When President Barack Obama came into office in 2009 in the midst of serious, ongoing terrorist threats to the United States, he confronted important choices about how to approach the bodies of international law that regulate the resort to force and the conduct of armed conflict. By many accounts, the Bush administration had taken a maximalist approach to those bodies of international law, staking out broad substantive claims about what international law permitted in resorting to force and in detaining and treating members of Al Qaeda, and asserting those claims publicly and frequently.

The Obama administration has repeatedly taken a notably different tack, employing an approach that we might characterize as “executive minimalism.” That is, the Obama administration has signaled to other states its interest in self-constraint by making fewer bold substantive and rhetorical claims related to the *jus ad bellum* and *jus in bello*. It has pursued this objective partly by establishing various policies that authorize a narrower scope of action than what some believe international law permits. In particular contexts, it has also been more hesitant as a rhetorical matter to assert precise legal claims about what international law allows or where international law’s limits lie. Accordingly, the Obama administration has sometimes taken action in the face of two (or more) possible legal theories without articulating its specific rationale.

Despite Senator Obama’s criticism of the Bush administration’s maximalist approach prior to the 2008 presidential election, it is precisely because of the Bush approach that the Obama administration has been able to employ its minimalist strategy, holding many of the Bush administration’s broad interpretations in reserve if needed, without having to break new ground in its own interpretations of international law. In this regard, the Obama administration has returned to a more traditional U.S. executive branch approach to legal analysis, whereby the executive evaluates the legality only of the specific policy before it, rather than conclusively assessing the legality of broader approaches that it ultimately may never employ.

The Obama approach to the *jus ad bellum* and *jus in bello* offers significant advantages for the United States. Many allies favor the Obama approach because it retains greater room for negotiation among states about international law’s content. Some U.S. officials may value the approach because it leaves more decision-making space for future U.S. administrations and reduces internal decisional costs within the current administration. These benefits flow from an executive approach to the law that echoes what, decades ago, Alexander Bickel termed, in
the judicial context, the passive virtues and Cass Sunstein more recently termed judicial minimalism. Executive minimalism is not without costs, however. The Obama approach slows the development of international law by obscuring the value of and weight to assign to U.S. positions and by suppressing the international claim/counterclaim dynamic. This approach also means that several controversial legal claims of the prior administration have been left undisturbed and therefore retain precedential value, both domestically and internationally.

This essay first summarizes the Bush administration’s substantively and rhetorically broad jus ad bellum and jus in bello claims, which set the stage for the Obama administration’s approach. The essay then draws from Bickel’s and Sunstein’s work to identify some characteristics, benefits, and costs of minimalist decision making. Using examples related to targeted killing, consent to the use of force, battlefield targeting, and intelligence activities, the essay argues that the Obama administration’s approach to certain legal issues in this realm may be considered minimalist. It concludes by considering the normative advantages and disadvantages of the Bush and Obama approaches to the jus ad bellum and jus in bello.

I. THE BUSH ADMINISTRATION’S MAXIMALISM

To understand the Obama administration’s approach to international uses of force and to the laws of armed conflict, it is necessary to review the Bush administration’s approach, particularly in the years immediately following September 11, 2001. The Bush administration took both a substantively and rhetorically maximalist approach to international law. It announced, clearly and plainly, its legal views on a wide variety of jus ad bellum and jus in bello topics. Substantively, those views often stood in tension with accepted understandings of international law, or at least reflected maximalist views about what actions existing treaties and customary international law authorized. Even when the Bush administration altered its policies during Bush’s second term, it rarely disavowed its earlier international legal claims.

For example, in the jus ad bellum context, in late 2001, the Bush administration articulated the view that international law allowed the United States to use force in the territory of other states to fight a transnational armed conflict against a nonstate actor (i.e., Al Qaeda). Embedded within this assessment were several controversial claims: (1) a nonstate group could undertake an attack so significant that it constituted an “armed attack” under Article 51 of the United Nations Charter, thus triggering a state’s right to use force in self-defense; (2) the United States could respond to that attack by targeting group members wherever they were found, including in states other than the one from which the members launched the attack; and (3) having determined that the United States was involved in an armed conflict with Al Qaeda, the United

4 For instance, in 2006, the Bush administration curtailed the use of secret detention sites abroad but never asserted that the use of those facilities was inconsistent with international law. White House Press Release, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), at https://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html.
States need not evaluate whether the level of hostilities in any one state rose to the level of an armed conflict before conducting attacks against the group’s members inside that state. At first, the U.S. position did not seem to reflect limits imposed by the sovereignty of the state in which the nonstate actors were operating, though by 2006, the U.S. government framed its authority to use force as geographically constrained by the sovereignty of other states.

Famously, the Bush administration also asserted that it was permissible to use force in what it termed preemptive self-defense. In its 2002 National Security Strategy, which expressed U.S. concerns about rogue states, terrorism, and weapons of mass destruction, the administration declared:

> The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy’s attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.

At the time, the doctrine of preemption created widespread concern among other states and international lawyers. As former United Kingdom legal adviser Daniel Bethlehem explained,

> The 2002 National Security Strategy invented new language and, in doing so, suggested that the United States was moving away, with deliberate thought and careful consideration, from established tenets of international law. And when new language was invented unilaterally, and by the United States, it justifiably gave cause for concern that the new policy based on the new language would be avowedly unilateralist as well.

