the IC and intelligence activities.’ The long list of misdeeds was illuminating, and their exposure led to serious – and long-lasting – reform, as well as marking a shift in the history of congressional oversight.

So, it is for this reason – as well as Snider’s above characterisation of a pre- and post-Church division – that the Church Committee has been chosen as the starting point for the discussion on periods of prominence regarding congressional oversight. It is important to note here that the Church Committee’s (a Senate body) House of Representatives counterpart, the Pike Committee, was not nearly as influential, as Loch Johnson explains: ‘Less well managed, the Pike inquiry disintegrated in its final days, a victim of internecine warfare and controversy over the leaking of its classified draft report.’ The Church Committee is the focus of this chapter, simply because it was the more productive body. Indeed, as Christopher Ford writes, ‘whereas previous congressional attempts to regulate the Intelligence Community proved incomplete, the Church Committee marked a watershed of congressional oversight and regulation.’ It is important to note here – particularly given this chapter’s primary focus on the legislative branch – that the Church Committee explored not only the executive branch and the IC, but also turned its focus inward, looking to deficiencies within the legislature itself. Indeed, as Ford again highlights:

Though thoroughly critical of the executive, the committee was no less rigorous themselves. Among the many formal conclusions, the committee found:

Congress, which has the authority to place restraints on domestic intelligence activities through legislation, appropriations, and oversight committees, has not effectively asserted its responsibilities until recently…

…Congress has failed to establish precise standards governing domestic intelligence…

…Congress has helped shape the environment in which improper intelligence activities were possible…

…During most of the 40-year period covered in this report, congressional committees did not effectively monitor domestic intelligence activities.

Also included in the Church Committee report was the conclusion that those congressional members responsible for oversight ‘made those excesses possible by delegating broad

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27 DeVine, “Congressional Oversight of Intelligence,” ii.
28 Johnson, “Accountability and America’s Secret Foreign Policy,” 104.
29 Ford, “Intelligence Demands in a Democratic State,” 746.
30 Ford, 748.
authority without establishing adequate guidelines and procedural checks.\textsuperscript{31} Such conclusions contributed substantially to spurring Congress’s work to legislate improvements to intelligence organisations and allowed for the creation of a host of policy changes and the creation of oversight mechanisms, across all three branches of government. The Church Committee’s contribution to greater awareness and transparency also led to the creation of the executive branch’s Internal Oversight Board (as discussed in Chapter V), as well as Executive Order 12333, which banned the use of assassination.\textsuperscript{32}

Significantly, the Church Committee also enabled the creation of standing congressional oversight committees – the SSCI and the HPSCI.\textsuperscript{33} Prior to this reform, it was the congressional Armed Services Committees that were primarily tasked with overseeing the IC. These committees were already responsible for overseeing the military and had little opportunity (or time) to properly oversee the CIA, too.\textsuperscript{34} One year after the creation of the Intelligence Committees, in 1978, the FISA Court (as discussed in Chapter VI) was created.\textsuperscript{35} The combination of such developments led to what Loch Johnson has described as ‘a new experiment in the evolution of American society…bringing greater transparency into the dimly lit world of espionage operations.’\textsuperscript{36} It did not take long to put these new mechanisms and this “new experiment” to the test, though, with the Iran-Contra scandal of the late 1980s challenging this new proposed era of greater transparency and oversight.

Iran-Contra

Indeed, the optimism for a new period in the history of America’s intelligence agencies was tested with the Iran-Contra scandal, and confidence (of both those members of the legislature tasked with oversight and transparency-minded citizens alike) in these new institutions was arguably shaken. As James Currie writes, the scandal ‘confirmed the worst fears of those responsible for conducting such oversight.’\textsuperscript{37} Indeed, it had the end effect of undermining the relationship between the intelligence committees and the CIA.\textsuperscript{38} The crux of the scandal can be summarised as follows:

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\item[32] Johnson, “Accountability and America’s Secret Foreign Policy,” 104-105.
\item[33] Johnson, 104-105.
\item[34] Currie, “Iran-Contra and Congressional Oversight of the CIA,” 186.
\item[35] Johnson, “Accountability and America’s Secret Foreign Policy,” 105.
\item[37] Currie, “Iran-Contra and Congressional Oversight of the CIA,” 202-203.
\item[38] Currie, 199.
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During the period from August 1985 through October 1986, the U.S. Government sold weapons to the government of Iran. The CIA assisted in these sales under Findings signed by the President in December 1985 and January 1986. Pursuant to these Findings, the President instructed the CIA not to notify Congress of these activities until specifically directed otherwise. The Iran-Contra Report concludes that funds generated by the arms sales to Iran were diverted to support the Contras in Nicaragua at a time when U.S. Government assistance to the Contras was restricted. CIA officers heard references about a possible diversion of funds to the Contras as early as January 1986. As described in the Iran-Contra Report, these officers thought that the references were 'far-fetched- and 'trivial,' and thus did not report them to more senior officers.³⁹

This affair highlighted some of the flaws and challenges associated with legislative oversight, namely that the president could choose to ignore reporting requirements, and even request that intelligence agencies do the same, deliberately circumventing congressional oversight and stretching executive power, as well as reverting to the pre-Church Committee notion of a distinct IC that should not be held to the same accountability standards as other government agencies.⁴⁰

According to Robert Strong, the Iran-Contra affair was, at its heart, ‘a struggle between the president and the Congress over the power to control American foreign policy.’⁴¹

And as several scholars point out, Iran-Contra was essentially to President Reagan’s detriment: while congressional oversight might be seen as a “thorn in the side” of the executive branch, sharing further information could have provided ‘wise and cautionary counsel that might have brought the Iran initiative to an earlier and less damaging end.’⁴²

This has echoes of the discussion point contained within Chapter IV, regarding secrecy and the poor policy-making it can result in. If the Church Committee was seen as a high point within the history of the exercise of legislative oversight, then Iran-Contra would certainly have to be considered a corresponding low-point, but it should be noted that this was not necessarily the fault of the legislature, and this goes to the core of the aforementioned power struggle: it is difficult for the legislature to exercise proper oversight when the executive is choosing to defy reporting requirements.⁴³

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⁴¹ Strong, 151.

⁴² Strong, 153. See also: Currie, “Iran-Contra and Congressional Oversight of the CIA,” 203.

9/11

As a starting point for any discussion on 9/11 and the legislative oversight process, it is essential to refer back to the separation of powers and how significantly 9/11 affected this: how ‘the scales tipped decidedly towards increased executive power in respect to national security decision-making.’\(^{44}\) Michael Tigar, writing on the significance of 9/11, notes that since the terror attacks, ‘the dismantling of the constitutional separation of powers has largely come to pass.’\(^{45}\) Indeed, as Chapters III and IV highlighted, the period following 9/11 witnessed a ‘massive expansion of executive power that transformed entire portions of America’s legal landscape.’\(^{46}\) Thus, any commentary on oversight in the post-9/11 period cannot be separated from the terror attacks themselves, including the political climate in their aftermath, and how angry and confused the US populace was feeling at the time. Indeed, there was a real tension between those who believed that intelligence agencies did not need to be overseen (in order to ensure more aggressive counterterrorism actions in the name of protecting citizens), and those who saw such oversight as especially important at such a time, essential to American democracy. As Loch Johnson explains:

> As incidents of terrorism rose in frequency around the world, a philosophical and political struggle gripped Washington, pitting those who seek to relax restrictions on and reviews of intelligence activities – the security school of thought (which highly regards secrecy and efficiency in combating America’s foes) – against those who prize America’s experiment in bringing democracy into the darkened corridors of government – the civil liberties school (which values privacy and transparency, but is certainly mindful that security is important, too).\(^{47}\)

For some US congressional members, and particularly those from the oversight committees, limiting (or even rejecting) a need for robust oversight at such a time of national emergency was seen as an indication of confidence – a sense of “rallying” behind the president and an expression of patriotism given changing national security interests.\(^{48}\) Although the executive branch’s assertions did not always go unchallenged, Johnson cites the words of one reporter

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\(^{44}\) Victor M. Hansen and Lawrence Meir Friedman, *The Case for Congress: Separation of Powers and the War on Terror* (Surrey; Burlington: Ashgate, 2009), 13.


\(^{47}\) Johnson, “Congress and the American Experiment in Holding Intelligence Agencies Accountable,” 494.

\(^{48}\) Johnson, “Accountability and America’s Secret Foreign Policy,” 109.
who claimed that ‘the relationship between the oversight committees and the intelligence community has “degenerated into a mutual admiration society for secret agencies”’.  

Executive power ‘continued to balloon in the years after 9/11, often bolstered by legislation and court rulings.’ Of course, this green-lighting did not always result in the most considered decision- and policy-making. For example, such excess manifested in a consequential way regarding the invasion of Iraq for their alleged possession of weapons of mass destruction (the existence of which has since been disproven). Indeed, as Liesbeth van der Heide writes, ‘some intelligence officials accused the Bush Administration of “cherry-picking” intelligence on Iraq to justify a decision it had already reached to go to war, and of ignoring warnings that the country could easily fall into violence and chaos after an invasion to overthrow Saddam Hussein.’ While beyond the scope of this thesis, the invasion of Iraq – along with the purported reasons for the invasion – remains highly controversial, but it was also indicative of the shift in the balance of power between the executive and legislative branches of government, and a sign of what was about to come regarding the continued excessive use of executive power, including through the drone program under Obama. Again, the significance of the AUMF has only grown since its initial passage with Obama (and Trump) having ‘interpreted the AUMF to extend their authority beyond solely targeting al-Qaeda and the Taliban in Afghanistan.’ Obama’s interpretation of his executive authority goes to the heart of what was discussed earlier with regards to Iran-Contra: weak congressional oversight means that there are fewer eyes on important decision-making, and less of a chance for potential mistakes to be avoided, and also weakens important balance of power considerations.

Such an imbalance was identified in the 9/11 Commission report, which concluded that:

> Of all our recommendations, strengthening congressional oversight may be among the most difficult and important. So long as oversight is governed by current congressional rules and resolutions, we believe the American people will not get the security they want and need. The United States needs a strong, stable, and capable congressional committee structure to give America’s national intelligence agencies oversight, support, and leadership.  

49 Johnson, 109.  
As Loch Johnson identifies, such recommendations may have been heeded by Congress: the aftermath of 9/11 resulted in a greater ‘willingness to review with serious intent major intelligence problems,’ identifying several key reviews as evidence of this: ‘the search for explanations about the failure to warn the public about the 9/11 attacks’; ‘why the assessment that Iraq had weapons of mass destruction proved wrong’; and ‘the probe into the use of torture by the CIA as a method of intelligence collection.’55 Thus, the post-9/11 period saw enhanced legislative oversight, perhaps a result of previous failings in checking the executive branch that was identified in the 9/11 Commission report. As will soon be identified with regards to the oversight of the drone program, though, the legislature soon faced challenges again in their ability to effectively oversee the executive branch.

The drone program under Obama
As highlighted throughout the thesis, Obama’s drone program pushed the limits of executive power. Congressional acquiescence played an important role in allowing this overstep to happen. Indeed, the drone program has largely been immune from criticism in Congress. The most prominent form of oversight over the drone program should stem from the House and Senate intelligence committees, as the designated overseers of CIA activity, including the highly classified drone program. When these committees were created following the Church Committee, they were ‘expected to develop stronger expertise and deploy it with greater vigour than the informal and loose congressional oversight mechanisms that preceded them.’56 This is not always what has occurred in practice, though, as will be explored. This is for a variety of reasons, including party affiliation, the power and direction of committee chairs, and – of course – the types of information that are made available to the legislative committees.

