The Obama Administration's conceptual change: imminence and the legitimation of targeted killings

Abstract

Starting in 2010, the Obama Administration engaged in an effort to justify drones strikes relying on the concept of 'imminence.' The aim of this article is to understand the reasons behind such insistence and to assess the Administration's efforts at conceptual change. Building on Skinner's and Bentley's work, the article argues that the administration has followed an 'innovating ideologist' strategy. The analysis shows how waves of criticisms exposed the administration to a key contradiction between its rhetoric of change that emphasised international law and the need for aggressive counter-terrorism. Reacting to this criticism, the administration has relied on imminence due to its connection with legitimate uses of force, while working to change the criteria for the concept, causing a shift away from imminent as 'immediate.' Re-assessing Skinner's place in IR, the article identifies conceptual change as a lens to assess foreign policy rhetoric and practice. The analysis emphasises the connection between actors' intentions, beliefs and practices. It highlights the importance of criticism in engendering contradictions, exploring why only some criticisms are confronted. Finally, the article develops an original typology of the limits confronted by the innovating ideologist and methods to assess whether the actor has respected them.

Keywords

Drones, Obama, imminence, Skinner, conceptual change.

Introduction

Starting in 2010, the Obama Administration engaged in an effort to publicly justify and legitimise the use of force in counter-terrorism, with a focus on the use of drone strikes. In this effort, US officials made clear that the concept of imminence, that is the temporal proximity of a threat, played a prominent role in guaranteeing administration's compliance with international law. The same officials, however, also argued that imminence should have moved away from a strict interpretation of imminent as 'immediate.'[1] The administration's reliance on imminence and the changes brought to the concept attracted criticisms and a few interpretations. Scholars and commentators argued that the concept had lost any meaning and it was used as a pretext to conduct targeted killings.[2] What these criticisms failed to provide was an interpretation as to why the administration put so much emphasis on imminence and made a concerted effort to define (and redefine) criteria for imminence. Among the few authors providing an interpretation, Benjamin Wittes and Wells Bennett agreed that the administration relied on imminence because such language was already available in the vocabulary of the executive branch.[3] Noura Erakat also argued that the administration's interest in imminence reflected a

[1] John Brennan, 'Strengthening our Security by Adhering to our Values and Laws,' Harvard Law School, 16 September 2011, available at: {http://opiniojuris.org/2011/09/16/john-brennan-speech-on-obama-administration-antiterrorism-policies-and-practices/} accessed 27 October 2015.
[2] Rosa Brooks, 'The Constitutional and counterterrorism implications of targeted killings,' Testimony before the Senate Judiciary Subcommittee on the Constitutions, Civil Rights and Human Rights, 23 April 2013a, available at: {http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1114&context=cong} accessed 27 October 2015, p. 13. Conor Fiedesdorf, 'Obama's Memo on Killing Americans Twists 'Imminent Threat' Like Bush,' *The Atlantic*, February 2013, available at: {http://www.theatlantic.com/politics/archive/2013/02/obamas-memo-on-killing-americans-twists-imminent-threat-like-bush/272862/} accessed 27 October 2015.
[3] Wells Bennett, 'A clue about the origins of imminence in the OLC memo,' *The Lawfare Blog*, 25 June 2014, available at: {http://www.lawfareblog.com/2014/06/a-clue-about-the-origins-of-imminence-in-the-

long-standing effort by the US to expand the justifications for its use of force.[4] This article argues that these interpretations are valid, but not sufficient. Imminence was already present, but the Obama Administration's focus on the concept was qualitatively different. Kenneth Anderson and Wittes conceded this point, admitting that the administration's strong reliance on imminence remains a 'mystery.'[5] The puzzle being investigated in this article is, then, why imminence?

Starting from Michelle Bentley's study of conceptual change and her introduction of Quentin Skinner's work in the US foreign policy discourse,[6] the article argues that the Obama Administration adopted what Skinner called an 'innovating ideologist' strategy. As Bentley writes, innovating ideologists 'select or construct conceptual interpretations in ways that serve their political ambitions.'[7] In the administration's project, the reliance on the concept of imminence permitted the respect of conventions regarding legitimate uses of force against an

olc-memo/} accessed 27 October 2014; Benjamin Wittes, 'Whence Imminence in that Drone Memo? A Puzzle and a Theory,' *The Lawfare Blog*, 24 June 2014, available at: {http://www.lawfareblog.com/2014/06/whence-imminence-in-that-drone-memo-a-puzzle-and-a-theory/} accessed 27 October 2015.

[4] Noura Erakat, 'New Imminence in the Time of Obama: The Impact of Targeted Killings on the Law of Self Defense,' *Arizona Law Review*, 56 (2014), pp. 195-248.

[5] Kenneth Anderson and Benjamin Wittes, *Speaking the law* (Stanford: Hoover Institution Press, 2013), p. 107.

[6] Michelle Bentley, 'The long goodbye: beyond an essentialist construction of WMD,' *Contemporary Security Policy*, Vol. 33:2 (2012), pp. 384-406, Michelle Bentley, 'War and/of words: constructing WMD in US foreign policy,' *Security Studies*, 22 (2013), pp. 68-97, Michelle Bentley, 'Strategic taboos: chemical weapons and US foreign policy,' *International Affairs*, 90:5 (2014a), pp. 1033-1048 and Michelle Bentley, *Weapons of Mass Destruction in US foreign policy* (London: Routledge, 2014b).

[7] Bentley (2013), p. 76.

imminent threat.[8] At the same time, the administration worked on innovating the concept, to expand the boundaries of its counter-terrorism practices.

An exploration of how the Obama Administration justified its drone strikes and its targeted killing practices - and of the role played by international law - is particularly timely. Several countries have adopted drones strikes and targeted killing in their counter-terrorism approach. Even more importantly, it is clear that several of these countries are following the example set by the United States in justifying their use of force.[9] The article also answers various calls from different corners of International Relations as a discipline. In particular, several scholars have called for a renewed engagement with concepts and concept analysis,[10] demonstrated also by a recent emphasis on conceptual histories.[11] Others have called for an increased focus on

[8] Quentin Skinner, 'Language and Political change,' in Terence Ball, James Farr and Russell Hanson R (eds.), *Political Innovation and Conceptual change* (Cambridge: Cambridge University Press, 1989), p. 21.
[9] Frances Gibb, 'Attorney-general sets out legal basis for drone strikes abroad,' *The Times*, 12 January 2017, available at {http://www.thetimes.co.uk/edition/law/attorney-general-sets-out-legal-basis-for-drone-strikes-abroad-f73ctmwqm} accessed 12 January 2017 and Anthony Dworkin, 'European countries edge towards war on terror,' *ECFR Report*, 9 September 2015, available at: {http://www.ecfr.eu/article/commentary_european_countries_edge_towards_war_on_terror4015} accessed 3 February 2017.
[10] Stefano Guzzini, 'The ends of international relations theory: stages of reflexity and modes of theorizing,' *European Journal of International Relations*, 19:3 (2013), pp. 521-541 and Felix Berenskoetter, 'Approaches to concept analysis,' *Millennium: Journal of International Studies*, 45:2 (2017), pp. 151-173.
[11] See John Bew, *Realpolitik: a history* (Oxford: Oxford University Press, 2016) and David Armitage, *Civil Wars: a history in ideas* (Yale: Yale University Press, 2017).

processes of legitimation, especially when it comes to the use of force,[12] and for a livelier dialogue between IR and international law scholars.[13]

Answering these calls, the article makes both theoretical and empirical contributions. From a theoretical perspective, this article places conceptual change at the centre of processes of legitimation and emphasises the importance of strategies of conceptual change in understanding foreign policy rhetoric and practice. By analysing conceptual change surrounding imminence, the article also addresses the legitimating role played by international law. The article also expands on the current understanding of conceptual change in IR. It emphasises the role of an actor's intentions and beliefs in driving his/her innovation strategies. It gives more prominence to arguments made by Robert Martin,[14] Terence Ball[15] and James Farr[16] on the importance of criticism and contradictions in creating the conditions for conceptual change. Throughout the analysis, the article also suggests that Bentley might be too pessimistic regarding the place of a Skinnerian approach in IR. At the empirical level, the article contributes to the literature on the

[12] Ian Hurd, 'The permissive power of the ban on war,' *European Journal of International Security*, 2:1 (2016), pp. 1-18

[13] See among others Karin M. Fierke and Knud Jorgense, *Constructing International Relations: the next generation* (London: Routledge 2015), p. 15 and David Armstrong, Theo Farrell and Helen Lambert, *International Law and International Relations* (Cambridge: Cambridge University Press, 2012), p. 3.

[14] Robert W. T. Martin, 'Context and contradiction: toward a political theory of conceptual change,' *Political Research Quarterly*, 50:2 (Jun. 1997), pp. 413-436.

[15]Terence Ball and J. A. G. Pocock, 'Introduction,' in (Eds.), Terence Ball and J. A. G. Pocock, *Conceptual change and the Constitution* (Lawrence: University Press of Kansas, 1988), Terence Ball, "A Republic - If you can keep it," in Terence Ball and J. A. G. Pocock (Eds.), *Conceptual change and the Constitution* (Lawrence: University Press of Kansas, 1988), Terence Ball, *Transforming Political Discourse* (New York: Basil Blackwell, 1988) and Terence Ball, 'Party,' in Terence Ball, James Farr and Russell Hanson (Eds.), *Political Innovation and conceptual change* (Cambridge: Cambridge University Press, 1989)

[16] James Farr, 'Conceptual change and constitutional innovation,' in Terence Ball and J. A. G. Pocock (Eds.), *Conceptual change and the Constitution* (Lawrence: University Press of Kansas, 1988) and James Farr, 'Understanding Conceptual change politically,' in Terence Ball, James Farr and Russell Hanson (Eds.), *Political Innovation and conceptual change* (Cambridge: Cambridge University Press, 1989).

Obama Administration's foreign policy and on drones and targeted killings. The article provides an analysis of the administration's foreign policy and its approach to international law. It brings forward a new interpretation of the legitimation of targeted killings. Finally, it contributes to the debate on continuities and changes between the Bush and Obama years.

This article can be divided into three main sections. The first section will explore Bentley's and Skinner's arguments. The second section will look at conventions surrounding imminence, expanding on the different approaches to imminence and international law adopted by the Bush and Obama Administrations. The final section will detail the administration's conceptual change. The conclusion will stress the importance of conceptual change as a lens to explore foreign policy rhetoric and practice.

