Drones and Democracy: Missing Out on Accountability?

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Unmanned aerial vehicles (“drones”) provide U.S. policymakers with tremendous flexibility when making use-of-force decisions. Drones are able to hover over targets for long periods of time without tiring and without putting U.S. personnel in harm’s way. Drones are able to precisely deliver force, ensuring mission success while minimizing collateral damage. Drones are also relatively cheap, making the loss of one drone fairly negligible.¹ That most drone strikes escape widespread public scrutiny contributes in no small way to the flexibility policymakers enjoy when relying on drones for using force.² But the absence of public scrutiny undermines an important accountability mechanism—political accountability—and constraint on use-of-force decisions. In fact, relying on drones has seemingly allowed U.S. policymakers the option of choosing force while avoiding several important accountability mechanisms. In so doing, the primary constraints on decisions to use force are avoided, lowering the barriers to use force, and contributing to more frequent uses of force by the United States.

Removing the constraints policymakers face when choosing to use force may be advantageous. Indeed, some argue that the post-9/11 world is so dangerous that policymakers

¹ Christopher Drew, Drones Are Weapons of Choice in Fighting Al Qaeda, N.Y. TIMES, Mar. 16, 2009, http://www.nytimes.com/2009/03/17/business/17uav.html?_r=1. Contra Winslow T. Wheeler, MQ-9 Reaper Drone: Not a Revolution in Warfare. Wheeler’s cost calculation emphasizes infrastructure costs associated with MQ-9 Reaper operations. These costs include the four Reapers that form a combat air patrol, the personnel costs, and the cost of a ground control station. However, none of these infrastructure costs attach when merely replacing a single Predator or Reaper lost to enemy fire or otherwise.

² Consider, for instance, that the United States has conducted some 280 drone strikes just since 2009, just in Pakistan. Covert War on Terror—the Data: Obama 2012 Pakistan Strikes, THE BUREAU OF INVESTIGATIVE JOURNALISM, Jan. 11, 2012, http://www.thebureauinvestigates.com/2012/01/11/obama-2012-strikes/. These strikes have been directed not only at leaders of Al Qaeda or the Taliban, but at foot soldiers and, often, at the foot soldiers of lesser militant groups of uncertain affiliation with either Al Qaeda or the Taliban, like Tehrik-e-Taliban Pakistan. See Laurie R. Blank & Benjamin R. Farley, Characterizing United States Operations in Pakistan: Is the U.S. Engaged in an Armed Conflict?, 34 FORDHAM INT’L L.J. 151 (2010). Yet, most public scrutiny over drone strikes has centered on just one strike: the strike that killed Anwar al-Aulaqi in 2011.
must be allowed to use force without constraint. However, an absence of accountability in use-of-force decisions—like an absence of accountability in any other realm—may lead to misguided or abusive use-of-force decisions. Arguably, the destabilization of Yemen and the increasing strength of Al Qaeda in the Arabian Peninsula are attributable in part to the frequency of U.S. uses of force there. Additionally, when the executive branch apparently purposefully and intentionally avoids accountability in use-of-force decision-making, it opens itself and the United States generally to a panoply of criticism—some well-founded, some not.

This article explores how drones have facilitated use-of-force decisions that avoid political, supervisory, and legal accountability. It argues not that drones are the root of accountability-avoidance, but that drones exacerbate an already flawed accountability system. It further argues that, although lack of accountability imparts policymakers with increased flexibility, that increased flexibility may come at the cost of wise policymaking.

Part I of this article provides a brief overview of current U.S. drone operations. Part II explores accountability mechanisms relevant to use-of-force decisions in the United States. Part III assesses the impact of accountability mechanisms on U.S. use-of-force decisions, particularly

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3 John Yoo, NYULRev from 2011-12; John Yoo, War, Responsibility, and the Age of Terrorism (2004)
those decisions that employ unmanned aerial vehicles. Finally, part IV concludes by arguing that accountability avoidance is detrimental because it increases the likelihood of policy failure. It then identifies several small steps by which Congress could improve the U.S. accountability system for use-of-force decisions.

It bears emphasizing that this article does not argue that drone strikes are *per se* wrong, illegal, or foolhardy. Nor is this article an argument for placing U.S. service personnel in harm’s way. Instead, this article highlights that a combination of circumstance and purpose facilitate U.S. policymakers’ accountability avoidance when employing an important modern tool—and that accountability avoidance may ultimately undermine U.S. policy objectives.

I. Background on U.S. Drone Operations

The United States first deployed armed drones in combat in 2001 in Afghanistan. In the first year of operations, U.S. Air Force drones struck approximately 115 targets. By the end of 2002, the United States was covertly employing drones for targeted strikes outside of Afghanistan. Under the Bush administration, the United States made comparatively meager use of unmanned aerial vehicles away from the acknowledged battlefields of Iraq and Afghanistan. Between 2002 and 2009, only 53 strikes were carried out outside of Iraq and Afghanistan. The vast majority of those, some 35 strikes, were carried out in the final six months of the Bush

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administration. In contrast, the Obama administration has extensively used covert drone strikes throughout its term. Since January 20, 2009, the Obama administration has carried out between 315 and 332 strikes in places like Pakistan, Yemen, and Somalia.

Growing U.S. reliance on armed drones is not limited to its clandestine services. Armed drones accompanied the invasion of Iraq. Throughout the occupation, drones provided close air support and performed intelligence, surveillance, and reconnaissance (ISR) missions for U.S. ground forces. In 2006, there were 12 drone patrols over Iraq and Afghanistan each day, by 2009 there were 34, and these 34 drone patrols were producing 16,000 hours of video each month. After NATO took command of the mission enforcing the Libyan No-Fly Zone on March 31, 2011, the United States contributed no combat aircraft aside from drones to that mission. Armed U.S. drones remained over Libya at least until October 20, 2011, when an American drone fired a missile into Qaddafi’s fleeing convoy, halting it, and leading to Qaddafi’s capture. This drone strike effectively ended the civil war in Libya. Finally, on January 5, 2012, the Obama administration announced a proposed defense budget that invested significantly in acquisition of new unmanned systems while drastically cutting the size and acquisition programs of conventional and manned systems.

11 *See, e.g.*, “War in Iraq is Underway” MSNBC Mar. 19, 2003.
15 President Barack Obama, United States Activities in Libya 25 (2011).
Drones are highly desired by U.S. combatant commanders because of their “versatility and persistence.”\(^\text{18}\) Although manned systems are able to perform many of the same missions for which drones are employed—and are often able to do so at greatly reduced cost—drones “reduce the risk to . . . warfighters by providing a sophisticated stand-off capability that supports intelligence, command and control, targeting, and weapons delivery. These systems also improve situational awareness and reduce many of the emotional hazards inherent in air and ground combat.”\(^\text{19}\) Moreover, even though manned systems and cruise missile are available and have been used for some targeted killings, the vast majority of these strikes have been carried out using drones.\(^\text{20}\)

Armed drones do offer several particular advantages over traditional manned systems. Most prominently, drones are unmanned and remotely operated. Thus, when choosing to use force with drones, policymakers choose to remove at least one American service person from harm’s way: the pilot.\(^\text{21}\)

In addition to removing the pilot from danger, armed drones like the MQ-1 Predator or the MQ-9 Reaper have unmatched abilities to loiter over a target. For example, even a Reaper fully laden with arms is able to operate for up to 14 hours without refueling\(^\text{22}\)—several times the endurance of armed manned systems. The Reaper’s long-term loitering capability makes it a


\(^\text{20}\) See, e.g., Micah Zenko, \textit{Collateral Damage: The Dangerous Precedent of America’s Drone Wars}, WORLD POL. REV. (“When President Barack Obama boasted in December 2011 that 22 out of al-Qaida’s 30 top leaders had been “taken off the battlefield,” he neglected to mention that all but one of the strikes were carried out via drone strikes.”)

\(^\text{21}\) Presentation; CRS Report


desirable platform for both close air support and hunter-killer missions. In a close air support role, drones provide increased situational awareness as well as the ability to deliver on-demand precision air strikes. In Iraq and Afghanistan, drones have been tasked with loitering above U.S. forces to assist in threat identification and interdiction. For example, in 2005, U.S. and Iraqi forces operating in Anbar province came under mortar fire. A UAV controller assigned to the unit under fire identified the mortar launch site through Predator imagery. The controller then used the Predator’s armament to destroy the launch site. In a strike capacity, drones loiter for hours until a target appears or until a strike will incur minimal collateral damage. Both Reapers and Predators have been deployed for these sorts of missions in Afghanistan and Iraq, as well as for hunter-killer missions over Pakistan, Yemen, Somalia, and Libya.

The capacity to loiter for long periods over a target make drones attractive platforms for ISR missions. Although some argue that the sensor packages mounted on Reapers produce relatively low quality imagery, the vast majority of reports indicate that Predator and Reaper

23 See, e.g., Jane Perlez & Zubair Shah, *Drones Batter Al Qaeda and Its Allies within Pakistan*, N.Y. TIMES, April 4, 2010, [http://www.nytimes.com/2010/04/05/world/asia/05drones.html](http://www.nytimes.com/2010/04/05/world/asia/05drones.html) (“The drones, operated by the C.I.A., fly overhead sometimes four at a time, emitting a beelike hum virtually 24 hours a day, observing and tracking targets, then unleashing missiles on their quarry . . . .”); David S. Cloud, *CIA Drones Have Broader List of Targets*, L.A. TIMES, May 5, 2010, [http://articles.latimes.com/2010/may/05/world/la-fg-drone-targets-20100506](http://articles.latimes.com/2010/may/05/world/la-fg-drone-targets-20100506) (“In some cases, drones conduct surveillance for days to establish the evidence that justifies firing a missile, the officials said.”); Christopher Drew, *Drones Are Weapons of Choice in Fighting Qaeda*, N.Y. TIMES, Mar. 16, 2009 (“Field commanders in Iraq and Afghanistan . . . say their ability to linger over an area for hours, streaming instant video warnings of insurgent activity, has been crucial to reducing threats from roadside bombs and identifying terrorist compounds.”);


26 Winslow T. Wheeler, *MQ-9 Reaper Drone: Not a Revolution in Warfare*. Wheeler cites several low-quality videos available on the Internet to support his point. *Id.* Methodological question aside, there are at least as many publicly available videos from Reapers or Predators featuring clearly discernible human figures. As Wheeler notes, even these videos likely have been degraded before public release. *See, e.g.*, RQ-1 Predator Ambush 2005 Iraq, [http://www.youtube.com/watch?v=5oLrA7k47tE&feature=related](http://www.youtube.com/watch?v=5oLrA7k47tE&feature=related); RAF Reaper Strikes Insurgent Team, [http://www.youtube.com/watch?v=GShSMMLooJg](http://www.youtube.com/watch?v=GShSMMLooJg); UAV Uses Two Hellfire To Kill Two Terrorists, [http://www.youtube.com/watch?v=JoVdLArd_qE&feature=relmfu](http://www.youtube.com/watch?v=JoVdLArd_qE&feature=relmfu); Predator Targets Insurgent Car with Hellfire, [http://www.youtube.com/watch?v=dLv-7zqHdF4&feature=related](http://www.youtube.com/watch?v=dLv-7zqHdF4&feature=related).
drones provide excellent information and high resolution imagery. At least one report describes the camera on a Reaper as able to read a license plate from two miles away. Moreover, the ability to loiter for long periods of time combined with high quality imagery makes Predator and Reaper drones highly precise weapons platforms, surpassing manned aerial systems in this regard.