For the first two years of Obama’s presidency, the Democrats held the White House, the House of Representatives, and the Senate. This raises interesting questions and concerns regarding the thoroughness, or robustness, of oversight, and whether effective oversight can be achieved when the executive is being overseen by the same party that the President comes from. Indeed, the President-Congress relationship is of importance in any consideration of

oversight, and ‘the partisan makeup of both branches is generally considered to be the most prominent factor affecting oversight behaviour.’\textsuperscript{57} Leon Halpert explains further:

The conventional wisdom is that a united form of government tends to reduce legislative review. Legislators, who come from the same party as the President’s, are reluctant to vigorously pursue oversight which may be a source of political embarrassment. Highlighting administrative malfeasance or program deficiencies during the term of a president who is of the same party as a legislator violates accepted norms of party unity.\textsuperscript{58}

Certainly, the early level of legislative oversight over the Obama drone program was criticised as not being nearly robust enough, but this cannot necessarily be entirely attributed to Democratic control of Congress. Much of this criticism was levelled at senior Democrat and then-Chair of the Senate Intelligence Committee, Dianne Feinstein, who was a strong supporter of the drone program (and as such, was reluctant to criticise the program at all).\textsuperscript{59}

The Senate Intelligence Committee – along with the House Intelligence Committee – was responsible for the oversight of drone strikes as carried out by the CIA, and thus could have (and/or should have) played a significant role in the unearthing of important information (such as foreign policy implications, legality and effectiveness) relating to the CIA’s involvement in the program – one of its more secretive aspects, of course. The prominence and consequence of committee chairs in the oversight process is important to consider here: the attitudes and opinions of committee chairs are considered highly swaying and instrumental factors in the level and quality of oversight, and it has been argued that if a ‘chair’s propensity to oversee is slight, others may find it difficult to conduct oversight…at least in a formal or systematic way.’\textsuperscript{60} So, Feinstein's support of the drone program – and, in particular, her support for the CIA's involvement in that program – directly undermined her Committee’s oversight of the program.

The Senate Intelligence Committee’s website states that the Committee’s mission includes the provision of ‘vigilant legislative oversight over the intelligence activities of the United States to assure that such activities are in conformity with the Constitution and laws of

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\item Halpert, 480.
\item Halpert, “Legislative Oversight and the Partisan Composition of Government,” 479-480.
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the United States.’

Steven Aftergood, of the Federation of American Scientists (FAS), highlights that the Intelligence Committee had previously performed this role dutifully and was, in fact, once ‘at the forefront of debates over public disclosure of intelligence.’ Aftergood notes the decline of oversight in the post-9/11 period using 2012 as an example, where ‘the Committee held only one public hearing, despite the prevalence of intelligence-related public controversies.’ This was a record low at the time, the lowest number of hearings held – and made open to the public – in 25 years.

Also reflecting on the congressional intelligence committees, Chris Woods (the founder of Airwars, an NGO tracking civilian casualties via drone) posits that the early days of drone oversight ‘amounted to little more than an occasional phone chat with select politicians.’ Woods continues, writing that it was not until 2010 that formal oversight was introduced for the CIA’s drone program:

By then, more than 850 people...had already died in 100 CIA drone strikes. Since then, intelligence officials met once a month with security-cleared members of the House and Senate to talk through the drone killing program – and to show them selected videos of the strikes. Sen. Dianne Feinstein, at the time chair of the Senate Intelligence Committee, boasted in 2012 that this congressional oversight would tackle the secret drone war’s ‘legality, effectiveness, precision, foreign-policy implications, and the care taken to minimise noncombatant casualties.’ Except that it [has not] worked out that way.

Such examples do not point to the congressional bodies charged with overseeing CIA drone strikes as being rigorous enough. At the very least, a case can be made that Congress should ‘independently review each drone strike to monitor targeting decisions and compliance with the rules of engagement.’ But as Woods captures, congressional members more often resembled passive “cheerleaders” of the Obama drone program – not overseers. This is important context for the remainder of the chapter, which will highlight how the executive

61 “About the Committee,” U.S. Senate Select Committee on Intelligence, para. 1, https://www.intelligence.senate.gov/about.
63 “Intelligence Oversight Steps Back from Public Accountability,” para. 9.
64 “Intelligence Oversight Steps Back from Public Accountability,” para. 9.
66 “Moving the Drone Program from the CIA to the Pentagon Won’t Improve Transparency,” para. 3.
68 “Moving the Drone Program from the CIA to the Pentagon Won’t Improve Transparency,” para. 5.
branch offered up alternatives for the drone program regarding how it could be better
governed and reviewed, only for these alternatives to be rejected by Congress.

The Problem: How the Obama Administration Interacted with Legislative Oversight and the Military Preference
As the introduction to this chapter briefly alluded to, the military preference policy, in its
most simple terms, would involve the CIA taking a step back from the drone program, and
the military being the preferred lead on all drone strikes – not just those strikes within
declared warzones, as was and still is the case. There was perhaps less interaction with the
military preference policy by Obama Administration officials than has been the case for the
other two policies for reform discussed in this thesis. Notably, though, this potential reform
was publicly discussed by Obama (as well as by CIA Director John Brennan), as will be
outlined below. And interestingly, the literature highlights that this was a strong policy
preference of the Obama Administration; something that was pushed for by the executive and
pushed back on from the legislature – and in particular, pushed back on by the Senate
Intelligence Committee.

For all the criticism that the Intelligence Committee received for its perceived lack of
oversight of the drone program throughout Obama's presidency, it flexed its muscles when it
came to the confirmation hearing of John Brennan to become the Director of the CIA. While
Brennan's Senate confirmation hearing was not entirely focused on drones, his previous role
as chief counterterrorism advisor to President Obama in his first term as president did come
under scrutiny, and this involved a pronounced focus on the drone program in the hearing.
Further, prior to the hearing taking place, members of the Senate Intelligence Committee
hinted that they might even prolong the confirmation process without access to materials they
deemed relevant, and as such Obama ordered the release of a classified document that
outlined the Administration's legal reasoning for potentially launching strikes against US
citizens overseas.\footnote{“U.S. Senate Committee Questions CIA Nominee on Drone Strikes,” CBC, published February 7, 2013, paras. 19-20, \url{https://www.cbc.ca/news/world/u-s-senate-committee-questions-cia-nominee-on-drone-strikes-1.1318836}.} Despite this, several reports after the hearing expressed disappointment in
the Intelligence Committee for not pushing Brennan further on the details of such releases,
with Fred Kaplan noting for \textit{Slate} that the Committee asked ‘plenty of questions about
whether [he would] give them documents about drone strikes and other practices…but they asked him very few about the practice themselves.’\textsuperscript{70}

In his confirmation hearing (and in the corresponding documents associated with it, such as prehearing questionnaires), Brennan interacted both with the notion of legislative oversight – and its importance – and with the notion of drone reform to enhance scrutiny of sensitive operations. For instance, in his opening statement to the Intelligence Committee, Brennan affirmed that he would keep the Intelligence Committee fully informed of the CIA’s activities because the Committee could ‘neither perform [its] oversight function nor support the mission of CIA if [it was] kept in the dark.’\textsuperscript{71} Brennan expanded on this in his responses to the questionnaire for completion by presidential nominees, writing:

As the elected representatives of the American people, members of Congress have the responsibility of ensuring that government operations, including intelligence, are conducted effectively, efficiently and in accordance with our laws and Constitution. The Director of the CIA has a legal obligation to keep the appropriate members and committees of Congress fully and currently informed of the range of Agency activities, and, if confirmed, I will do so. History shows that a relationship of candour and trust between the congressional intelligence committees and the CIA strengthens our national security. If confirmed, I look forward to sustaining this close and cooperative relationship.\textsuperscript{72}

On the face of things, what Brennan was openly saying indicated a positive sign for the future of congressional oversight of the drone program, as the primary instrument of lethal force against terrorists. However, it must be noted that Brennan was hoping to be confirmed for his new position, and there may have been an element of diplomatically but superficially telling the committee what they wanted to hear about oversight arrangements, particularly in light of the pre-hearing actions (or threat of actions) of some committee members discussed above.

Yet Brennan did also interact with the idea of reforming the drone program, referring to both the idea of a form of judicial oversight (as explored in the previous chapter) and the notion of the military preference. Regarding the CIA’s precise role in the drone program,


\textsuperscript{71} “Statement for the Record: Opening Statement of John O. Brennan,” U.S. Senate Select Committee on Intelligence, February 7, 2013, 6, \url{https://www.intelligence.senate.gov/hearings/open-hearing-nomination-john-o-brennan-be-director-central-intelligence-agency#}

\textsuperscript{72} “Responses to Questionnaire for Completion by Presidential Nominees,” U.S. Senate Select Committee on Intelligence, February 7, 2013, 14, \url{https://www.intelligence.senate.gov/hearings/open-hearing-nomination-john-o-brennan-be-director-central-intelligence-agency#}
Brennan put forward differing perspectives. For instance, in his response to additional pre-hearing questions from members of the Intelligence Committee, Brennan first wrote:

While the CIA’s charter assigns the Agency primary responsibility for providing strategic intelligence for the President and senior policymakers, CIA has for decades increasingly supported military operations in theatres of war. I believe CIA’s primary mission and resources should be dedicated to the organisation’s core responsibility to provide the best possible strategic intelligence to the nation’s most senior policymakers, but I also value the Agency’s commitment and capability to apply these same resources to supporting our warfighters in harm’s way.\(^{73}\)

He then later wrote: ‘In my view, the CIA is the Nation's premier “intelligence” agency, and needs to remain so. While [the] CIA needs to maintain a paramilitary capability to be able to carry out covert action as directed by the President, the CIA should not be used, in my view, to carry out traditional military activities.’\(^{74}\) Brennan then summarised that, if confirmed, he ‘would not be the Director of a CIA that carries out missions that should be carried out by the U.S. military.’\(^{75}\) Diverse interpretations can be made from this, largely because the implications of such a statement are entirely dependent upon how Brennan – and the broader Administration – demarcate a covert action, and how they define what a “traditional military activity” is.

Several months after Brennan's confirmation hearing, in May of 2013, President Obama gave a significant speech to the NDU. Again, like with Brennan's confirmation hearing, Obama himself touched on both the idea of and importance of congressional oversight and the notion of drone program reform that did not leave Congress – and the American public – in the dark. On oversight, Obama noted:

[I have] insisted on strong oversight of all lethal action. After I took office, my administration began briefing all strikes outside of Iraq and Afghanistan to the appropriate committees of Congress. Let me repeat that: not only did Congress authorise the use of force, it is briefed on every strike that America takes. Every strike. That includes the one instance when we targeted an American citizen – Anwar Awlaki, the chief of external operations for AQAP.\(^{76}\)

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\(^{74}\) “Responses to Additional Prehearing Questions,” 6.

\(^{75}\) “Responses to Additional Prehearing Questions,” 7.

Then-House Intelligence Committee Chair, Representative Mike Rogers, agreed with Obama’s characterisation, stating: ‘If there is any air strike conducted that involves an enemy combatant of the United States outside the theatre of direct combat, it gets reviewed by this committee. I am talking about every single one.’\textsuperscript{77} Several media reports discussing this speech stated that Obama explicitly mentioned and advocated for the military preference policy in his remarks.\textsuperscript{78} However, this was not the case, as the \textit{Washington Post} reported at the time.\textsuperscript{79} Rather, Obama was expected to use the speech to announce and advocate for such a policy.\textsuperscript{80} According to the transcript of the speech that was released via the White House website, the only reference to the policy came through an interaction between Obama and a protesting audience member:

\begin{quote}
Audience member: ‘Can you take drones out of the hands of the CIA? Can you stop the signature strikes killing people on the basis of suspicious activities?’
Obama: ‘[We are] addressing that, ma’am.’\textsuperscript{81}
\end{quote}

Thus, it appears that it was by chance interaction that the military preference was referred to within this speech. Nonetheless, the significant reporting around the policy and Obama’s speech, as well as its focus during Brennan’s CIA confirmation hearing, did advance the military preference option as a policy outlet worthy of further consideration to help maintain confidence in drone operations.