The Bush administration also adopted assertive and controversial interpretations of the *jus in bello*. In explaining why it would not give Taliban detainees “prisoner of war” status, the United States argued that Article 4 of the Third Geneva Convention required state armed forces to meet conditions typically (but not indisputably) thought to apply only to militias associated with state forces. Likewise, the Bush administration declined to provide Article 5 tribunals to Taliban detainees to assess their eligibility for “prisoner of war” status, because the president determined categorically that Taliban members fell outside the coverage of Article

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4.11 The U.S. Department of Justice also notoriously took a very broad view of what interrogation techniques would not violate the U.S. statute implementing the Convention Against Torture, though its opinions were only made public in 2009. Further, the Bush administration firmly asserted its views on the application of human rights law to military activities. In particular, it made clear that it did not interpret the International Covenant on Civil and Political Rights as applying to individuals held at Guantanamo.

Notwithstanding these and other broad legal claims, in some cases, the Bush administration may not actually have taken actions that relied on the outer limits of these claims. For instance, the Bush administration arguably never invoked the concept of preemptive self-defense to justify the use of force against either a state or nonstate actors in advance of an armed attack. Its use of force in Iraq in 2003 was primarily grounded in an interpretation of several UN Security Council resolutions that, in the United States’ and United Kingdom’s view, authorized force. Similarly, the Bush administration’s legal arguments about which individuals were subject to detention or targeting outside Afghanistan and Iraq included low-level members of Al Qaeda. However, the Bush administration seemingly only targeted senior members and leaders of Al Qaeda in places such as Yemen or Somalia. Finally, even after it closed detention facilities run by the Central Intelligence Agency (CIA), the Bush administration publicly reserved the right to maintain overseas detention facilities to hold and interrogate terrorists. It does not appear to have reopened these facilities, however. It is ironic that the Bush administration never sought to take advantage of that fact by portraying its policies as more modest than it did.

II. THE OBAMA ADMINISTRATION’S EXECUTIVE MINIMALISM

Bickel famously advocated for the use of “passive virtues” in judicial decision making, pursuant to which courts avoid deciding socially or politically divisive questions by using tools such as standing, ripeness, and the political question doctrine.

11 Memorandum from Assistant Attorney General Jay S. Bybee, supra note 10, at 31.
14 Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba, at 4 (Mar. 10, 2006), available at http://www.state.gov/documents/organization/98969.pdf (“By its express terms and clear negotiating history, the International Covenant on Civil and Political Rights (‘ICCPR’) applies to each State Party only with respect to ‘individuals within its territory and subject to its jurisdiction.’ The ICCPR thus does not cover operations in Guantanamo, which is not within U.S. territory.”); see also ICCPR, Dec. 16, 1966, 999 UNTS 171.
17 James Risen & David Johnston, Threats and Responses: Hunt for Al Qaeda; Bush Has Widened Authority of C.I.A. to Kill Terrorists, N.Y. TIMES, Dec. 15, 2002, at http://www.nytimes.com/2002/12/15/world/threats-responses-hunt-for-al-qaeda-bush-has-widened-authority-cia-kill.html (“The president has given broad authority to the C.I.A. to kill or capture operatives of Al Qaeda around the world, the officials said. But officials said the group’s most senior leaders on the list were the agency’s primary focus.”).
19 Bickel, supra note 2, at 42–47.
Bickel’s ideas, arguing that, in taking up difficult and controversial questions, courts should issue modest, narrow decisions that attract consensus rather than articulate bold, high-profile constitutional visions in their opinions.20 This approach finds value in both “substantive minimalism”—deciding a legal issue as narrowly as possible—and “rhetorical minimalism”—saying no more than necessary about one’s decision. While an actor will often choose to employ both substantively and rhetorically minimalist approaches in a given case, that actor may not do so in all cases. For example, one might take a substantively minimalist approach to a legal question by adopting a modest interpretation of what the law allows, but take a rhetorically maximalist approach to the legal question by choosing to describe one’s reasoning and its context and limits in detail, at length, and in multiple fora.

Both Bickel’s and Sunstein’s theories derive in part from the judiciary’s lack of democratic accountability and therefore cannot be straightforwardly mapped onto actions by the executive branch of government, which is democratically accountable to voters. Nevertheless, some of the same advantages that flow from a judicially “modest”21 or “minimalist” approach to domestic law also flow from a minimalist executive approach to international law. Among the benefits that may accrue from a minimalist approach to decision making are the ability to attract broader consensus around the narrower decision; to leave greater room for further reflection and debate among relevant political actors; and to make fewer (and less-damaging) errors.22 But the minimalist approach also has costs: it diminishes predictability for those trying to assess what the law is,23 and it may commit the decision maker to little in her future decisions, thus inviting unprincipled decision making.24

The Obama administration’s approach to international law and policy has features that may be termed “minimalist” and bears both the benefits and costs that accompany such an approach.25 An executive branch that intends to act in a minimalist way toward international law will (1) make an effort to decide only those difficult international law questions that it must; (2) when it takes a position, adopt as narrow a position as possible that still allows it to achieve its operational goals; and (3) not say more than it must about why it believes the act to be legal. In some cases—though certainly not all—the Obama administration has adopted

20 SUNSTEIN, supra note 3, at 9; Cass R. Sunstein, Foreword: Leaving Things Undecided, 110 HARV. L. REV. 4, 14 (1996) (defining minimalist judge as one who avoids broad rules and theories and focuses only on what is necessary to decide particular cases).