Although drones do provide policymakers with unique flexibility, they are not without their drawbacks. For example, Predator and Reaper drones, at least, have no real ability to defend

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27 E.g., Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.’s Covert Drone Program*, NEW YORKER, Oct. 26, 2009 (“On August 5th, officials at the Central Intelligence Agency, in Langley, Virginia, watched a live video feed relaying closeup footage of one of the most wanted terrorists in Pakistan. Baitullah Mehsud, the leader of the Taliban in Pakistan, could be seen reclining on the rooftop of his father-in-law’s house, in Zanghara, a hamlet in South Waziristan. It was a hot summer night, and he was joined outside by his wife and his uncle, a medic; at one point, the remarkably crisp images showed that Mehsud, who suffered from diabetes and a kidney ailment, was receiving an intravenous drip.”) (emphasis added); Elisabeth Bumiller, *Air Force Drone Operators Report High Levels of Stress*, N.Y. TIMES, Dec. 16, 2011 (“After a strike, operators assess the damage, and unlike fighter pilots who fly thousands of feet above their targets, drone operators can see in vivid detail what they have destroyed.”) (emphasis added);


29 Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.’s Covert Drone Program*, NEW YORKER, Oct. 26, 2009 (“Predator drones, with their superior surveillance abilities, have a better track record for accuracy than fighter jets, according to intelligence officials.”). Consider this defense of increased U.S. reliance on drones in Yemen:

Instead of pointing to [the December 2009 strike in Abyan, Yemen] as justification for halting drone strikes in Yemen, the civilian casualties created by this intelligence failure and use of a cruise missile alternatively suggest the need for the use of drones as a more surgical platform for achieving our counterterrorism objectives while minimizing civilian casualties. Cruise missiles introduce several factors that may contribute to errant targeting. The limitations of cruise missiles, in many ways, provided the impetus for developing the drone platform. Cruise missiles 1) require intelligence far in advance of hitting their target, 2) take a considerable amount of time to travel to their target, 3) are difficult to divert from their target once launched and 4) employ large scale and more devastating munitions such as cluster bombs which can lead to increased civilian casualties. In contrast, drones can provide their own targeting intelligence devoid of Yemeni government influence, provide real-time visual surveillance of a target, minimize the time between target engagement and target impact, and use smaller munitions able to reduce civilian casualties. While neither technology platform is a perfect engagement tool, drones vis-à-vis cruise missiles have further improved the U.S. ability to engage terrorists and minimize civilian casualties.

themselves from air-to-air or ground-to-air fire: they are relatively slow and have limited maneuverability. Essentially, this limitation restricts drones to permissive airspace—airspace that is either controlled by a government overtly or covertly cooperating with the United States or airspace whose defense systems have been degraded through other means. This seemingly undercuts one of the primary benefits drones afford: removing the pilot from danger. However, operating a manned system at the slow speeds and for the long durations that characterize unmanned systems operating over Pakistan, for example, would expose manned craft to increased danger from man-portable anti-aircraft systems. Additionally, the prospect of a crash resulting in the capture of a U.S. pilot in either Yemen or Pakistan must terrify policymakers.

Finally, the absence of American pilots on board these aircraft also contributes to the willingness of the governments of Pakistan and Yemen to at least tacitly cooperate with U.S. drone operations over those states.

Moreover, in spite of these drawbacks, the importance of drones to U.S. policymakers is patent. While he was still Director of the CIA, Leon Panetta described drones as “the only game in town.”

II. Accountability and Constraints on the Use of Force

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30 In the months leading up to Operation Iraqi Freedom, the United States strapped Stinger missiles to Predators operating over southern Iraq. On December 23, 2002, an Iraqi MiG-25 attacked a Predator. The Predator fired its Stinger but was shot down by the MiG. Walter J. Boyne, How the Predator Grew Teeth, A.F. MAG., July 2009.
31 E.g., Pakistan and Yemen.
32 E.g., Libya after the initial NATO bombing campaign.
34 See, e.g., Peter Bergen & Katherine Tiedemann, Washington’s Phantom War: The Effects of U.S. Drone Program in Pakistan, FOR. AFF., July/August 2011;
Accountability is an agency relationship\textsuperscript{36} in which the agent, A, must answer to the principal, P, for the agent’s actions or inactions. In general, an accountability relationship exists between A and P if: (1) A is obliged to act on P’s behalf; and (2) P is empowered to positively or negatively sanction A for A’s actions or inactions.\textsuperscript{37} Accountability is thus a method of principal-agent control. Increasing an agent’s accountability to its principal increases a principal’s control of its agent.\textsuperscript{38} However, P’s ability to effectively sanction A is limited by P’s knowledge of A’s actions or inaction. Thus, “standard definitions of accountability emphasize both information and sanctions.”\textsuperscript{39} By their nature, accountability mechanisms constrain the freedom of action enjoyed by the actor being held accountable.\textsuperscript{40}

The relevance of a particular accountability mechanism depends upon the agency relationship under consideration.\textsuperscript{41} For example, in large bureaucracies or organizations, hierarchical accountability may be the primary accountability mechanism at work: “superiors can remove subordinates from office, constrain their tasks and room for discretion, and adjust their financial compensation.”\textsuperscript{42} However, when discussing the interaction of legislatures and executives in modern democracies, it may be more appropriate to focus on supervisory or fiscal accountability.

\textsuperscript{36} Keohane; John Ferejohn, Chapter 4: Accountability and Authority: Toward a Theory of Political Accountability, in ADAM PRZEWORSKI, SUSAN C. STOKES & BERNARD MANIN, DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 131, 131–34 (1999)
\textsuperscript{37} Ronald J. Oakerson, Governance Structures for Enhancing Accountability and Responsiveness, in HANDBOOK OF PUBLIC ADMINISTRATION 114 (1989); James D. Fearon, Chapter Two: Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance, in ADAM PRZEWORSKI, SUSAN C. STOKES & BERNARD MANIN, DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 55 (1999)
\textsuperscript{38} John Ferejohn, Chapter 4: Accountability and Authority: Toward a Theory of Political Accountability, in ADAM PRZEWORSKI, SUSAN C. STOKES & BERNARD MANIN, DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 131, 141 (1999)
\textsuperscript{40} 15 Am. U. Int’l L. Rev. 1, 148; Ruth W. Grant & Robert O. Keohane, Accountability and Abuses of Power in World Politics, 99 Am. Pol. Sci. Rev. 29 (2005);
\textsuperscript{41} Keohane at 1131–1134. Keohane identifies eight mechanisms of accountability at work in contemporary democracies. These are: (1) hierarchical accountability; (2) supervisory accountability; (3) electoral accountability; (4) fiscal accountability; (5) legal accountability; (6) market accountability; (7) participatory accountability; and (8) public reputational accountability. Id.
accountability. According to Keohane, accountability in general can be divided into eight accountability mechanisms that describe particular agency relationships: hierarchical accountability; supervisory accountability; political accountability; fiscal accountability; legal accountability; market accountability; participatory accountability; and public reputational accountability.

In the United States, use-of-force decision-making is the shared responsibility of Congress and the President. This institutional arrangement indicates that the accountability mechanisms most relevant to U.S. use-of-force decision-making include (A) the political accountability of the President and members of Congress; (B) the supervisory and fiscal accountability Congress exercises over the President; and (C) legal accountability both domestically and internationally. This article discusses these accountability mechanisms in turn.

A. Political Accountability

Political accountability is “a distinctively democratic form of accountability.” It operates through competitive elections in which the electorate sanctions its political leaders with replacement or reelection for those leaders’ actions or inactions. To be effective, political accountability is “a distinctively democratic form of accountability.” It operates through competitive elections in which the electorate sanctions its political leaders with replacement or reelection for those leaders’ actions or inactions.

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46 See, e.g., John Ferejohn, Chapter 4: Accountability and Authority: Toward a Theory of Political Accountability, in ADAM PRZEWORSKI, SUSAN C. STOKES & BERNARD MANIN, DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 131, 131 (1999) (“Electoral institutions are employed . . . as mechanisms to hold incumbents accountable to the public, and, in these ways they make policies more or less responsive to public wishes. Accountability is, on this view, a property of institutional structures.”).
accountability requires competitive elections. Competition empowers political accountability’s sanction mechanism. Close competition also yields greater accountability, which in turn provides the electorate with increased control over its political leadership.  

Finally, competitive elections induce candidates to reveal information about themselves and their competitors to the electorate in an effort to ensure electoral success. In this way, the facet of democracy that empowers political accountability’s sanction element also works to make it more effective by increasing the availability of information necessary for principals to exercise political accountability. Ultimately, political accountability is a potentially powerful accountability mechanism because political leaders desire reelection.  

Unfortunately, political accountability suffers a number of severe handicaps limiting its effect. First, voters are at a severe information disadvantage compared to political leaders. Second, the periodicity of elections blunts the force of electoral sanction. Finally, the vote is an imprecise tool made less precise by its multifarious use by voters. 