Skinner, Bentley and International Relations

Skinner's third way: actors, beliefs and intentions

As Bentley writes, Skinner's approach is based on the study of speech-acts and on the assumption that we can do things with words.[17] Skinner focuses on the illocutionary effects of an utterance (defined as its intended significance) as they permit a 'grasp of the *point* of the action for the agent who performed it' [emphasis added].[18] Skinner is interested in an actor's

[17] Bentley (2014b), p. 24 and John L. Austin, *How to do things with words*, (Oxford: Oxford University Press, 1975). John Searle, *Speech acts: an essay in the philosophy of language* (Cambridge: Cambridge University Press, 1969).
[18] Quentin Skinner, 'Meaning and Understanding in the History of ideas,' *History and Theory* 8:1 (1969), p. 44 and Kari Palonen, *Quentin Skinner: history, politics, rhetoric* (Cambridge: Polity Press, 2003), pp. 43-44.

intention 'in doing' something, it is an 'intent-centric' approach.[19] This approach is not simply 'negative,' as Bentley suggests, that is a critique of Derrida-inspired arguments that negate the role of an actor's intentions.[20] It is an effort to chart a third way between Derridean claims and the 'discredited hermeneutic ambition of stepping empathetically into other people's shoes.'[21] In her analysis, Bentley suggests that critics of Skinner abound.[22] Bentley's view, however, excludes many points of contact between Skinner and IR. In Skinner's view, the study of how concepts have developed and have become accepted serves emancipatory purposes.[23] Skinner's aim in writing conceptual history finds resonance in critical theory.[24] Skinner's approach has also found support among constructivist scholars. Christian Reus-Smit has shown that the constructivist philosophy of history is '"Skinnerian" in essence.'[25]

For Skinner, the aim of the scholar should be to provide an interpretation of the utterance and of the actor's intentions in making it. 'Intentions can be inferred from an understanding of the conventional significance of the act itself.'[26] Utterances represent 'interventions' in a context and by looking at this context we can hope to 'refine' our interpretation of an actor's

[19] See Bentley (2014b), p. 25, Quentin Skinner, 'Motives, intentions and interpretations,' in Quentin Skinner, *Visions of Politics, Volume I, Regarding Method* (Cambridge: Cambridge University Press, 2002a).
[20] Bentley (2014b), p. 25.
[21] Skinner (2002a), pp. 120-122.
[22] Bentley (2013), p. 77 and Bentley (2014b), pp. 25-26. See also Ronald Krebs, *Narrative and the Making of US National Security* (Cambridge: Cambridge University Press, 2015) and Christian Reus-Smit, 'Reading history through constructivist eyes,' *Millennium*, 37:2 (2008), pp. 395-414.
[23] Skinner (2002a), p. 6, Skinner (2002b), p. 126.
[24] Duncan S. A. Bell, 'Language, Legitimacy and the project of critique,' *Alternatives*, 27 (2002), p. 335. See also Brett Bowden, *The Empire of Civilization: the evolution of an imperial idea* (Chicago: The University of Chicago Press, 2009), pp. 2 and 7-10.
[25] Reus-Smit, 'Reading history,' pp. 400-401 and 403-409.
[26] Skinner (2002a), p. 119.

intentions.[27] Looking at Skinner's account, this interpretation can be corroborated through a three-step process. First, we should assume that whatever an actor was doing, it was doing it intentionally.[28] Second, since intentions depend on beliefs we should make sure that the actor possesses beliefs that are compatible with the intentions we are assigning him/her. The attribution of intentions can also be strengthened by the discovery that the actor had a motive.[29] Third, one should note that principles are professed with certain consistency; they aim at locating an utterance in a precise normative and linguistic context.[30] We should then corroborate the interpretation by examining the coherence of an actor's beliefs.[31] We should assess whether an actor's current utterances conform to same traditions and approaches, whether they are compatible with other utterances, and whether an actor's utterances have followed similar traditions and approaches in the past. We should look at his/her track record.

Context, contradiction and criticism: mechanics and conditions for conceptual change

For Skinner, Bentley notes, conceptual change is driven by two main dynamics.[32] First, an exogenous shock might leave a concept in a status of 'semantic confusion.' This refers to uncertainty regarding the criteria and extent of a concept often due to the co-existence of several interpretations.[33] This argument is familiar to IR scholars who have identified an exogenous

[27] Skinner (2002a), p. 117.
[28] Skinner (2002a), p. 119.
[29] Skinner (2002a), p. 119.
[30] Quentin Skinner, 'Augustan party politics and Renaissance constitutional thought,' in Quentin Skinner, *Visions of Politics: Volume II, Renaissance Virtues* (Cambridge: Cambridge University Press, 2002b), p. 348.
[31] Skinner (2002a), p. 119.
[32] Bentley (2014b), p. 25.
[33] Bentley (2013), p. 75 and Skinner (1989), p. 17.

shock as a catalyst giving actors the opportunity to reshape the environment.[34] Several scholars have also highlighted how the manipulation of exogenous shocks permits actors to adopt policies that would have been unthinkable prior to such shock.[35] Jackson and Tsui have argued that change is almost impossible without an exogenous shock.[36]

For Skinner and scholars of conceptual change, however, a second, quieter option exists: change through 'ongoing debates.'[37] As Martin writes, Skinner's account of this second option does not elucidate the conditions for conceptual change and the 'mechanics' of this process.[38] One of the main reasons is Skinner's 'extreme economy of context.'[39] Skinner mainly focuses on the linguistic contexts, excluding 'semi-linguistic' factors, such as political and socio-economic factors.[40] Understanding conceptual change, they argue, requires a more detailed analysis of context and contextual shifts.[41] As Martin writes:

> A shift in the relevant contexts, be they political, social, intellectual, or whatever, often triggers conceptual change by enabling or constraining certain lines of

[34] Martha Finnemore and Kathryn Sikkink, 'International norm dynamics and political change,' *International Organization* 52:4 (1998), p. 909. Jeffrey Legro, *Rethinking the world: great power strategies and international order* (Ithaca: Cornell University Press, 2005).
[35] Mary Dudziak, *Wartime* (Oxford: Oxford University Press, 2012), Francois Debrix, *Tabloid Terror* (London: Routledge, 2008), Stuart Croft, *Culture, Crisis and America's War on Terror* (Cambridge: Cambridge University Press, 2006).
[36] Richard Jackson and Chin-Kuei Tsui, 'War on terror II: Obama and the adaptive evolution of US counterterrorism,' in Michelle Bentley and Jack Holland (Eds.), *The Obama Doctrine* (London: Routledge, 2017), p. 80.
[37] Bentley (2014b), p. 25
[38] Martin (1997), p. 414.
[39] Martin (1997), p. 417.
[40] Skinner (1969), p. 49 and Martin (1997), pp. 421-422.
[41] Terence Ball, *Transforming Political Discourse* (New York: Basil Blackwell, 1988), p. 15

> criticism or by highlighting certain new or extant contradictions. These contextual shifts, then, can best be seen as *occasions* of conceptual change.[42]

Martin's point makes clear that the identification of the relevant contexts and of the defining shifts will depend on the conceptual change being studied. Felix Berenskoetter has recognised the difficulties in clearly defining context and the need to move beyond the purely semantic context.[43] The present analysis of conceptual change will focus on two main contexts: the strategic context of the Obama Administration's conduct of counter-terrorism and the domestic, political context in which the administration justifies and legitimates its conduct.[44] Furthermore, among the many potentially relevant contextual shifts, one should isolate those that highlight contradictions setting the stage for conceptual change.[45] In her analysis, Bentley discusses the role of contradictions in driving conceptual change.[46] However, as Farr argued, policy-makers confront plenty of contradictions and yet only some lead to conceptual change.[47] It is criticism that forces actors to revise the concepts they are professing and the criteria defining those concepts in a way that eases the contradiction.[48] Criticism is a quintessentially

[42] Martin (1997), p. 425.
[43] Berenskoetter (2017), p. 160.
[44] See Richard Snyder, H. W. Bruck, and Burton Sapin / Valerie Hudson, Derek H. Chollet, and James Goldgeiger. *Foreign Policiy Decision-making Re-visited* (New York, Palgrave and MacMillan, 2002).
[45] Martin (1997), p. 429.
[46] Bentley (2014b), p. 25.
[47] Farr (1989), p. 26. See also Martin (1997), pp. 424-425.
[48] Terence Ball and J. A. G. Pocock, Introduction,' in (Eds.), Terence Ball and J. A. G. Pocock, *Conceptual change and the Constitution* (Lawrence: University Press of Kansas, 1988), p. 4.

political action[49] which brings contradictions, of which an actor was unaware or that an actor had tried to hide, to the fore creating the conditions for conceptual change.[50]

To be sure, actors feel the need to answer only some criticisms, hence, only some lines of criticism lead to conceptual change. Conceptual change represents a problem-solving strategy. Engaging in conceptual change, the actor clearly has multiple aims. S/he is trying to achieve political and strategic objectives, s/he is trying to quiet opposition, that is, to convince an audience of the appropriateness of his/her behaviour; finally, conceptual change also represents an effort to ease the discomfort created by contradiction.[51] In the latter sense, conceptual change acts as a strategy to reduce what the political-psychology literature calls dissonance. As Robert Jervis reported, purely negative strategies like the avoidance of dissonant information are rare.[52] An actor tends to adopt positive strategies to reduce the discomfort created by dissonant information.[53] These strategies, Ole Holsti detailed, include discrediting the source, reinterpreting the information in a positive light, but also modifying or changing existing attitudes and ideas. It is in this last option that conceptual change plays a role. Holsti has provided suggestions as to which contradictions will be ignored, which will be answered, and how. One should look at the contents and source of the dissonant information, at situational factors, and at personality factors.[54] As Farr argued, in political life, contradictions can emerge

[49] Farr (1989), p. 35.
[50] James Farr, 'Conceptual Change and constitutional innovation,' in Ball and Pocock (1988), pp. 24-25
[51] Farr (1989), p. 34.
[52] Robert Jervis, *Perceptions and misperceptions in International Politics* (Princeton: Princeton University Press, 1976), pp. 386-387.
[53] Ole Holsti, 'Cognitive Dynamics and Images of the Enemy,' *Journal of International Affairs*, 21:1, 1967, p. 19.
[54] Holsti (1967), p. 22.

from a contrast between the propositions and beliefs an actor advances and his/her practices.[55] In this case, going back to Holsti, we can identify a case in which the incoming information is in line with an actor's beliefs but exposes contradictions (is dissonant) with his/her practices. The most likely strategy to ease contradiction – hinted at, but not explored by Holsti - will be that the actor would alter ideas and concepts to show how his/her practices could actually be interpreted through the lens of those beliefs. In this sense, we can argue that the closer a contradiction is to an actor's beliefs, interests and public image, the more probable his/her engagement in conceptual change to legitimate behaviour. The analysis will show how shift in the strategic and political context created waves of criticisms. Coming from sources close to the Obama administration's beliefs, and touching upon key beliefs, interests and principles held by the administration, these waves of criticism exposed a key contradiction and endangered the administration's objectives, creating the conditions for conceptual change.

