Choosing war: a constitutional and ethical evaluation of the U.S. response to 9/11 in OIF and OEF

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Choosing War
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Garen Marshall

ABSTRACT

Terrorism, which is often politically motivated, is an intentional act or threat of violence against noncombatants that is performed with the aim of influencing the actions of a third group. Governments may respond to such acts through the paradigm of war (which emphasizes killing or capturing enemy combatants) or the paradigm of crime (which emphasizes arresting and prosecuting perpetrators). In framing the nation’s geopolitical response to the attacks of September 11, 2001, the Bush administration primarily applied the war model (through Operations Iraqi and Enduring Freedom: OIF and OEF) but also incorporated some elements of the crime paradigm. In order to evaluate the administration’s use of these paradigms in the international response to 9/11, the war powers of the President are first analyzed through the lens of the U.S. Constitution and other relevant legal documents (including the Insurrection and Posse Comitatus Acts). The analysis of this thesis first concludes that by responding to 9/11 through OEF and OIF, the Bush administration acted within the parameters of the Constitution. As an additional method of evaluation, OEF and OIF are then analyzed according to principles of Just War Theory (jus ad bellum and jus in bello). Through this analysis, the thesis concludes that although OEF has been better than most previous wars, neither OIF nor OEF have been completely acceptable.

THESIS STATEMENT

The U.S. response to 9/11 in OIF and OEF has been constitutionally sound but not completely ethical according to a rights-based, just war analysis.
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Introduction

At 8:46 a.m. on Tuesday September 11, 2001, American Airlines Flight 11 crashed into the North Tower of the World Trade Center in Lower Manhattan. As the U.S. came under the largest attack since Pearl Harbor, I sat across the Upper New York Bay in my eleventh-grade American History class trying to make sense of what had occurred. We were locked in the classroom for several hours as the school’s administrators tried to figure out how to handle the situation. By the time we were released I had already decided that I would join the military no matter where it would take me.

In March 2003, two days after my eighteenth birthday, I enlisted in the U.S. Navy and planned to become an explosive ordnance disposal (EOD) technician. After learning how to disarm every type of explosive device in existence, I quickly began deploying to the Middle East in support of the Bush administration’s War on Terror.

My primary responsibility during my deployments to the Middle East was to disarm improvised explosive devices (IEDs) left by insurgents to kill civilians and coalition troops. An additional responsibility in my role as an EOD technician was to conduct post-blast analysis on sites of significant insurgent-performed attacks that had involved explosives. In those cases I was to use my expertise in explosives to analyze what had happened at the scene, including making conjectures about who had performed the attack and by what means.

On April 15, 2008 I was tasked with performing a post-blast analysis in Baquba, Iraq. When I arrived on the scene it turned out that a vehicle-borne IED had been driven into the center of a crowded marketplace filled with civilian men, women, and children. In my investigation, I found that the attacker had been an Iraqi police officer who filled the trunk of
his police cruiser with explosives in order to kill as many civilians as possible, along with a couple of Iraqi soldiers. Among the dead were a woman, her six-year-old daughter, and her five-year-old son. A bus that had flipped over during the explosion (one of eight vehicles destroyed) landed on the mother and her daughter, most likely killing them instantly. The boy, on the other hand, was not completely crushed so he lived long enough to spend his last few minutes looking at his dead mother and sister. A few meters away, in the car directly behind the VBIED, the decapitated driver still held what remained of his arms aloft at the wheel.

When I returned to base I was greatly disturbed. Certainly, part of being deployed to a war zone is learning to detach your emotions from what is going on around you. But when I thought about the children and all the people whose lives had been so brutally ended that day, I was at a loss for how a person could do such horrible things to innocent people. I eventually began to question whether our presence in Iraq was even doing any good. I had heard, at times, from several Iraqis, that they were better off after the American invasion. Yet I also wondered how many of the Iraqis (and Americans) who died in the war could have otherwise lived decent lives. It seemed natural that I came to question the morality of the war in Iraq. It is that questioning of the morality of war which was the impetus for this paper.

My original reason for joining the military was 9/11. The enormity of the attacks made it seem clear from that day, that we would respond militarily. At the time, everything seemed black and white. But in retrospect, there were a lot of questions that should have been answered before we went to war: “Was 9/11 a crime or an act of war?” “Was the Bush administration acting within their constitutional powers in deciding to go to war?” And
finally, “Were the wars, as a response to 9/11, ethically justified?” It is these questions that I will attempt to answer here.

In Section I of this paper, I will discuss what terrorism is. Although identifying instances of terrorism may at first appear straightforward, competing definitions from key stakeholders complicate this process significantly. In an effort to establish a shared definition for the remainder of the thesis I consider who it is that can perform acts of terrorism, who the intended targets are, and what the goals of terrorism must be. In Section II, I will go on to describe the differences in methods for responding to acts of terrorism. I will set up what will be described as the war and crime paradigms (the war paradigm having an emphasis on killing or capturing enemy combatants, and the crime paradigm having an emphasis on arresting and prosecuting perpetrators).