Voters suffer significant information disparity with respect to their political leaders. “Even if individuals know what is best for them, if they are not fully informed about some relevant features of the world . . . they may err in their . . . sanctions.”  

51 Keohane at 1131; Bernard Manin, Adam Przeworski, and Susan C. Stokes, Chapter 1: Elections and Representation, in ADAM PRZEWORSKI, SUSAN C. STOKES & BERNARD MANIN, DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 29 (1999); James D. Fearon, Chapter Two: Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance, in ADAM PRZEWORSKI, SUSAN C. STOKES & BERNARD MANIN, DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 55, 56 (1999)
52 Bernard Manin, Adam Przeworski, and Susan C. Stokes, Introduction, in ADAM PRZEWORSKI, SUSAN C. STOKES & BERNARD MANIN, DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 1, 13 (1999). See also James D. Fearon, Chapter Two: Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance, in ADAM PRZEWORSKI, SUSAN C. STOKES & BERNARD MANIN, DEMOCRACY,
induce politicians to explain their actions and their preferred policies to the electorate.\textsuperscript{53} “[v]oters have neither the time to follow policy debates in Washington nor the training and skill to evaluate conflicting ‘expert’ arguments about what is best.”\textsuperscript{54} Even if voters did have the training and skill to effectively evaluate the actions of their leaders, “voter’s incentives to be interested and well informed about politics are far from strong.”\textsuperscript{55}

Compounding voters’ lack of interest or ability to effectively measure leaders’ actions, the information necessary to evaluate leaders’ actions is often obscure or unattainable. Often, the public may not be able to acquire relevant information detailing the work of its leadership or may only be able to do so at a significant cost.\textsuperscript{56} Legislative policymaking diffuses responsibility and naturally masks information: “[W]hen policy is produced by a legislature, it is difficult to see how one can hold individual members responsible for it unless one has a detailed empirical and theoretical understanding of legislative procedure and politics (which even full-time students of Congress do not agree on).”\textsuperscript{57} The President, on the other hand, is vested with the authority to classify or declassify information and Presidents have regularly issued Executive Orders governing classification and declassification.\textsuperscript{58} The President is thereby empowered to control

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\item \textsuperscript{53} Keohane at 1131; cf. Federalist 72
\item \textsuperscript{54} James D. Fearon, \textit{Chapter Two: Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance}, in ADAM PRZEWORSKI, SUSAN C. STOKES & BERNARD MANIN, DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 131, 132 (1999).
\item \textsuperscript{55} James D. Fearon, \textit{Chapter Two: Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance}, in ADAM PRZEWORSKI, SUSAN C. STOKES & BERNARD MANIN, DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 55, 68 (1999)
\item \textsuperscript{56} Bernard Manin, AdamPrzeworski, and Susan C. Stokes, \textit{Chapter 1: Elections and Representation}, in ADAM PRZEWORSKI, SUSAN C. STOKES & BERNARD MANIN, DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 29, 42 (1999)
\item \textsuperscript{57} James D. Fearon, \textit{Chapter Two: Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance}, in ADAM PRZEWORSKI, SUSAN C. STOKES & BERNARD MANIN, DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 55, 83 (1999)
\item \textsuperscript{58} Bernard Manin, AdamPrzeworski, and Susan C. Stokes, \textit{Chapter 1: Elections and Representation}, in ADAM PRZEWORSKI, SUSAN C. STOKES & BERNARD MANIN, DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 29, 42 (1999)
\end{itemize}
the availability—and relative advantage or disadvantage—of information necessary for voters to employ political accountability.

The periodicity of elections also tempers the efficacy of political accountability. Elections for federal offices in the United States occur every two, four, or six years depending on the office. Although political leaders are highly responsive to the electorate in the period when an election looms—within the so-called shadow of an election—their responsiveness wanes in the period between elections. This oscillating responsiveness suggests that leaders know—or at least believe—that the electorate is relatively less concerned with their actions when an election is distant. That is, political leaders may enjoy greater freedom of action and less accountability between elections.

Finally, the vote is an imprecise tool. Voters cast a ballot for one or another candidate at the end of an incumbent’s term. Voters may sanction all of the incumbent’s actions or inactions over the whole of that term or for some particular subset of actions or inactions during the term. Voters themselves contribute to this imprecision by using the vote multifariously. Often—perhaps, predominately—voters cast their ballots prospectively, effectively guessing about the candidate’s future actions or inactions and providing the candidate with a mandate for those actions or inactions.

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59 John Ferejohn, Chapter 4: Accountability and Authority: Toward a Theory of Political Accountability, in ADAM PRZEWORSKI, SUSAN C. STOKES & BERNARD MANIN, DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 131, 131, 132 (1999)
60 James D. Fearon, Chapter Two: Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance, in ADAM PRZEWORSKI, SUSAN C. STOKES & BERNARD MANIN, DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 55, 68 (1999); John Ferejohn, Chapter 4: Accountability and Authority: Toward a Theory of Political Accountability, in ADAM PRZEWORSKI, SUSAN C. STOKES & BERNARD MANIN, DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 131, 131, 137 (1999)
61 James D. Fearon, Chapter Two: Electoral Accountability and the Control of Politicians: Selecting Good Types versus Sanctioning Poor Performance, in ADAM PRZEWORSKI, SUSAN C. STOKES & BERNARD MANIN, DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 55, 67 (1999)
62 Bernard Manin, AdamPrzeworski, and Susan C. Stokes, Chapter 1: Elections and Representation, in ADAM PRZEWORSKI, SUSAN C. STOKES & BERNARD MANIN, DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 29 (1999); James D. Fearon, Chapter Two: Electoral Accountability and the Control of Politicians: Selecting Good
Despite the factors undermining the effectiveness of electoral accountability there is “diverse evidence . . . that the threat of electoral sanctioning does matter.”63 Political leaders are responsive to both polls and elections. By tailoring their behavior to the electorate’s opinion between elections, political leaders hope to avoid replacement at the next election.

Political accountability is particularly potent with respect to use-of-force decisions. Political accountability acts as a substantial constraint on the willingness of political leaders to choose to use force.64 In fact, an appreciation for the potency of political accountability as a constraint on use-of-force decisions is responsible in part for the U.S. Constitution65 and the democratic peace thesis.66 However, the importance of political accountability to use-of-force decision-making—and the extent to which it limits leaders’ decisions to use force—depends on the nature of that use-of-force decision, including the scope of the use of force, its expected duration, its risk of U.S. casualties, and whether it is an overt or a covert use of force.67

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64 Karen Mingst, *Domestic Political Factors and Decisions to Use Military Forces*, in Democratic Accountability and the Use of Force in International Law 61, 70 (Charlotte Ku & Harold K. Jacobson, eds. 2003) (“The willingness of democratic governments to threaten and use force is positively and strongly correlated with the degree of domestic support. Media, and the public opinion shaped by the media, play an especially key role in democratic accountability. Both individual and group support (or dissent) matters to democratic governments.”); Michael Koch & Scott Sigmund Gartner, *Casualties and Constituencies: Democratic Accountability, Electoral Institutions, and Costly Conflicts*, 49 J. Conflict Res. 874 (2005).

65 See, e.g., James Madison, Fourth Letter of Helevidus (“Hence it has grown into an axiom that the executive is the department of power most distinguished by its propensity to war.”); Samuel Issacharoff, *Political Safeguards in Democracies at War*, 29 Oxford J. Leg. Stud. 189, 201 (2009).

66 Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*

67 “Covert action is sometimes referred to as the ‘quiet option’ at the Headquarters of the Central Intelligence Agency . . . . The phrase comes from a supposition that covert action is apt to be less noisy and obtrusive than the overt use of force in American foreign policy, such as landing a Marine brigade (an assumption frequently proven false—most notoriously with the disastrous Bay of Pigs operation on the southern coast of Cuba in 1961).” Loch K. Johnson, *Covert Action and Accountability: Decision-making for America’s Secret Foreign Policy*, 33 INT’L STUD. Q. 81, 82 (1989).
In general, “governments lose popularity in proportion to the war’s cost in blood and money.” After an initial boost in popularity at the outset of hostilities, the rising casualties, increasing costs, and lengthening duration of a conflict dampen political leaders’ chances of reelection. This relationship between casualties and a leader’s popular support pushes leaders to avoid potentially costly uses of force. But it is not merely the accumulation of casualties that erodes public support—thereby increasing the threat of negative electoral sanction—for a use of force. Public support also erodes due to the size of marginal casualties. Thus, episodes in which U.S. casualties are killed unexpectedly or in large numbers can generate precipitous declines in support for a use of force. Such was the case in Somalia when a relatively small number of

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68 Bruce Russett, Grasping the Democratic Peace 46 (1990). Political accountability provides the most straightforward explanation for the democratic peace thesis, Edward D. Mansfield & Jack Snyder, Electing to Fight: Why Emerging Democracies Go To War 23 (2005). This structural explanation for the democratic peace theory traces its lineage to Immanuel Kant:

Kings could pass along the costs of war to their powerless subjects, [Kant] argued, whereas elected regimes would suffer at the ballot box if they dragged their citizens into needless, costly wars. This, he predicted, would make elected governments more prudent in their decisions to go to war.

As a result of this prudence, democracies . . . are adept at avoiding unsuccessful, costly wars.


69 Russet 1990; Holsti 1996; Parker 1995

70 See, e.g., Dan Reiter & Allan C. Stam, Democracies at War 166–173 (2002). But the greater a government’s ability to distribute the political costs of casualties, the more willing it will be to fight a costly war. Michael Koch & Scott Sigmund Gartner, Casualties and Constituencies: Democratic Accountability, Electoral Institutions, and Costly Conflicts, 49 J. Conflict Res. 874, 875 (2005) (“[T]he diffuseness of political accountability affects the probability that a state is willing to sustain casualties during a militarized dispute, such that states with greater ability to distribute the political consequences of casualties fight more costly conflicts. At the same time, as the number of parties and political diffuseness increase, states are less likely to get involved in disputes.”); Dan Reiter & Allan C. Stam, Democracies at War 172 (2002) (“We know that an individual’s support for the [Vietnam War] was sensitive to escalating casualties of soldiers originally from that individual’s hometown or county. We know that this relationship was race-blind, that white Americans’ support for the war was just as vulnerable to the deaths of black soldiers as it was to the deaths of whites. We know that casualties that were more recent affected a person’s opinion of the war more strongly than the deaths and injuries of soldiers taking place in years before the surveys. We also know that the flow of blood of soldiers drawn from an American’s hometown trumped other factors that might have guided public opinion, as local casualty rates were far more important in affecting public opinion than newspaper editorials or the antiwar movement.”).