The innovating ideologist strategy and its limits

Among various processes of conceptual change, Skinner identified the task of innovating ideologists, that is, actors who are engaged in the legitimation of questionable actions.[56] Innovating ideologists rely on the manipulation of evaluative-descriptive terms, used to commend or condemn the actions, which they are employed to describe. The use of a concept implies not only its meaning but also a 'definite normative colour.'[57] To understand a concept

[55] Farr (1989), p. 35.
[56] Quentin Skinner, 'Some problems in the analysis of political thought and action,' *Political Theory* 2:3 (1974a), p. 294.
[57] Palonen (2003), p. 51.

we must understand 'the range of things that can be done with it.'[58] In Skinner's view one of the main strategies consists in the manipulation of favourable evaluative-descriptive terms.[59] This strategy is based on two prongs. First, the actor has to 'insist, with as much plausibility as he can muster that, in spite of any contrary appearances, a number of favourable evaluative-descriptive terms can in fact be applied as apt descriptions of his own apparently untoward social actions.'[60] Second, s/he manipulates 'the criteria for the application of an existing set of favourable evaluative-descriptive term.'[61]

The focus on a favourable evaluative-descriptive term has implications for the identification of the limits an innovating ideologist confronts. This article identifies an original typology of limits. The first type of limits concerns the 'availability' of a concept. The range of evaluative-descriptive terms (with a positive connotation) available is limited and this availability is beyond the ideologist's control.[62] In choosing a term, Skinner argues, an actor should challenge his/her opponents on their own terms, by showing that terms they are using to describe actions they approve of are compatible with his/her behaviour.[63] The actor needs to 'be able to call upon an already existing stock of concepts.'[64] In IR, this argument is compatible with constructivist emphasis on the 'fit,' 'adjacency' and 'appropriateness' of new norms.[65]

[58] Quentin Skinner, 'A reply to my critics,' in James Tully (ed.), *Meaning and Context: Quentin Skinner and his critics* (Cambridge: Polity Press: 1988a). See Skinner (1974a), pp. 290-291.
[59] Skinner (1974a), p. 298.
[60] Skinner (1974a), p. 298.
[61] Skinner (1974a), p. 298.
[62] Skinner (1974a), p. 300.
[63] Skinner (1974a), p. 294.
[64] Ball (1989), p. 157.
[65] Finnemore and Sikkink (1998), pp. 807 and 908. Margaret Keck and Kathryn Sikkink, 'Transnational Advocacy networks in international and regional politics,' *International Social Science Journal* 159

Once an ideologist has settled on an available concept, s/he confronts additional limits concerning the plausibility of the conceptual manipulation. As Bentley argues, conceptual manipulation represents a balance between innovation and convention: 'conceptual flexibility has to "answer" and justify itself, to convention.'[66] Skinner acknowledged that the 'dominance' of practices and conventions depends to a large extent on the 'power of our normative language to hold them in place.'[67] However, he also emphasised the difficulties an ideologist confronts in convincing the audience of the plausibility of his/her claims.[68] Manipulating existing terms constitutes a 'linguistic sleight-of-hand.'[69] The ideologist runs a double risk of failing. If in the process of innovation he drops too many of the criteria that define the concept, s/he runs the risk of failing by making his/her 'sleight' too visible. If s/he doesn't drop enough criteria, s/he runs the risk that the concept won't cover his/her actions after all.[70] The tailoring of a concept, however, like the availability of terms, is not totally under the control of the actor.[71] Ideologists can rely 'on some freedom for manoeuvre…in the criteria for the application of the relevant

(1999), pp. 89-101 and Ann Fiorini, 'The Evolution of International Norms,' *International Studies Quarterly* 40:3 (1996), pp. 363-389, Martha Finnemore, *The Purpose of Intervention* (New Delhi: Manas Publications, 2009a), p. 15.

[66] Bentley (2014b), p. 127.

[67] See Bentley (2013), pp. 76-77 and Skinner (2002a), p. 7.

[68] Even in his more recent focus on 'paradiastole,' Skinner has maintained the need for 'neighbourliness' in conceptual manipulation. Skinner (2002a), pp. 182-184. See also Quentin Skinner, 'Rhetoric and conceptual change,' *Finnish Yearbook of Political Thought*, 3 (1999), pp. 67-68, Ball (1989), p. 157 and Skinner (1974a), p. 299.

[69] Skinner (1974a), p. 298.

[70] Skinner (1974a), p. 298.

[71] Skinner (1974), p. 300.

normative terms,'[72] but what they can hope to legitimate depends on what they can plausibly portray as compatible with '*existing* normative principles' [emphasis added].[73]

Finally, the strategist confronts limits that concern his/her credibility. S/he is 'obliged to behave in such a way that actions remain compatible with the claim that the legitimating principles genuinely motivated them.'[74] The innovating ideologist looking to legitimate his/her behaviour must tailor 'his normative language in order to fit his projects' - the limits discussed by Bentley - but also tailor 'his projects in order to fit the available normative language.'[75] Since actors cannot stretch existing terms indefinitely, 'they can only hope to legitimise, and hence to perform, a correspondingly restricted range of actions.'[76] Here, Skinner argues, innovating ideologists 'have no freedom to act' except in ways compatible with their legitimating principles.[77] The point of this third type of limits is that whether we regard stated principles as 'flapdoodles' is largely inconsequential.[78] First, we still need to explain why the actor has decided to propagate 'one brand of flapdoodle rather than another, and to propagate one particular brand with such remarkable consistency.'[79] This concerns the availability and the normative colour of those principles. Second, professed principles (whether an actor believes in them or not) affect his/her freedom of action and hence should play a role in explaining his/her

[72] Skinner, Email exchange with the author.
[73] Quentin Skinner, *Liberty before Liberalism* (Cambridge: Cambridge University Press, 1998), p. 105.
[74] Skinner (1974a), p. 299.
[75] Quentin Skinner, *The Foundations of Modern Political Thought, Vol. 1: The Renaissance* (Cambridge: Cambridge University Press: 1978), p. xiii.
[76] Skinner (2002a), p. 156. See also Skinner (1974), p. 300.
[77] Skinner, Email exchange with the author.
[78] Quentin Skinner, 'The principles and practice of opposition' in Neil McKendrick, *Historical Perspectives: Studies in English thought and society (*London: Europa publications, 1974b), p. 103.
[79] Skinner (1974b), p. 103.

behaviour.[80] IR as a discipline has recognised the importance of justifications and legitimacy.[81] In Nicholas Wheeler's words, 'justification is a critical enabling condition of action and not simply a rationalization of decisions taken for other reasons.'[82] Like Skinner's innovating ideologists, Wheeler's humanitarian states - having claimed the moral high ground - will engender 'the suspicion that they had hidden motives' if their actions contradict their legitimating principles.[83]

Assessing whether an actor has adopted an available concept requires assessing the concept intellectual and (in this case) legal history and what 'colour' the concept has carried in the practices of actors (in this case states and governments); that is whether the concept has a connotation compatible with the use by the actor and his/her intentions. As to the plausibility of the manipulation, the judgment regarding the success of the manipulation, as Farr argued, does not belong to the actor alone; 'a community' must be convinced.[84] Assessing whether a manipulation is plausible should, then, rely on a comparison between how the concept has been understood in the relevant community - and in the practice of states[85] - and the use by the actor,

[80] Skinner (1998), p. 105.
[81] Hurd, (2016), Martha Finnemore, 'Legitimacy, hypocrisy and the social structure of unipolarity: Why being a unipole isn't all it's cracked up to be,' *World Politics* 61:1 (2009), pp. 58-85; Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 1995); Ian Hurd, 'Legitimacy and authority in international politics,' *International Organization*, 53:2 (1999), pp. 379-408.
[82] Nicholas Wheeler, *Saving strangers* (Oxford: Oxford University Press, 2000), p. 10. See also Thomas Risse and Kathryn Sikkink, 'The Socialization of international human rights norms into domestic practices,' in Thomas Risse, Stephen Ropp and Kathryn Sikkink (eds.), *The power of human rights*, (Cambridge: Cambridge University Press, 1999), p. 9.
[83] Wheeler (2000), p. 40. See also Nicholas Wheeler, 'The Bush Doctrine: the dangers of American exceptionalism in a revolutionary age,' *Asian Perspective*, 27:4 (2003), p. 211.
[84] Farr (1989), p. 34.
[85] Hurd (2016) and Ingo Venzke, 'Is interpretation in International Law a game?' in Andrea Bianchi, Daniel Peat and Matthew Windsor (Eds.), *Interpretation in International Law* (Oxford: Oxford University Press, 2015).

as well as on the reception of the actor's manipulation within such community. Finally, an assessment of credibility should rely on the coherence between stated aims, legitimating principles and practices, that is, conduct of the actor. The actions of the actor should be aligned with his/her legitimating principles. As Wheeler argued, one should show that the actor did not act in situations not covered by the chosen legitimating principles.[86] Actors should avoid discrepancies between their legitimating principles and their actions.

Imminence and the use of force

Conventions, availability and normative colour

Before focusing on the administration's actions, in line with Skinner's suggestion, it is necessary to focus on the 'conventions surrounding the performance of such actions,'[87] that is, the conventions surrounding imminence. This contributes to assessing the availability of imminence and its normative colour. Discussing imminence, Anderson and Wittes write:

> It is a bit of a mystery…whether the administration is using it to address resort-to-force matters under international law, to tackle domestic separation-of-powers questions…or perhaps as a prudential invocation of the standards of international human rights law.'[88]

[86] Wheeler (2000), pp. 8-9.
[87] Skinner (2002a), p. 142.
[88] Wittes and Anderson (2014), p. 107

The point made here is that imminence represents a favourable evaluative descriptive term in all these contexts. In the US domestic context, the Supreme Court, in a series of historical cases concerning the Fourth Amendment (banning unreasonable seizures) such as *Tennessee v. Garner* and *Brandenburg v. Ohio* has identified the imminence of the threat posed as the criteria distinguishing legitimate from illegitimate uses of force.[89] In foreign policy, the Constitution gives the president the power to repel an imminent threat; a power confirmed by the 1973 War Powers resolution.[90] At the international level, in International Human Rights Law (IHRL), a recent report has clarified that the right to life requires deadly force to be used only to protect against an imminent threat and after other options have been explored.[91] Once again, the suggestion is not that these standards are the same, but that imminence distinguishes legitimate from illegitimate uses of force.