22 SUNSTEIN, supra note 3, at 4.

23 Id. at 48.


25 Parallels exist between the Obama administration’s approaches to international law and constitutional law in the area of war powers. In the domestic context, the administration has sought to avoid broad and controversial interpretations of the president’s Article II powers, just as it has sought to avoid broad interpretations of international law. See Michael D. Ramsey, Constitutional War Initiation and the Obama Presidency, 110 AJIL 701 (2016) (noting that, in the conflicts against Al Qaeda and the Islamic State in Iraq and Syria (ISIS), Obama principally relied on congressional authorization even though independent presidential power justifications were available). At the same time, as we might expect, the administration has not expressly taken expansive Article II claims off the table, leaving to another day core questions about the constitutional allocation of war powers.
policies that claim a narrower scope of authority and therefore are more likely than the Bush positions to garner international support; has avoided announcing legal positions that are broader than necessary to achieve policy goals; and, by virtue of its policy positions, has avoided resolving some difficult legal questions.

This part first describes specific examples of Obama administration minimalism, including its 2013 targeted killing policy, its widespread reliance on other states’ consent to use force, its policy regarding covert action, and its approach to targeting in areas of active hostilities. It then identifies several situations in which the Obama administration did not adopt a minimalist approach to the *jus ad bellum* or *jus in bello*. The part concludes by demonstrating how the Bush administration’s maximalist approach enabled Obama’s minimalism.

**Examples of Executive Minimalism**

*Targeted killing policy.* Obama’s targeted killing policy offers a good example of substantive executive minimalism. In 2013, after extensive public discussions and critiques of U.S. targeted killings, the president announced a policy governing forcible counterterrorism operations that take place away from “hot battlefields” such as Afghanistan and Iraq.\(^\text{26}\) This policy makes clear that the United States may target only a subcategory of people against whom the United States believes it legally could use force. Moreover, the policy narrows the range of individuals based on nonlegal considerations, including (presumably) an understanding that its decision to target terrorists remains controversial internationally.\(^\text{27}\) The policy states that, in this context, the United States will only use lethal force against a target who poses a “continuing, imminent threat to U.S. persons.”\(^\text{28}\) Before striking, the government must have “near certainty” that the target is present and that noncombatants will not be injured or killed. The United States has also expressed a preference for capturing an individual where feasible, rather than killing him or her.\(^\text{29}\) Each of these caveats exceeds what the law of armed conflict currently requires.

The policy explicitly preserves wider flexibility for the president when necessary, however. According to the White House’s fact sheet from 2013, these new standards and procedures “do not limit the President’s authority to take action in extraordinary circumstances when doing so is both lawful and necessary to protect the United States or its allies.”\(^\text{30}\) It thus makes clear that the rules contained in the policy do not reflect the outer legal limits of what the United States thinks international law permits, though it declines to articulate those outer limits.

*Consent to the extraterritorial use of force.* With few exceptions, the Obama administration appears to have used force against nonstate actors inside other states only with the consent of the state in which force is used. Consider the Obama administration’s December 2015 War Powers report, which discusses active military operations in Afghanistan, Iraq, Syria, Turkey,
Somalia, Yemen, Djibouti, Libya, Cuba, Niger, and central Africa. Various sources indicate that the United States conducts operations against nonstate actors in these states with the governments’ express or tacit consent. Indeed, the only U.S. military operations since 2009 that seem to have occurred without consent by the host government or Security Council authorization are the incursions into Pakistan to capture or kill Osama bin Laden and kill Taliban leader Mullah Mansour, and possibly the U.S. use of force in Syria against the Islamic State in Iraq and Syria (ISIS) and al-Nusra.

The fact that the Obama administration has likely sought and obtained consent in many use-of-force contexts is, at first glance, unsurprising and salutary. The Obama administration sought to appear more attentive than the Bush administration to partner-state equities and more interested in multilateral actions. Thus, for the Obama administration, obtaining a partner state’s consent before using military force in the partner state’s territory presumably seemed natural. In addition, obtaining host-state consent helps ensure that the intervention maintains a lower and less contested international profile. Further, from the perspective of the acting state, obtaining consent from the host state incurs fewer diplomatic and transaction costs than obtaining Security Council authorization to use force in that state without its consent.

At the same time, the Obama administration has taken a rhetorically minimalist approach to its legal justifications for these operations. It has rarely detailed the precise basis for various forcible acts, including in cases in which more than one legal theory is available. A more maximalist administration might have justified its actions on the basis of more contested legal justifications, such as humanitarian intervention or the idea that a state may use force in self-defense in a host state’s territory against nonstate actors where the host state is unwilling or unable to suppress the threat. A maximalist administration also would have announced clearly its legal basis for acting.

Obama’s apparent preference for consent thus reflects an executive branch interest in employing narrower or less controversial legal justifications where possible, without repudiating broader legal positions that the government may wish to use later. This approach is useful because the executive will not always be able to obtain host-state consent. Saying little publicly about the use of consent offers the United States other advantages as well: it allows the United States to protect those states that may have given their consent in secret and to avoid publicly addressing difficult legal questions that can accompany consent. For instance, where the United States apparently has received consent from the host state, the United States rarely clarifies whether the host state has given consent to the United States’ use of force to assist the host state in fighting its own conflict or, alternatively, whether the host state is allowing the United

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32 See, e.g., David Rohde, The Obama Doctrine, FOREIGN POL’Y, Feb. 27, 2012, at 65, 65 (“Just as importantly, the administration’s excessive use of drone attacks undercut[s] one of its most laudable policies: a promising new post-9/11 approach to the use of lethal American force, one of multilateralism, transparency, and narrow focus.”).
33 A Security Council resolution authorizing force requires an affirmative vote of nine states and no veto by a permanent member of the Council. See UN Charter, Art. 27.
States to engage in forcible action in which the host state is uninvolved. In cases ranging from Yemen to Somalia to Mali, U.S. forces might either be assisting the host state in fighting a non-international armed conflict against rebel or terrorist groups or be fighting members of Al Qaeda and associated forces in their conflict with the United States.\textsuperscript{35} The existence of host-state consent allows the United States to avoid having to navigate the question, even though the United States might have different obligations and limitations depending on the scenario in which it finds itself.\textsuperscript{36}