In Section III I begin to analyze the Bush administration’s choice to go to war in response to 9/11. I begin this investigation by evaluating what powers the Constitution, the Insurrection and Posse Comitatus Acts, and presidential signing statements give the President in choosing how to respond to acts of terrorism. Additionally, I review recent and past case law to explain what powers the President has in choosing to prosecute enemy combatants once they are captured.

Finally, in Section IV, I will put forward a moral evaluation of the decision to go to war in Iraq and Afghanistan. By building on the groundwork of just war theorists, such as Michael Walzer, I further develop a moral theory intended to ensure that actions in war recognize the individual rights of human beings. Through the lens of this rights-based, just war theory analysis, I reveal the ethical limitations of our military endeavors in Iraq and Afghanistan.
I
Defining Terrorism

The United States Department of Defense defines terrorism as:

The calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.¹

In contrast, the U.S. Department of State defines terrorism as:

Premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience.²

Surprisingly, it seems that the definitions provided by these two organizations are vastly different. The State Department definition is much more specific in limiting who terrorist attacks are perpetrated against (noncombatants) as well as who they are perpetrated by. The Department of Defense, on the other hand, references the particular groups (governments and societies) that terrorism is intended to influence. This divergence in the defining of terrorism amongst our governmental organizations is just one of many examples. Of course, if this were only an issue of semantics it would not be a major problem, but unfortunately, the ability of national and international organizations to successfully combat terrorism relies, in part, on a common understanding of what is and what is not an act of terrorism.

One of the major difficulties in defining terrorism is that the term’s usage has changed with time. The term “terrorism” was originated during the latter part of the French

Revolution. The régime de la terreur described the governmental use of mass executions to silence opposition to the newly formed revolutionary government. For a short time la terreur enjoyed a reasonably positive connotation, since it was seen as needed to maintain order. Before long, however, the reach of la terreur grew too large and the revolutionary leader who had argued for the virtue of governmental terrorism (Maximilien Robespierre) was executed, transforming “terrorism” into the pejorative term it is considered to be today.³

Although terrorism was used at times to describe the tactics of non-governmental revolutionary and anarchistic groups in the 19th century, the early to mid 20th century led to a shift back to terrorism as a description of state-based actions (those of Italy, Germany, and Russia). It wasn’t until after WWII that terrorism came to be a description of decidedly non-state based actions. Whether as a result of the fine-tuned rhetoric of nations in the post-war world or due to the change in tactics of governmental and non-governmental groups, it seems that terrorism, as a description of non-state based actions has remained in common use through to today.

In defining terrorism, then, the first consideration should be who it is that can perform an act of terrorism. In his book, Terrorism: The Philosophical Issues, Igor Primoratz claims that an act of terrorism must have “the aim of intimidating some other people [than those attacked] into a course of action they would otherwise not take”⁴ (this being a major point of distinction between terrorism and murder). Certainly it seems that this sort of action is not dependant on the identity of the person or group performing it. In fact, some of the most historically significant acts of violence have taken exactly this form, for example, the

American atomic attacks on Hiroshima and Nagasaki as well as the British “area bombings” of German cities in WWII. In both of these instances the primary goal of the attackers was not to slaughter thousands of civilians but to break the will of the opposing military forces and governments, thereby pressuring those governments to surrender. Yet, since much of today’s discourse on the topic of terrorism seems to restrict that label to actions performed by non-state entities (as is the case in the U.S. Department of Defense definition), further specification on the criteria required for a terrorist attack is needed.

In the U.S. State Department’s definition of terrorism (referenced above), the identity of the victim is offered as a defining feature. According to the State Department, a terrorist attack is “perpetrated against noncombatant targets.” In further explanation, the State Department defines “noncombatants” as “civilians (or) military personnel who at the time of the incident are unarmed or not on duty.” The idea that there is a difference between attacks on combatant and non-combatant targets is a moral distinction. The common view of “terrorism” as a pejorative term combined with the idea that attacks on combatants are the only type that can be legitimate is likely the reason that terrorism has been restricted to attacks on noncombatants. Accordingly, when Iraqi insurgents attack a combatant U.S.

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5 Primoratz 141.
6 (When referring to acts of this nature performed by states, many laymen as well as the media will not refer to such acts simply as terrorism but will qualify the acts as state terrorism or will not call them terrorism at all). For examples of the use of the term “state terrorism,” see "US Has Endorsed Indian State Terrorism in Occupied Kashmir." Pakistan Patriot. 10 Nov. 2010. Web. 11 Nov. 2010.; "State Terrorism Stays on Having Thrown out Tamil Terrorism It Spawned." Sri Lanka Guardian. 2 Nov. 2010. Web. 11 Nov. 2010.
military convoy in Iraq it is an act of war, but when they attack civilians in a crowded marketplace, it may be (although not necessarily) an act of terrorism.