Similarly, in international law, imminence has always played a prominent role in discussions regarding a state's right to use force featuring heavily in the opinions of classical international law scholars.[92] Self-defence in customary international law includes a very restrictive notion of pre-emptive action based on the *Caroline* criteria: the use of force is legitimate only in situations in which the threat 'is instant, overwhelming and leaving no choice of means and no

[89] Charlie Savage, *Power Wars* (New York: Little, Brown and Co., 2015), p. 239 and Scott Shane, *Operation Troy* (New York: Tim Duggan Books, 2015), p. 216
[90] William P. Rogers, 'Congress, the President and the War Powers,' *California Law Review*, 59:5 (1971), p. 1197.
[91] Christof Heyns, Dapo Akande, Lawrence Hill-Cawthorne and Thompson Chengeta, 'The Right to Life and the International Law Framework Regulating the Use of Armed Drones in Armed Conflict or Counter-Terrorism,' Written evidence, December 2015 [http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/the-uk-governments-policy-on-the-use-of-drones-for-targeted-killing/written/25641.pdf], p. 2
[92] Harold Koh, 'Comment,' in Michael Doyle, *Striking First* (Princeton: Princeton, 2008) and Abraham Sofaer, 'On the necessity of pre-emption,' *European Journal of International Law* 14:2 (2003), pp. 209-226.

moment for deliberation.'[93] Imminence here is a 'temporal requirement.'[94] The prohibition of the use of force enshrined in article 2(4) of the UN Charter seemed to put an end to the possibility of pre-emption. Some legal scholars found refuge in article 51's protection of an 'inherent right' of self-defence.[95] The word 'inherent,' they argued, meant that the aim of the Charter was to complement, and not to abolish the customary notion of imminence and pre-emptive action.[96] The International Court of Justice has been unable to provide definitive clarifications on the matter.[97] Ruys argued convincingly that before 9/11 the predominant view of article 51 of the Charter was a restrictionist one, rejecting anticipatory uses of force.[98] Several authors, however, have pointed out that preemptive actions such as Israel's behaviour in the Six Days War have generally been considered more favourably than preventive actions, such as Israel's 1981 bombing of Iraq's Osirak nuclear plant.[99] The distinction depended on the 'imminence' of the threat.

Since the 1980s, the emergence of international terrorism has brought the issues of imminence and pre-emption under the spotlight, especially in the United States. The Reagan Administration through *National Security Decision Directive 207* and the 'Shultz Doctrine,' seemed to suggest

[93] Neta Crawford, 'The Justice of Preemption and Preventive War Doctrines,' in Mark Evans (ed.), *Just War Theory: a Reappraisal* (Edinburgh: Edinburgh University, 2005).
[94] Erakat (2014), p. 203.
[95] United Nations, *Charter of the United Nations*, available at: {http://www.un.org/en/sections/un-charter/chapter-viii/index.html} accessed 28 October 2015.
[96] Noam Lubell, 'The problem of imminence in an Uncertain World,' in Mark Weller, Jake Rylatt and Alexia Solomou (eds.), *The Oxford Handbook of the Use of Force in International Law* (Oxford: Oxford University Press: 2014).
[97] Lubell (2014) and Tom Ruys, *Armed attack and Article 51 of the UN Charter* (Oxford: Oxford University Press, 2013), p. 262.
[98] Ruys (2013), p. 308. See also Karen Mueller, Jasen Castillo, Forrest Morgan, Negeen Pegahi and Brian Rosen, *Striking First* (Santa Monica: Rand Corporation, 2006).
[99] Michael Reisman and Andrea Armstrong, 'The past and future of the claim of pre-emptive self-defense,' *The American Journal of International Law*, 100:3 (2006), pp. 525-550.

that a nation under attack from international terrorists could act both in reaction to and in prevention of future attacks.[100] At the time, both pre-emptive and preventive strikes, especially against Libya, were seriously considered and often excluded for practical and political, and not legal or moral reasons.[101] When a strike was carried out, it was justified in terms of retaliation and the administration did not expand on imminence.[102] Similarly, the Clinton Administration raised the issue of pre-emption when fighting asymmetrical foes.[103] The US carried out strikes against al-Qaeda compounds defining the terrorist group as an 'imminent threat.' Asked to clarify the meaning of imminence, however, US officials demurred.[104] 9/11 proved a turning point for the concept of imminence.

Exogenous shock: 9/11 and the Bush Administration's approach to imminence and international law

9/11 represented a Skinnerian 'exogenous shock.' Several scholars have explored various facets of the Bush Administration's exploitation of this shock and the insecurities it created.[105] What is clear is that the attacks provided the Bush Administration with a key reference point. The administration could always point to 9/11 as a demonstration of the alleged failure of previous

[100] George Shultz, 'Low-intensity warfare: the challenge of ambiguity,' Remarks at Low-intensity warfare conference, *US Department of State Bulletin*, 15 January 1986, available at: {http://archive.org/details/departmentofstat86210621111986unit} accessed 28 October 2015.
[101] Bob Woodward, *Veil: the secret wars of the CIA* (New York: Simon and Schuster, 1986).
[102] Reagan justified the strike as retaliation for Libya's involvement in the earlier Berlin bombing. Woodward (1986), p. 515.
[103] Reisman and Armstrong (2006), p. 530.
[104] US Department of State, 'Press Briefing on U.S. Strikes in Sudan and Afghanistan,' 20 August 1998, available at: {http://1997-2001.state.gov/www/statements/1998/980820.html} accessed 28 October 2015.
[105] Lee Jarvis, *Times of Terror* (London: Palgrave MacMillan, 2009), Dudziak (2008), Debrix (2008).

strategies for US security and call for new (and unprecedented) strategies.[106] In these strategies, we can identify two main elements. First, the administration applied an extreme interpretation of Presidential power. John Yoo who would become one of the administration's most important (and controversial) lawyers, as well as Vice President Dick Cheney and Secretary of Defense Donald Rumsfeld had been long-term critics of limits on presidential power.[107] The administration relied on the 2001 Congressional Authorization for the use of Military Force (AUMF). Having received permission to use force, the administration's view established that the President could disregard any statute or regulation that conflicted with his preferred means of prosecuting military conflict.[108] A 2002 Office of Legal Counsel opinion and a later Department of Defense report concluded that the President's Commander in Chief authority could 'render specific conduct, otherwise criminal, not unlawful.'[109] In the administration's view the AUMF and presidential power were sufficient for the conduct of an unbounded war in the new global 'battlespace.'[110] This approach was not limited to the administration's first term. In 2006, after the *Hamdan v. Rumsfeld* Supreme Court decision, the Department of Justice still

[106] George W. Bush, 'Graduation Speech at West Point,' 1 June 2002a, available at: {http://georgewbush-whitehouse.archives.gov/news/releases/2002/06/20020601-3.html} accessed 28 October 2015.
[107] See John Yoo, 'The Continuation of Politics by Other Means: The Original Understanding of War Powers.' *California Law Review*, 84:2, 1996, pp. 167–305, Dick Cheney, 'Minority report,' in *Report of the congressional committees investigating the Iran- Contra Affair: with supplemental, minority, and additional views*, 1987, available at {https://archive.org/stream/reportofcongress87unit/reportofcongress87unit_djvu.txt} accessed 18 January 2017. Charlie Savage, *Takeover: the return of the imperial presidency and the subversion of American democracy* (New York: Little Brown and Company, 2007), Chapter 1.
[108] David Barron and Martin Lederman, 'The Commander in Chief at the lowest ebb - framing the problem, doctrine and original understanding,' *Harvard Law Review*, 121:3 (Jan. 2008a), p. 693. See Karen Greenberg, *Rough Justice* (Crown: New York, 2016) and Mark Danner, *Spiral* (New York: Simon and Schuster, 2016).
[109] Barron and Lederman (2008a), pp. 705-707.
[110] See Donald Rumsfeld, Memorandum to Douglas Feith and General Dick Myers, 'Preparation of the battlespace,' 2 September 2004, available at: {http://papers.rumsfeld.com/library/} accessed 28 October 2015. See also Savage (2015), p. 241.

refused to acknowledge that Congress had any authority to regulate the President's conduct in military affairs.[111] Second, the negation of any limits on the President's conduct of war extended to international law. Members of the administration viewed international law and, more generally, the rule of law as a hindrance to US action.[112] In particular, as Carvin and Williams have pointed out, key civilian lawyers within the Bush Administration including David Addington, Jay Bybee and Yoo subscribed to a 'new sovereigntist' view of international law. In this view, they write, international law is 'seen as vague, unaccountable, undemocratic and unenforceable.'[113] Within the Administration, neo-conservatives also shared views of international law as a fastidious constraint on American power.[114] Rumsfeld famously lamented the 'judicialization of international politics.'[115] International law and the rule of law were viewed not only as a constraint, but also as weapons the enemy could use to weaken the US.[116]

Consistent with these beliefs and premises the administration developed an aggressive strategy to confront its enemies. The strategy, presented as one of pre-emption, would become a cornerstone of the Bush Doctrine.[117] On the 17th of September, Bush affirmed that new approach would stress 'preemption of future attacks' over prosecution and the gathering of evidence.[118] In

[111] Barron and Lederman (2008a), p. 708.
[112] Anderson and Wittes (2013), p. 18 and Wheeler (2003), p. 208 and Savage (2007), p. 146.
[113] Stephanie Carvin and Michael John Williams, *Law, Science, Liberalism and the American Way of Warfare: the quest for humanity in conflict* (Cambridge: CUP. 2015), pp. 188-190. See also Peter J. Spiro, 'The New Sovereigntists: American exceptionalism and its false prophets,' *Foreign Affairs*, 76:6 (2000), p. 10
[114] Andrew Bacevich, *The New American Militarism* (Oxford: Oxford University press, 2005), pp. 88-91.
[115] Jack Goldmsith, *The Terror Presidency* (New York: Norton and Company 2009), p. 63.
[116] Barron and Lederman (2008a), p. 713.
[117] Robert Jervis, 'Understanding the Bush Doctrine,' *Political Science Quarterly*, 118:3, 2003, pp. 365–388.
[118] Bob Woodward, *Bush at war* (New York: Simon and Schuster, 2003), p. 97.

the 2002 State of the Union address, Bush similarly stressed the necessity to prevent threats.[119] The strategy was crystallised in the 2002 *National Security Strategy* (*NSS*).[120] Having called for a strategy of pre-emption, the *NSS* made a specific claim as to the need to 'adapt the concept of imminent threat to the capabilities and objectives of today's adversaries.'[121] The *NSS* itself blurred the distinction between pre-emption and prevention. At one point the document stated that the US needed to 'prevent' threats by acting 'preemptively.'[122] The *NSS* did not explicitly adapt the concept of imminence, nor did the Bush Administration.[123] This, however, does not mean that debates surrounding pre-emption did not occur during the Bush years. The *NSS* engendered a heated debate regarding pre-emption and the use of force.[124] The point being made here is that imminence was not redefined; it was side-lined.