\textbf{A Potential Solution? The Feasibility of the Military Preference}

There are a host of reforms that have been proposed within the literature for the reform of the drone program that are tangentially related to the legislative branch, the adoption of which could potentially improve or advance the governance of the drone program. Indeed, in her testimony to a 2013 Senate Judiciary Committee hearing on the use of drones (‘Drone Wars:

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\textsuperscript{77} “Unmanned Oversight: How Congress Whiffed on Drones,” para. 6.
\textsuperscript{81} “Remarks by the President at the National Defence University,” paras. 96-97.
\end{flushright}
The Constitutional and Counterterrorism Implications of Targeted Killing”), law professor Rosa Brooks outlined several of these reforms. Brooks’ suggested reforms included: more public hearings on US targeted killing policies (including hearings on the challenges of adapting the laws of war and self-defence in a 21st-century context); the imposition of reporting requirements on the executive branch by the legislature; the repeal of the AUMF; the encouragement of further transparency from the executive branch, post-strike; and the creation of a judicial mechanism akin to the FISA Court.82 While these policies are all significant in their own right, the policy that has received perhaps the most attention, both in the scholarly literature and in the media, is the military preference policy. Indeed, the military preference is a proposal of great significance, and its exploration in the literature and media has been pronounced.83 In a sense, it is an outlier when it comes to the policies under discussion within this thesis because it was advocated for by the executive branch (as above, both President Obama and John Brennan expressed support for the military preference) while pushback largely appeared to come from the legislature itself as plans began to surface of the CIA becoming – or reverting to – a primarily intelligence-gathering outfit.84

The policy option put forward by Obama for the military to take the lead in conducting drone strikes has been characterised by Larry Lewis and Diane Vavrichek as the “military preference” policy. In short, the military preference policy would result in a reduction in how many drone strikes the CIA could carry out, while the military would take on a more pronounced role in the program.85 The Pentagon would handle drone strikes,

although Obama did not completely rule out a continuing role for the CIA. The logic – or reasoning – behind such a policy position is that drone strikes are military activities that should primarily be carried out by a military body, and that making such a change would increase and improve the oversight of the drone program. As a White House official stated:

The President has explained his belief that we must be more transparent about both the basis of our counterterrorism actions, including lethal operations, and the manner in which they are carried out...Because of this, he has indicated that he will increasingly turn to our military to take the lead and provide information to the public about our efforts. We continue to work diligently towards this goal.\(^86\)

Lewis and Vavrichek explain the policy further:

In May 2013, President Obama issued classified guidance to implement what was described to the media as a ‘...preference that the United States military have the lead for the use of force’ around the world, regardless of whether operations are in or outside of war zones...The military preference policy, as described, would not prohibit OGAs [other government organisations, e.g. the CIA] from carrying out drone strikes, but should reduce the number of strikes they carry out (at least, as ‘lead’ organisations).\(^87\)

As Lewis and Vavrichek also point out, though, this policy action for reform was blocked by the legislature, ‘through a classified annex to the federal budget.’\(^88\) Significantly, according to a report by Ali Watkins, this move to block the White House from using federal dollars to limit the CIA’s drone program involvement was a measure stemming from Senator Feinstein.\(^89\) And as Lee Hamilton highlights, this congressional action was a valid one: in the US system, ‘the president is entitled to propose legislation, but the Congress is equally entitled to dispose of it.’\(^90\) This does present a potential further roadblock to the reform and improved governance of the drone program that has been relatively unexplored within this thesis thus far, though: that the blocking of potential reform can come from the legislature as well as the executive. Arguably, Obama did not appreciate how intently the CIA and its backers in Congress would resist proposed changes, nor how the fluid nature of party politics could impact potential reform.


\(^{87}\) Lewis and Vavrichek, Rethinking the Drone War, 47.

\(^{88}\) Lewis and Vavrichek, 46.

\(^{89}\) “Obama Administration on Plan to Take Away CIA’s Drones,” para. 17.

\(^{90}\) Hamilton, How Congress Works and Why You Should Care, 9.
While Obama proposed the military preference policy, John Brennan appeared to signal his support for it in his Senate confirmation hearing, as highlighted above. Such a viewpoint was directly at odds with that of Senator Feinstein, who disapproved of the proposed policy because she perceived the CIA to be more accurate than the military and did not see the need for drone capabilities to be removed from the intelligence agency. 91 Indeed, according to the *Washington Post*, Feinstein said that ‘she had seen the CIA “exercise patience and discretion specifically to prevent collateral damage” and that she “would really have to be convinced that the military would carry it out that well”’. 92 There is commentary in the literature that advocates more strongly for the viewpoint of Obama and Brennan, though, making the case for removing CIA drone capabilities. Such commentary perceives the drone program to be a sub-section of the war on terror, making it an inherently military activity in which the CIA should not be heavily involved (or, at the very least, where it should not take the lead in carrying out drone strikes). 93 The military preference, then, ‘would better align drone strike operations with this perspective’. 94

Thomas McDonnell captures five key reasons as to why the CIA should not have a dominant involvement with the drone program, writing that:

(1) The CIA keeps drone operations and any after action reports secret; (2) the CIA drone ‘pilots’ are not uniformed and are, therefore, unprivileged combatants; (3) CIA officers are not subject to the Uniform Code of Military Justice and are probably not schooled in international humanitarian law; (4) the CIA made egregious blunders in the run-up to the U.S. 2003 invasion of Iraq; and (5) the CIA has a troubling history, having assassinated foreign political leaders in the 1960s and 1970s. 95

Such a point is reinforced by Sarah Holewinski, who concludes – in light of the above considerations – that ‘there is no indication that the CIA has an ethos that would motivate it to reduce civilian harm’. 96 The natural conclusion, then, is that because the military – unlike the CIA – does have to adhere to the above rules of engagement standards, the military should be the body to take the lead. Broadly speaking, a case can be made that this shift does make sense from a robust security governance perspective. As will be further explored below,

92 Miller, para. 12.
93 Lewis and Vavrichek, *Rethinking the Drone War*, 87.
94 Lewis and Vavrichek, 87.
95 McDonnell, “Rule of Law in the Age of the Drone,” 94.
though, the discussion of such a policy proposal must be more nuanced, taking into consideration sub-groups within the military.

The discussion points surrounding this proposed policy also highlight the problems associated with the overlap (or blending) of which government body should take the lead (and provide information to the public) on drone activities, heightening the debate around the distinction between traditional military activities and covert operations. Various commentators have pointed to the blurring of boundaries between traditional military activities and covert operations, which complicates oversight at the operational level and has often led to confusion and a lack of accountability. Indeed, there is much ambiguity in this area, largely because it has become increasingly difficult to distinguish who the primary operator of drones is between the CIA and the military. As Jennifer Kibbe writes, which body engages in such actions is of extreme importance:

Once the nation is engaged in shadow wars, does it really make a difference whether the CIA or SOF [special operations forces] conducts them? The answer here is yes, given current U.S. law. Shadow wars raise the fundamental question of whether they are subject to the appropriate amount of consideration, oversight, and accountability. There are important differences between CIA and SOF operations on these points. Shadow wars fall squarely into the murky realm of covert action, defined in U.S. law as activity that is meant ‘to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.’

Another point of importance here is that a clear, definitive shift from the CIA to the military regarding drone strikes would not inevitably result in the drone program’s improved transparency. A useful example that helps to highlight this is JSOC. JSOC is a Pentagon structure that occasionally carries out drone strikes with CIA help. Perhaps best known for the killing of Osama bin Laden, JSOC is an incredibly secretive military structure (the body’s corresponding oversight bodies, the congressional armed services committees, have had difficulties in their ability to properly oversee JSOC as a result of this), and thus the movement of strikes from the CIA to the military does not necessarily result in automatically

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improved transparency.\textsuperscript{100} President Obama made use of JSOC, likely for the same reasons that he made use of the CIA in the drone program: because it was able to operate in a ‘culture of near-total secrecy.’\textsuperscript{101} JSOC occasionally operated in tandem with the CIA, and – like the intelligence agency – has largely managed to avoid congressional oversight.\textsuperscript{102} McDonnell expands on this, highlighting that:

JSOC suffers from the same chief institutional flaws as the CIA. Congress exercises little oversight over JSOC, and, consequently, neither Congress nor the public can generally determine whether JSOC is complying with domestic or international law. Furthermore, JSOC members often operate outside of uniform, likewise rendering them unprivileged combatants in armed conflict. Like the CIA, JSOC has been linked in the past to assassinations, in its case, to those carried out in the drug wars in Colombia.\textsuperscript{103}

Chris Woods agrees with this general point of view, pointing out that the military preference policy could not be automatically assumed to improve the transparency of the drone program because strikes would likely be transferred to JSOC and because the Senate Armed Services Committee – to which oversight would belong – ‘might be even less equipped to oversee targeted killings away from the battlefield than the Senate Intelligence Committee.’\textsuperscript{104} Woods makes this case by arguing that the Armed Services Committee receives even less information out of JSOC than the Intelligence Committee gets out of the CIA.\textsuperscript{105} This potential policy, then, might also need to consider issues surrounding the effectiveness of the congressional committee process, including questions concerning how committees conduct their investigations and their associated powers.

Thus, the military preference policy (as proposed by Obama and Brennan) may not be – in and of itself – enough to improve the oversight and overall governance of the drone program. Regardless, Obama ‘settled for a compromise that [gave] JSOC control in most


\textsuperscript{102} Holewinski, “Just Trust Us,”” 62.

\textsuperscript{103} McDonnell, “Rule of Law in the Age of the Drone,” 95-96.

\textsuperscript{104} “Moving the Drone Program from the CIA to the Pentagon Won’t Improve Transparency,”” para. 9.

\textsuperscript{105} “Moving the Drone Program from the CIA to the Pentagon Won’t Improve Transparency,”” para. 10.
conflict areas but [let] the CIA operate its own armed drones. But the future implementation or revival of any military preference type of policy would need to consider the existence of JSOC (and its involvement in the drone program), perhaps by expanding the confines of the policy by including the removal of JSOC’s drone capabilities as well as the CIA’s, largely based on notions that ‘as clandestine actors, they are ill-suited to carry out this type of attack.’ In part, McDonnell argues, this is because secrecy must be a part of their modus operandi, which keeps ‘the American public and the international community in the dark about the deliberate institutional taking of a life.’ A further complicating factor of the military preference option is that there is no simple way to precisely measure whether oversight would improve. Oversight would shift from the congressional intelligence committees to the congressional armed services committees, but there is no pragmatic way to know for certain whether this would result in a more satisfactory form of oversight – it remains, rather, a somewhat academic point. David Auerswald and Colton Campbell offer up an example of how the Armed Services committees might perform in such a role, though, noting:

[T]he Armed Services Committees take as their point of departure a basic sympathy with DOD. Most Armed Services committee members and staff see themselves as advocates and supporters of the defence establishment, in a way that goes beyond whatever parochial interests the members might have in the way of bases or contractors back in their constituencies. Critics lament that this makes DOD’s congressional overseers lapdogs rather than watchdogs.

And the above scenario, of course, detracts from the potential oversight and transparency possibilities of the military preference policy.

Conversely, looking at the potential benefits of the implementation of such a policy: one of the most significant possible advantages of the military preference is that the military (with the exclusion of JSOC, as explored above) is, arguably, inherently a more transparent body, operating under much clearer laws and guidelines than the CIA – a ‘relatively well-understood collection of standards and procedures.’ As former Director of National

108 McDonnell, 111.
109 Lewis and Vavrichek, Rethinking the Drone War, 61.
111 Lewis and Vavrichek, Rethinking the Drone War, 63.
Intelligence Dennis Blair claimed: ‘within the armed forces we have a set of procedures that are open, known for how you make decisions about when to use deadly force or not, levels of approval, degrees of proof and so on and they are things that can be and should be out.’ Such procedures have the potential to result in more accurate outcomes. As Sarah Holewinski notes, the military has an ‘institutional history of analysing and understanding global, or even US, norms and values in using force,’ unlike the CIA. In their analysis of drone strike data, Megan Braun and Daniel Brunstetter note that:

[T]he data indicate that 23 per cent of CIA strikes caused collateral damage which is a far higher percentage than what the US military tolerates. The observed outcome of collateral damage from CIA drone operations is more than twice as high as the US military’s accepted threshold of 10 per cent and orders of magnitude higher than the military’s actual collateral damage rate of 1 per cent.

As such, these stricter requirements that the military operates under may well also result in better outcomes when it comes to civilian casualties.