In response to the U.S. Department of State’s definition of “noncombatants” as “civilians (or) military personnel who at the time of the incident are unarmed or not on duty” it must be pointed out that their classification of some military personnel as noncombatants is far too over inclusive. Although this will be discussed in much further detail in Section IV, there is a significant moral distinction between civilians and all military personnel in the rights that they enjoy. By becoming a combatant one sacrifices some rights that a civilian does not and so whether military personnel are actively participating in hostilities is inconsequential to whether they are in the same class as civilians. As pointed out by Rutgers University Professor of Philosophy, Jeff McMahan, “It is therefore because combatants pose a threat to others that they are legitimate targets of attack; and it is because noncombatants threaten no one that they are not legitimate targets.”9 This being said, the U.S. Department of State’s restriction on acts of terrorism to those perpetrated against noncombatants is acceptable, but those noncombatants are exclusively civilian. Moreover, this does not imply that it is never wrong to kill a combatant; just that killing a combatant is not constitutive of an act of terrorism.

In discussing the distinctions between the killing of combatants and noncombatants it must, furthermore, be pointed out that some people reject the distinction completely. On one side of the argument, there are those who believe that attacks on combatants are just as

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morally impermissible as attacks on noncombatants.\textsuperscript{10} Yet, there is a strong argument to be made for the moral rights of people to defend themselves, their property, and those around them against attacks by others. In fact, in many cases it seems as though there is a moral duty to do so. If we are to say that it cannot be morally acceptable to attack combatants, we are left with a level of pacifism that is counter to the commonly accepted views of Just War Theory (which will be discussed in further detail in Section IV).\textsuperscript{11} Whether from a Kantian, Utilitarian, or Just War perspective, there seem to be significant justifications for the view that it is at least sometimes permissible to attack combatants.

On the other side of the debate, there are those who claim that it is not only morally acceptable to attack combatants but that in some circumstances it is permissible to attack those who support them (e.g., by being members of a democracy). Although many earlier terrorist groups believed that civilians should be free from attack,\textsuperscript{12} with time this view was abandoned; most noticeably in the late 20\textsuperscript{th} century. Noah Feldman outlined the growing inclusiveness of acceptable targets of violence (from the view of radical-Muslim terrorists) in a speech entitled, “Past & Future in the Middle East: 7 Years Since 9/11”: the attack on the U.S. Marine barracks in Beirut was justified because those present (although not involved in active combat) were “military occupiers.” In Arab-Israeli conflicts, women became acceptable targets since they were serving in the military. Eventually, attacks on American civilians were accepted, since democracy means that everyone is involved (although the


\textsuperscript{11} Orend

\textsuperscript{12} For example, the Russian group Narodnaya Volya claimed that, “‘not one drop of superfluous blood’ should be shed in pursuit of aims, however noble or utilitarian they might be.” See Hoffman 6.
deaths of children pose a particular problem for this assertion). It seems, thought, that this growing inclusiveness of morally acceptable targets is a problem for the distinction between the rights of combatants and noncombatants.

Because they do not directly participate in hostilities, civilians are illegitimate objects of attack. As humans we, in some sense, enjoy a right to life. This right to life should be understood not only as Thomas Hobbes understood it, as being a right to protect one’s own life, but as implying a corresponding duty on others not to interfere with one’s ability to continue living. However (as will be discussed in much greater detail in Section IV), by becoming combatants some people sacrifice their rights to life, which is why they are the only people considered legitimate targets of attack. Since combatants lack a full right to life, others also have a diminished duty to not interfere with the combatant’s right to life. This means that there is a duty not to kill civilians but that there is either a much more limited or even no duty at all not to kill combatants. For this reason, the argument that it is morally acceptable to attack noncombatants should be discarded.

So to clarify, thus far the criteria for an act of terrorism are that it be performed with the aim of influencing the actions of a group other than the one attacked and that the victims of the attack be noncombatants. These criteria seem to be satisfying in as far as they allow attacks like the Oklahoma City bombing and the U.S. Embassy bombings in Africa to be considered acts of terrorism. However, we are still left with the issue of who it is that can perform acts of terrorism. Although it is clear that non-state entities (e.g., Al Qaeda, FARC,  

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...may perform acts of terrorism, the criteria stated thus far leave the door open to the idea that states can also perform acts of terrorism. Clearly, this requires further investigation since so much of the common discourse seems to restrict the label of “terrorism” to non-state actions.