The policies of the Bush and Obama administrations with regard to consent are less divergent than in other examples offered here. Like the Obama administration, the Bush administration sometimes sought consent from states before conducting military or intelligence operations in their territories.\textsuperscript{37} But Obama’s use of consent seems different in an important way. The types of activities that Obama has undertaken are more frequent, more widespread geographically, and lower profile.\textsuperscript{38} Jack Goldsmith has noted that Obama “ordered approximately ten times as many drone strikes as Bush, which killed seven times as many people, and he did so in seven countries as opposed to Bush’s five.”\textsuperscript{39} In 2015, the U.S. forces had an average deployment of 7,200 personnel per week in 139 nations overall, though most were involved in training and support and not combat operations. These statistics suggest that the consent that the United States has received to use force during the Obama administration is more widespread than during the Bush administration. At the same time, the wider range of contexts in which force is used makes it more troubling that the legal justifications for various actions remain obscured.

\textit{Covert action.} Like its targeted killing policy, the Obama administration’s approach to covert intelligence activities primarily reflects substantive minimalism, though one also can identify an interest in avoiding broad rhetorical claims about what international law requires or allows. Compared to past administrations, the Obama administration has talked more publicly about the relationship between intelligence activities and law. These disclosures have been necessary as the public gains more knowledge about intelligence activities. In short, the Obama administration has expressed a policy preference for having its intelligence community comply with various bodies of international law.\textsuperscript{40} At the same time, one will search in vain for a U.S. government statement that announces with precision which rules of international law do and do not apply to intelligence activities.

\textsuperscript{35} Although French troops had the lead in fighting Al Qaeda in Mali, news reports indicate that U.S. forces have engaged in clandestine missions in Mali as well. Craig Whitlock, \textit{U.S. Sends a Handful of Troops to Mali}, WASH. POST, May 1, 2013, at A7.


\textsuperscript{37} See Condoleezza Rice, U.S. Secretary of State, Remarks en Route to Germany (Dec. 5, 2005), at http://2001-2009.state.gov/secretary/rm/2005/57643.htm (noting, in the context of revelations about secret detention facilities, that the United States respects the sovereignty of its partners, which implies that the United States obtained consent from the states hosting those sites).


For instance, Caroline Krass, during her nomination hearing to become the CIA’s general counsel, stated, in part in respect to the use of force, that “as a general matter, the United States respects international law and complies with it to the extent possible in the execution of covert action activities.”41 Similarly, the 2013 targeted killing policy—which facially applies to both the U.S. Defense Department and the CIA—states, “Capture operations are conducted only against suspects who may lawfully be captured or otherwise taken into custody by the United States and only when the operation can be conducted in accordance with all applicable law and consistent with our obligations to other sovereign states.”42 This policy allows the United States to avoid stating definitively which international laws apply to intelligence activities, while attempting to assuage concerns that U.S. intelligence activity is unregulated.

At times, the Obama administration has been more specific about the relevance of certain bodies of international law, including the law of armed conflict. In 2010, then-legal adviser Harold Koh stated: “[I]t is the considered view of this Administration—and it has certainly been my experience during my time as Legal Adviser—that U.S. targeting practices, including lethal operations conducted with the use of unmanned aerial vehicles, comply with all applicable law, including the laws of war.”43 Because journalists had reported that both the CIA and the U.S. Defense Department used drones to strike Al Qaeda members, many understood Koh’s speech to apply to both agencies.44 Then-CIA general counsel Stephen Preston later made a similar representation: “[T]he Agency would implement its authorities in a manner consistent with the four basic principles in the law of armed conflict governing the use of force: Necessity, Distinction, Proportionality, and Humanity.”45 Yet Koh’s and Preston’s statements stop short of asserting that the CIA follows the law of armed conflict out of a sense of international legal obligation. It is possible, for instance, that the CIA complies with the law of armed conflict to avoid potential criminal liability under the U.S. War Crimes Act.46

In sum, the Obama administration’s articulated policy preference for compliance with international law reflects an awareness of the controversial nature of many U.S. intelligence activities, and it signals an interest in demonstrating U.S. self-constraint. At the same time, the administration has avoided delineating with precision where and when the United States thinks that its intelligence community must comply—or may avoid compliance—with international law, without foreclosing future legal arguments to either effect.

**Targeting in areas of active hostilities.** The Obama administration’s interest in avoiding unnecessary decisions about controversial legal theories extends also to targeting in areas of active hostilities. For example, in late 2015, the U.S. military decided to target ISIS oil trucks in Iraq. Before striking the trucks, it dropped flyers in the area that it planned to target as a

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41 Senate Select Committee on Intelligence, Questions for the Record: Caroline D. Krass (undated) (emphasis added), available at http://www.intelligence.senate.gov/sites/default/files/hearings/krasspost.pdf (noting additional prehearing questions).
42 Targeted Killings Policy, supra note 26 (emphasis added).
46 18 U.S.C. §2441. Failing to comply with the principle of distinction during an armed conflict would potentially constitute murder under §2441(d)(1)(D) or intentionally causing serious bodily injury under §2441(d)(1)(F).
means of taking precautions. The flyers warned truck drivers to flee the area because of the impending strikes. Where feasible, a state conducting military operations must undertake precautions to spare the civilian population from the effects of attacks. On the other hand (and more controversially), a state might conceivably conclude that individuals driving oil trucks in such a situation were targetable because they were civilians directly participating in hostilities. Contemporaneous news reports merely indicate that the United States dropped the leaflets to “reduce the risk of harming civilians,” but reflect no U.S. statements about the legal status of the drivers.