Overall, the military preference policy proved impossible to fully implement under President Obama. Despite having some semblance of executive approval, the legislature did not allow for its complete implementation, through the annex to the federal budget mentioned above. As explored, this was due to the views of those within the Intelligence Committee, including Dianne Feinstein, who perceived the CIA as being more precise and effective than the military regarding drone strikes (despite evidence to the contrary, as above). This was aligned with what she regarded as ‘the Pentagon’s poor performance in lethal operations outside of Iraq and Afghanistan.’ There was also little to no progress made on implementing such a policy under President Trump. Indeed, Trump’s White House supported a push from the CIA – led by then-Director Mike Pompeo – to expand its drone program into declared battlefields – once the domain of the military – such as Afghanistan. Under

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112 Lewis and Vavrichek, 63-4.
113 Holewinski, “Just Trust Us,” 49.
115 Lewis and Vavrichek, Rethinking the Drone War, 46.
117 Mazzetti, “Delays in Effort to Refocus C.I.A. From Drone War,” para. 15.
Trump, there was also an increase in the overall number of drone strikes that were carried out abroad. For instance, reporting from the BIJ highlights that in 2017, ‘strikes doubled in Somalia and tripled in Yemen’ – both, of course, undeclared warzones and thus nations where the CIA would take the lead with drones.\(^{119}\)

In sum, it is not clear-cut whether the military preference policy would have a meaningful and deep impact on the drone program, nor on the program’s transparency and governance. On the face of things, it appears as though the full implementation of this policy would practically shift drone capabilities from one secretive organisation (the CIA) to another (JSOC), as well as shifting oversight responsibility from one secretive congressional committee (the Intelligence Committee) to another (the Armed Services Committee). The military preference could, though, send a strong symbol to other nations as to which bodies should be carrying out inherently militaristic activities, along with a message about IHL commitments and the United States’ adherence to such laws.

**Conclusion**

The Framers of the US Constitution deliberately chose to make the separation of powers a theory of prominence within the Constitution, reiterating the importance of the three (co-equal) branches of government and their responsibilities in checking one another. Many of the congressional oversight powers and functions explored within this chapter were set out within the US Constitution, but – importantly – they were implied powers. This can help to partially explain why legislative oversight has ebbed and flowed over time. The post-Church Committee era was seen as a high point of sorts for the exercise of congressional oversight, but various other scandals (such as the Iran-Contra affair and the post-9/11 context) have challenged legislative oversight, both in terms of confidence in its abilities, but also Congress's own ability to properly oversee the executive branch. Such challenges have remained prevalent to the current day, and indeed, legislative oversight of the drone program has proved to be a challenge. This is particularly the case because of the CIA's prominent role in carrying out drone strikes, but also partially due to the Intelligence Committee's support for the CIA's role within the drone program, and its actions to block reform such as the military preference policy. Of course, it is not evident that the military preference would result in enhanced transparency and/or the improved governance of the program even if adopted, due

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to the potential likelihood that the responsibility for strikes would be transferred to one subsection of the military: the secretive JSOC structure.

The next chapter will explore the feasibility of the military preference (along with the other two policies explored in previous chapters, the release of further information by the executive branch and the notion of judicial review) in a much more specific, focused way. The chapter will outline the specific indicators of security governance that have been developed to aid analysis of such policies, weighing the proposals up against the indicators to evaluate whether security governance could be a beneficial framework used in the improvement of the drone program’s oversight.
CHAPTER VIII – SECURITY GOVERNANCE: PRINCIPLES, FRAMEWORKS AND POLICIES

Introduction
There are several core components to this chapter, which builds on the central lines of inquiry that have been discussed and examined within the thesis. Broadly speaking, these core components will revolve around Schroeder’s security governance (and the related preventive security governance), and the applicability of norms and standard-setting to the use of drones. This thesis has captured six central security governance themes and benchmarks that can expand on Schroeder’s existing work and serve as a general model for the United States (and for other nations): civilian control and accountability mechanisms; the rule of law; transparency; respect for human rights; compliance with international law; and public legitimacy. All of these general principles have been captured and summarised in Appendix 1 and will be aligned within the context of the Obama Administration (as well as the Trump Administration, where relevant), and matched with the previously explored policies for reform regarding the US drone program.

In short, these policies will be linked with specific principles of security governance in order to explore each policy’s feasibility, selected by the author based on previously highlighted security governance literature, including, most prominently, Schroeder’s work. While security governance is not a new term, the model and its direct application to the drone program in efforts to avoid excessive secrecy and move towards greater accountability benchmarks does offer a unique pathway to pursue “best practice” and policies within this key area. It would be the utilisation of an existing framework to new and emerging technologies and could prove useful for even newer technologies such as AWS. Such a model can not only ensure that US practice and policy are better aligned, but also provide a basis for pathways to support and improve future drone operations and oversight arrangements. Further, considerations and reflections regarding security governance principles and frameworks can help policymakers to ensure that future drone warfare policy is not only effective but also responsible, legitimate, proportionate, and consistent with democratic standards and the wider public interest.

Critically and as addressed below, adapting and learning lessons about the application of security governance principles to drone operations continues to remain highly relevant to improve future versions of US drone programs as well as in setting an example for the international community about guidance and operational standards. This will be unpacked
with reference to three key concerns surrounding the use of drones that have already started to play out into reality: their proliferation (for example, the creation of drone programs similar to the United States’ within other nations); domestic precedent and standard-setting in the United States – in other words, what happens to a largely unchecked targeted killing program when a new president comes into power with ideas around democracy (and its core principles) that differ from the normative, ethical, and professional obligations or presumptions; and the development of arguably more problematic weaponry, such as the aforementioned AWS.

Finally, the chapter will move to a third and interrelated core component and address a key pillar of accountability and legitimation – a normative agenda at a global scale, as consistent with Martha Finnemore and Kathyrn Sikkink’s argument that domestic norms have the potential to become international in nature.1 In conjunction with any strategic-legal framework that aims to enhance best practice, the chapter will briefly shift emphasis from notions of "security governance" to ideas about "preventive security governance." This will entail how the development of global norms and shared understandings can impose some checks on state behaviour. While not the focus of the broader thesis, the salience of preventive security governance does build on notions and implications of security governance and can take advantage of some of the legal and political ambiguities about the use of drones through upholding certain normative preferences. As has been highlighted throughout this thesis (particularly within Chapter III), the application of the law – domestic and international – to such an armed drone program is contentious, inconsistent and fractious. Preventive security governance provides a deliberate mechanism through which norms can be created surrounding the trade-offs and the ongoing use of drones, but that does not necessarily have to relate to the specific application or interpretation of the law. At the very least, as the norms governing the use of armed drones continue to change and evolve, it is important to recognise the ongoing tension between pursuing security and promoting oversight and accountability. While met with some scepticism, shifts in global norms could provide a catalyst for changes to laws that are captured and solidified within domestic legislation to limit human rights violations, among other abuses.

Security Governance – Principles

Appendix 1 outlines some of the central principles that can contribute to what is collectively referred to as “effective security governance,” and that will be used to analyse the policies for reform of the drone program, as outlined in the previous three chapters. These include civilian control and accountability mechanisms; the rule of law; transparency; respect for human rights; compliance with international law; and public legitimacy. On the contrary, to help clarify the definition by providing a counter-definition, “bad security governance” would refer to ‘dysfunctional security sectors that pose threats to the citizens of a state or community instead of providing for their security, or to situations in which democratic civilian authority over the security sector is limited or even completely missing.’

There is a case to be made that this is relevant to the drone program as it currently stands, largely due to the cloak of secrecy surrounding the program, necessarily resulting in a lack of oversight. A further issue is related to what is sometimes perceived as the arbitrary nature of the program, particularly by those outside of the United States, due to the number of mistakes and mishaps that have occurred, including civilian casualties and the reporting of a target’s death several times over before the target was actually killed. This has led to “blowback,” where the drone program has been cited as a reason for retaliatory actions.

Thus, there is a need for better governance of the drone program, which will be explored via the following six principles of security governance.

Principle 1: civilian control and accountability mechanisms

This principle will be discussed in relation to judicial review and the military preference.

This principle requires that there be both political and judicial oversight over the security sector – an ‘obligation of security actors to report on their activities to the political and judicial institutions of the state.’ Ursula Schroeder expands on this definition, explaining that such control and accountability exists when civilians (or civilian representatives) can

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4 A notable example of this, as discussed in Chapter I, is the failed Times Square bomber, Faisal Shahzad, who explicitly cited the drone program as a reason for his actions: Lorraine Adams and Ayesha Nasir, “Inside the Mind of the Times Square Bomber,” *Guardian*, September 19, 2010, para. 68, https://www.theguardian.com/world/2010/sep/19/times-square-bomber.

request reports relating to the conduct of the security sector, and when civilians/civilian representatives have the power to impose costs on the security sector. And, as outlined above, Schroeder perceives that such accountability mechanisms should be conferred upon both political and judicial institutions – that is, in Schroeder’s view, there is a place for judicial involvement within security governance. The previous chapters – focusing on individual branches of government – highlighted some of the ways that this principle was not realised in Obama’s drone program (nor, indeed, in Trump’s). With reference to political oversight, Chapter VII explored some of the issues surrounding Congress’ abdication of power and control over the oversight of the drone program, including then-Senate Intelligence Committee Chair Dianne Feinstein’s support for the CIA’s involvement in the drone program. There could be several reasons for this support, and one such reason – that being personal opinion and party affiliation – was exemplified in 2017 (highlighting some similarities in the continuation of the drone program from Obama's presidency through to Trump's) by then-Chair of the Senate Foreign Relations Committee, Republican Bob Corker, who said:

Unfortunately, the use of lethal force against ISIS, Al Qaeda, and other terrorist groups will remain necessary for the foreseeable future to prevent attacks against Americans and our allies. The president, just like President Obama, believes he has the legal authority he needs under the 2001 AUMF to fight ISIS, Al Qaeda, and other terrorist groups. And I agree. I agreed with the Obama administration, and I agree with this administration that they currently have that authority. It is clear that Congress is united in its strong support of the fight against Al Qaeda, the Taliban, ISIS, and other terrorist groups, and I believe Congress as a whole would agree that the president should continue to act against these threats.

This quote helps to highlight how Congress can aid (and has aided) in the expansion of executive power. But political oversight is also impacted by politics (or the nature of politics). For example, in the above quote, Corker stated that he was supportive of Obama’s use of the 2001 AUMF to justify the drone program’s legality, as well as Trump’s. Yet in 2013, Corker had this to say:

6 Schroeder, 27.
‘For far too long, Congress has failed to fully exercise its constitutional responsibility to authorise the use of military force, including in the current struggle against al Qaeda, so I urge the committee to consider updating current antiterrorism authorities to adapt to threats that did not exist in 2001 and to better protect our nation while upholding our morals and values,’ Corker said. Congress should amend the law to specify exactly how and when the president can use drones and kill or capture missions to kill people and Congress must ‘restore the appropriate balance of power between the legislative and executive branches of government while maintaining flexibility for the president to respond swiftly under threat of attack,’ Corker said.9

Civilian control and accountability mechanisms are also conferred – in theory, according to this principle – upon the judiciary. Of course, as explored in Chapter VI, this has not played out in practice for a long time in the United States context, even before 9/11. This is seen through the repeated use of the political question doctrine, which has led to judicial deference as highlighted in the various cases explored in Chapter VI.10 For this exact reason, the US judiciary at various levels has demonstrated a reluctance to rule on matters pertaining to the drone program. This was perhaps most famously exemplified by the use of the political question doctrine in the previously discussed Aulaqi case.11

Given that Schroeder includes both political and judicial institutions within this security governance principle, the focus will now shift to the previously discussed policies for reform of both the judiciary and the legislature – judicial review, and the so-called military preference. The implementation of judicial review within the drone program, perhaps via the already evaluated drone court, would inevitably enhance the nature of civilian control and accountability mechanisms relating to the drone program. The adoption of such a policy would necessarily increase the level of judicial involvement in the drone program – the judiciary is currently quite restricted, and this policy would change this. This would require a transformation in the theoretical perceptions of the courts and their role in issues of national security and the like – those "political questions" that have been discussed already. That is, it could happen, but it would necessitate an enormous shift in how the courts (and their role/s) are perceived. Under a form of judicial review, the executive (security sector) would need to approach the court, either before the fact (akin to the FISA Court example), or after the fact

(more akin to the Israeli-style). Again, this would necessitate a significant change in the amount of judicial control and the nature of oversight of the drone program. So, the implementation of this policy would improve this principle, but remains unlikely for now.