At first glance it may seem that actions that satisfy the aforementioned criteria are morally worse when performed by non-state actors. However, this view is most likely the product of life in a country where non-state actors have performed the most notorious attacks. In reality, it seems that these actions, when performed by states, not only lack moral superiority (compared to those actions when performed by non-state actors), but that, as pointed out by Igor Primoratz, they are often morally worse for at least four reasons:

- State based terrorism is typically performed on a much larger scale.
- State based terrorism usually involves secrecy, deception, and hypocrisy [of course, the same may be said about actions performed by non-state actors but it, in some sense, seems worse when it is our own government deceiving us].
- State based terrorism violates international human right declarations or conventions and agreements the states sign on to.
- States cannot say they have no alternative, for the most part.\(^\text{15}\)

Accordingly, many philosophers and political scientists alike have made the argument that “states as well as non-state groups can engage in terrorism.”\(^\text{16}\) Yet, if state and non-state actors alike may perform acts of terrorism, there must be some explanation for why the term “terrorism” is so often used as referring exclusively to the actions of non-state actors. I would attribute this discrepancy to the ability of states to control the dialogue of terrorism.

In *The Semantics of Terrorism*, Edward Herman claims, “Terrorism is mainly an instrument of the strong, who have the resources to terrorise, a frequent interest in using

\(^{15}\) Primoratz 117.

terror to keep opponents of their rule under control, and the cultural power to define terrorism to exclude themselves and pin the label on their enemies and targets [italics added].”17 Although it is not completely clear that terrorism is primarily carried out by the “strong” (since it seems most acts of terrorism are very small attacks), Herman’s observation that those with cultural power label others as terrorists explains the common usage of the term. As it is clear that state action may constitute terrorism, it is the ability of states to categorize non-state actors as terrorists that has driven mainstream terminology. Obviously it is advantageous to have your enemy labeled as a terrorist, while being immune to such a classification for similar, if not more horrendous actions.

One pervasive, yet unsuccessful method of countering the ability of strong actors to label others as terrorists, which must be addressed, is making the claim that “one man’s terrorist is another man’s freedom fighter.” For example:

Speaker A: “The 9/11 hijackers were clearly terrorists.”
Speaker B: “Well, that’s not necessarily true. You know, one man’s terrorist is another man’s freedom fighter.”

Of course, speaker A’s statement is clearly consistent with the criteria of terrorism discussed thus far, but how can this make sense if, as speaker B points out, some people may have seen the hijackers as “freedom fighters?” It seems the issue here is really that speaker B’s argument is based on a faulty assumption. When speaker B replies in this conversation, the argument he/she is really making is that “Some people may have seen the hijackers as freedom fighters. Therefore, it is incorrect to claim that the hijackers may be objectively labeled as terrorists.” It seems though that in making this claim, speaker B is assuming that

someone cannot be both a freedom fighter and a terrorist, which is certainly not true. A terrorist, by definition is someone who commits acts of terrorism. A freedom fighter is someone who fights for the goal of freedom. In comparing the two, labeling someone a terrorist describes the tactics they use, while labeling someone a freedom fighter describes their ultimate goal. So, when speaker B claims that some people see the 9/11 hijackers as freedom fighters this is perfectly consistent with the obvious fact that the hijackers were simultaneously terrorists. As speaker B’s claim will run into the same problem in every instance, it is insufficient to counter the labeling ability of strong actors (i.e., states). It seems clear, then, that powerful actors will continue to control the mainstream dialogue of terrorism. Fortunately, despite the ability of these actors to control the dialogue, it is fairly clear that there is no reason why some state actions cannot be considered terrorism. Recognizing that “terrorism” should not be restricted to describing only non-state actions leaves the growing definition of terrorism as an act of violence against noncombatants (in accordance with the State Department definition of noncombatant), performed with the aim of influencing the actions of a third group.

Another issue that must be addressed is that the U.S. Department of Defense includes threats of violence in their definition. As Sherry Colb points out, “Threats can…sometimes accomplish more than physical violence can, and when the "accomplishment" is destructive rather than benign, it might be fair to characterize the threat as "worse" at some level than the violence.”\(^\text{18}\) Yet, the fact that the effects of threats may be just as bad as those of actual violence is not the reason why the Department of Defense is correct in including some

threats of violence in their definition. At the core of terrorism is the way in which terror influences the group that is not attacked. If, for example, a group which has been known to carry out bombings in the past threatened to attack shopping malls throughout the U.S., the fear they intend to generate in shoppers and the effect they intend this threat to have on the government are just as constitutive of terrorism as if they had carried out the attacks. Of course, having not carried out the attacks is a significant mitigating factor, but the threat has still attained the aim of influencing a third group through terror, which is most certainly the essence of terrorism. Accordingly, the definition of terrorism must be expanded to include not only acts of violence but threats of violence as well. This adjustment will leave the definition of terrorism as an act or threat of violence against noncombatants, performed with the aim of influencing the actions of a third group.