At the international level, views of the Bush Doctrine often coincided with views on the Iraq War. Even among supporters of the war, however, several governments showed uneasiness regarding Bush Administration's unwillingness to define imminence. The UK and Australia, for example, argued that imminence played a prominent role in decision surrounding self-defence

[119] George W Bush, 'State of the Union Address,' 29 January 2002b, available at: {http://www.washingtonpost.com/wp-srv/onpolitics/transcripts/sou012902.htm} accessed 28 October 2015.
[120] US Government, *The National Security Strategy*, September 2002, available at: {http://www.state.gov/documents/organization/63562.pdf} accessed 28 October 2015.
[121] US Government (2002), p. 15.
[122] US Government (2002), p. 15.
[123] Lawrence Freedman, 'Prevention, not pre-emption,' T*he Washington Quarterly*, 26:2 (2003), pp. 105-114 and Jack Levy, 'Preventive war and Democratic Politics,' *International Studies Quarterly*, 52:1 (2008), p. 4.
[124] Ivo Daalder and James Lindsay, *America Unbound* (Hoboken, John Wiley and Sons, 2006), John Lewis Gaddis, *Surprise, Security and the American Experience* (Boston: Harvard University Press, 2004), Robert Litwak, *Regime Change* (Baltimore, The Johns Hopkins University Press, 2007), Michael Doyle, *Striking First* (Princeton: Princeton, 2008) and Sofaer (2003).

and it should have been defined.[125] Among scholars and commentators, the vagueness surrounding imminence received criticism both at the time and later. As critics noted, the identification of criteria for imminence would have represented a key step.[126] The refusal to provide details of what would comprise 'justifiable preemptive action' meant, according to Patricia Dunmire, that pre-emption and imminence were 'gradually detached from their justificatory context of international law.'[127] In particular, the *NSS* seemed to adopt a double standard using 'imminent' when referring to the framework of international law, but using 'sufficient' - a more ambiguous term - when discussing the US's justification for action.[128] Public statements and internal deliberations confirmed that the administration had no intention of redefining imminence.[129] As Paul Wolfowitz argued at the time, 'anyone who believes that we can wait until we have certain knowledge that attacks are imminent has failed to connect the dots that led to September 11.'[130] Similarly, President Bush argued in his 2003 State of the Union Speech that waiting until the threat was imminent meant accepting defeat.[131] In internal deliberations, Donna Star-Deelen has argued, several members of the administration seemed

[125] UK Ministry of Defence, The Strategic Defence Review: a new chapter, July 2002, available at {http://www.comw.org/rma/fulltext/0207sdrvol1.pdf}, accessed 20 January 2015, p. 12 and House of Commons, 'Foreign Policy Aspects of the War against Terrorism,' Foreign Affairs Committee, 2002-2003, available at: {http://www.publications.parliament.uk/pa/cm200203/cmselect/cmfaff/196/196.pdf}, accessed 20 January 2015, p. 44.
[126] Robert Litwak, 'The new calculus of pre-emption,' *Survival* 44:4 (2002), p. 73 and Wheeler (2003).
[127] Patricia Dunmire, '"9/11 changed everything": an intertextual analysis of the Bush Doctrine,' *Discourse and society*, 20:2, 2009, p. 203.
[128] Dunmire (2009), p. 205.
[129] See Daalder and Lindsay (2006).
[130] Francois Heisbourg, 'A work in progress: the Bush Doctrine and its consequences,' *The Washington Quarterly*, 26:2 (2003), p. 4.
[131] George W. Bush, 'The President's State of the Union Address,' 28 January 2003, available at { http://www.washingtonpost.com/wp-srv/onpolitics/transcripts/bushtext_012803.html} accessed 6 January 2017.

'unable to articulate the distinction.'[132] More crucially, perhaps, officials did not seem to care about the distinction, or imminence. US officials made clear that due to the shadowy nature of terrorism, uncertainty as to the time and place of the attack was no reason to proceed with caution.[133] Action, it was argued, should not require 'clear evidence' to avoid the impression of rewarding the enemy's defiance.[134] More generally, as Douglas Feith has reported, the concerns of members of the administration included the possibility that Saddam might get stronger in the future and that Congress might not authorise the use of force against a future Saddam armed with nuclear weapons.[135] These are concerns clearly associated with preventive war.

This extremely permissive understanding of how and when the president could use force also expanded to the use of drone strikes and targeted killings. The number of drone strikes during the Bush Administration was limited, but the administration never developed a separate set of arguments to legitimate its conduct of targeted killing. In line with the importance of contradiction identified above, it is clear that members of the Bush Administration did not see the need to develop specific criteria and justifications for targeted killings. When the first official High Value Target (HVT) drone strike was carried out in Yemen against Qaed Salim Sinan al-Harethi, Wolfowitz welcomed it as a 'very successful tactical operation.'[136] The success of the strike, however, caused international concerns. Asma Jahengir, UN Special Rapporteur, wrote that the killing violated international standards of human rights and could set

[132] Donna G. Starr-Deelen, *Presidential Policies on terrorism: from Ronald Reagan to Barack Obama* (New York: Palgrave MacMillan, 2014), p. 112.
[133] Ron Suskin, *The One Percent Doctrine* (New York: Simon and Schuster 2006), p. 62.
[134] Douglas Feith, *War and Decision* (New York: Harper, 2008), p. 306.
[135] See Feith (2008), pp. 308 and 329.
[136] Jeremy Scahill, *Dirty Wars* (London: Serpent's tail, 2013), p. 77.

an 'alarming precedent for extrajudicial executions.'[137] The US Government refused to comment on the specific incident, but argued the US was at war with al-Qaeda, such conflict had no geographical boundaries and the US was in its right to strike at will, everywhere and at any time.[138] In this sense, imminence was already in the vocabulary of the executive. Contrary to Erakat's argument, however, administrations preceding Obama's had not engaged in an explicit reconceptualisation of imminence.[139]

Obama the 'innovating ideologist'

Beliefs and intentions: law, counter-terrorism and a new 'normative colour'

Debates on continuity and change between Bush and Obama, have characterised the Obama Administration from its inception. The Obama Administration abandoned the extreme claims regarding Presidential power made during the Bush years.[140] Similarly, the administration adopted a different approach to the rule of law and international law. Beliefs of some of its future members demonstrate both the prominence of international law and the need for a more lawful conduct of foreign policy. Obama had argued, since 2006, that a respect for the rule of

[137] United States Mission to Geneva, 'Inquiry from Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions. Telegram to Secretary of State,' 15 November 2002, available at: { https://www.aclu.org/files/dronefoia/dos/drone_dos_20110720DOS_DRONE000134.pdf} accessed 28 October 2015.
[138] US Secretary of State, 'Response to UNHCR SR on Yemen incident of 3 Nov 2002,' 9 April 2003, available at: {https://www.aclu.org/files/dronefoia/dos/drone_dos_20110720DOS_DRONE001925.pdf} accessed 28 October 2015.
[139] Erakat (2013).
[140] Jack Goldsmith, *Power and constraint* (New York: Norton and Company, 2012) and Dawn Johnsen, 'The Lawyers' war: counter-terrorism from Bush to Obama,' Review article, *Foreign Affairs*, 2 January 2017, available at {https://www.foreignaffairs.com/reviews/review-essay/2016-11-22/lawyers-war}, accessed 6 January 2017

law was necessary if the US wanted to win the 'global battle of ideas' against terrorism.[141] As Daniel Klaidman wrote, the president believed 'to his core' that America should have conducted a smarter and a more just war.[142] Harold Koh, future Legal Advisor to the State Department, had worked extensively on the importance of international law and on the 'transmission belt' between international norms and national compliance.[143] Similarly he had been a long-term critic of unrestrained presidential power[144] and of the Bush Administration's disregard for both domestic and international law.[145] David Barron and Martin Lederman (who would work in the Office of Legal Counsel) had penned critiques of the Bush Administration's abuse of Presidential power.[146] In office, many (and key) members of the administration, including the president, were lawyers. Furthermore, many of these lawyers came from a liberal background. The hiring of Koh at State and Jeh Johnson at the Pentagon typified, according to Klaidman, 'the reassertion of law in the terror war.'[147] Under Obama, the rule of law was also more firmly institutionalised. During the transition, Tom Donilon developed a National Security Council decision-making process that ensured a more direct involvement of lawyers.[148] As Goldsmith

[141] Barack Obama, *The Audacity of Hope* (New York: Random House, 2006), p. 308.
[142] Daniel Klaidman, *Kill or capture* (New York: Mariner Books, 2013), p. 98.
[143] Harold Hongju Koh, 'Why do nations obey international law?' *The Yale Law Journal*, 106:8 (1997), pp. 2599-2659.
[144] Harold Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (Yale: Yale University Press, 1990).
[145] Koh, 'Comment' in Doyle (2008).
[146] See Barron (2008a) and David Barron and Martin Lederman, 'The Commander in Chief at the lowest ebb: a constitutional history,' *Harvard Law Review*, 121:4 (Feb. 2008b), pp. 941-1111.
[147] Klaidman (2013), p. 207.
[148] Savage (2015), p. 64.

convincingly shows, several self-imposed restrictions[149] can only be explained by 'a genuine ideological and intellectual commitment' to the rule of law.[150]

The language in the early month reflected the centrality of international law among the administration's beliefs and interests. Obama's Nobel Peace Prize acceptance speech, for example positioned international law and the *just war* tradition at the heart of foreign policy.[151] Officials consistently and publicly acknowledged the role of international law[152] and made clear the importance of respecting its principles. International law and the rule of law were elements of US strength, not weaknesses exploited by the enemy.[153] 'Lawyerliness,' Savage summarised, 'suffused the Obama Administration.'[154]

Among the president's key beliefs, the need to strengthen counter-terrorism was also prominent. Since the campaign, the Obama team had criticized the Bush Administration for many of its foreign policy choices and for its aggressiveness in pursuing them. On counter-terrorism, however, Obama accused his predecessor of having been soft on al-Qaeda.[155] In this sense, the administration gave early signals of its intention to strengthen counter-terrorism while