When it comes to the policy discussed for the legislature – the military preference – the outcome when it comes to whether it could improve control and accountability mechanisms is not quite so clear. The shift of the drone program from the CIA to the military could potentially result in further transparency, simply through the transfer from a secretive intelligence agency to the more traditional military structure. When it comes to the nature of civilian control, oversight of the program would shift from the congressional intelligence committees to the congressional armed services committees. But as outlined in the above quotes from Corker (and in the discussion on Senator Feinstein within Chapter VII), the nature of oversight conducted by committees largely relies on the personal opinions of the central lawmakers within them. Both Feinstein and Corker were largely supportive of the drone program, and the same could feasibly be true for the lawmakers within the armed services committees. As an aside, though, it should be noted that often such members are supportive of counterterrorism policy when it is being conducted by their own party. Again, the nature of politics plays a role in the quality of oversight being performed. As such, the implementation of the military preference would not necessarily result in a change in the amount of civilian control and the robustness of accountability mechanisms, but rather a change in how such control is exercised, and this is dependent on the personal opinions of some individual lawmakers. There is also the complicating factor of JSOC, as explored in Chapter VII, to take into consideration – it must be borne in mind that there are structures within the military that are secretive, and that operate in ways that are not necessarily dissimilar to the CIA in terms of secrecy. Thus, the military preference policy would not automatically improve the nature of political control over the drone program.

**Principle 2: rule of law**

This principle will be discussed in relation to the release of more information; judicial review; and the military preference.

There are of course a variety of definitions for the rule of law within democratic contexts. As per Schroeder, ‘…the Vera Institute of Justice’s definition generally emphasises

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12 The nature of oversight is also (sadly) quite dependent on what the executive is willing to offer up to the other branches of government. As such, questions are raised as to whether legislative oversight can really change that much without a huge change in what information the executive is willing to release.
the “supremacy of the law” over all other spheres of political and social life, and specifically mentions the relevance of “equity, accountability and avoidance of arbitrariness”.’ To expand on this definition, the rule of law is also ‘a principle of governance in which all persons, institutions and entities, including the State, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and that are consistent with international human rights norms and standards.’ This would appear to be a slight expansion on traditional understandings of the rule of law, as expressed in the first definition above and in Appendix 1. There is thus a standard domestic definition – involving the “supremacy of the law,” and an expanded international one, which is even more relevant to security governance and thus to the drone program.

Nicole Ball, Tsjeard Bouta and Luc van de Goor explore the rule of law with explicit reference to the security sector, highlighting that analysis of the rule of law within this field should seek to determine: ‘whether there are formal roles and mandates of the security bodies’; ‘what the hierarchy of authority is among the security bodies, the executive, the legislature and other oversight bodies’; ‘whether there are clear constitutional provisions and/or legislation enshrining the agreed roles, mandates and hierarchies’; and ‘if these provisions operate effectively.’ Taking these examples of considerations to be made regarding the rule of law, the drone program would appear to be consistent with this principle at least according to some of these considerations – and at least following the implementation of the 2013 PPG, which sought to establish a framework for the conduct of drone strikes, as highlighted in Chapter III. In the words of Luke Hartig, the PPG is ‘a dry foray into the gears of government, law, and operational procedures…The PPG runs 18 pages and contains eight sections that lay out in meticulous detail the standards for the use of force, as well as the bureaucratic processes for approving direct action.’ This document was referred to as the "playbook" guiding the practice of drone strikes and was intended as a guide of sorts to

13 Schroeder, Measuring Security Sector Governance, 29.
ensure that standards – legal and otherwise – were met prior to lethal action being conducted.¹⁷

But some scholars and commentators have also made convincing arguments that Obama’s drone program stood in stark contrast to the rule of law. In the words of Michael Boyle, Obama was ‘just as ruthless and indifferent to the rule of law as his predecessor.’¹⁸ Jameel Jaffer noted that the drone program continued to pose challenges to the law even after the PPG’s creation.¹⁹ Elsewhere, the use of drones is seen to challenge the rule of law because drone strikes ‘defy straightforward legal categorisation…[they] constitute a serious, sustained, and visible assault on the generally accepted meaning of certain core legal concepts.’²⁰ There is also the complicating factor of the CIA and their use of signature strikes when it comes to the rule of law, too.

This does raise questions as to how the rule of law could be utilised to improve the governance of the drone program. Indicative of its prominence within the conception of security governance used within this thesis, and within democracy more broadly, the rule of law is a principle that can apply, at some level, to each of the three policies – the release of more information; judicial review; and the military preference – that have been explored within this thesis. At the very least, transparency is an important element to the rule of law, as affirmed by Rosa Brooks – laws and procedures must be transparent to be adequately followed – and thus the release of more information relating to the drone program by the executive branch could improve this rule of law principle.²¹ Looking back to Chapter V, to those distinct examples of the types of information that could be released relating to the drone program, – the release of information about targeting processes and standards; the release of information after a strike has occurred; the publishing of the financial costs associated with the drone program; and the publishing of the kill list – any four of those examples could arguably improve the rule of law as it pertains to the drone program. This is largely because, as per the definition outlined in Appendix 1, the release of more information on the drone program can...

program could help to reduce the perception of an “arbitrary” drone program, killing at will with little to no restraints.22

When it comes to the judicial policy for reform – judicial review in the form of a drone court – the rule of law could certainly be improved with the adoption of such a policy. As expressed by Tom Farer and Frederic Bernard, the explicit point of a drone court is to ensure that drone strikes are carried out under and according to the rule of law.23 This has been the case in Israel’s implementation of a drone court, which assesses the legality of drone strikes after the fact, providing a clear example of how the rule of law can be strengthened with judicial review, and how the governance of the drone program could be improved.24

Indeed, as Eileen Kaufman argues: “the norm that has developed in Israel in even the most sensitive cases is that there is always a legal framework for the courts to use. This has reinforced the rule of law as a bedrock principle in Israeli society, which is due in large measure to the phenomenon of legal oversight by the Israeli Supreme Court.”25 And, finally, the rule of law could be improved upon with the adoption of the military preference. This is explored by Sarah Holewinski, who highlights that military structures have a greater commitment to the rule of law and IHL obligations than the CIA does.26 These points have been echoed elsewhere by those who wish to limit the CIA’s involvement in the targeted killing program.27 In a similar way to the release of more information, the adoption of the military preference could help to avoid a sense of arbitrariness to the drone program, simply because of the clearer and more cohesive structures that the military is required to follow, the likely improved nature of oversight, and the abovementioned commitment to the rule of law that Holewinski writes of.

22 Schroeder, Measuring Security Sector Governance, 29.
25 Kaufman, 159.
**Principle 3: transparency**

This principle will be discussed in relation to the release of more information; judicial review; and the military preference.

The security sector should be as transparent as possible, while still respecting the very real need for confidentiality that can arise at times, as discussed in Chapter IV. Basic information, though, should be made available to the public and to elected civilian representatives, and 'the need for confidentiality should never be allowed to undermine civil oversight.' According to John Wanna’s definition of the term, transparency is related to the release of government information, particularly that information on which decision-making is based. Transparency is important to consider especially within the context of democracy and democratic principles, too. In the words of Obama-era official John Brennan, ‘staying true to our values as a nation includes upholding the transparency upon which our democracy depends.’ Finally, transparency is an essential principle to include within this discussion on security governance and its application to the drone program, and it has of course been a large focus of this overall thesis, which has provided multiple examples of the lack of transparency that accompanied the program under Obama (along with the lack of transparency that has remained following his presidency, too).

The vast majority of definitions of transparency – as with the definition outlined in Appendix 1 – concede to the fact that there is a certain level of "legitimate" secrecy that is required for the security sector to carry out its work (for example, a recognition that the CIA may need to be secretive at times, to protect intelligence sources). What effective security governance requires – and what this thesis is advocating for – is for the security sector to not hide behind this cloak of legitimate secrecy, stretching the parameters of what can and should be kept secret from the populace. For instance, an earlier mentioned issue that was of concern during the Obama Administration was an increase in secrecy that was paired with a rise in

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civilian deaths due to the use of drones.\textsuperscript{32} It has been argued that the lack of transparency contributed to the perception of the drone program as a program of assassination (and also – as above – that it was and is “arbitrary”).\textsuperscript{33} This necessarily raises questions as to what an appropriate level of transparency would look like: a form of transparency that would still account for the fact that a certain amount of secrecy would have to remain in place. In other words, how could transparency in this form be used to improve the governance of the drone program?

As a starting point, the release of further (specific and limited) information by the executive branch would improve the transparency of the drone program but could still maintain this balance that takes into account legitimate secrecy. The release of information in any of the four aforementioned categories – targeting processes and standards; post-strike information; financial costs; and the publishing of the kill list – would increase the transparency of the program. Each area would be likely to receive pushback from the security sector and the broader executive branch, but aspects of this information could be released without compromising that legitimate secrecy that sometimes necessitates a lack of transparency. Perhaps the most likely way to achieve the implementation of this policy would be to not push for the release of the kill list, as there are many – both inside of government and outside – that would argue that this would hinder the United States and its counterterrorism interests.\textsuperscript{34}

Alternatively, the implementation of greater judicial review within the drone program would likely have only a limited effect on the nature and level of transparency. While in theory, a drone court could help to bring the drone program out of the shadows, in practice it would likely be a secretive process, much like the FISA Court that serves as one of the models outlined in Chapter VI.\textsuperscript{35} Thus, while such a policy might improve the accountability

\textsuperscript{32} Daniel Brunstetter and Megan Braun, “The Implications of Drones on the Just War Tradition,” \textit{Ethics and International Affairs} 25, no. 3 (2011): 353, \url{https://doi.org/10.1017/S0892679411000281}.


(and legality) of the drone program, it would not necessarily be the most appropriate policy to implement when the focus is on this specific principle of security governance.

As has already been discussed within this thesis, it remains uncertain whether the introduction of the military preference policy would necessarily result in further transparency. When it comes to the levels of transparency that arise from the congressional committee processes, it does appear to be dependent on the attitudes and opinions of individual members (particularly those who are higher up in the hierarchy, such as former Chair of the Senate Intelligence Committee Dianne Feinstein). There could certainly be an added layer of transparency that necessarily arises as a result of the program shifting from CIA control to military control, but as Chapter VII affirmed, this is complicated by the existence of JSOC and its involvement in the drone program.36 Thus, the introduction of the military preference policy might not be the policy most likely to enhance or support the transparency of the drone program.

Principle 4: respect for human rights

This principle will be discussed in relation to judicial review and the military preference. Respect for human rights within the security sector involves both reactive and proactive mechanisms. Reactive mechanisms could include providing ‘venues for filing complaints and ensuring remedial action,’ while proactive mechanisms could include mechanisms for ‘educating and training the security sector on human rights standards, monitoring their behaviour, and ensuring representation of minority or disadvantaged groups in decision-making governing bodies.’37 Fairlie Chappuis and Aditi Gorur build on this definition for what respect for human rights in the security sector looks like, writing that human rights abuses occur due to security sector ineffectiveness.38 For some, the existence of civilian deaths within Obama’s drone program was evidence in and of itself that it did not centre (nor respect) human rights.39 For others, the mere existence of the drone program

37 England, Security Sector Governance and Oversight, 12.
proved this point, as it was perceived as violating the ‘most basic human right,’ the right to life.\textsuperscript{40} For this sub-section of critics, the method (in the form of the weapon being used) was seen as being immoral, too. This perception that the Obama Administration’s drone program did not respect human rights was compounded by the lack of transparency that surrounded the program, with even the UN Commissioner for Human Rights raising concerns over this fact.\textsuperscript{41} But it should also be reiterated here that the Obama Administration did place some highly respected figures associated with the promotion of human rights within its drone program, most prominently including the previously discussed Harold Koh.