Another aspect of both the Department of Defense and State Department definitions of terrorism is that they refer to terrorist acts as being “premeditated” or “calculated.” The reason for this is most likely to establish that these acts involve a certain level of intent. Although it may be the case that many attacks are, in fact, thought out to the level that these agencies have specified, premeditation or calculation (i.e., planning the attack ahead of time as opposed to it being more spontaneous) cannot be considered necessary to reach the level of intent involved in terrorism. Although it is certainly necessary that an act of terrorism involve intent, the idea that an act of terrorism must be premeditated or calculated is too high a standard. One can clearly imagine an act of violence that someone carries out because the attacker has built up a sense of anger or frustration and has simply had an opportunity presented to him or her. For example, someone who is frustrated with poor service provided by the local bussing company may decide, while riding on the bus, to attack the driver,
intentionally causing him to steer the bus off of a cliff and killing all of the passengers. Although this act could have been performed with absolutely no prior planning or forethought (for example, the attacker could have become particularly frustrated while riding on the bus and spontaneously decided it was the appropriate time for such an attack), few, if any would deny that it is an act of terrorism.

A lower standard of intent which is still sufficient to constitute an act of terrorism is similar to that called for by the *mens rea* requirement in most common law systems. In order for someone to be found guilty of a crime, it is necessary (in most instances) that the prosecution establish the mental culpability of the defendant. In order for such culpability to be established, there are two factors that must be satisfied. First, the act must be voluntary. In other words, the person performing the act must have been able to do otherwise. If this standard were applied to terrorism, the implication would be that an act of terrorism could not be caused by factors outside the perpetrator’s control. For example, if someone somehow tripped and fell off of a building, thereby killing several bystanders below, the involuntary nature of his actions would preclude the act from being an act of murder. On a side note, coercion (e.g., a threat of death unless an action is performed) does not make an action involuntary. Although coercion may be considered a mitigating factor for committing an act of terrorism, such an act cannot be considered involuntary. Someone who carries out a coerced act could do otherwise (than perform the act), he just decides it would be in his or someone else’s best interests that he completes the act as demanded.

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The second factor that is necessary in establishing intent is that the actor be aware or should have been aware of the likely outcome of his actions. If someone, for example, is tricked into detonating an explosive device (say, the trigger mechanism for an explosive device is actuated by turning on a light switch, and the person in question was asked to turn that light switch on), he cannot be considered responsible for an act of terrorism, since he neither knew or should have known what the likely outcome of his actions would be. Of course, in an instance like this, the only person who can be said to have carried out an act of terrorism would be whoever set up the explosive device in the first place. Therefore, with these two factors of intent understood (and after discarding the governmental terminology, since “premeditated” or “calculated” are each too high a standard), the newest formulation of the definition of terrorism is an intentional act or threat of violence against noncombatants, performed with the aim of influencing the actions of a third group.

A final consideration in the defining of terrorism is whether these acts must be, as Bruce Hoffman puts it, “ineluctably political in aims and motives.”\textsuperscript{20} In agreement with Hoffman, Robert Gilpin uses 9/11 as just one example of how “terrorism in all its many manifestations is a form of political action carried out to achieve specific political objectives.”\textsuperscript{21} Although it is clear that 9/11 was politically motivated (Osama Bin Laden has long called for the restoration of the Caliphate as well as the expulsion of Westerners from Muslim lands), it does seem theoretically possible that an act of terrorism could have a non-political goal. To clarify, politically aimed terrorism would be those acts intended to have an effect on either governmental or social policy. For example, the attacks on the US embassies

\textsuperscript{20} Hoffman 40.
in Kenya and Tanzania were political because the attackers intended to change US governmental policy. On the other hand, the terrorism of the Ku Klux Klan, pervasive throughout the South during Reconstruction, was political as a result of its aim of changing social policy. One example of terrorism that may not be political would be an attack on a local shopkeeper by the mafia in order to intimidate other shopkeepers into paying a monthly fee. This sort of non-political terrorism has been described as having a “conscious design to create and maintain a high degree of fear for coercive purposes, but the end is individual or collective gain rather than the achievement of a political objective.” So, while it may be true that most forms of terrorism are political, it seems theoretically possible that there may be non-political forms of terrorism as well. This will leave the final version of the definition of terrorism as an intentional act or threat of violence against noncombatants, which is often politically motivated, and is performed with the aim of influencing the actions of a third group.

As it is now relatively clear what is and what is not an act of terrorism, it will be much easier to examine the ways in which terrorism can be dealt with and to evaluate the U.S. response to 9/11. In section II, as I discuss the two paradigms through which terrorism may be addressed I will narrow the scope of my focus to the most salient and problematic form of terrorism throughout the United States: radical-Islamic terrorism performed by non-state actors. For simplicity, when referring to “terrorism” throughout the rest of the paper, it is this specific form of terrorism that I will be discussing.

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II  
Crime vs. War

One of the central questions in any counterterrorism strategy is whether terrorism should be handled as war or crime. Choosing one paradigm over another will have major consequences. The acceptable use of force, the protection of rights, and the sort of justice sought varies greatly with each. With the attacks of September 11th, 2001, serving as the most effective terrorist attacks in modern history (of those performed by non-state actors), these two paradigms each offer a distinct and critically important range of options in responding to and preventing future attacks. What responding to terrorism through either of these paradigms entails will be the focus of this section.