Additionally, in the United States, the electorate’s sensitivity to casualties—and the attendant risk of political accountability leaders face for casualties—may be increasing. “Casualty for casualty, support . . . declined far more quickly [in Iraq] than it did during either the Korean War or Vietnam War.”\footnote{73}{John Mueller, \textit{The Iraq Syndrome}, 84 FOR. AFF., Nov./Dec. 2005, at 44.} However, leaders can limit their exposure to political accountability—and avoid its constraints—by choosing uses of force that are cheap, brief, or that reduce the threat of casualties.

The fear of U.S. casualties and the fear of lengthy mission duration played prime roles in U.S. decision-making regarding the use of force and the scale of that use of force during the 1991 Gulf War. “[I]t was well understood within the American military that holding down casualties was a political prerequisite for launching a military offensive [against Iraq].”\footnote{74}{DAN REITER & ALLAN C. STAM, DEMOCRACIES AT WAR 176 (2002).} Policymakers discarded invasion plans that carried too high a risk of casualties. “President [George H.W.] Bush’s belief that victory could come quickly and cheaply bolstered his commitment to the war.”\footnote{75}{DAN REITER & ALLAN C. STAM, DEMOCRACIES AT WAR 176 (2002).} Additionally, U.S. policymakers pursued war plans that, in stark contrast to the slow escalation during the Vietnam War, involved immediate, overwhelming force that would both protect American armed forces and ensure a short war.\footnote{76}{DAN REITER & ALLAN C. STAM, DEMOCRACIES AT WAR 176–77 (2002) (The American concern to keep the war brief and casualties few shaped the coalition’s military strategy in three major ways. First, it encouraged an additional constraint to the military strategy.)}
In contrast, covert action theoretically offers policymakers a use-of-force option that escapes political accountability altogether. Covert action is conducted in a manner in which it is “intended that the role of the United States Government will not be apparent or acknowledged publicly.” Yet to avoid revelation of U.S. government involvement, covert action must be self-limiting. It should be no surprise that, despite being nominally covert, large scale operations like the Bay of Pigs or Iran-contra risk the exposure of U.S. involvement and the very political accountability policymakers sought to avoid by relying on covert action.

Similarly, non-covert, limited uses of force may evade political accountability because they risk few U.S. casualties, they have short durations, or they are relatively cheap. Unlike covert action, the purpose of these uses of force is not necessarily to obscure U.S. responsibility or involvement and, as a consequence, they are not inherently self-limiting. Such limited uses of force may include attacking a very small set of targets with cruise missiles or other standoff platforms including drones. They may also include infiltrating a very small contingent of U.S. troops to attack specific targets. Or they may involve deploying a small number of U.S. advisors to assist an ally engaged in an armed conflict. Policymakers may initially choose a limited use of an extremely intense phase of aerial bombing before the launching of the ground campaign. . . . Second, a prominent awareness among American decision makers was that the war would have to be short with casualties shaped the planning for the ground campaign. The basic plan of action was for a massive flanking operation to the west of Kuwait itself, encircling Iraqi forces without the need for large-scale set piece battles, which would cause casualty counts to escalate rapidly. . . . Third, motivation to keep the war short drove the termination of the war itself. . . . Bush and Powell stopped operation and accepted a cease-fire with the Iraqis, in no small part to hold down American casualties.”). [GET Feaver, Choosing Your Battles]

77 Joint Explanatory Statement of the Committee of Conference, H.R. 1455, July 25, 1991; Carter Executive Order on Intelligence (“designed . . . so that the role of the United States Government is not apparent or acknowledged publicly”); See also Richard A. Best, Jr., Covert Action: Legislative Background and Possible Policy Questions, RL33715, Dec. 27, 2011.

78 See, e.g., BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE 123–24 (1990) (“These operations [in Iran, Guatemala, Brazil, Chile, and Nicaragua] were covert, and denied, because as overt actions support them in the U.S. political system would have been dubious at best. . . . [although there was widespread public support for the contras], opposition to the Reagan administration’s acts was equally widespread.”). Recognizing that political accountability is avoidable when using force in a limited fashion may explain why the democratic peace thesis is unable to explain the rate of low intensity conflict or covert uses of force between democracies. BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE 123 (1990). Contra Sebastian Rosato, The Flawed Logic of Democratic Peace Theory, 97 AM. POL. SCI. REV. 585 (2003).
force but later escalate that use of force, simultaneously increasing their exposure to political accountability, as was the case during the Vietnam War.

Thus, political leaders may modulate their exposure to political accountability by strategically selecting the scope of a particular use of force. The ability of political leaders to effectively control their electoral destiny in this respect is limited, however, by the possibility that the use of force may result in unexpected U.S. casualties.

B. Supervisory Accountability

Supervisory accountability is the mechanism by which one collectivity is authorized to hold specific actors accountable.\textsuperscript{79} “One prominent example of supervisory accountability is the requirement in representative democracies that executives answer to the legislature for their actions or inactions.”\textsuperscript{80} Such is the case in the American system: Congress as principal legislates grants of authority to the President to act. Congress then appropriates funds to the President to carry out those grants of authority.\textsuperscript{81} Congress then demands information about the President’s actions or inactions through reporting requirements or by holding hearings at which executive officers are called to testify about their actions and the actions of the departments they administer. Finally, Congress sanctions those actions or inactions with additional legislation, granting or withholding additional funds, or conducting public investigations into the President’s actions or the actions of the President’s officers.

Supervisory accountability mechanisms can be particularly robust devices for ensuring executive compliance with legislative desires. Executive agencies are constrained to operate within the mandates given their agencies by the legislature. They are likewise constrained by the

\textsuperscript{79} Keohane at 1131
\textsuperscript{80} Keohane at 1131
\textsuperscript{81} Congressional budgetary control in this regard implicates an additional type of accountability: fiscal accountability. Keohane at 1132. “Fiscal accountability is the mechanism through which funding agencies can demand reports from, and ultimately sanction, agencies that are recipients of funding.” Keohane at 1132.
funding the legislature appropriates. These supervisory accountability powers give Congress greater leverage over the President than the electorate enjoys over either Congress or the President through political accountability. At the same time, broad departmental authorizations and general appropriations limit the effectiveness of both supervisory and fiscal accountability.

The role of Congressional supervisory accountability over use-of-force decisions is difficult to locate precisely. Unlike many other powers found in the U.S. Constitution, the federal war-making power is not directed to a single branch of government. Instead, war-making is divided between the President and Congress. Whereas Congress holds the power to raise and support armies, declare war, tax and spend, and regulate the militia, the President holds executive authority and is Commander-in-Chief of the armed forces. This diffusion of authority among Congress and the President has rightly been described as an “invitation to struggle.” Justice Jackson’s concurrence in the Steel Seizures Case provides a useful—and perhaps the best—description of the constitutional operation of Congress and the President’s shared role in war-making.

In the Steel Seizures Case, the Court determined that President Truman acted beyond his constitutional authority when he ordered the seizure of American steel mills during the Korean War to ensure the steel supply for the war effort in the face of an impending steelworkers strike. The President claimed the inherent authority to effect such a seizure. The Court concluded that the President exceeded his authority in ordering the seizure of the steel mills because his power as Commander-in-Chief is not so broad as to include the ability to seize

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82 Ferejohn at 134.
83 Corwin
85 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952).
private property to avert labor disputes from stopping production. Moreover, the seizure order itself represented an improper attempt by the President to legislate.

Jackson’s concurrence provides a framework for determining whether a President possesses the authority for a particular action. Jackson noted that presidential authority fluctuates “depending on [its] disjunction or conjunction with [the authority] of Congress.” He specifically identified three scenarios of consonance and dissonance between presidential and Congressional authority and each scenario’s impact on presidential power. The President’s authority is maximal when he is acting within an “express or implicit” Congressional authorization. It is at its nadir, on the other hand, when the President acts in contradiction to the will of Congress and must rely on only “his own constitutional powers minus any constitutional powers of Congress over the matter.”

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89 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)
90 Jackson identified three levels of presidential authority:
   1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
   2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
   3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.
91 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring)
In line with Jackson’s *Steel Seizures* model, Congress has exercised its supervisory accountability over use-of-force decisions by legislatively separate statutory frameworks for overt and covert uses of force. These two frameworks provide specific authority for the President to use force. They also delimit the roles played Congress and the President when using force overtly and covertly. Whereas the covert use-of-force framework consists of a broad authorization, light reporting requirements, and limited oversight authority, the overt use-of-force framework is one of narrow authorization, rigorous reporting requirements, and strong oversight authority. Thus, Congress constructed a system that affords the President greater flexibility in covert uses of force than overt uses of force.

Despite recent modifications, covert use of force is governed primarily by amendments to the National Security Act of 1947 made by the Intelligence Authorization Act of 1991. Among other requirements, this statutory framework demands that covert action, including covert uses of force, be executed pursuant to a written “finding,” issued prospectively, determining that the covert action is necessary to support “identifiable foreign policy objectives of the United States.” The President must also notify Congress when using covert action.