As a result, we cannot extrapolate whether the U.S. government believes that the individuals driving the oil trucks for ISIS are civilians not involved in the armed conflict (who could not be targeted) or are civilians taking direct part in hostilities (who could be). If the government had conducted the strikes without such precautions, it would have indicated that the government saw the drivers as directly participating in hostilities. And we cannot extrapolate whether the United States thought that it would have needed to include the drivers as civilians in its proportionality analysis, if it had chosen to hit the tankers while the drivers were still in them. By leafleting, the United States rendered the targeting consistent with either of two legal theories. The administration’s policy decision is commendable, and its substantively and rhetorically minimalist approach means that actors with different preferred legal theories all can view the action as consistent with international law. However, this course of action also obscures the U.S. view of what international law permits.

**Exceptions to the Minimalist Approach**

Not all cases fit this mold of adopting more modest policy positions and avoiding unnecessary decisions and statements about the outer parameters of international law. In several situations, as described below, the Obama administration has made deliberate efforts to clarify the limits of international law. In at least one case, the Obama administration seemed prepared to use force in a context that would require a maximalist approach to international law.

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51. For two views, see Beth Van Schaack, Targeting Tankers—and Their Drivers Under the Law of War (Part 2), JUST SECURITY (Dec. 3, 2015), at https://www.justsecurity.org/28071/targeting-tankers-drivers-law-war-part-2 (treating the precautions as probably legally required), and Butch Bracknell, Warnings to Civilians Directly Participating in Hostilities: Legal Imperative or Ethics-Based Policy?, LAWFARE (Nov. 29, 2015), at https://www.lawfareblog.com/warnings-civilians-directly-participating-hostilities-legal-imperative-or-ethics-based-policy (treating the precautions as a policy decision).

52. The U.S. legal position might have been ambiguous even if the United States had not chosen to target the trucks. However, understanding the parameters of the U.S. legal and policy positions seems more pressing because the United States chose to act in this situation and likely will face similar situations in the future.

53. See infra text accompanying notes 56–61.

54. See infra text accompanying note 61 (describing Obama’s “red line” in Syria).
And in another case, the Obama administration took a Bush-like approach by asserting and acting in reliance on a broad claim about what the customary law of armed conflict allows.\footnote{See infra text accompanying notes 63–65 (discussing Obama administration’s approach to targetability of “war-sustaining” capabilities).}

The Obama administration made deliberate efforts to clarify—not obscure—the parameters of the U.S. position on an international law question in its treatment of detainees and in the fight against Al Qaeda. In the first week of his administration, Obama issued an executive order clarifying the legal and policy limits on interrogation, to ensure that all U.S. interrogations were consistent with the Geneva Conventions and the Convention Against Torture.\footnote{Exec. Order 13,491, sec. 3(a), 74 Fed. Reg. 4893 (Jan. 22, 2009), at https://www.whitehouse.gov/the-press-office/ensuring-lawful-interrogations (citing Geneva Conventions and Convention Against Torture).}

This action reflects a situation in which the executive displayed an approach that was substantively minimalist but rhetorically maximalist: Obama adopted a relatively narrow substantive position about what types of interrogation are permissible under international law, while stating clearly, publicly, and repeatedly the U.S. legal position and asserting that certain acts constitute torture.\footnote{See, e.g., White House Press Release, News Conference by the President (Apr. 29, 2009), at https://www.whitehouse.gov/the-press-office/news-conference-president-4292009 (“I believe that waterboarding was torture. And . . . whatever legal rationales were used, it was a mistake.”).}

Second, several Obama administration senior policymakers and lawyers have made a significant effort to articulate, albeit at some level of generality, the legal framework that guides the fight against Al Qaeda.\footnote{See KENNETH ANDERSON & BENJAMIN WITTES, SPEAKING THE LAW: THE OBAMA ADMINISTRATION’S ADDRESSES ON NATIONAL SECURITY LAW (2015) (compiling speeches).} The framework generally tracks the Bush administration’s legal theory: the United States is involved in an armed conflict with Al Qaeda and may target members of Al Qaeda and associated forces, subject to a determination that a particular state in which the United States seeks to use force has either consented or is unwilling or unable to address the threat posed by those groups. Notwithstanding the Obama administration’s efforts to be more transparent than the Bush administration on these issues, some scholars have assessed those efforts as less than fully successful. For instance, one commentator notes:

The key legal claims [in the Obama administration’s positions on targeted killing] turn out to be quite hard to pin down, because they are framed in the alternative. . . . [I]f the strike is not covered under international law by an existing armed conflict, then it may be covered by the right of self-defense.\footnote{See David Pozen, The Rhetorical Presidency Meets the Drone Presidency, NEW RAMBLER (2015), at http://newramblerreview.com/book-reviews/law/the-rhetorical-presidency-meets-the-drone-presidency (concluding that the executive has baked “ambiguity and circuitry” into its legal formulations).} Some of the speeches undoubtedly lend greater precision to the U.S. legal position, however, such as the recent discussion by U.S. State Department Legal Adviser Brian Egan of the meaning of the “unwilling or unable” test and of the term \textit{imminence} in the self-defense context.\footnote{Brian Egan, Legal Adviser, U.S. Department of State, Address at the Annual Meeting of the American Society of International Law: International Law, Legal Diplomacy, and the Counter-ISIL Campaign (Apr. 1, 2016), at http://www.state.gov/s/l/releases/remarks/255493.htm.} In one instance, the Obama administration seemed ready to take actions that would not just press up against the limits of but actually violate international law. Obama’s threat to use force against the regime in Syria after President Bashar al-Assad used chemical weapons in Syria’s
The Obama Administration's approach to the use of force in the context of the global war on terrorism presents an important case study of both minimalist and maximalist strategies. The Obama administration's approach was characterized by a focus on international law and a commitment to respecting the principles of armed conflict. At the same time, the administration took steps to expand the scope of permissible military action, particularly in the context of targeting Islamic State of Iraq and Syria (ISIS) fighters in areas beyond Iraq and Syria.

One of the key moments in this process was the Obama administration's decision to target ISIS fighters in Syria without seeking explicit congressional authorization. This decision was based on the administration's interpretation of international law, which it argued authorized the use of force in response to an imminent threat from ISIS in areas beyond Iraq and Syria. The administration's interpretation of international law was informed by a broader understanding of the legal framework governing the use of force, which it sought to reconcile with the need to protect the rights of civilians and comply with international humanitarian law.

This approach was in contrast to the Bush administration's more expansive use of military force and its interpretation of international law, which placed a greater emphasis on the need to protect the rights of civilians and comply with international humanitarian law. The Obama administration's approach was also in contrast to the minimalist approach of President George W. Bush, who sought to limit the use of military force to self-defense and the use of force as a last resort.

The Obama administration's approach to the use of force was thus a reflection of its commitment to minimalist strategies in the context of international law. This approach was characterized by a focus on international law and a commitment to respecting the principles of armed conflict. At the same time, the administration took steps to expand the scope of permissible military action, particularly in the context of targeting ISIS fighters in areas beyond Iraq and Syria.

This approach was in contrast to the Bush administration's more expansive use of military force and its interpretation of international law, which placed a greater emphasis on the need to protect the rights of civilians and comply with international humanitarian law. The Obama administration's approach was also in contrast to the minimalist approach of President George W. Bush, who sought to limit the use of military force to self-defense and the use of force as a last resort.

The Bush/Obama Interplay

Although the Bush and Obama administrations have viewed international law quite differently, the Bush approach facilitated the Obama approach. The Obama administration did not need to plow new ground in asserting the global nature of the armed conflict with Al Qaeda, the Taliban, and associated forces. Nor did Obama have to carve a new path to employ the use of the “unwilling or unable” test or the notion that nonstate actors can commit armed attacks that trigger a state’s right of self-defense. Likewise, the Bush administration had already laid out legal justifications in support of broadening the interpretation of “imminence” in the context of self-defense. Obama did not have to claim for the first time that it was permissible both to detain members of Al Qaeda and the Taliban until the end of the conflict and to decline to treat them as prisoners of war or protected persons.66 The Bush administration had already laid all of that groundwork.

62 Egan, supra note 60.
63 Id.
64 Ryan Goodman, The Obama Administration and Targeting “War-Sustaining” Objects in Noninternational Armed Conflict, 110 AJIL 663, 663 (2016) (“President Obama embraced what many in the international law community long regarded as off-limits: targeting war-sustaining capabilities, such as the economic infrastructure used to generate revenue for an enemy’s armed forces.”).
65 Id. at 663.
As a result, the Obama administration earned credit from international partners by crafting narrower policies in certain areas, while retaining significant (but more discreetly employed) legal flexibility to conduct its military and intelligence operations. In part, the Obama administration was able to continue to rely on these legal arguments because the Bush administration had worked hard to publicize, explain, and justify them. Officials such as then-U.S. State Department legal adviser John Bellinger had already discussed the merits of these arguments with European allies. As he noted, “In its second term, the Bush administration made significant efforts to clarify the legal rules applicable to detention and engage U.S. allies in discussions on international legal issues.” To the extent that these discussions mitigated some European concerns, Obama’s continuation of these foundational theories of the conflict may have proved less contentious, while his ongoing use of those theories further legitimized them.

Had the Obama administration been the first to stake out legal theories related to the use of force against Al Qaeda in different geographic locations, the Obama administration would not have been perceived as minimalist at all, in either a substantive or rhetorical sense. That is, minimalism has a relative aspect to it, and the Obama administration has benefited from the fact that the Bush administration had been (or at least was perceived as being) maximalist in its legal positions. Additionally, Obama probably found it quite easy to take a minimalist approach because, in acting against the background of broad Bush administration legal theories, he would have felt comfortable that he retained particular flexibility to employ those theories if his more minimalist approach proved insufficient to support the military operations required.

### III. Benefits and Costs of Executive Minimalism in International Law Discourse

The Obama administration had many reasons to pursue a minimalist approach to international law. Most prominently, this approach diminished political and legal conflicts with allies while retaining future operational flexibility. At the same time, such an approach imposed underappreciated costs on the United States, including a reduced ability to shape international law doctrines. This section details the various benefits and costs that flow from executive minimalism in the context of decisions about and interpretations of international law.

#### Benefits

A minimalist approach to assertions about international law offers diverse benefits to the minimalist state. Most notably, a minimalist approach, such as the one that Obama pursued, allows for greater dialogue with other states about the meaning and outer bounds of international law. At times, the Bush administration came across as uninterested in the views of other states about what international law required. Saying little about what one views as the outer...
parameters of international law suggests a greater recognition that a single state alone cannot make or determine those outer parameters and invites interstate dialogue about the law’s meaning. It might also improve relations (or at least mitigate tensions) with states whose assistance the United States might desire in military or other areas.