At least until recent times, the distinction between crimes (which violate domestic law) and acts of war (which have typically been considered a challenge to the attacked state’s sovereignty) has been seen as relatively clear. These traditional distinctions have been based around four criteria that are outlined by Bemis Professor of International Law at Harvard Law School, Noah Feldman, in his essay, “CHOICES OF LAW, CHOICES OF WAR”: identity, provenance, intent, and scale.²³

The identity criterion is, perhaps, the simplest traditional distinction between war and crime. This is the idea that states, immune from domestic law, can only carry out acts of war, not crime, when attacking other states. Conversely, non-state actors lack such immunity from domestic law, and so their acts of aggression are considered criminal in nature. This criterion, of course, is dependant on the supposition that the only true law is domestic in nature.

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nature, and that there is a global state of anarchy. Therefore, the existence of global institutions of law, such as the International Court of Justice, poses a problem for such a belief.

The provenance criterion refers to the jurisdictional provenance of states. This criterion requires that crimes occur only within the areas in which states are considered to have legal jurisdiction. This provenance is, however, relatively vast, since it includes “actions within its [the state’s] borders (even if taken outside the borders); actions against its nationals, even nationals abroad under some circumstances; and actions taken outside the state that are directed against the security of the state.”24 On the other hand, acts of war are typically considered as being committed from outside the provenance of the attacked state, even though the attacks themselves may occur within that provenance. Hence, the states usually refrain from making laws against attacks performed on them by other states. These acts of war are seen as being beyond the grasp of domestic law, making them distinct from the crimes of non-state actors performed within the state’s legal jurisdictions.

The third criterion, that of intent, refers to the purpose of the attackers as a point of distinction between war and crime. In acts of crime, it is claimed, that the perpetrators act within the legal framework of the state. Their intent is to commit their act (which they are usually aware is a violation of domestic law) and evade capture, prosecution, and punishment. In contrast, the intent of an actor in an act of war is not to similarly evade legal sanctions, but to challenge the system of the attacked state itself. In other words, the criminal acts within the legal system, while the warrior acts from without. Of course, war

24 Feldman.
crimes are troublesome for the intent criterion, but they are just one of several issues faced by these traditional criteria.

Finally, the scale criterion places war and crime on a continuum of force. The difference between war and crime, it is claimed, is that war is noticeably larger. This means that a particularly small act of aggression is not an act of war, despite the identity of the attacker. Likewise, a massive attack performed either by a state or some non-state entity is an act of war. In the past this criterion would most often have led to the same line being drawn as the identity criterion (i.e., state actions as war and non-state actions as crime). Today, however, the rise of technology has made it possible for these two criteria to have different outcomes. 9/11 serves as the perfect example of how massive attacks are no longer isolated within the domain of state action. This means that although the scale criterion would label 9/11 as an act of war, the identity criterion would label the attacks as criminal.

Acts like 9/11 are not the only ones that cause problems for the stability of the four criteria. As Feldman points out, other difficulties arise when trying to classify acts of treason, rebellion, civil disobedience, and (as mentioned earlier) war crimes. For example, cases of civil disobedience, when understood through the identity criterion, are certainly instances of crime. The intent criterion, however, would possibly label certain acts of civil disobedience as war, since they may be performed with the intent of challenging the sovereignty of the state. A particularly large act of civil disobedience may be considered war under the scale criterion, and yet the provenance criterion would label civil disobedience as crime. Although there are many actions that may be easily identified as falling into either the war or crime paradigms, the few borderline cases that exist may pose some serious

25 Feldman.
problems. Most recently, the blurred distinction between crime and war has become a major issue in dealing with terrorism. Beginning with 9/11, the US response to terrorism, which was greatly affected by choosing between these paradigms, has had a major effect on many countries around the world. That said, it is extremely important to consider the implications of confronting terrorism from either a crime or war paradigm.

**Significance of the Crime/War Distinction: Kill/Capture or Arrest/Prosecute.**

One of the most important differences between the paradigms of war and crime is how choosing one over the other affects the morality of causing harm to certain individuals (in war those individuals are combatants and in crime they are suspects). In war, the aim in pursuing a combatant is to deny him the ability to perform an attack (whether he would actually take part in an attack or just contribute to the ability of the enemy forces to perform attacks). This being the case, it is usually considered acceptable for soldiers to kill the targeted individuals on sight. The only instance in which a soldier is prohibited from killing a targeted individual (assuming the soldier’s orders have not precluded the use of deadly force) is when that individual is either attempting to surrender and/or is incapacitated. In the event that the targeted individual does surrender or becomes incapacitated, the soldier’s responsibility shifts from killing to capturing them. The captured individual will then be held as a prisoner of war until the conclusion of hostilities, at which point he will be released (assuming that he has not committed crimes against the law of war, i.e., war crimes).