[149] These include the refusal to work with Congress to get new military detention authorities for fear that Congress might give it more power, or the acceptance, in spite of plausible Article 2 argument to the contrary, of Congress 'unprecedented restrictions' on the president's power to transfer enemy prisoners. See Goldsmith, (2012), p. 42.
[150] Goldsmith (2012), p. 41.
[151] Barack Obama, 'Nobel Peace Prize acceptance Speech,' *The Huffington Post,* 18 March 2010, available at: {http://www.huffingtonpost.com/2009/12/10/obama-nobel-peace-prize-a_n_386837.html} accessed 28 October 2015.
[152] Anderson and Wittes (2015), p. 18.
[153] Goldsmith (2012), p. 41.
[154] Savage (2015), p. 63.
[155] Kenneth Anderson, 'Targeted killing in US counterterrorism strategy and law,' Working Paper, Georgetown University Law Center and Hoover Institution, 11 May 2009, available at: {https://www.law.upenn.edu/institutes/cerl/conferences/targetedkilling/papers/AndersonCounterterrorismStrategy.pdf} accessed 4 May 2017.

respecting international law. Imminence emerged from the start as an important criterion for action. In a famous speech against the Iraq War, then Senator Obama had made clear that he opposed the war since Saddam did not pose an imminent threat to the US.[156] Similarly, in *The Audacity of Hope*, the future President had made clear how imminence represented a key factor in the conduct of counterterrorism.[157] Similarly, Koh had highlighted the importance of imminence.[158]

In line with Skinner's approach this overview does not hope to get into the policymakers' heads. The analysis has contrasted the beliefs held by Bush Administration officials and those held by members of the Obama Administration. This has provided a necessary background to corroborate this article's interpretation through an emphasis on the coherence of actors' professed principles as well as on the compatibility between beliefs of the actors and intentions we are assigning them.

Conceptual change: shifts, criticism, and contradictions

The language adopted by the administration and the emphasis on international law aimed at painting Obama's policies with a new 'normative colour.' Klaidman wrote that such an effort created, from the start, a key conundrum: how to continue counter-terrorism operations while at the same time achieving the publicly stated objective of scaling down the war on terror

[156] Barack Obama, 'Remarks against the Iraq War,' 2 October 2002 {http://www.npr.org/templates/story/story.php?storyId=99591469} accessed 10 March 2016.
[157] Obama (2006), pp. 308-309
[158] Koh (2008).

framework.[159] In Farr's terms, this represented the administration's contradiction. It concerned inconsistencies between beliefs of its key members and its rhetoric of change and international law, on one side, and its practice on the other.

In the very early days, Obama clearly discussed the importance of language and the perils of using 'war on terror' to describe US counter-terrorism.[160] The administration substituted 'Global War on Terror' with 'overseas contingency operations.'[161] As Adam Hodges has noted, instead of a universal 'war on terror,' the administration often talked about two wars (Afghanistan and Iraq).[162] Finally, the administration also made an effort to better specify the enemies it was fighting; no longer a global war against a concept, but a struggle against specific groups in specific places.[163] As several scholars have noted, however, these early shifts did not represent a radical change.[164] In spite of recognising the need to abandon the language of the 'war on terror,' the administration adopted many of the narratives (including the 'war' narrative) established by its predecessor.[165]

[159] Klaidman (2013).
[160] Barack Obama, 'Interview with Hisham Melhem of Al Arabiya,' 27 January 2009, available at { http://www.presidency.ucsb.edu/ws/index.php?pid=85891&st=war+on+terror&st1=}, accessed 6 January 2017.
[161] See Barack Obama, 'Letter to Congressional Leaders Designating Funds for Overseas Contingency Operations/Global War on Terrorism,' 23 December 2011, available at {http://www.presidency.ucsb.edu/ws/index.php?pid=98003&st=Overseas+Contingency+Operations&st1=} accessed 6 January 2017. Later labels would include constructions like 'global struggle against violent extremism.'
[162] Adam Hodges, *The War on terror narrative* (Oxford: Oxford University Press 2011), p. 159.
[163] John Oddo, 'Variation and continuity in intertextual rhetoric: from the "war on terror" to the "struggle against violent extremism,"' *Journal of Language and Politics*, 13:3 (2014), pp. 522 and 529.
[164] See Trevor McCrisken, 'Ten Years on: Obama's war on terrorism in rhetoric and practice,' *International Affairs*, 87:4 (2011), pp. 781-801and Richard Jackson, 'Bush, Obama, Bush, Obama, Bush, Obama…: the War on Terror as social structure,' in Bentley and Holland (Eds.) (2014).
[165] Michelle Bentley, 'Continuity we can believe in: escaping the War on Terror,' in Bentley and Holland (2014).

With the administration seemingly betraying its message of change, shifts in the strategic and political contexts also contributed to the emergence of criticism. At the strategic level, the failed 'underwear bomber' terror plot of Christmas 2009 represented a 'pivotal moment' for the administration.[166] The intelligence failure and the mismanagement of the plot's aftermath[167] radically changed the domestic political context. Cheney, who had been criticising the administration's approach since it took office, launched a Republican offensive accusing the administration of 'pretending' that the US was not at war. Other Republicans portrayed the President as weak.[168] Republicans seemed to take back ownership of the 'terrorism' issue. In a shocking victory, Republican Scott Brown relied on a 'terrorism platform' to win the Senate seat vacated by Ted Kennedy's death; a victory that meant the loss of the Senate for the Democrats.[169] The administration seemed to succumb to this Republican surge and was compelled to backtrack on some of its policies such as the closure of Guantanamo and the civilian trial of 9/11 mastermind Khalid Sheikh Mohammed.[170] The message of change and respect for international law was also contradicted by the administration's early approach to counter-terrorism. Drone strikes boomed in Obama's first-term. By December 2013, the President had authorised 322 strikes in Pakistan alone[171] - with a peak of 122 in 2010 -

[166] Savage (2015).
[167] Savage (2015) p. 75.
[168] Philip Rucker and Michael D. Shear, 'Political attacks over Christmas Day airline incident heat up,' *The Washington Post*, 31 December 2009 {http://www.washingtonpost.com/wp-dyn/content/article/2009/12/30/AR2009123001231.html} accessed 10 March 2016.
[169] Goldsmith (2012), p. 46.
[170] Jennifer Daskal and Steve Vladeck, 'Power Wars Symposium: Where Did Things Go Wrong? Three Key Moments That Shaped Obama's Failed Guantánamo Policy,' *Just Security*, 11 November 2015 available at {https://www.justsecurity.org/27514/wrong-key-moments-shaped-obamas-failed-guantanamo-policy/} accessed 9 January 2017. See also Savage (2015), p. 87.
[171] The increased number of drone strikes in Pakistan was also connected with the decision for a 'surge' in Afghanistan. See Bob Woodward, *Obama's War* (New York: Simon and Schuster, 2011) and Wali

compared to the forty-eight strikes during Bush's two terms in office.[172] Obama also took an unprecedented role as the 'ultimate' decision-maker on targeted killing.[173] Initially, the administration had been particularly silent on its drone policies.[174] The increased use of the weapon added to the sense that the promised change was elusive and helped in raising strong criticisms. The administration started to confront criticism from NGOs, journalists and international organizations, including the U.N. Special Rapporteur Philip Aston who criticised drones and the 'PlayStation mentality' they created.[175] As Obama clarified, criticisms from these sources helped him and the administration realise that the drone program was unregulated and this contradicted some of the administration's key beliefs (as well as rhetoric).[176] In Holsti's and Farr's words, the source and contents of these criticisms made the contradiction between rhetoric and practice hard to ignore. With the number of drone strikes rising, with criticisms coming from several quarters, and with the administration working on a particularly

Aslam, 'Drones and the issue of continuity in America's Pakistan policy under Obama,' in Bentley and Holland (Eds.) (2014).

[172] Peter Bergen and Jennifer Rowland, 'Decade of the drone,' in Peter Bergen and Daniel Rothenberg (eds.), *Drone Wars* (Cambridge: Cambridge University Press, 2015), p. 13.

[173] Jo Becker and Scott Shane, 'Secret 'Kill List' Proves a Test of Obama's Principles and Will,' *The New York Times* 29 May 2012, available at: {http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?_r=0} accessed 28 October 2015.

[174] Noah Schachtman, 'CIA Chief: drones "only game in town for stopping al Qaeda,' Wired, 19 May 2009 {http://www.wired.com/2009/05/cia-chief-drones-only-game-in-town-for-stopping-al-qaeda/} accessed 10 March 2016.

[175] Philip Aston, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions,' UN General Assembly, 28 May 2010, available at: {http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf} accessed 5 May 2016, p. 25.

[176] Barack Obama, 'Exit Interview' *NPR*, 19 December 2016, available at: {http://www.npr.org/2016/12/19/504998487/transcript-and-video-nprs-exit-interview-with-president-obama} accessed 18 January 2016.

controversial strike - the targeting of radical cleric and American citizen Anwar al-Awlaki - the Obama Administration started a public effort to normalise and legitimise drone strikes.[177]

The strategy in action: adoption of a term and manipulation of criteria

The first prong of the administration's strategy, the reliance of imminence, became explicit near the time of Awlaki's killing. In November 2010, in a court case brought by Awlaki's father, Judge John Bates asked Department of Justice lawyer Douglas Letter to clarify why judicial scrutiny was needed for electronic surveillance of US citizens abroad, but not for their targeting. Letter replied that in a eavesdropping case: 'you're not being asked to stand at the shoulder of the president as the president is trying to decide, is there an imminent threat to the security of US nationals…?'[178] In September 2011, the strategy's first prong went public. John Brennan, at the time Assistant to the President for Homeland Security and Counterterrorism, delineated the administration's position. Showing insistence on imminence, he argued that in use of force decisions: 'the question turns principally on how you define imminence.' Brennan stated that the US was finding 'increasing recognition in the international community that a more flexible understanding of imminence might be appropriate.'[179] Something the Bush Administration had also recognised.