Second, as a related matter, employing more modest policies that decline to adopt bold legal positions also can minimize tensions with allies, who might feel the need to publicly disagree with a clearly stated legal position. Because international law is authored not by the United States alone but by states together, other states may resist strongly when an individual state (such as the United States) attempts to assert, without consultation, the meaning of a particular international legal rule, especially where that meaning is either controversial or particularly beneficial to the state announcing the interpretation. More modest policies and limited public rhetoric about international law’s scope provide less of a target for opponents to shoot at and less of an incentive to shoot. Further, rhetorical minimalism—including silence in the face of several possible legal theories—can minimize clashes with states that accept one available theory but may reject other theories.

Third, executive minimalism can avoid broad decisions that produce unforeseen adverse consequences. Decisions that try to anticipate and regulate a wider set of circumstances than the ones presented at the time will often inadvertently sweep in situations for which the decision is ill-suited. At the same time, actions taken pursuant to particular executive policies still produce some form of state practice relevant to customary international law, indicating a U.S. view that “at least action X” is lawful, even if the United States remains silent about whether action X+1 would also be lawful.

Fourth, following a more restrained operational policy might allow officials inside the U.S. government who argue for a more modest legal position to eventually persuade others inside the government that a broader assertion of legal authority is unnecessary to meet U.S. security needs. Forcing the government to take a firm legal position early or publicly may entrench a more aggressive position to preserve greater flexibility for unknown future scenarios.

Fifth, executive minimalism even offers advantages domestically. Policy-based decisions authorizing actions within the outer bounds of international law leave more decision-making space for future administrations to move either further in from or closer to the edge legally, and to do so in a way that does not require future administrations to affirmatively contradict legal statements of past administrations. Policy-focused minimalism also reduces internal decisional costs within a single administration, particularly where two executive agencies do not agree on the outer legal limit.

First term, often gave the impression that it did not need to . . . listen to others.”). On an early trip to Europe, President Obama critiqued the Bush administration’s approach as overly unilateral, stating, “I know that there have been honest disagreements over policy, but we also know that there’s something more that has crept into our relationship . . . . So I’ve come to Europe this week to renew our partnership, one in which America listens and learns from our friends and allies . . . .” White House Press Release, Remarks by President Obama at Strasbourg Town Hall, Strasbourg, France (Apr. 3, 2009), at https://www.whitehouse.gov/the-press-office/remarks-president-obama-strasbourg-town-hall.

71 SUNSTEIN, supra note 3, at 4 (noting that a court that “leaves things open will not foreclose options in a way that may do a great deal of harm”).

to plots against the United States or who were also part of Al Qaeda allowed the president to avoid making a final determination on that difficult legal issue.

Similarly, the U.S. targeted killing policy allows U.S. national security agencies to avoid deciding with finality any difficult international law questions that would arise absent this narrowing. For example, because the 2013 targeted killing policy limited the types of situations in which the United States will target low-level members who are part of Al Qaeda, fewer circumstances will arise in which the United States will need to decide hard questions about what types of actions render someone “part of” this group. Likewise, by setting a very low tolerance for civilian harm, the administration avoids having to make difficult legal decisions about what level of collateral damage is permissible when using force inside a state with which the United States is not in conflict. Further, the targeted killing policy, which indicates that the government will use force only to “prevent or stop attacks against U.S. persons,” takes off the table “bargaining chip” strikes in which the United States carries out attacks at the request of other states against the latter’s domestic insurgencies.74 These “bargaining chip” strikes raise complicated and unresolved questions about what legal rules apply to the conduct of such strikes and whether the state conducting the strike has an obligation to evaluate the laws regulating the host state’s conflict.75 In contrast, a more maximalist policy that embraced the targeting of all members of Al Qaeda and associated forces, while legally justifiable, would require more controversial legal analyses and public justifications.

It is not difficult to understand why the Obama administration found a minimalist approach appealing. In several contexts, the Obama administration presumably concluded that the Bush administration had claimed more authority under international law than the Obama administration believed was required to achieve Obama’s military and operational goals. It was therefore both possible and desirable to issue policy guidance limiting the claimed authority to that which was necessary to accomplish those goals. But armed conflicts are rife with uncertainty, and the Obama administration—operating under a president who reportedly told his national security team, “Maintain my options”—likely worried about foreclosing future reliance on some of those broader legal claims.76 As a result, the Obama administration left at the ready some clearly articulated, broad international legal positions as precedent if and when the narrower policies proved unmanageable. The Obama administration thus benefited from the international perception that it was more minimalist than its predecessor without having to sacrifice future legal flexibility.

supporters of Al Qaeda detained away from the “hot battlefield” were detainable under international law and noting that U.S. Department of Justice’s Office of Legal Counsel was “not prepared to state any definitive conclusion”).

73 Charlie Savage, At White House, Weighing Limits of Terror Fight, N.Y. TIMES, Sept. 16, 2011, at A1 (“Defense Department lawyers are trying to maintain maximum theoretical flexibility, while State Department lawyers are trying to reach out to European allies who think that there is no armed conflict, for legal purposes, outside of Afghanistan, and that the United States has a right to take action elsewhere only in self-defense, the official said. But other officials insisted that the administration lawyers disagreed on the underlying legal authority of the United States to carry out such strikes.”).