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When acting within the paradigm of crime, the law enforcer (typically, police) is responsible for a much more non-violent approach. As opposed to the soldier’s immediate objective of killing or capturing their target, the law enforcer’s immediate focus is on apprehension. Force should be used only as a last resort, and even then the force should be kept to a minimum (hence, the use of nightsticks, pepper spray, and tasers as alternatives to pistols, rifles, and shotguns). In fact, it seems that the use of force by law enforcers is acceptable not for its utility in serving the objective of apprehension, but for its necessity in circumstances where the enforcers or bystanders are facing “an imminent threat of death or serious bodily injury.”

In addition to the differences as far as the appropriate times for the use of force, the rules of war and the rules of law enforcement find different levels of “collateral damage” to be acceptable. As Baruch College Professor Douglas P. Lackey explains, in war “noncombatants can be legitimately killed if their killing is an unavoidable side effect of military operation aimed at some legitimate effect and is proportionate to the importance of that effect.” This Doctrine of Double Effect is a readily accepted part of Just War Theory. No such standard exists for law enforcement. As evidenced by hostage situations in which police will spend hours on end trying to negotiate with criminals, it is seen as

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27 Roth 2.
completely unacceptable in police work to take actions that are likely to cause injury to noncombatants.  

Another difference between the paradigms of war and crime is what is intended to be the final disposition of those who are captured or apprehended. In war, the final release of those who are captured is not only thought to be acceptable but is required. As called for in Article 118 of the Geneva Conventions, “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.” In instances of crime, after they are apprehended, the suspects (who in the United States are not considered guilty until they are convicted) are prosecuted. If they are convicted, they are punished for their actions. This punishment, depending on the circumstances of the crime as well as the laws in the venue of the trial, may include death. This point of distinction is the only one in which the use of force is heightened on the law enforcement side. So in war, the targeted individual may be killed up until the point of capture and then must be released at the end of hostilities (assuming he has not violated any conventions of international law). In instances of crime, the law enforcer must try to avoid killing the perpetrator, but after apprehension and conviction it is possible that killing will become acceptable.

One other major distinction between the paradigms of crime and war is the use of military tribunals or commissions in cases of war (based on the powers granted to Congress

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in Article I of the United States Constitution)\textsuperscript{32} and civilian trials (based on the powers granted to the Judiciary in Article III of the Constitution)\textsuperscript{33} in cases of crime. In war, assuming that there have been no “Offenses against the Law of Nations,”\textsuperscript{34} all captured enemy combatants are released at the cessation of hostilities. However, when enemy combatants are accused of violating these laws (e.g., the Geneva Conventions), Article I of the U.S. Constitution allows that they be brought before a military commission and tried as war criminals. As defendants under these commissions, enemy combatants do not typically enjoy the full array of rights reserved to those facing trial in Article III (civilian) courts. Among the rights that defendants in such instances may be denied are the rights to a jury trial, indictment, due process, and counsel, as well as protection against self-incrimination. Military commissions will often have more inclusive evidentiary rules (e.g., sometimes allowing hearsay and coerced confessions) that tend to work against the defendant.\textsuperscript{35}

Although these military commissions have most often been limited to use against non-citizens, they have been used against U.S. citizens as well.\textsuperscript{36}

To summarize, the differences between using a war or crime paradigm are as follows:

\textsuperscript{32} “The Constitution of the United States,” Article 1, Section 8, § 9 & 10
\textsuperscript{33} U.S. Const. art. III
\textsuperscript{34} U.S. Const. art. I, sect. 7, § 10
**War Rules:**

1. Soldiers are primarily responsible for stopping enemy combatants from committing or contributing to any further hostile actions.

2. Soldiers may kill enemy combatants as long as those individuals are neither surrendering nor incapacitated.

3. The doctrine of necessity and the Rule of Double Effect allow soldiers to cause substantial collateral damage, including deaths of civilians, if such destruction is considered a military necessity and if the deaths of those civilians are not the primary intention of the attack.

4. Once an enemy combatant is captured, soldiers must respect the rights of the captured enemy. The captured enemy may be detained until the end of hostilities, at which point all prisoners of war who are not being prosecuted for war crimes by a military commission must be released.

5. If an enemy combatant is found to have committed a war crime, he may be prosecuted as part of a military commission as allowed by Article I of the U.S. Constitution.

**Crime Rules:**

1. The primary responsibility of law enforcers is the apprehension of suspects.
2. Force should be used only as a last resort. When force is used, it is not for the goal of mission success, but to protect the endangered well-being of law enforcers and innocent bystanders.

3. Once a suspect is apprehended, if a sufficient amount of evidence is produced, he will undergo criminal proceedings outlined in Article III of the United States Constitution.

4. Although defendants will not always enjoy the full array of constitutional protections (depending on their citizenship or immigration status), they will almost always enjoy a greater array of rights than those guaranteed to defendants in military commissions.

**Pros and Cons of Each Paradigm**

Both the crime and war paradigms have distinct advantages and disadvantages. In crime, the primary advantage is that procedures protect suspects’ rights and help to ensure that only the guilty are punished. The rights of those accused are held to be just as important as the interests of the state. This emphasis on rights means that “We make the effort to think through responsibility, we make the effort of proving that responsibility beyond a certain standard, and then we think about issuing a punishment.”