The Obama Administration, however, had also started working on the second prong of the strategy - changing the criteria defining the concept. Having seen the evidence on Awlaki, Koh

[177] Lynn Davis, Michael McNerney, James Chow, Thomas Hamilton, Sarah Harting and Daniel Byman, *Armed and Dangerous: UAVs and US security*, Rand Corporation, available at: {http://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR449/RAND_RR449.pdf} accessed 28 October 2015, p. 19.
[178] Shane (2015), p. 231.
[179] Brennan (2011).

started developing criteria for imminence. In 2004, after his exit from the Bush Administration, Yoo had argued that imminence should have been evaluated as a more discretionary decisional standard including three criteria: 'the probability of an attack,' 'the need to take advantage of a window of opportunity,' and 'the magnitude of the harm.'[180] Like Yoo, Koh argued that terrorism required an 'elongated' notion of imminence and adopted similar criteria.[181] Confirming Skinner's point regarding the freedom of ideologist in manipulating criteria but also the need to 'answer' at least partially to conventions, the new criteria maintained a connection to the temporal nature of imminence through the idea of a 'window of opportunity.'

The legitimation effort increased after the killing of Awlaki. The killing engendered unprecedented criticism, which exacerbated the contradiction between Obama's rhetoric of respecting the rule of law and aggressive counter-terrorism. In January 2012, pressed by questions from his *Google Hang-out* audience, President Obama justified the use of drones relying on the idea of a window of opportunity and suggesting that suspects are targeted before they can 'go in and harm Americans.'[182] In March 2012, Attorney General Eric Holder publicly elaborated on the criteria included in the new concept. Holder argued that whether:

> an individual presents an "imminent threat" incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window

[180] Yoo (2004), p. 18.
[181] Klaidman (2013), p. 219.
[182] Barack Obama, *Google Hangout*, 30 January 2012, available at: {http://www.youtube.com/watch?v=2rPMPMqOjKY} accessed 10 January 2017.

would cause to civilians, and the likelihood of heading off future disastrous attacks against the US.[183]

Through memos leaked and released in January 2013 and June 2014, it is now clear that the public language was a reflection of the internal decision-making process. In the memo that had permitted the killing of Awlaki, Assistant Attorney General Barron did not expand on imminence, but he relied on the availability of the concept in domestic and international contexts and on its positive normative colour confirming that the targeting of Awlaki was permissible, among other reasons, since the cleric represented a 'continued' and 'imminent' threat.[184]

The results of innovation were evident in the *White-Paper*, leaked to *NBC* in January 2013. The 16-page document explained the criteria for the targeting of US citizens who are also al-Qaeda's 'senior operational leaders,' providing a clear platform for future policy.[185] The *Paper* emphasised the compliance of counterterrorism policies with both domestic and international law. Like Brennan in 2011, the *Paper* made clear that the notion of imminence represented the core of the administration's justification. The memo identified three criteria: the existence of a

[183] Eric Holder, 'Remarks at Northwestern University School of Law,' 5 March 2012, available at: {http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law} accessed 28 October 2015.
[184] David Barron, 'Memorandum for the Attorney General,' 16 July. 2010, available at: {http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/06/23/National-Security/Graphics/memodrones.pdf} accessed 28 October 2015.
[185] Scahill (2013).

'window of opportunity,' the possibility of reducing collateral damage, and the chance to head off future disaster.[186]

Late 2012 and early 2013 also provided additional shifts in the relevant contexts. At the strategic level, in November 2012, Jeh Johnson made clear that the fight against al-Qaeda and associated forces soon would have reached a 'tipping point' after which the US should have abandoned the 'armed conflict' framework. At that time, the US, Johnson argued, would rely on law enforcement, with 'military assets available in reserve to address continuing and imminent terrorist threats.'[187] In the domestic political context, the 2012 Presidential Election and the possibility of a Romney victory convinced the administration to codify targeting policies. Furthermore, a new wave of criticism emerged from both the Libertarian right - with Rand Paul's filibuster during Brennan's confirmation as Director of the CIA [188] - and civil rights groups regarding the targeting of Americans.[189] These shifts and criticisms compelled the administration to an even stronger effort at legitimation if it wanted to achieve its strategic objective of easing the contradiction between practices and beliefs.

In 2013, during a speech at National Defense University, Obama stated: 'we act against terrorists who pose a continuing and imminent threat to the American people.' Elaborating on the criteria, the President stressed that the available window of opportunity, potential future

[186] DoJ (2011), p. 7.
[187] Jeh Johnson, 'The Conflict against Al-Qaeda and its affiliates: how it will end,' 30 November 2012, available at: {http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/} accessed 18 March 2016.
[188] Wittes and Anderson (2013), p. 141
[189] Wittes and Anderson (2013), pp. 141-142.

casualties and other governments' policies play a role in the decision to target.[190] Obama also assured that the US had codified in a *Presidential Policy Guidance* criteria for the targeting of individuals.[191] The documents made clear that targeting decisions relied on the modified imminence criteria.[192] These conformed to those delineated in the *White Paper*, and more generally to those elaborated through the administration's innovating ideologist strategy. One day before the speech, Holder had also written, in a letter to the Senate, how the administration's interpretation of imminence had guided the targeting of al-Awlaki.[193] The Department of Defense also confirmed that the criteria developed in the *White Paper* guided its targeting practices.[194]

The administration continued to insist on the importance of imminence and to elaborate criteria for the concept. In 2016, Brian Egan, new Legal Advisor from the State Department, argued that imminence played 'an important role as a matter of policy…even when it is not legally required.' He added that criteria for imminence included:

[190] Barack Obama, 'Remarks by the President at the National Defense University,' 23 May 2013, available at {https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/remarks-president-national-defense-university } accessed 4 May 2017.
[191] See White House, 'US Policy Standards and Procedures for the Use of Force in Counterterrorism,' 23 May 2013b, available at: {https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism } accessed 4 Mayl 2017.
[192] White House (2013a).
[193] Eric Holder, 'Letter to Patrick J. Leary, Committee on the Judiciary, US Senate,' 22 May 2013, available at: {http://www.justice.gov/slideshow/AG-letter-5-22-13.pdf} accessed 4 May 2017.
[194] US Department of Defense, 'Law of Armed Conflict, the use of military force and the 2001 Authorization for the use of military force,' Joint Statement for the record, Committee on Armed Services, US Senate, 16 May 2013, available at: {http://www.armed-services.senate.gov/imo/media/doc/lawofarmedconflict_useofmilitaryforce_2001aumf_hearing_051613.pdf} accessed 4 May 2017, p. 8.

> the nature and immediacy of the threat; the probability of an attack; whether the anticipated attack is part of a concerted pattern of continuing armed activity; the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of mitigating action; and the likelihood that there will be other opportunities to undertake effective action in self-defense that may be expected to cause less serious collateral injury, loss, or damage.[195]

The inclusion of the 'immediacy' of the threat increased the prominence of the temporal element and represented a departure from the *White Paper*. More generally, these criteria seemed to represent an effort to bring the modified concept closer to its original international law interpretation of imminent as temporally immediate.[196] This, however, does not detract from the Administration's conceptual change. The changed concept of imminence is no longer limited only to a temporal dimension. The reintroduction of a temporal element permitted the Administration's to increase the plausibility of the manipulation. Confirming these changes, in December 2016, the administration published a report on the legal and policy frameworks guiding the use of force in counter-terrorism. The president's foreword argued that the codification of this framework represented only the latest demonstration of the importance that the Administration assigned to adhering 'to standards - including international legal standards -

[195] Brien Egan, 'International law, Legal Diplomacy, and counter-ISIL campaign,' 4 April 2016, available at: {https://www.justsecurity.org/wp-content/uploads/2016/04/Egan-ASIL-speech.pdf} accessed 9 may 2016, p. 5.
[196] Daniel Bethlehem, 'Not By Any Other Name: A Response to Jack Goldsmith on Obama's Imminence,' *Lawfare* Blog, 7 April 2016, available at: {https://www.lawfareblog.com/not-any-other-name-response-jack-goldsmith-obamas-imminence} accessed 9 may 2016.

that govern the use of force.'[197] More importantly, for the purposes of this article, the report re-confirmed word by word Egan's criteria for imminence.[198]

Legitimation and innovation: the innovating ideologist's strategy and its limits

The administration's insistence on imminence has received strong criticisms. These criticisms have targeted not only the conceptual manipulation of imminence, that is, the plausibility of the administration's change of criteria but also the relation between the administration's legitimating principles and its policies; that is, its credibility. Assessing plausibility means assessing how the relevant community has received the concept. It is fair to admit that the 'tailoring of the normative language' has been problematic. Commentators and scholars have criticised the manipulation; the 'sleight-of-hand' is now public. The changes brought by the Obama Administration, however, find some resonance in the concerns of scholars of international law and scholars within the just war tradition who have long grappled with the issue of imminence and the requirements it imposes on government. Already in 1977, Michael Walzer identified some of the difficulties in interpreting 'imminence' as a strict temporal requirement. He proposed a new threshold that included: a 'manifest intent to injure,' an 'active preparation' that turned that intent into a danger and a 'general situation' in which waiting 'magnifies the risk.'[199] As we have seen, at the time of the Bush Administration, several scholars pointed to the necessity of updating imminence and developing new criteria. In more

[197] The White House, 'Report on the legal and policy frameworks guiding the United States' use of military force and related national security operations,' December 2016, available at: {https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf} accessed 4 January 2017.
[198] White House (2016), pp. 9-10.
[199] Michael Walzer, *Just Wars* (London: Basic Books, 2000), p. 81.

recent times, scholars like Daniel Betlehem developed these criteria.[200] Egan and the Obama Administration explicitly relied on these criteria. The reception of these criteria and of efforts to move away from a strictly temporal understanding of imminence has been, at best, mixed.[201] In terms of states' practice, Michael Scharf has noted how other states seem to have accepted at least in part US claims regarding self-defence and imminence.[202] The statements and practices of several states seem to have moved in this direction. The UK Attorney General explicitly adopted Betlehem's (and by extension the Obama Administration's) understanding of imminence and of criteria defining the concept.[203] As Anthony Dworkin has pointed out, several European countries have also accepted US views on self-defence, imminence and targeted killing.[204]

This debate on manipulation is connected to the debate on interpretation in international law. Ian Hurd has argued that legitimating claims, such as those surrounding self-defence, inevitably change in the direction states intend, with states' practice and, generally, based on the practice of great powers.[205] Some scholars have suggested that there is no 'language' of international

[200] Daniel Betlehem, 'Self-Defense against an imminent or actual armed attack by nonstate actors,' *The American Journal of International Law*, 106:4 (2012), pp. 775-776.
[201] Mary Ellen O'Connell, 'Dangerous departures,' *The American Journal of International Law*, 107:2 (April 2013), pp. 380-386. See also Benjamin Wittes, 'The White House Releases a "Report on the Legal and Policy Frameworks" on American Uses of Military Force,' *Lawfare*, 5 December 2016, available at: {https://www.lawfareblog.com/white-house-releases-report-legal-and-policy-frameworks-american-uses-military-force} accessed 9 January 2017 and Anderson and Wittes (2013).
[202] Michael P. Scharf, 'How the war against ISIS changed international law,' *Case Western Reserve Journal of International Law*, 48:1, 2016, pp. 50-51
[203] Gibb (2017).
[204] Dworkin (2017).
[205] Hurd (2016), p. 2.

law beyond that spoken by states through their legitimating claim.[206] Others have suggested that interpretation can be compared to a game. As Rosa Brooks wrote looking at tennis:

> Calling a ball "in" when it just touches the outside of the baseline is skirting the edge of the permissible…Calling a ball "in" when you know it landed outside the baseline is cheating, but it is still "playing tennis"…Pausing to beat up your opponent when he complains that you are cheating is no longer tennis, however; the resort to force destroys the game entirely.'[207]

The Bush Administration's arguments regarding waterboarding and torture represented, in Brooks's, view the destruction of the game. It could be argued that the *White Paper* interpretation of imminence constituted cheating. In its more recent interpretation, with a renewed emphasis on the temporal element, the administration might be 'skirting the edge of the permissible.' However, it seems that the administration is still 'playing tennis.' The increased international acceptance discussed above seems to support recognition of the plausibility of the Administration's manipulation.