The implementation of a form of judicial review could improve the human rights standards underpinning the drone program. This is particularly relevant within the realm of a drone court modelled upon the Israeli system. As Chapter VI outlined, the Israeli Supreme Court has tended to find that judicial deference is not appropriate at those times where human rights are at stake.\textsuperscript{42} Centring the judiciary within the drone program would constantly affirm the importance of the law within the use of targeted killings, and given the importance of human rights within IHL, human rights could become more prominent, too. Where this becomes difficult is if the judges for a potential drone court are not experts in IHL – this would need to be given heavy consideration in any drone court formulation.

The policy that could have a greater impact on the standard of respect for human rights would be the military preference policy. The shifting of control over the drone program from the CIA to the military would likely result in greater respect for, and adherence to, the Geneva Conventions.\textsuperscript{43} Geoffrey Robertson expands on this, highlighting that it would ‘make…drone operations more principled.’\textsuperscript{44} Sarah Holewinski writes on the same issue, noting the fundamental differences between the CIA and the military and pointing out that the military has various resources at its disposal, including ‘military handbooks, rules of engagement, and best practices documents.’\textsuperscript{45} Holewinski continues, writing that it is essential that ‘…there exist greater transparency regarding elements of the targeting process,

\textsuperscript{41} Lewis and Vavrichek, \textit{Rethinking the Drone War}, 39-40.
\textsuperscript{42} Kaufman, “Deference or Abdication,” 154.
\textsuperscript{44} Robertson, 25.
\textsuperscript{45} Holewinski, “Just Trust Us,” 49.
application of the laws of war, and human rights training for drone operators.

Again though, as outlined above and in Chapter VII, the existence and involvement of JSOC complicates the discussion, and does not necessarily make this policy a clear cut example of how to improve the respect for human rights within the drone program. Any discussion on policies for reform necessarily needs to be more nuanced than this, but it can be said that the implementation of the military preference policy could be a positive step within the realm of human rights. At the very least, on the face of things, it would look better for the military to be in control of the drone program, rather than the CIA.

**Principle 5: compliance with international law**

This principle will be discussed in relation to judicial review and the military preference.

Compliance with international law confers international legitimacy upon a state, through legal conduct. Thus, the security sector is required to adhere to a state’s international law obligations. Compliance with international law requires a certain level of oversight because compliance must be verified by an external agent. In the context of the drone program, compliance with international law would require US strikes to adhere to the principles of necessity, distinction, and proportionality. Actions being taken in self-defence would also comply with international law. This thesis has already outlined the belief on the part of the Obama Administration that its drone program complied with international law, largely because the drone program was being carried out according to self-defence as a result of the 9/11 attacks. But the drone program does present a particular type of challenge for international law because it is largely seen as a “grey area,” where actions are not easily applied to concrete legal concepts and definitions. Further, to go back to the self-defence argument, even this is contested, both in legal circles and within the political science

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46 Holewinski, 61.
literature. To take the example that was given within Chapter III’s discussion of the legal framework to the drone program, self-defence was particularly contested in reference to its argued application to the 2003 Iraq invasion.

In the above discussion on respect for human rights, it was contended that the introduction of judicial review might not necessarily improve human rights standards and that it largely depends on an individual judge's familiarity with international law. This statement stands with regards to this principle of security governance, as well: the implementation of a drone court would not automatically improve the drone program’s compliance with international law. The impact that such a policy could have would largely be dependent on the individual judges selected for a drone court, and their familiarity with international law. This also raises questions surrounding just how far – jurisdictionally – such a court could function. Would a drone court be sticking purely to domestic law, or would it look also to international law violations? These questions would be a determining factor in just how much of an impact such a policy could have regarding the drone program’s ambit and compliance with international law.

The introduction of the military preference could shift the drone program’s level of compliance with international law. This is primarily because of the Geneva Conventions and how the military is trained according to human rights and law standards, as opposed to the CIA, which is a body that necessarily must violate the law at certain times, in certain circumstances. This is not to say that this simple policy adjustment would automatically pull the drone program in line with international legal standards – particularly given the previously mentioned role of JSOC and its work with the CIA – but rather that it could improve on this principle of security governance.

Principle 6: public legitimacy

This principle will be discussed in relation to the release of more information and judicial review.

Public legitimacy, as a principle of security governance, refers to an acceptance on the part of those subject to the security sector; an indication 'that they accept its authority.' As

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55 John Ehrenberg et al. (eds.), The Iraq Papers (New York: Oxford University Press, 2010), xxii.
56 Lewis and Vavrichek, Rethinking the Drone War, 95.
England notes, ‘…legitimacy increases when the security sector is responsible to, representative of and responsive to the community it serves and the community is able to influence the security sector.’58 Public legitimacy – in the context of the drone program – can be defined as ‘how U.S. operations, and the military campaign more broadly, are perceived by the American population and the international community.’59 Public legitimacy is, indeed, tied to perception. The combination of the five principles discussed above could all contribute to the public legitimacy of the security sector because they are in part indicators of a security sector that is responsible to and representative of the people.60 As the Office for the Promotion of Parliamentary Democracy notes, ‘both legitimacy and the quality of executive policies and actions arguably stand to gain from broader security sector accountability.’61 Accountability confers legitimacy.

The US drone program is quite a popular one amongst both the domestic population and the military/intelligence class.62 According to Admiral Dennis Blair, former Director of National Intelligence under President Obama: ‘it is the politically advantageous thing to do – low cost, no U.S. casualties, gives the appearance of toughness…It plays well domestically, and it is unpopular only in other countries.’63 Yet despite this popularity amongst the population, the drone program has been challenged by journalists and scholars alike, many of whom believe that the lack of transparency relating to the drone program lessens and clouds its public legitimacy.64 Popularity, of course, is not the only marker of public legitimacy.

For this reason, the release of more information by the executive branch of government could have an impact on perceptions of legitimacy. Regardless of what type of information is released – whether it be information on targeting processes and standards; post-strike information; information regarding associated financial costs; or the publication of the kill list – transparency would be increased (in a controlled way, too – the release of

58 England, 14.
59 Lewis and Vavrichek, Rethinking the Drone War, 44-45.
61 Parliamentary Oversight of the Security Sector, 9.
63 Jeremy Scahill, Dirty Wars: The World is a Battlefield (London: Serpent’s Tail, 2013), 353.
information by the executive branch of government would not be a transparency dump akin to Wikileaks), and this could shift understandings and perceptions of the program’s legitimacy as a result. Releasing information would indicate that the drone program is not uncontrollable and unaccountable.\textsuperscript{65} It should be reiterated, though, that it is not enough to simply release information to hit transparency (and public legitimacy) benchmarks – any information released should be analysed and given context for it to be meaningful.

The implementation of a form of judicial review – via a drone court – could also have a significant positive impact on the legitimacy of the drone program, largely because it would be an added form of accountability, combined with a sense of legal legitimacy that would set better precedents going forward.\textsuperscript{66} This goes back to the already discussed notion of judges being respected members of the community. Alternatively, though, opponents of a drone court argue that such a structure would ‘give a patina of legitimacy to a ruling for summary execution following a one-sided argument.’\textsuperscript{67} This is closely linked with those previously mentioned arguments that a drone court modelled on the FISA Court would act as nothing more than a rubber stamp for targeted killing requests. If a strike is quickly approved based on a one-sided argument, and this is seen as legitimate because it was a judge who signed off on it, this would not be doing much to improve the drone program as it currently stands. In the context of this principle, it also would likely not do much to bolster public legitimacy, and indeed would probably have the opposite effect.\textsuperscript{68} Courts as institutions are typically trusted though, and judges in particular are often well respected.\textsuperscript{69} This is also a consideration that needs to be accounted for in discussions of how judicial review could impact the perceived public legitimacy of the drone program.

Overall, based on the six principles discussed above and outlined in Appendix 1, the policies for reform that have been discussed within this thesis would all have varying levels of impact on the practice of security governance. At a domestic US level, the implementation of any one of these policies could result in a drone program that creates more opportunities to avoid excessive secrecy, improves oversight arrangements, and moves towards greater accountability benchmarks, through improved civilian control and accountability

\textsuperscript{65} Murphy and Radsan, “Notice and an Opportunity to be Heard Before the President Kills You,” 866.
\textsuperscript{66} Lewis and Vavrichek, \textit{Rethinking the Drone War}, 97.
\textsuperscript{67} Lewis and Vavrichek, 96-97.
\textsuperscript{68} Lewis and Vavrichek, 97-98.

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mechanisms; the rule of law; transparency; respect for human rights; compliance with international law; and public legitimacy.

**Why Is This Change Needed?**

In addition to the existing issues that this thesis has raised with regards to the drone program – largely concerning increased government secrecy and the expansion of executive power – there are three other major reasons that contribute to why this thesis posits that the governance of the drone program should be strengthened. These reasons are that, firstly, drone programs are passed on to incoming presidents, who can wield the power of the program in ways that are inconsistent with democratic standards; secondly, that there is a potential for international proliferation without appropriate norms and standards surrounding the use of drones; and thirdly, that weapons systems more sophisticated and challenging to IHL and democratic standards are in development, including AWS. Indeed, there are now concrete examples of these possibilities eventuating, with the drone program being passed on from President Obama to President Trump (and now to President Biden), and with various other nations developing their drone programs, among other weapons programs. These examples have been touched on briefly throughout this thesis but will be explored in more detail within this next section of the chapter, and such examples help to highlight what a future drone program – without action being taken – might look like.

**Future presidents**

At the time of writing (December 2021), Donald Trump’s first term as US president has ended, and there is a now-established Biden Administration to consider in the context of foreign policy. This makes it slightly easier to reflect on the risks that this thesis has been discussing – Trump’s presidency serves as proof of what some were warning about in the end days of Obama’s presidency: that an unregulated drone program would be passed on to an unpredictable successor, and that the “just trust us” mentality is not as attractive when the program is being passed from a constitutional lawyer to a president who (as a candidate) threatened to kill the family members of suspected terrorists.70 Chris Woods, director of Airwars (the civilian casualty tracking organisation), warned of the danger associated with Obama’s ‘failure to set in stone effective concrete rules on how drones should be used’ and

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how this could be ‘exploited by his successor.’ Woods highlights that: ‘…the biggest error of the Obama administration is not putting a decent rule book in place for the targeted assassination programme. Trump will now inherit a programme with no effective rules in place.’ These remarks proved to be accurate.

Indeed, worst fears about Trump’s embrace of the drone program were realised throughout his presidency. A 2017 NYT report, citing Centcom, found that close to 500 civilians had been unintentionally killed by strikes (coalition strikes, not purely US strikes, it should be noted). The NYT pointed out that while this uptick in civilian deaths could be indicative of the war moving into major cities, it could also be reflective of a relaxation on the part of the military on oversight and accountability. Any consideration of Trump’s embrace of the drone program must take into consideration his views concerning executive power, too: ‘it appears he would have no compunctions about tapping into what has become a unilateral power of the presidency.’ This has of course been compounded by the likes of John Yoo – a Bush-era proponent of the UET – who has argued for an ‘energetic unitary executive,’ even as recently as 2020. This embrace of an even more extreme version of executive power undoubtedly had an impact on Trump’s view of the drone program, and this highlights the dangers – that many spoke of in the late stages of Obama’s presidency – of drone accountability and oversight mechanisms that are not entrenched in law.

In the early months of President Biden’s administration, predictions were made about his potential counterterrorism policy (based largely on his silence over the use of drones in the 2020 campaign period): namely, that the program would essentially continue, largely unchanged. Such predictions were bolstered by the number of Obama-era officials (supportive of the drone program) that Biden surrounded himself with during his campaign.

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72 “Donald Trump to Inherit Drone Assassination Programme Which Has ‘No Effective Rules’,” para. 15.
74 Zenko, para. 3.
and transition period.\textsuperscript{79} It should be noted, though, that Biden did later order a review of both Obama- and Trump-era drone policies.\textsuperscript{80} But if the drone program under Biden continues along the same track that it did under both presidents Obama and Trump, it could have a disastrous impact on the shaping of norms and standards around the use of drones, particularly concerning the next focus of this chapter: proliferation. Indeed, the domestic drone program remaining unchanged under President Biden would have international ramifications.