In contrast, the War Powers Resolution (“WPR”) governs overt uses of force. The WPR revised the post-war national security system to increase Congressional supervisory authority

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92 *See* Richard A. Best, Covert Action: Legislative Background and Possible Policy Questions, RL33715, 3 n.9, December 27, 2011.
93 P.L. 102-88
94 50 USC 413b. *See also* Richard A. Best, Covert Action: Legislative Background and Possible Policy Questions, RL33715, 6, December 27, 2011
95 50 USC 413b(a).
96 50 U.S.C. 413b. The President is generally required to notify the Congressional intelligence committees. *Id.* However, in certain “extraordinary” circumstances, the President is empowered to limit notification to the chairman and ranking members of the intelligence committees, and the House and Senate majority and minority leadership—the so-called Gang of Eight. *Id.* at (c)(2).
97 By its own terms, the War Powers Resolution does not apply to covert action and only applies to those situations involving “United States Armed Forces.”
and control over overt use of force.\textsuperscript{98} Specifically, the WPR was intended to prevent future “undeclared creeping wars that start and build before Congress or the public are fully aware,”\textsuperscript{99} like Vietnam. The WPR attempts to accomplish this goal by demanding that the President “consult with Congress” in “every possible instance” before introducing U.S. forces into hostilities or situations where imminent involvement in hostilities is “clearly indicated by the circumstances.”\textsuperscript{100} The President must notify the Speaker of the House and the President pro tempore of the Senate within 48 hours of introducing U.S. armed forces into hostilities without a declaration of war.\textsuperscript{101} The Resolution then directs the President to withdraw U.S. forces from hostilities sixty days after their introduction in the absence of subsequent Congressional approval.\textsuperscript{102} Thus, whereas the statutes governing covert action contemplate a regime of assumed Congressional accession, the WPR imposes a regime that both presumes Congress will not accede to uses of force and demands affirmative action on the part of Congress to lawfully continue a use of force extending beyond sixty days.

However, the WPR has failed to actually constrain the President’s overt use of force. Instead, every President since its enactment has refused to acknowledge its constitutionality. Worse, Presidents have treated the sixty-day clock as de facto authorization for the use of U.S. armed forces in hostilities for up to sixty days. When faced with U.S. armed forces engaged in hostilities and the sixty-day clock on the verge of expiration, Congress has provided express

\textsuperscript{98} Geoffrey Corn, \textit{Triggering Congressional War Powers Notification: A Proposal to Reconcile Constitutional Practice with Operational Reality}, 14 LEWIS & CLARK L. REV. 687, 688 (2010) (“To achieve [the rebalancing of use-of-force decisions], the [War Powers Resolution] imposed upon the President notification, consultation, and express authorization requirements as conditions precedent to the employment of U.S. armed forces in all hostilities other than those responsive to attacks on U.S. territory or armed forces.”).


\textsuperscript{100} WPR at §3

\textsuperscript{101} WPR at §4

\textsuperscript{102} WPR at §5
authorization for all but two military campaigns since the law’s enactment.\textsuperscript{103} Even in the two situations where Congress failed to authorize U.S. use-of-force outside of the sixty-day window, the President continued existing U.S. operations until completion of the respective campaigns.\textsuperscript{104} Finally, the President has adopted a definition of “hostilities” that allows him to escape the constraints of the War Powers Resolution unless his operations involve “sustained fighting or active exchanges of fire with hostile forces . . . the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by those factors.”\textsuperscript{105}

C. Legal Accountability

Legal accountability is an accountability mechanism that requires “agents [to] abide by formal rules and be prepared to justify their actions in those terms.”\textsuperscript{106} Legal accountability operates at several levels, including domestic legal accountability for the President as an individual and international legal accountability for the United States as a state.

1. The U.S. Domestic Legal Regime

\begin{quote}
\textsuperscript{103} See Geoffery Corn, Triggering Congressional War Powers Notification: A Proposal to Reconcile Constitutional Practice with Operational Reality, 14 LEWIS & CLARK L. REV. 687, 689 (2010) (noting that Congress has expressly authorized all but one campaign since passage of the War Powers Resolution). Since Professor Corn’s article was published, the United States engaged in an international military intervention in Libya in 2011. Although the President argued that U.S. forces were not engaged in “hostilities” for War Powers Resolution purposes, see President Barack Obama, United States Activities in Libya 25 (2011), Congress failed to authorize U.S. involvement in that intervention. \textit{Libya authorization, defunding rejected}, UPI, June 24, 2011, \url{http://www.upi.com/Top_News/US/2011/06/24/House-rejects-Libya-authorization/UPI-94281308917125/}.
\end{quote}

\begin{quote}
\textsuperscript{104} Cf. See Geoffery Corn, Triggering Congressional War Powers Notification: A Proposal to Reconcile Constitutional Practice with Operational Reality, 14 LEWIS & CLARK L. REV. 687, 689 (2010) (arguing the one the existing example added “substantial weight to the arguments that [the sixty-day clock] provision was from its inception ultra vires”).
\end{quote}

\begin{quote}
\textsuperscript{105} President Barack Obama, United States Activities in Libya 25 (2011).
\end{quote}

\begin{quote}
\textsuperscript{106} Keohane at 1132. Legal accountability is buttressed by the rule of law—a separate but related concept. The rule of law ensures that all individuals and entities within a legal system are equally subject to the law. Bingham, Rule of Law.
\end{quote}
As described above, the domestic legal regime governing U.S. decisions to use force is made up of the constitution, the National Security Act of 1947,\(^{107}\) the War Powers Resolution,\(^{108}\) amending statutes, any express statutory authorization of the use of force, and relevant case law, including the *Steel Seizures* case. This regime envisions shared executive and legislative responsibility for decisions to use force.\(^{109}\)

The domestic legal regime has been of limited effect in constraining the executive’s use of force. In terms of covert operations, the President appears to adhere to the finding and reporting requirements. For example, after the attacks of September 11, 2001, President Bush reportedly issued a finding authorizing the CIA to use force against Osama bin Laden and others.\(^{110}\)

On the other hand, the domestic legal regime governing overt resort to force has been singularly ineffective in preventing the overt use of force.\(^{111}\) As noted previously, no President since the passage of the War Powers Resolution has acknowledged the law’s constitutionality.\(^{112}\) When Congress has failed to authorize the use of U.S. armed forces abroad, the President (unsurprisingly) has continued the operation in progress irrespective of the War Powers

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\(^{107}\) 61 Stat. 495.

\(^{108}\) 87 Stat. 555.

\(^{109}\) Koh


\(^{111}\) Corn; see generally HAROLD KOH, THE NATIONAL SECURITY CONSTITUTION (1990).

\(^{112}\) Corn. Notably, the Obama administration refused to state its position on the War Powers Resolution during the Libya intervention. Obama, Libya at 25; Megan Dumpe Kenworthy, *White House Won’t Say if War Powers Resolution is Constitutional*, FOXNEWS.COM, June 20, 2011, http://politics.blogs.foxnews.com/2011/06/20/white-house-wont-say-if-war-powers-resolution-constitutional (“[W]e are not making a judgment on the constitutionality of the War Powers Act with this reasoning: We are simply stating that the War Powers Resolution does not need to be involved because the hostilities clause of that resolution,’ Press Secretary Jay Carney told reporters, ‘is not met.’”). Instead, the Obama administration asserted that President Obama had the authority to intervene in Libya due to his “constitutional authority . . . as Commander in Chief and Chief Executive and pursuant to his foreign affairs authority.” Obama, Libya at 25. The administration further argued—without reference to its constitutionality—that the War Powers Resolution was not triggered because U.S. forces were not engaged in hostilities. Obama, Libya at 25. Finally, without reference to whether the President was compelled to consult with Congress in this instance, the administration listed more than 45 separate Libya-related communications with Congress before and during the Libya intervention. Obama, Libya at 26–31.
Resolution. And Congress has never mustered the political will to disapprove of an operation already in progress.

Further, when the President has been challenged in court over his use-of-force decisions, the courts either have been extremely deferential to the President or have simply refused to entertain challenges for reasons of justiciability, effectively empowering the meager use-of-force constraints imposed by Congress. For example, in *Campbell v. Clinton*, Representative Campbell brought suit against President Clinton seeking a declaration that introduction of U.S. forces into Kosovo in 1999 in support of the NATO campaign against Yugoslavia violated the Constitution and the War Powers Resolution.\(^\text{113}\) The NATO campaign lasted for 79 days, Congress failed to authorize U.S. involvement beyond the sixty day limit stipulated by the War Powers Resolution, and the President failed to withdraw U.S. forces from Kosovo after the expiration of the sixty day window.\(^\text{114}\) Rather than addressing the merits of Campbell’s claim, the President contested the claims justiciability, challenging the claim as being moot, the plaintiffs as lacking standing, and the claim as a political question.\(^\text{115}\) The D.C. Circuit dismissed Representative Campbell’s claim because it found he and his co-plaintiffs lacked standing. Moreover, the court found that the plaintiffs “enjoy[ed] ample legislative power to have stopped the prosecution of the ‘war.’”\(^\text{116}\) Additionally, in his concurrence, Justice Silberman emphasized that, even if the plaintiffs had standing to press their claims, the claims were non-justiciable as political questions.\(^\text{117}\)

More recently, in *Kucinich v. Obama*, ten members of the House of Representatives brought suit alleging that President Obama violated the War Powers Resolution by introducing U.S. forces in support of the U.N. Security Council Resolution authorizing a No-Fly Zone in

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\(^{113}\) *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 1999).

\(^{114}\) *Campbell v. Clinton*, 203 F.3d 19, 20 (D.C. Cir. 1999).

\(^{115}\) *Campbell v. Clinton*, 203 F.3d 19, 20 (D.C. Cir. 1999).

\(^{116}\) *Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 1999).

Libya. The D.C. district court granted the Obama administration’s motion to dismiss on the basis that Representative Kucinich and his co-plaintiffs, like the plaintiffs in Campbell, simply lacked standing to challenge the President’s deployment of U.S. forces in support of the mission over Libya.

That said, when the President “acts consistently” with the War Powers Resolution, he at least justifies his action in the formal terms of the law, demonstrating a measure of legal accountability. For example, even while refusing to acknowledge either the constitutionality of the War Powers Resolution or its applicability to U.S. involvement in the Libya campaign, President Obama defended his action in terms of the statute itself.

2. The International Legal Regime

The international law governing the use of force is divided into two branches: *jus ad bellum*, the law governing the resort to force, and *jus in bello*, the law governing conduct of hostilities. Importantly, these branches operate independent of one another such that an illegal resort to force does not mean that the conduct of hostilities are necessarily illegal—nor does an illegal resort to force remove a state’s obligation to abide by the *jus in bello*. Similarly, a lawful resort to force does not, *a priori*, indicate lawful conduct of hostilities.