On credibility, a comprehensive assessment of the administration's practices will, perhaps, be possible in the future. Only in the longer-term discrepancies between legitimation and action fully emerge. The Reagan Administration, for example, justified Operation *Urgent Fury* (the invasion of Grenada) relying on the need to protect US students on the island. We now know, however, that the conduct of operations showed that the administration had little interest in the

[206] Venzke (2015).
[207] Rosa Brooks, *How Everything became war and the military became everything: tales from the Pentagon* (New York: Simon and Schuster 2016), pp. 200-202.

safety of the students and little knowledge regarding their location.[208] On the Obama Administration, there is evidence that the criteria of imminence set by the Administration have been guiding its targeting policies.

First, high-value targets cases show how imminence and the criteria identified played a role. The targeting of Anwar al-Awlaki is one such case. As Savage convincingly argued, Awlaki had been on the US radar at least since the Bush Administration. The decision to kill him, however, was made only after the failed Christmas plot and after evidence of contact between Awlaki and Umar Farouk Abdulmutallab. These contacts had made Awlaki an imminent threat.[209] In line with Wheeler's suggestion, a second high-level case included the refusal to target a suspect due to the fact that he did not pose an imminent threat. Having tracked al-Shaabab in Somalia for months, members of the administration were pushing to eliminate the leaders of its two main factions. One of these factions, led by Sheikh Mohamed Mukhtar Abdirahman had declared allegiance to al-Qaeda and intelligence indicated that it was ready to target the West. The second faction, led by Sheikh Mukhtar Robow, on the contrary, was focused on internal conflict. In an interagency meeting, Koh strongly opposed the targeting of the latter on the basis of imminence. 'If Robow was not focused on attacking Americans,' Koh stated, he did not represent an imminent threat to US security and hence the US 'could not use self-defense justification for killing him.' Robow was not targeted.[210]

[208] See Rachel Maddow, *Drift* (New York: Broadway Books, 2012), pp. 86-87 and Woodward (1986).
[209] Savage (2015), p. 232.
[210] Klaidman (2013), p. 221 and Chris Woods, Email exchange with the author, 12 January 2016.

Second, it must be noted that the heat surrounding the drone debate and the salience of some strikes have perhaps obscured the fact that drone strikes have declined since Obama's first-term and since the development and publication of the policy planning guidance. The guidance had the effect of standardizing and institutionalizing rigorous criteria for analysis and action.[211] UN Special Rapporteur Ben Emmerson confirmed that the 'reigning in' of the CIA under stricter Presidential control, led to a decline in strikes and in civilian casualties.[212] Several reports have more generally suggested that drone strikes dropped outside hot battlefields in Obama's second term.[213] Perhaps, an additional confirmation also comes from the correlation between the Trump Administration's decision to relax the policy guidelines established under Obama[214] and a spike in drone strikes in Trump's first months in office.[215]

Identifying a drop in drone strikes during the second term of the Obama Presidency, however, exposes the intricate relation between legitimation and action in US foreign policy. In his discussion of the role of law and legitimation in the Cuban Missile crisis, Abraham Chayes identified a 'continuous feedback' between principles and actions limiting the amount of

[211] Luke Hartig, *The Drone Playbook: An Essay on the Obama Legacy and Policy Recommendations for the Next President*, New America, 2016, available at: {https://na-production.s3.amazonaws.com/documents/Drone_Playbook_Essay_8.16.pdf}, accessed 9 January 2017.
[212] Chris Woods, *Sudden Justice* (London: Hurst and Company, 2015), p. 160
[213] Jack Searle, 'CIA drone strikes in Pakistan fall to lowest level in 8 years,' *The Bureau of Investigative Journalism*, 7 January 2016, available at: {https://www.thebureauinvestigates.com/2016/01/07/cia-drone-strikes-in-pakistan-fall-to-lowest-level-in-8-years-bureaus-annual-report-reveals/} accessed 18 March 2016.
[214] Charlie Savage and Eric Schmitt, 'Trump Administration Is Said to Be Working to Loosen Counterterrorism Rules,' *The New York Times*, 12 March 2017, available at: {https://www.nytimes.com/2017/03/12/us/politics/trump-loosen-counterterrorism-rules.html?_r=0} accessed 21 April 2017.
[215] Micah Zenko, 'The (Not-So) Peaceful Transition of Power: Trump's Drone Strikes Outpace Obama,' *Council on Foreign Relations*, available at: {http://blogs.cfr.org/zenko/2017/03/02/the-not-so-peaceful-transition-of-power/} accessed 21 April 2017.

options available.[216] Furthermore, as Chayes argued, the fact that we cannot find a direct causation between principles and policies 'is no more fatal to the operation of legal factors than of any other kind of indeterminate data or analysis bearing on decision.'[217] In the context of the Obama Administration's drone strikes, then, it might be easy to find cases in which the administration exceeded its professed principles. What this exercise obscures, however, is 'the scores of times' in which principles pre-empted operations and policies that never made it onto the agenda.[218] Looking at the Obama Administration's credibility, it might not be right to suggest that legitimating principles directly caused a restraint in policies, but rushing to the opposite view - that they had no role - is unconvincing.

Conclusion

In a 2016 lecture, Harold Koh argued that the US government should have abandoned ideas regarding war as a 'legal black hole.' It should have engaged instead in a 'translation exercise from previously agreed international rules,' adapting these rules while maintaining their spirit and while acting within the framework of the law.[219] This article has provided a Skinnerian interpretation of this translation effort by exploring the Obama Administration's legitimation of targeted killings. The analysis has placed conceptual change at the centre of foreign policy legitimation.

[216] Abram Chayes, *The Cuban Missile Crisis* (Oxford: Oxford University Press, 1974), p. 103.
[217] Chayes (1974), p. 35.
[218] See Jack Goldsmith, 'Let loose the laws of war,' *The Slate Book Review*, 6 January 2016, available at: {http://www.slate.com/articles/news_and_politics/books/2016/01/power_wars_by_charlie_savage_reviewed.html} accessed 10 March 2016.
[219] Harold Hongju Koh, 'The Emerging law of 21st Century law,' Third Annual Justice Stephen Breyer Lecture on International Law, available at: {https://www.brookings.edu/wp-content/uploads/2017/04/ios_20170411_breyer_lecture_koh.pdf} accessed 21 April 2017, p. 39.

First, the analysis has shown how imminence represented an available favourable evaluative-descriptive term within domestic and international legal conventions. Second, the analysis has explored the role of contextual shifts, contradictions and criticism in creating the conditions for conceptual change. The analysis has identified a key contradiction for the administration: how to pursue an aggressive counter-terrorism program while achieving the strategic objective of putting US counter-terrorism on a sounder legal footing, abandoning the 'war on terror' framework, and establishing a contrast with the Bush Administration. The analysis has suggested that it was the importance of this strategic aim and its conformity with strongly held views and beliefs of members of the administration that led it to address this contradiction and not others. At different points, the analysis has suggested that shifts in the strategic and domestic political contexts, as well as criticisms, spurred conceptual change. Third, through the two steps of the innovating ideologist's strategy, the analysis has shown how imminence turned into one of the cornerstones of the Obama Administration's justifications of counter-terrorism. As William Banks wrote, 'the self-defence justification…matured and sharpened…to focus on the imminence of the continuing threat posed by the target.'[220] Imminence has been at the forefront of the administration's justifications from 2011 to 2016. The administration also proceeded to change the criteria, building a more permissive imminence, while trying to maintain its normative colour.

Exploring this process of conceptual change, the article has made important theoretical contributions. The article has emphasised the importance of innovating ideologist strategies in legitimating foreign policy practice; as well as the benefits and limits inherent in these

[220] William Banks, 'Regulating drones' in Bergen and Rothenberg (2015), p. 144.

strategies. The analysis has reaffirmed and expanded the role of Skinner in IR. The analysis has emphasised the importance of exploring an actor's beliefs and intentions. It has identified the role played by criticisms in bringing contradictions to the fore, also suggesting why some criticisms are addressed while other are ignored. Finally, the focus on a specific strategy (the adoption of a term with a favourable normative colour) has permitted the development of an original typology of limits and of strategies to assess whether they are respected. These contributions open avenues of future research, suggesting the possibility of developing this Skinnerian framework along two main lines.

The typology of limits and the criteria developed to assess the respect of these limits provide a sophisticated account of the relation between legitimation and action in US foreign policy. The three types of limits seem to provide a three steps framework to explore foreign policy decisions. First, the scholar can assess what concepts policymakers adopted and what connotations and histories these concepts have. Second, the extent of the manipulation, as we have seen, can be assessed by relying on both the understanding and the reception of the concept in the relevant community. Third, the credibility of the actor can be assessed by looking at the relation between legitimation and actions. A second line of inquiry could explore additional cases of innovating ideologist strategies. 'Assassination' is an interesting case in this context. Here we see first a change of criteria of what constitutes assassination in the aftermath of the Ford Administration's Executive Order 11905 banning the practice.[221] Second, the substitution of 'assassination' with 'targeted killings,' seems to conform to Skinner's recent

[221] Thomas (2001), John Prados, Interview with the author, 11 September 2015 and Bruce Riedel, Interview with the author, 4th August, 2016, Washington DC.

analysis of paradiastole in which a term with a negative connotation is substituted with a 'neighbouring' term with a more positive or a neutral one.