\textit{Proliferation}

Another concern that is highlighted across the literature is that of proliferation. Neatly tied to the next component of this chapter, which will look to norms and standard-setting in greater detail, proliferation is met with unease largely as a result of the precedent that has been set with regards to the use of drones by the United States, both under Obama as highlighted throughout this thesis, and by Trump, as highlighted briefly above. This proliferation has been evidenced via those large powers that have traditionally challenged democratic norms and standards – Russia and China, to name two prominent examples – but also via other, smaller nations, such as Iraq, Nigeria and Pakistan.\textsuperscript{81} An issue that has not been touched on significantly within this thesis due to its scope, but that also raises its own set of concerns, is the adoption of drones by non-state actors such as terrorist groups. Such drones are not as advanced as the drones deployed by the United States, but ‘the small ones they purchase can still wreak havoc – as ISIS is proving every day in Iraq.’\textsuperscript{82}

The NGO Drone Wars regularly compiles a list of nations that have armed drone capabilities and a list of nations that are nearing this status.\textsuperscript{83} Their July 2021 list – the most recent list that has been published – indicates that 20 nations have armed drone capabilities, and a further 15 are near to operating armed drones.\textsuperscript{84} According to their research, nations other than the United States (and other than those smaller nations referred to above) with

\begin{itemize}
\item \textsuperscript{79} “Joe Biden’s Silence on Ending the Drone Wars,” para. 8.
\item \textsuperscript{83} “Drone Wars UK: Our Mission, Role and Strategic Aims,” Drone Wars, https://dronewars.net/role-and-aims/.
\item \textsuperscript{84} “Who Has Armed Drones?,” Drone Wars, last updated July 2021, https://dronewars.net/who-has-armed-drones/.
\end{itemize}
drone capabilities include China, Iran and Saudi Arabia, while nations nearing armed drone capabilities include Russia, India and Australia. Interestingly, Drone Wars is seeking an international ban on the use of armed drones. This aim is sometimes reflected in the academic literature, too, but this is more often applied to a prohibition on AWS, rather than on drones. Indeed, as Denise Garcia writes:

My premises are twofold: one is that international security itself depends in part on the international regulation of armaments, as all states will have advantages arising from the value of having them either controlled or prohibited….And second is that more cooperation and transparency in the domain of new lethal weapons technologies, in and out of the cyber world, mean more peace and security, while less coordination and no clear governing rules mean a more insecure world.

This last part of the passage – “less coordination and no clear governing rules” – is of relevance to the drone program, of course, but it is also relevant to the final concern to be explored in this chapter: AWS.

Autonomous weapons systems
At the same time that drones have proliferated, more advanced technologies have also begun to be used, including AWS. The word “autonomous” is the defining characteristic of such weapons systems: their perceived strength is their ability to select targets without needing human intervention. Ingvild Bode and Hendrik Huelss explain further: “the autonomous quality of weapons systems typically refers to their ability to “think” and “make decisions” in the broad, technical sense. This ability is the basis for searching and identifying targets within a set of preprogrammed parameters based on sensor input.” Bode and Huelss then go on to link AWS with drones, highlighting that the use of drones has helped to shape “standards of appropriateness” around the use of AWS. The commentary around the use of AWS in the current literature is very much that global norms need to be set to regulate their use. The setting of norms around the use of drones would go a long way in ensuring that this happens

85 “Who Has Armed Drones?”
87 Garcia, 95.
89 Bode and Huelss, 394.
90 Bode and Huelss, 404.
with other weapons systems, too. The principles of security governance that are discussed above could act as a model not just for drones, but also for AWS and any other potential future weapons that challenge norms. These principles could help to ensure that AWS are used in ways that are democratic, accountable, and that centre civilian rights. This helps to highlight the ongoing issues that will emerge if the governance of the drone program is not improved under the Biden Administration. The notion of “preventive security governance” could also be of use here.

**Preventive Security Governance**

Preventive security governance should be differentiated from the security governance that has been discussed thus far. Preventive security governance refers to ‘the codification of specific or new global norms, arising from existing international law that will clarify expectations and universally agreed behaviour on a given issue-area. Such issue-area is characterised by no rules or by the imprecision of extant rules.’\(^{92}\) This definition helps to explain why preventive security governance is of relevance to the drone program, considering the questions surrounding the program's adherence to the law, and the grey areas that often surround their use outside of declared warzones. The utilisation of security governance is considered a form of norm and standard-setting for such technologies, in need of some ground rules. It is also being considered because international law is thought of as not particularly well-suited to new technologies, or perhaps as needing to "catch up" – old principles are being applied to new weapons. Because the rules around the use of drones are not always clear, preventive security governance could mark an improvement, as it could be used as a strategy to formulate standards for and around the use of drones.\(^{93}\) Denise Garcia expands on this by pointing to five key concerns that lead to a need for preventive security governance: first, a ‘regression in the observance of accepted mores for global society and agreed-upon international law’; second, the use of drones outside of declared warzones; third, their potential for proliferation; fourth, the unpredictability of the technology; and fifth, the ambiguity around existing norms and their application to the use of drones.\(^{94}\)


Narrowing in on that fifth and final concern, and to expand on the idea of norms within preventive security governance, Ann Towns writes that values are at the core of norms:

[N]orms help set the terms for what can be said and done as a certain kind of actor. They also set out what has to be said and done in order to be regarded as a certain kind of actor. Norms are essentially about value – they validate certain kinds of behaviour for specific sorts of actors and devalue other sorts of behaviour. The assigned value is key to understanding the operation and effectiveness of norms – indeed, assigning value gives norms much of their force.\(^95\)

Norms are relevant and applicable to both the use of drones and in discussions on security governance. The use of drones has challenged the application of the law. Their use has challenged long-standing norms too, though, perhaps best exemplified by the controversy drones have raised concerning the norm against assassination. This makes norms an ideal construct to discuss concerning drones, and even to new and evolving weapons systems more broadly. Indeed, norms have been underlying much of what has been discussed within this thesis: norms of just war, norms regarding assassination, norms concerning the separation of powers. These norms have been chipped away at by the drone program, which has created new norms and standards in its place. Thus, now is the ideal time to seriously discuss norms concerning the drone program: drones have been used for long enough to have set a concerning precedent, but the technology as it is currently being used is also young enough to begin setting standards for their improved use.

Across the literature, there appears to be a case being made for the introduction of certain normative standards around the use of drones, in addition to international law. This is largely due to that aforementioned “grey area” that exists around the use of drones in certain contexts. There is a case being made for the formulation of ‘standards of appropriateness,’ before the creation of a ‘status quo’ that makes it more difficult to challenge the further proliferation and usage of drones.\(^96\) This is where the domestic aspect of this thesis – the policies for reform that have been explored – ties in with this more international focused discussion. There is undoubtedly a need for reform to be made within a domestic US context, but a precedent has been set and drones are already proliferating. This fact may mean that accountability arrangements and the “rules of the game” also extend beyond a domestic level,


\(^96\) Bode and Huelss, “Autonomous Weapons Systems and Changing Norms in International Relations,” 404.
to the creation of norms and standards that surround the expanded use of drones within an international realm.

It is useful to consider this question within the context of a fast-moving technology such as drones and AWS. Writing on AWS more broadly, Bode and Huelss note that laws and norms, while related to one another, are not identical.\[^{97}\] The authors continue:

\[T\]he literature fails to consider that practices related to the development, testing, training, or usage of AWS outpace public, governmental, and legal considerations. As we argue, AWS may shape norms in practice by privileging procedural norms that are detached from deliberative processes. We get to this process by asking: what are the implications of developing and deploying AWS for international norms?\[^{98}\]

Thus, there is a need for norms to shape the use of drones, not for the use of drones to shape the creation and construction of norms.

**Conclusion**

The discussion on norms and the use of drones helps to identify the core difference between security governance and preventive security governance. Security governance provides a mechanism – through those six aforementioned principles: civilian control and accountability mechanisms; the rule of law; transparency; respect for human rights; compliance with international law; and public legitimacy – through which the US drone program can avoid excessive secrecy, improve oversight arrangements and move towards greater accountability benchmarks. Preventive security governance takes a longer-term and incremental view, providing a means through which to create, support and codify norms and standards surrounding the use of drones, in light of their proliferation outside of the United States.

While the major focus of this thesis has been at that domestic level – indicative of the fact that the United States currently does have the most developed drone program – it is useful to end by taking a crystal-ball viewpoint, anticipating the international impact that this US foreign policy has had, and will continue to have, if consistent and lucid norms and standards surrounding the use of armed drones are not put in place.

The policy proposals for the reform of the US drone program, as explored within this thesis, - the release of further information; judicial review; and the military preference – all interact with the six chosen principles of security governance, to varying degrees and with

\[^{97}\] Bode and Huelss, 395.
\[^{98}\] Bode and Huelss, 395.
differing levels of potential effectiveness. The next chapter – the concluding chapter – will interpret the analysis within this security governance chapter, assessing just how effective each policy proposal could be in improving the security governance of the drone program.
CHAPTER IX – CONCLUSION

And so [it is] very important for the president and the entire culture of our national security team to continually ask questions about ‘Are we doing the right thing? Are we abiding by the rule of law? Are we abiding by due process?’ And then set up structures and institutional checks so that you avoid any kind of slippery slope into a place where [we are] not being true to who we are.1

- Barack Obama, 2012

The above remarks, made by President Obama in 2012 as he stared down an upcoming presidential election, provide a neat launching point through which to explore some conclusions relating to the problematic use of drones by the United States and the subsequent attempts to restrain and/or improve their use, as explored within this thesis. It is important to highlight that this quote was given in a very particular context: the use of drones for targeted killings had skyrocketed during Obama’s first administration, driven by a combination of important factors. These included technological advancements, certainly, but also a lack of desire for a traditional “boots on the ground” war, and a need to find a cheaper way to conduct warfare in the wake of a struggling economy caused by the global financial crisis. Even more important, when considering the relevant contextual background, is that while drone use had increased, so too had inaccuracies leading to civilian deaths across various Middle Eastern nations. Of further significance when considering the context to the quote is that Obama was facing the very real prospect of missing out on a second term as president and was thus reflecting on the drone program and its associated immense powers, and what they might look like in the hands of a President Mitt Romney.

Of course, Obama did go on to win that second term as president, and 2013 was a year that saw some marked improvements in the drone program: Obama was attempting to put in place some of those aforementioned “structures and institutional checks” to avoid the slippery slope. Such mechanisms for change included those discussed in Chapter III, such as the 2013 PPG, the 2016 Executive Order 13732, and the 2016 Presidential Memorandum, Steps for Increased Legal and Policy Transparency Concerning the United States’ Use of

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Military Force and Related National Security Operations. The 2013 PPG did result in some tangible positive outcomes, most notably through the civilian death rate in undeclared warzones decreasing post-2013.² Such a decrease was reportedly due to a combination of fewer strikes occurring, and more precise targeting when strikes did occur.³ For all the positive outcomes that came with the passage of the PPG, the remaining actions that were taken in 2016 appeared akin to a last-ditch scramble to get the drone program’s affairs in order, implementing some semblance of accountability surrounding targeted killings before the inauguration of President Donald Trump who had, of course, threatened to kill even the families of terrorists on the campaign trail in 2016.⁴

A point (or problem) that has been reiterated throughout this thesis is that one of the most significant problems with the (very worthy) reforms that the Obama Administration eventually did implement was that such reforms were not entrenched in law. Obama spoke of a need for accountability structures but was not able to make his reforms a permanent structure within the drone program. This allowed for them to first be ignored by the Trump Administration, and then eventually overturned, such as through the revocation of Executive Order 13732.⁵ As such, the long-term implications of the issues that have been raised throughout this thesis will continue, and the need for reform remains ongoing, as the current state of play helps to highlight. Indeed, to help contextualise the state of the drone in December 2021, drone development and use have continued to proliferate. In their July 2021 update, Drone Wars reported that nations such as Iran, Turkey, Pakistan, Iraq and Saudi Arabia are currently operating armed drones.⁶ Nations that are nearing this status include Russia, Poland and Australia.⁷ At the same time that drones are proliferating, there is a real interest in weapons technologies that are even more sophisticated, such as AWS. These are – arguably – an even more concerning development, particularly because there are still very few norms that have been developed surrounding the use of drones. Indeed, scholars have made an explicit link between the lack of norms and standards surrounding the use of drones,

³ Bergen and Rowland, 15.
⁷ “Who Has Armed Drones?”
and how this could bode for the similar future use of AWS. Obama’s 2012 statement rings true, still, today: there remains a real need for structures and institutional checks to avoid the proverbial slippery slope.