The *jus ad bellum* is governed by the U.N. Charter. The Charter provides only three lawful situations in which a state may use force: self-defense in response to an armed attack; force used lawfully in another state with the consent of the host state; and force authorized by

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120 Corn string cites Presidential statements about War Powers
121 President Barack Obama, United States Activities in Libya 25, 26–31 (2011).
122 U.N. Charter art. 51.
the Security Council under Chapter VII. For an invocation of self-defense to be lawful it must be responsive to an armed attack, necessary, immediate, and proportionate. Under the U.N. Charter, self-defense is subject to an additional reporting requirement, demanding that “[m]easures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council.”

International humanitarian law (IHL), the *jus in bello*, is a *lex specialis* triggered by the existence of an armed conflict. When triggered, it defines the rights and responsibilities of parties to a conflict, including the authority to use force as a first resort against legitimate targets, subject to IHL’s four fundamental principles of necessity, proportionality, distinction, and humanity. It also dictates who and what are lawful targets, and when they are lawful targets. For example, a member of a state’s uniformed armed forces is a lawful target at anytime and in anyplace during an armed conflict. In contrast, civilians—essentially anyone who is not a

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124 U.N. Charter art. 2(7); U.N. Charter art. 42.
127 U.N. Charter art. 51.
128 The scope of that IHL’s application is determined by the character of the armed conflict—whether it is international or non-international. Thus, while an international armed conflict is subject to the full panoply of the Geneva Conventions of 1949 and customary international humanitarian law, a non-international armed conflict is subject only to the less restrictive provisions of Common Article 3 and the customary international law governing non-international armed conflict.
uniformed member of a state’s armed forces—are not targetable unless and for so long as they
directly participate in hostilities.

Again, because these two prongs of international law operate independently, they must be
analyzed separately. They are not substitutes for one another and they operate on separate levels.
Force may be used in self-defense to an armed attack or as authorized by the Security Council
under Chapter VII. At the same time, because the existence of an armed conflict is a question of
fact—and it is not automatically triggered by every use of force by a state—a state’s actions are
not necessarily governed by IHL even if those actions comply with the *jus ad bellum*. For
example, it is conceivable that a state might invoke its right to self-defense under the U.N.
Charter by striking a non-state actor, the intensity of which fails to rise to the level of an armed
conflict. In such cases, the strict separation of *jus ad bellum* and *jus in bello* dictates that IHL
is not triggered and international human rights law or applicable domestic law govern the
strike.  

III. Unmanned Aerial Vehicles and the Existing Accountability Constraints on Use of
Force

As described above, the U.S. accountability system for use of force decisions is imperfect
in general. Despite its potential, political accountability is undermined by the severe
informational disadvantage to which the electorate is subject—particularly with respect to covert

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130 *Cf.* Tadic.
INT’L HUM. L. (2011); Laurie R. Blank, *Targeted Strikes: The Consequence of Blurring the Armed Conflict and Self-
Defense Justifications*, 37 WM. MITCHELL L. REV. (2011). However, others argue that self-defense automatically
triggers the application of IHL. See Geoffrey Corn, *Self-defense Targeting: Blurring the Line between the Jus ad
Legal Advisor Koh in the wake of the bin Laden killing). “In [situations of self-defense], the attack would
accordingly be unrelated to the existing armed conflict the United States asserts is ongoing with [al-Qaeda and the
Taliban]. If this was the meaning of [Koh’s] use of “or,” it produces little confusion: imminent terrorist threats to the
United States may justify military action as an exercise of *jus ad bellum* self-defense, and use of force for such a
purpose triggers LOAC applicability.” *Id.*
uses of force—as well as by the multifarious purposes for which the vote is employed. Further, the extent to which political accountability constrains use-of-force decisions depends on the scope of the use of force in question so policymakers are empowered to avoid accountability by modulating the scale of force used. Supervisory and fiscal accountability over covert uses of force are intentionally loose, allowing the President great flexibility—but not deniability—in his decisions to use force, so long as the use of force serves an important and identifiable U.S. foreign policy objective. Supervisory and fiscal accountability over overt uses of force are not intentionally loose; however, the President’s refusal to acknowledge the constitutionality of the War Powers Resolution, the lack of political will within Congress to negatively sanction the President for violating the War Powers Resolution, and the judiciary’s implicit support for executive avoidance of the War Powers Resolution combine for an environment in which the President is relatively unaccountable for and relatively unconstrained in choosing to use force.

Relative lack of accountability and the absence of constraints on U.S. use-of-force decisions are longstanding. They predate the introduction of armed unmanned aerial vehicles into overt combat in 2001, as well as the introduction of armed unmanned aerial vehicles into covert action by 2002.\footnote{The absence of use-of-force constraints also pre-dates the near introduction of armed drones into covert action in the late 1990s to kill Osama bin Laden. See, e.g., Bush Slow on Bin Laden Drones Before 9/11, ASSOC. PRESS, June 25, 2003, http://www.usatoday.com/news/washington/2003-06-25-drones-osama_x.htm.} Yet, policymakers exacerbate existing weaknesses in political, supervisory and fiscal, and legal accountability when using drones. In part, this exacerbation is due to the nature of unmanned aerial vehicles. It is also due in part to choices made by policymakers when employing drones. The following sections consider the implications of drones for political, supervisory and fiscal, and legal accountability.

A. Unmanned Aerial Vehicles and Political Accountability
Policymakers reduce their exposure to political accountability, thereby alleviating its constraints, when relying on drones. Drones dampen the forces that drive political accountability’s sanctions prong. Policymakers are also able to employ drones in a manner that limits the availability of information necessary for the electorate to hold political leaders accountable.

Drones reduce the threat of negative electoral sanction faced by policymakers when choosing to use force. In general, policymakers increase their risk of negative electoral sanction by choosing use-of-force options that risk U.S. casualties, that are costly, or that are lengthy in duration. By mediating any or all of these facets of a use of force, policymakers are able to reduce their exposure to political accountability and, in so doing, reduce the constraints they face in choosing to use force.

Unmanned aerial vehicles mediate at least two of the facets of uses of force that drive negative electoral sanctions. First, drones remove altogether or substantially limit the threat of cumulative U.S. casualties by removing pilots from hostile environments. Additionally—and perhaps more importantly—drones insulate policymakers from the impact marginal casualties may have on long-term uses of force, as in Pakistan. There, although the airspace is permissive, policymakers must fear the effect of the loss of a U.S. pilot to a crash—or, worse, the capture and execution of such a pilot—on U.S. public support for counterterrorism operations over Pakistan. Thus, relying on drones, U.S. policymakers need not worry about a “Blackhawk Down” scenario in which, although the total number of casualties is small in a historical context, the shock is severe, producing a significant negative impact on public support. Second, drones are also relatively cheap—the loss of an individual Predator or Reaper is negligible compared to the loss of a manned system. Additionally, drone operations do not require large-scale
deployments of U.S. troops. In these respects, drone operations mimic the features of covert action or limited overt action that allow policymakers to reduce their exposure to political accountability.

However, drone operations differ from the modes of force that generally limit political accountability in important ways. Most prominently, drone operations in Pakistan are not limited. Since 2009, there have been 268 drone strikes in Pakistan alone. These strikes have killed between 1507 and 2447 individuals, of which as many as 313 may have been innocent civilians. During 2010, the 118 drone strikes in Pakistan indicate that drones were operating there at least 2.3 times each week. But, that the CIA based some of its targeting decisions in Pakistan—at least during 2010 and 2011—on pattern-of-life analyses may suggest that drones were operating over Pakistan even more frequently. Drone operations in Yemen may also surpass limited uses of force. Since 2011, there have been 35 to 45 drone strikes in Yemen, killing between 329 and 949. The CIA’s newfound “signature strike” authority in Yemen—like its strike authority in Pakistan—may indicate that drones are operating over Yemen at high frequency.

Additionally, drone operations in Pakistan and Yemen are no longer covert in any meaningful sense. Far from being conducted in a manner “intended that the role of the United States Government will not be apparent or acknowledged publicly,” U.S. responsibility for

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133 Year of the Drone
134 Year of the Drone
136 Bureau of Investigative Journalism
137 Bureau of Investigative Journalism
139 Joint Explanatory Statement of the Committee of Conference, H.R. 1455, July 25, 1991; Carter Executive Order on Intelligence (“designed . . . so that the role of the United States Government is not apparent or acknowledged publicly”); See also Richard A. Best, Jr., Covert Action: Legislative Background and Possible Policy Questions, RL33715, Dec. 27, 2011.
drone strikes has become the worst kept secret in Washington.\textsuperscript{140} Even before the United States effectively publicly admitted its responsibility for drone strikes in Pakistan 2012,\textsuperscript{141} it was apparent and unofficially acknowledged. Thus, drones give U.S. policymakers an ability to use force that, like cover action, undermines political accountability, but without being subject to the practical constraints of covert action like limited uses of force that hide U.S. responsibility.

Policymakers also employ drones in a manner that limits publicly available information about drone strikes. Many of the drone-borne uses-of-force have occurred in geographically remote locations, under the aegis of covert action. Outside of the acknowledged battlefields of Iraq, Libya, and Afghanistan, the United States employs or has employed armed drones in Northwest Pakistan, Yemen, Somalia, the Philippines and Syria. The regions of Pakistan, Yemen, and Somalia where drones have been employed are places almost entirely beyond the writ of the nominal state of jurisdiction. They are difficult to reach and they are unsafe. Moreover, even when journalists do report on a drone strike, even the basic facts of who was killed and whether they were militants are often obscure.\textsuperscript{142}

What is publicly known about decision-making processes for covert uses of drones is either the product of apparently officially sanctioned leaks,\textsuperscript{143} reporting that relies heavily on anonymous sources, or—rarely—unsanctioned leaks that have been vigorously prosecuted.\textsuperscript{144} Unsurprisingly, these reports are often vague and sometimes contradictory. The incomplete

\textsuperscript{141} \textit{Id.}; see also John O. Brennan, The Ethics and Efficiency of the President’s Counterterrorism Strategy, Apr. 30, 2012.
\textsuperscript{142} See, e.g., Bergen & Tiedemann, \textit{Year of the Drone}.
\textsuperscript{143} E.g., NYTimes report detailing al-Aulaqi’s addition to the CIA’s targeted killing list in April 2010.
\textsuperscript{144} E.g., former CIA lawyer being prosecuted for interview with Newsweek. Additionally, in May and June 2012 a number of leak-based articles revealing extraordinary U.S. covert actions, including those that rely on drones, spurred a Presidential press conference, [CITE], and the appointment of two Assistant U.S. Attorneys to investigate the leaks.
picture provided by these reports substantially limits the electorate’s ability to measure policymakers’ use-of-force decisions and hold them accountable for such decisions.