75 Deeks, supra note 36.

76 Jo Becker & Scott Shane, Secret “Kill List” Proves a Test of Obama’s Principles and Will, N.Y. TIMES, May 29, 2012, at A1 (noting that as Obama signed three executive orders related to Guantánamo detentions and interrogation techniques, “he was already putting his lawyerly mind to carving out the maximum amount of maneuvering room to fight terrorism as he saw fit”).
Costs

Yet the Obama administration’s minimalism in the international law arena is not without costs. First, when a state declines to articulate its legal views, it slows the development of international law by suppressing the action/reaction dynamic between states.77 One fairly might take the view that the world’s dominant military power should be more forthcoming about its legal theories and defend them publicly with more reason-giving. Perhaps the Bush administration’s straightforward and bold assertions about the fact and scope of the armed conflict with Al Qaeda and the “unwilling or unable” doctrine ended up attracting other states to this paradigm.78 A state that pursues a maximalist approach to international law may gain certain advantages for itself: staking out strong international law positions may create focal points for continued interstate negotiations and, ultimately, may facilitate the evolution of international law in a direction favorable to the maximalist state. Where the state pursuing a maximalist approach is a significant player on the global stage, the state can exercise significant influence on the direction of international law when it asserts that a particular rule of international law is custom, when it produces extensive state practice, or when it asserts that a particular action is consistent with international law. The Obama administration’s decision to avoid making certain legal claims in favor of policy decisions and its choices to leave unstated certain justifications for forcible action may mean that it has a reduced opportunity to shape international law doctrines related to force.

Second, when a state imposes limits on its own behavior as a matter of policy without deciding the outer bounds of its international legal authority, it often ends up creating ambiguity about what legal constraints actually exist on executive conduct. A certain amount of skepticism accompanies the United States’ use of policies. Ambiguity about whether something is a legal claim or a policy claim makes others distrustful, especially given the perception that U.S. policy is malleable and opportunistic.79 Because it tends to be easier inside the executive branch to change policy views than to change legal views, acts taken pursuant to policy assertions may provide less stable guidance to other states about what future U.S. actions may look like.

Third, for a leading military power that has publicly recognized that others will follow its lead,80 a failure to be precise about the outer legal limits and about underlying legal justifications allows other states to make problematic claims about what international law permits. The use of legal theories that necessarily remain obscured may expose the United States to undesirable interpretations by other actors about the parts of the operation that are public.81 For

77 See generally Matthew Waxman, Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4), 36 YALE J. INT’L L. 421, 448 (2011) (suggesting, in the context of similarly opaque cyber operations, that “the processes of claims and counterclaims moving toward a predictable, stable outcome, or the accretion of interpretive practice commanding broad consensus, will likely be slow and uncertain”).
78 Ashley Deeks, UK Air Strike in Syria (with France and Australia Not Far Behind), LAWFARE (Sept. 9, 2015), at https://www.lawfareblog.com/uk-air-strike-syria-france-and-australia-not-far-behind (describing adoption by various states of armed conflict paradigm against ISIS and their apparent reliance on the “unwilling or unable” test).
instance, because states often insist that their consent remain secret, operations taken pursuant to secret consent may be construed in different ways by outside observers. In 2013, U.S. military and intelligence officials entered Libya and captured Abu Anas al-Liby, whom the U.S. Justice Department indicted for his role in the 1998 bombings of U.S. embassies in Kenya and Tanzania. In news reports, anonymous U.S. officials asserted that they had Libya’s consent to his removal from Libya. But some Libyan officials denied this claim.82 Even assuming that the United States had received Libya’s secret consent, another state might view the al-Liby example as a case in which the United States rendered someone on an unclear legal basis, in the face of Libyan nonconsent. The third state may seek to use that perceived precedent in ways that the United States would deem unlawful, and it may be difficult for the United States to criticize publicly the third state’s interpretation without revealing the secret host-state consent.

Some of these concerns may be magnified because the Obama administration has operated against a background of certain broad legal claims and prior precedents set by the Bush administration. Clearer statements about the limits of international law, including in the areas of rendition and conditions of confinement, could minimize the value of some of those precedents in the United States and by other states. Perhaps ironically, then, the extent to which one prefers executive minimalism may depend on the extent to which one approves of the existing international law precedents in that state. Those who dislike the precedent will dislike executive minimalism, at least as long as the disfavored precedents endure.

IV. CONCLUSION

Like the Bush administration, the Obama administration has conducted considerable U.S. military and intelligence activity overseas. In a variety of these contexts, the Obama administration has pursued an approach to international use-of-force issues that can be captured by the idea of “executive minimalism.” The administration has tried to establish policies that reach no further than necessary to achieve a particular operational goal, that avoid resolving difficult international legal questions unnecessarily, and that avoid broad statements about U.S. claims.

In adopting this strategy, the Obama administration has benefited by establishing a narrative of restraint relative to the Bush administration and by alleviating pressure from critics who feared the former administration’s more maximalist approach to these international law doctrines. At the same time, the Obama administration has not renounced many of the broad legal claims made by the Bush administration, leaving unsettled whether and to what extent the United States still believes that it is legally justifiable to rely on those broad interpretations of international law.83 Offering clearer views about the U.S. government’s international legal positions undoubtedly incurs costs, many of which are articulated above. Notwithstanding these costs, the U.S. executive branch can accrue significant benefits by asserting both generalized and specific articulations of international law. Because the Obama administration pursued a minimalist approach in the *jus ad bellum* and *jus in bello* contexts described above, it forewent those benefits. As a result, the administration’s international war powers legacy will be a modest one.


83 As discussed above, in certain situations the Obama administration actually renounced Bush administration legal positions or adopted those positions wholesale.