This becomes evident upon narrowing the focus back in to look more specifically at the current state of the drone in the United States as of December 2021. The drone program remains unaccountable and highly secretive, and the CIA remains involved. Thus, the issues raised within this thesis remain ever-present, and the need for reform is likely greater than ever, particularly due to this aforementioned proliferation, both of drones and alternative weapons technologies. Even with the advent of new technologies, the drone is likely to stay put. Indeed, the 2021 military withdrawal from Afghanistan will likely result in an increased reliance on the drone within that nation, particularly with the Taliban – who has been fought via drone within Pakistan – at the helm. This appears to have begun already. For example, there was a controversial drone strike that was carried out in late August 2021, which killed ten civilians – including seven children. This thesis has not touched too specifically on drone use in Afghanistan, primarily because the pronounced focus was instead directed towards the CIA’s use of drones in undeclared warzones. It is not yet certain whether the CIA will play a role in Afghanistan following the military withdrawal, but if the United States’ pattern of conduct in undeclared warzones continues, it very likely will.

Thus, the precedent for the use of drones that was set by Obama – a precedent that built upon the framework that he inherited from the Bush Administration – remains in place. The US drone program remains largely unregulated and unaccountable, it continues to be highly secretive, and civilian deaths are still occurring (as evidenced via the strike in Afghanistan mentioned above). A great deal to do with the US drone program has changed throughout the years that spanned the writing of this thesis, but these core aspects remain the same, highlighting the ongoing relevance of the research.

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Significance and Findings

Perhaps the most significant finding that this thesis has made – and has reiterated throughout – is that under Obama, there were serious problems with the US's use of drones relating to transparency and accountability and that these problems have been difficult to shake in succeeding administrations. Considering the pervasiveness of the post-9/11 power framework (as highlighted within this thesis) that has remained in place following the Bush Administration, influencing various facets of counterterrorism policy, this is not necessarily a surprising finding, but it is a significant finding. This is because it helped to lay the groundwork for the remaining content of the thesis. Indeed, through highlighting the various problems associated with the use of drones by the United States (and by Obama in particular), the need for reform becomes clear.

This is where the core output of this thesis comes into play. This thesis has identified and explored three potential policies for reform that could – some more feasibly than others – rectify some of these identified problems. These policies are inextricably linked with the three branches of government, which have rarely been explored in conjunction with each other in the drone literature. These policies – the release of further information by the executive branch; the implementation of a form of judicial review via a “drone court” by the judicial branch; and the implementation of the military preference by the legislative branch – could achieve the potentially significant reform of the drone program. Such reform would have varying levels of success when each policy is compared with those principles of security governance that were formulated for use within this thesis, as explored within Chapter VIII. Appendix 1 additionally highlights the policies that were discussed with each principle. As the discussion in Chapter VIII highlighted, a policy being considered of relevance to a particular principle of security governance does not necessarily mean that the policy under discussion would necessarily improve on that outcome. For example, Chapter VIII discussed the idea of judicial review in relation to the principle of transparency, concluding that the implementation of either of the drone court models explored in Chapter VI would not likely result in further transparency, due to the secretive nature of the models. With this in mind, judicial review was discussed in relation to all six of the security governance principles and was considered feasible in four of the six: civilian control and accountability mechanisms; the rule of law; respect for human rights; and public legitimacy. The military preference was discussed according to five of the six principles (all principles excluding public legitimacy) and was considered feasible in three of the five: the rule of law; respect for human rights; and
compliance with international law. The release of further information was considered according to three of the six principles (the rule of law; transparency; and public legitimacy), and it was concluded that this policy would align with all three of those relevant principles.

**Thesis Outcomes**

Put simply, this thesis has highlighted the Obama Administration’s approach to the use of drones and has explored some pathways for the construction of a more robust drone accountability regime, guided by the developed principles of security governance. The question that has guided this thesis looked to the potential of security governance as a framework through which to achieve the reform of the drone program, asking: how can the US drone program utilise Ursula Schroeder’s concept of “security governance” to avoid excessive secrecy, improve oversight arrangements, and move towards greater accountability benchmarks?

Through overviewing the existing oversight mechanisms that applied to the US drone program throughout the Obama Administration, looking to the lack of clarity that surrounded the drone program and its related legal frameworks, this thesis has shown that it is via the three branches of government that Schroeder’s security governance can be utilised by the United States. Adopting a separation of powers model for the reform of the program – via the policies outlined in Chapters V, VI and VII – would allow for the fullest potential reform, through various methods of oversight. Such an approach would be a marked improvement from the approach that was taken throughout the Obama Administration (and the administrations following it), which saw a patchwork approach of accountability measures and scrutiny mechanisms. Through the six relevant indicators of security governance that have been devised for this body of work emerges a realistic framework for the continued use of drones. Such a framework acknowledges that drones will remain a present technology in counterterrorism pursuits (indeed, at no stage has this thesis put forward the argument that such technologies should be banned; only restrained), and so provides an avenue through which the use of drones can become more transparent and open to mechanisms of accountability.

**Contribution of New Knowledge**

Until now, there has been relatively little critical analysis that is centred on the utility of security governance mechanisms for increasing the effective transparency of drone use,
particularly analyses that look to the role that various domestic oversight bodies, incorporating the executive, judicial and legislative branches, could play. This is despite the potential that such a framework has for creating positive change, particularly for new and emerging technologies. The six principles of security governance that have been used and explored within this thesis have been chosen from across the existing security governance literature but were chosen with the drone program (and its flaws) specifically in mind. These principles will also capture potential problems with new and emerging technologies such as AWS, too, further demonstrating their potential application and usefulness. This is the primary contribution to new knowledge that this thesis brings: this combination of civilian control and accountability mechanisms, the rule of law, transparency, respect for human rights, compliance with international law, and public legitimacy, the principles through which to analyse and assess the use of drones, as well as any potential policies that could reform such use. It is also important to highlight that these principles of security governance could be helpful within an Australian context, as the Australian government embraces new technologies such as drones.

Relatedly, in the sense that these policies are what the principles of security governance have been applied to, the second core contribution to new knowledge that this thesis makes is via those three policies for reform that have been highlighted within this thesis: the release of further information by the executive branch; a form of judicial review, via a “drone court,” by the judicial branch, and the adoption of the military preference by the legislative branch. It should be noted that these policies have all individually been explored within the literature, but that the contribution comes in the form of linking the policies with individual branches of government and advocating for all three branches of government to play a role in the oversight of the drone program, despite current practice and precedent which has not allowed this to occur. Such a reformulation of the separation of powers, back to what is perhaps more consistent with the original intentions of the US Founding Fathers, and away from how it has been conceived of in the post-9/11 period, has not often been seriously explored within the existing literature.

**Future Avenues for Research**

There are several potential avenues for future research that could either build on the findings of this thesis or contribute to the broader discussion on the use of drones. Firstly, a major point that has been argued within this body of work is that the Bush Administration set up a framework of secrecy and executive power that was able to be inherited, followed, and even
expanded upon by the Obama Administration. This was able to be argued due to the benefit of hindsight and knowledge from that period. Now that a suitable amount of time has similarly passed from the Obama Administration, a proper examination of the power frameworks that Obama himself has passed on to successive administrations would be helpful. This thesis did, at points, highlight the actions of the Trump Administration regarding the drone program and its continuation from Obama, but a more in-depth analysis would serve a useful purpose, particularly in light of the fact that there is information now being released on the former Trump drone program.10

Secondly, this thesis looked only to the domestic reform of the drone program, exploring how US branches of government could play a role in its oversight. Given the reality of drone proliferation, there is a need for research to be conducted into the potential passage of an international framework or international guidelines for the use of drones in a global sense. Considering the outsized role of the United States in promoting norms and standards for other countries to follow, the United States would need to adopt reforms, such as the ones highlighted within this thesis, on a domestic level in order to have any semblance of legitimacy in calling for their international use to be restrained. Indeed, as the Centre for a New American Security highlights, ‘the United States can influence how other nations use drones by example and by promulgating norms of appropriate behaviour.’11

Thirdly, and looking to research on drones more broadly, this thesis did not have the space to properly explore the ethics surrounding the use of drones. Given the reality of proliferation, and the development of even more sophisticated weapons technologies, such a discussion might be too late to have an effect, but it is a worthy one nonetheless, particularly because - as Trish Glazebrook highlights - ‘drone warfare departs from Just War Theory…[and] this [is not] the only ethical issue it raises. The scope and legitimacy of drone use are also problematic.’12 It is important to highlight that this thesis very much operated from the perspective that drones are a tempting and advantageous technology, and thus was formed with the realist (or realistic) position that their use is not likely to be banned. This does not mean that discussions surrounding such actions, or the ethics of drones more widely, are irrelevant, though: ethical frameworks and considerations will continue to be a highly

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critical element of drone debate and the related implications of not only current but future technological advances.

The Future of Drones
Of the many concerning points that have been raised within this thesis, the future remains even more concerning (and uncertain). Questions remain regarding how drones could be used under any potential future US president; how drone proliferation will continue to play out; and what role new weapons technologies will play in future warfare. All of this is occurring in a world that has been operating under the precedent – set by the Obama Administration – for the use of drones. This points to a real need for the oversight mechanisms, as explored within this thesis, to be implemented. Drones (and similar warfare technologies) will continue to be used for years to come, but their use can be constrained and overseen to allow for the weapons to live up to their full potential while prioritising civilian lives.
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### Appendices

#### Appendix 1

**6 Security Governance Principles, Branches of Government and Armed Drone Policy**

<table>
<thead>
<tr>
<th>PRINCIPLE</th>
<th>DESCRIPTION</th>
<th>POLICY/IES MOST RELEVANT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civilian control and accountability mechanisms</td>
<td>There should be both political and judicial oversight over the security sector – an ‘obligation of security actors to report on their activities to the political and judicial institutions of the state.’</td>
<td>Judicial review</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Military preference</td>
</tr>
<tr>
<td>Rule of law</td>
<td>There are of course a variety of definitions for the rule of law within democratic contexts. As per Schroeder, ‘…the Vera Institute of Justice’s definition generally emphasises the “supremacy of the law” over all other spheres of political and social life, and specifically mentions the relevance of “equity, accountability and avoidance of arbitrariness”.’</td>
<td>Release of more information</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Judicial review</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Military preference</td>
</tr>
<tr>
<td>Transparency</td>
<td>The security sector should be as transparent as possible, ‘consistent with meeting legitimate and well-defined needs for confidentiality, which should be subject to regular, independent oversight.’ Basic information, though, should be made available to the public and elected civilian representatives, and ‘the need for confidentiality’</td>
<td>Release of more information</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Judicial review</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Military preference</td>
</tr>
</tbody>
</table>

2 Schroeder, 29.
| Respect for human rights | Respect for human rights involves both reactive and proactive mechanisms. Reactive mechanisms could include providing ‘venues for filing complaints and ensuring remedial action,’ while proactive mechanisms could include mechanisms for ‘educating and training the security sector on human rights standards, monitoring their behaviour, and ensuring representation of minority or disadvantaged groups in decision-making governing bodies.’


5 England, Security Sector Governance and Oversight, 12.


7 England, 14.

8 England, 14. |
| Compliance with international law | The security sector is required to adhere to a state’s international law obligations.6 |
| Public legitimacy | This refers to acceptance on the part of those subject to the security sector; an indication ‘that they accept its authority.’7 ‘…[L]egitimacy increases when the security sector is responsible to, representative of and responsive to the community it serves and the community is able to influence the security sector.’8 |
| Judicial review | Military preference |
| Judicial review | Military preference |
| Release of more information | Judicial review |
Appendix 2

Deaths in Pakistan through Obama’s presidency. Source: *The Bureau of Investigative Journalism*

Deaths in Somalia through Obama’s presidency. Source: *The Bureau of Investigative Journalism*
Deaths in Yemen through Obama’s presidency. Source: *The Bureau of Investigative Journalism*