Drones allow use-of-force decisions that wholly or substantially avoid casualties. When conducted covertly in inaccessible regions of the world, this casualty avoidance allows policymakers to avoid political accountability for use-of-force decisions by both limiting information and undermining the primary driver of political sanctions for uses of force. Avoiding political accountability removes it as a constraint on policymakers’ freedom to choose force.

**B. Unmanned Aerial Vehicles and Supervisory and Fiscal Accountability**

Policymakers take advantage of the existing flaws or intentional weaknesses of the supervisory and fiscal accountability systems governing U.S. use-of-force decisions when they choose force generally. However, with respect to overt uses of force, drones exacerbate the War Powers Resolution’s flaws in unexpected ways. Moreover, the lack of political accountability attending drone strikes undermines Congressional incentives to exercise its supervisory and fiscal accountability mechanisms or redress the flaws in the existing supervisory and fiscal accountability system.

As is the case for covert uses of force generally, covert drone strikes are subject to finding and reporting requirements—relatively weak accountability measures that afford executive branch policymakers flexibility in covert uses of force. Similarly, overt uses of drones are subject to the War Powers Resolution—a regime that, although it was designed to prevent unilateral executive uses of force, has proved ineffective in constraining use-of-force decisions. Although drones have operated relatively neatly within the existing framework of covert uses of force—covert drone strikes have been authorized by Presidential findings and duly reported to
the intelligence committees as well as Congressional leadership—reliance on drones for overt uses of force has unexpectedly weakened the War Powers Resolution.

The War Powers Resolution is built around “hostilities.” For example, the WPR’s consultation requirement is triggered by the “introduc[tion of] United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”\(^{145}\) Similarly, the first of three WPR reporting triggers is the introduction of U.S. armed forces “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”\(^{146}\) Finally, the WPR’s sixty-day limit\(^{147}\) on a President’s use of force without statutory authorization begins when “a report is submitted or is required to be submitted;”\(^{148}\) that is, the sixty-day limit runs from the introduction of U.S. armed forces into hostilities or circumstances indicating imminent involvement in hostilities.

The Obama administration, however, defines hostilities to occur when there is “sustained fighting or active exchanges of fire with hostile forces[,] . . . the presence of U.S. ground troops[,] . . . U.S. casualties or a serious threat thereof[,] . . . or any significant chance of escalation into a conflict characterized by those factors.”\(^{149}\) This definition will likely be adopted by future U.S. Presidents and it allows the President to escape the WPR whenever he relies on drones—regardless of the extent of a military campaign involving drones. Thus, without

\(^{145}\) WPR § 3
\(^{146}\) WPR § 4(a)(1). The two subsequent reporting requirement triggers revolve around “combat,” which may or may not imply hostilities or the imminent threat thereof. WPR §4(a)(2)–(3).
\(^{147}\) The so-called sixty-day clock may be extended an additional thirty days “if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of the United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.” WPR § 5(b)(3).
\(^{148}\) WPR § 5(b).
\(^{149}\) President Barack Obama, United States Activities in Libya 25 (2011). Perhaps more concerning, there was arguably no need for the Obama administration to adopt this definition of hostilities to lawfully conduct operations in Libya within the confines of the War Powers Resolution. See Jordan J. Paust, Constitutionality of U.S. Participation in the United Nations- Authorized War in Libya, 26 Emory Int’l L. Rev (2012).
amendment to the WPR, the President may rely on drones to engage in unreported, unconsulted, and temporally boundless overt uses of force without statutory authorization.

C. Unmanned Aerial Vehicles and Legal Accountability

Policymakers avoid domestic and international legal accountability when they employ drones in two ways: by acting contrary to the law without judicial sanction and by obfuscating the formal rules governing use of force.

Domestically, policymakers are able to avoid legal accountability for uses of force due to the judiciary’s unwillingness to intercede in what it views as a political question. Thus, when the President chooses to overtly use force in a manner that violates the War Powers Resolution—as was the case during the Kosovo and Libya operations—the judiciary has relied on various prudential grounds to avoid deciding the merits of challenges to the President’s authority to use force without Congressional authorization. With respect to overt uses of force, drones exacerbate this lack of judicial enforcement by allowing policymakers to claim that drone-borne uses of force do not qualify as hostilities under the War Powers Resolution.

When the President does violate the War Powers Resolution, he is unlikely to face legal accountability. The history of War Powers Resolution enforcement through judicial oversight is dismal. And there is no indication that the judiciary is ready or willing to change its stance that war powers disputes—including those involving the War Powers Resolution—are political questions, outside of the judiciary’s competence, and resolvable only by Congress and the President. The most recent attempt to enforce the War Powers Resolution, [Kucinich case], ended in a dismissal on justiciability grounds just as the previous attempt, [Kosovo case], had twelve years earlier. And, although more than twenty years ago Harold Koh, attributed this judicial reluctance to a general reluctance on the part of courts to interfere in the executive’s
foreign affairs authority, decisions like Hamdan, Hamdi, and Boumediene since September 11, 2001, have demonstrated an unprecedented judicial willingness to intercede in executive power related to war making—except, evidently, in use-of-force decisions.

Policymakers avoid international legal accountability when relying on drones by consistently conflating two potentially relevant international law paradigms while restricting information about drone strikes. Although policymakers have to an unprecedented extent publicly justified their use of drones in terms of the two potentially relevant legal paradigms, their consistent conflation of these two paradigms confuses the relevant questions and obfuscates the relevant law. In so doing, these policymakers have actually seriously undermined legal accountability while appearing to adhere to it. For example, when speaking at the American Society of International Law on March 25, 2010, State Department Legal Adviser Harold Koh stated, “[A]s a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.”

Similarly, Attorney General Eric Holder recently remarked that, “Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law . . . . And international law recognizes the inherent right of national self-defense.”

Self-defense and the existence of an armed conflict do each provide guidelines for using force. But the parameters of lawful self-defense provide guidelines for when a state may use force—jus ad bellum. Whereas the existence of an armed conflict triggers international

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150 Kenneth Anderson describes this conflation as the emergence of “naked self-defense,” a use of force framework that (impermissibly) subsumes jus in bello within jus ad bellum. CITE to Anderson. For a critique of this approach, see Geoffrey Corn, Self-defense Targeting: Blurring the Line between the Jus ad Bellum and the Jus in Bello, 88 INT’L L. STUD. 56 (2012).

151 Koh speech to Asil

152 Holder speech to Northwestern
humanitarian law—*jus in bello*—which provides parameters governing how force is used and who must be protected from the effects of an armed conflict. International law strictly separates *jus ad bellum* and *jus in bello*.\(^{153}\) The application of one does not necessarily dictate the applicability of the other. Likewise, violating one does not mean the other has been violated, nor does it alleviate the obligation of either party to behave in accordance with both. Recognizing the differences between self-defense and international humanitarian law is essential to lawfully using force—and to holding uses of force legally accountable.

Justifying targeted killing generally with reference to both self-defense and the existence of an armed conflict is not inherently problematic. However, consistently referencing each paradigm—doing so in the context of specific targeted killings—is unnecessary, confusing, and allows the Obama administration to avoid a robust assessment of the lawfulness of those targeted strikes.\(^{154}\) It also encourages confusion of other issues attending the use of force, including the geographic scope of armed conflicts, whether there is an obligation to attempt capture, proportionality, conduct- versus status-based targeting,\(^{155}\) and the implications of drones operated by civilian agencies like the Central Intelligence Agency.\(^{156}\)

The problems arising from the Obama administration’s consistent and apparently purposeful conflation of self-defense and the existence of an armed conflict are compounded by the dearth of public information regarding specific strikes and the targeted killing programs generally. Observers are left guessing which paradigm is applicable to each strike and forced to make assumptions about the relevant facts and legality of individual strikes or the overall


\(^{154}\) See, e.g., Geoffrey Corn, *Self-defense Targeting: Blurring the Line between the Jus ad Bellum and the Jus in Bello*, 88 INT’L STUD. 56, 66 (2012);


\(^{156}\) CIA personnel—as opposed to military personnel—who operate unmanned aerial vehicles are civilians directly participating in hostilities.
program. This opacity is further compounded by the United States’ apparent failure to comply with the U.N. Charter’s self-defense reporting requirement with respect to drone strikes.\textsuperscript{157} As a result, observers are unable to conclude with any certainty whether a particular strike is lawful or unlawful.\textsuperscript{158} Although honest, this result does little to ensure that the United States is using force lawfully. Instead, it demonstrates that the United States is undermining legal accountability for its use-of-force decisions from both ends: limiting information and insulating itself from sanctions.

IV. Conclusion: Unaccountable Uses of Force and High-Risk Policymaking

Effective accountability mechanisms constrain policymakers’ freedom to choose to use force by increasing the costs of use-of-force decisions and imposing barriers on reaching use-of-force decisions. The accountability mechanisms here discussed, when effective, reduce the likelihood of resorting to force (1) through the threat of electoral sanctioning, which carries with it a demand that political leaders explain their resort to force; (2) by limiting policymakers to choosing force only in the manners authorized by the legislature; and (3) by requiring policymakers to adhere to both domestic and international law when resorting to force—and demanding that their justifications for uses of force satisfy both domestic and international law. When these accountability mechanisms are ineffective, the barriers to using force are lowered and the use of force becomes more likely.

Use-of-force decisions that avoid accountability are problematic for both functional and normative reasons. Functionally, accountability avoidance yields increased risk-taking and increases the likelihood of policy failure. The constraints imposed by political, supervisory,
fiscal, and legal accountability “make[] leaders reluctant to engage in foolhardy military expeditions. . . . If the caution about military adventure is translated into general risk-aversion when it comes to unnecessary military engagements, then there will likely be a distributional effect on the success rates of [democracies].”\textsuperscript{159} Indeed, this result is predicted by the structural explanation of the democratic peace. It also explains why policies that rely on covert action—action that is necessarily less constrained by accountability mechanisms\textsuperscript{160}—carry an increased risk of failure.\textsuperscript{161} Thus, although accountability avoidance seductively holds out the prospect of flexibility and freedom of action for policymakers, it may ultimately prove counterproductive.

In fact, policy failure associated with the over-reliance on force—due at least in part to lowered barriers from drone-enabled accountability avoidance—may be occurring already. Airstrikes are deeply unpopular in both Yemen\textsuperscript{162} and Pakistan\textsuperscript{163} and, although the strikes have proved critical to degrading al Qaeda and associated forces in Pakistan, increased uses of force may be contributing to instability, the spread of militancy, and the failure of U.S. policy objectives there.\textsuperscript{164} Similarly, the success of drone strikes in Pakistan must be balanced against


\textsuperscript{160} Supra

\textsuperscript{161} DAN REITER & ALLAN C. STAM, DEMOCRACIES AT WAR 160 (2002).


\textsuperscript{163} 71\% of villagers in Northwest Pakistan oppose drone strikes. Only about 20\% of Pakistani villagers view foreign fighters or the Pakistani Taliban favorably. Nearly 70\% of Pakistani villagers favor the Pakistan’s sole pursuit of Taliban, al-Qaeda, or foreign fighters. But 60\% of these villagers believe it is often or sometimes justifiable to use suicide bombs against the U.S. military. In contrast, only 12\% of these villagers believe it is often or sometimes justifiable to use suicide bombings against the Pakistani military. FATA: Inside Pakistan’s Tribal Region, PakistanSurvey, \url{http://pakistansurvey.org/}.

\textsuperscript{164} Micah Zenko, \textit{Collateral Damage: The Dangerous Precedent of America’s Drone Wars}, World Pol. Rev. ("Many aspects of the drone campaign remain invisible to U.S. diplomats, who in some cases oppose them. In countries where drone strikes occur, some State Department and U.S. Agency for International Development officials believe that the attacks overshadow and diminish the effectiveness of civilian assistance programs. In Pakistan, successive U.S. ambassadors objected to the intensity and timing of certain CIA drone strikes. Meanwhile, drone strikes often contradict stated nonmilitary foreign policy objectives. For example, at the international contact group for Somalia, Secretary of State Hillary Clinton stated, ‘I know enough to say airstrikes would not be a good idea. And we have absolutely no reason to believe anyone, certainly not the United States, is considering that.’ Within hours of her speech, however, a U.S. drone attacked a convoy in the Lower Shabelle region of Somalia, killing between four and seven suspected Islamic militants. An anonymous U.S. official later confirmed that the...")
the costs associated with the increasingly contentious U.S.–Pakistani relationship, which is attributable—at least in part—to the number and intensity of drone strikes. These costs include undermining the civilian Pakistani government and contributing to the closure of Pakistan to NATO supplies transiting to Afghanistan, forcing the U.S. and NATO to rely instead on several repressive Central Asian states. Arguably the damage to U.S.–Pakistan relations and the destabilizing influence of U.S. operations in Yemen would be mitigated by fewer such operations—and there would be fewer U.S. operations in both Pakistan and Yemen if U.S. policymakers were more constrained by use-of-force accountability mechanisms.

strike was carried out by a JSOC drone.”; Gregory Johnsen, A Profile of AQAP’s Upper Eschelon, CTC SENTINEL, July 2012, 6; Paul Harris, Drone Attacks Create Terrorist Safe Havens, Warns Former CIA Official, GUARDIAN (London), June 5, 2012; Ibrahim Mothana, Opinion, How Drones Help Al-Qaeda, N.Y. TIMES, June 13, 2012; Joshua Foust, Yes, Sometimes Drones Are Actually Effective, THE ATLANTIC, July 24, 2012, http://www.theatlantic.com/international/archive/2012/07/YES-SOMETIMES-DRONES-ARE-ACTUALLY-EFFECTIVE/260260/; Joshua Foust, American Drones Will Not Save Yemen, THE ATLANTIC, May 13, 2012, http://www.theatlantic.com/international/archive/2012/05/american-drones-will-not-save-yemen/257086/; Gregory Johnsen, The Seduction of Simple Solutions, WAQ AL-WAQ, June 30, 2011, 12:47 PM, http://bigthink.com/waq-al-waq/the-seduction-of-simple-solutions?page=all (“I’ve talked myself blue in the face, arguing that AQAP has been making an argument that Yemen is no different from Iraq or Afghanistan, and that just like those two countries Yemen is under western military attack. This is important because if AQAP is successful in this argument than many more Yemenis will be willing to fight. Why do you think more Yemenis went abroad to fight in Iraq and Afghanistan than are fighting at home? The answer is because many still don’t see Yemen as a legitimate theater of jihad. The more bombs the US drops – the easier it is for AQAP to make this argument and the wider the war gets. I’m particularly worried that eventually the circle of who constitutes an AQAP member becomes so wide that the US can’t kill its way out of the war.”); David Kilcullen & Andrew Exum, Death from Above, Outrage from Below, Opinion, N.Y. TIMES, May 16, 2009. See also James Joyner, Why the Obama Administration’s Drone War May Soon Reach a Tipping Point, THE NEW REPUBLIC, May 2, 2012, http://www.tnr.com/article/world/103059/unmanned-aerial-vehicles-foreign-policy-drone-war-yemen (“Such a steady escalation of the drone war—and the inevitable increase in civilian casualties that will accompany it—could easily tip the delicate balance that assures we kill more terrorists than we produce. . . . [A] Yemeni analyst, Abdul Ghani al-Iryani, . . . attributes the rise of Ansar al Sharia, a key AQAP ally, directly to the outrage over [the December 2009 Abyan strike which killed 55, including 14 women and 21 children]. ‘Of the thousands of Ansar al Sharia now fighting in Abyan, the majority were not al Qaeda; they were angered by what they saw as American aggression,’ Iryani said, calling it ‘one event that radicalized an entire [province].’”); Benjamin R. Farley, No End In Sight: The U.S. Drone Campaign as a Perpetual Stop-gap, INT’L AFF. REV., Dec. 12, 2011, http://www.iar-gwu.org/node/369. But see CLINTON WATTS & FRANK J. CILLUFFO, DRONES IN YEMEN: IS THE U.S. ON TARGET? (2012), available at http://www.gwu.edu/hsp/policy/drones.pdf; Christopher Swift, Arc of Convergence: AQAP, Ansar al-Shari’a and the Struggle for Yemen, CTC SENTINEL, June 2012, 1.

See, e.g., Declan Walsh, Eric Schmitt & Ihanullahtipu Mehsud, Drones at Issue as U.S. Rebuilds Ties to Pakistan, N.Y. TIMES, Mar. 18, 2012.


From a normative perspective, the freedom of action that accountability avoidance facilitates represents the de facto concentration of authority to use force in the executive branch. While some argue that such concentration of authority is necessary or even pragmatic in the current international environment, it is anathema to the U.S. constitutional system. Indeed, the founding generation’s fear of foolhardy military adventurism is one reason for the Constitution’s diffusion of use-of-force authority between the Congress and the President. That generation recognized that a President vested with an unconstrained ability to go to war is more likely to lead the nation into war.

Among the relevant accountability-holders, Congress is best positioned to strengthen the U.S. accountability system for use-of-force decisions. Congress can both define the limits of presidential authority to use force and compel adherence to those limits. Moreover, Congress need not wait for an election or a plaintiff with standing to employ its accountability mechanisms.

Congress should reinvigorate the War Powers Resolution regime by insisting on presidential compliance. Congress should no longer tolerate scenarios like Kosovo or Libya in which the President uses force beyond the sixty-day window without Congressional authorization. Moreover, Congress should not allow such a scenario to arise in the first place. When the President uses force abroad, Congress should take up the matter immediately and determine well before the expiration of the sixty-day clock whether the United States will go to war. This determination is Congress’s constitutional responsibility. Earlier determinations will also avoid the spectacle of last minute Congressional ratification of a President’s decision to go to war simply to avoid the appearance of marginalization, as was the case during the 1991 Gulf

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168 Yoo
169 James Madison, Political Observations; Federalist 26; Federalist 69; Federalist 74;
War. Obviously, merely approving or disapproving of a President’s decision to use force is not enough. Congress must be willing to enforce its determination through its appropriations authority. Having actually employed its supervisory accountability mechanism in the manner described here, Congress will more likely be able to rely on judicial support and enforcement.

Congress should strengthen the War Powers Resolution regime by defining hostilities in a manner that links hostilities to the scope and intensity of a use of force, irrespective of the attendant threat of U.S. casualties. Without defining hostilities, Congress has ceded to the President the ability to evade the trigger and the limits of the War Powers Resolution. The President’s adoption of a definition of hostilities that is tied to the threat of U.S. casualties or the presence of U.S. ground troops opens the door to long-lasting and potentially intensive operations that rely on drones—at least beyond the sixty-day window—that escape the WPR by virtue of drones being pilotless—which is to say, by virtue of drones being drones. Tying hostilities to the intensity and scope of the use of force will limit the President’s ability to evade Congressional regulation of war. It will curtail future instances of the United States being in an armed conflict for purposes of international law but not for purposes of domestic law—as was the case in Libya. Finally, a statutory definition of hostilities will provide the judiciary with a meaningful standard for determining if the President has violated the War Powers Resolution, should the judiciary ever be presented with a plaintiff able to surmount the various prudential doctrines that have counseled against entertaining WPR cases to date.

Finally, Congress should insist that covert uses of force meet the statutory definition of covert action. And, in cases where supposed covert action does not meet that definition, then those uses of force should be subject to the War Powers Resolution and not the less constraining National Security Act regime. Such a case might include Pakistan where U.S. drone strikes
ceased being covert in any meaningful way years ago and where the United States is likely engaged in at least one armed conflict.\textsuperscript{170}