Although it is possible that a person may be wrongfully convicted of a crime and executed, the possibility of an innocent person being killed in pursuit of justice is far less likely when

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37 United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir. 1988).
using a crime paradigm, especially since the doctrine of necessity is not seen as acceptable. This inapplicability of the doctrine of necessity as well as the requirement of more universal rights protections in criminal proceedings means that the crime paradigm has more of an emphasis on human rights than that guaranteed by the paradigm of war. In addition, the satisfaction of justice that may be attained in a well-conducted criminal prosecution will rarely, if ever, be reached in actions following the paradigm of war.

The benefits of using a war paradigm, on the other hand, spring from the more loosely required protections of human rights that are often identified as the cons of such a strategy. First and foremost, the allowance of force under the rules of war means targeted individuals will rarely be able to carry out any further attacks once identified and located by military forces. In law enforcement, the perpetrator is sometimes allowed to get away if it means pursuit may endanger bystanders. In contrast, war rules mean that the pursuit of such individuals will be carried on, to varying extents, even if at times that entails harming innocent bystanders.

Another benefit of using the war paradigm is that the level of success in preventing enemy combatants from carrying out future attacks is bolstered by the fact that, for the sake of the mission, soldiers do not have to be as worried about protecting the rights of bystanders or of those targeted. This makes going after such individuals in a war paradigm much easier, since soldiers are unconstrained by many of the obstacles that stand in the way of routine police work. These constraints, when applicable, as in

the paradigm of crime may mean that targeted individuals will more often be able to escape, and even if captured may end up being freed as a result of rights violations committed by law enforcers. Even more importantly, high standards of evidence required in a criminal paradigm may be extremely difficult if not impossible to satisfy when dealing with incidents or perpetrators located outside the confines of the United States and its territories.

Finally, when using a crime paradigm, insufficient evidence will mean that suspects have to be released. In instances where these suspects are actually dangerous to society, their release may pose a significant threat. In contrast, the rules of war allow that enemy combatants be held until the cessation of hostilities. Being able to hold these combatants for this period of time entails that a lack of evidence will not lead to their early release and continued threat to society. However, the fact that these individuals do have to be released at the end of hostilities (assuming, once again, that they have not committed war crimes) may leave them free to conduct further acts of violence in the future, a problem that is not found in the crime paradigm, since punishment for particularly heinous crimes may lead to sentences of life imprisonment. Furthermore, since enemy combatants have become harder to distinguish from civilians (as has been the case in Operation Iraqi Freedom and Operation Enduring Freedom), the war paradigm leaves open the possibility that civilians will be captured by mistake, and held for an indefinite period of time, a risk to human rights the crime paradigm does not suffer from.
Choosing War In Response to 9/11

Beginning with the attacks of September 11, 2001, the U.S. has been forced to reorganize its response to and planning for terrorist attacks. The attacks left the question open as to whether they were criminal actions or acts of war. On one side of the argument were those who claimed that, in accordance with the scale criterion, the sheer size of the attacks constituted an act of war. In opposition, there were many who claimed that despite the scale of the attacks, the fact that they were carried out by members of a non-governmental organization meant the actions were criminal in nature.

By choosing to go to war in Afghanistan and later in Iraq the Bush Administration largely chose a war paradigm (at least internationally). Additionally, the U.S. response has included, to some extent, elements of the crime paradigm. With those decisions behind us we can now evaluate whether they were acceptable. One way of analyzing the Bush administration’s decisions is to consider whether the U.S. Constitution and the laws of the U.S. offer guidance in choosing a paradigm. Whether the choices made by the Bush administration were in line with those restrictions will be the focus of Section III.
III
Constitutional/Legal Powers and Restrictions On Choosing a Model

In evaluating the Bush administration’s response to 9/11 through the wars in Afghanistan and Iraq, it makes sense to begin by examining the powers given to and the restrictions placed upon the government by the Constitution and the laws of the United States. As discussed earlier, use of the war (kill/capture) paradigm usually involves more infringement on liberty and human rights. It is safe to say, then, that if there were Constitutional/legal restrictions on the ability of the government to choose a paradigm, most of those limitations would be placed upon choosing a war paradigm. Yet, as will be discussed in this section, the entire body of laws in the United States leaves the President nearly free to do as he pleases with the military, especially overseas. Additionally, the President and Congress face very few restrictions when it comes to the use of military commissions to prosecute those involved in terrorism and wars against the United States.

The Constitution splits the responsibilities of war and defense between the legislative and executive branches. Article I, Section 8 of the Constitution outlines congressional war powers:

§1. The Congress shall have the power to…provide for the common Defence and general Welfare of the United States;\textsuperscript{40}

§9. To constitute Tribunals inferior to the supreme Court;\textsuperscript{41}

§10. To Define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;\textsuperscript{42}

\textsuperscript{40} U.S. Const. art. I, sect. 1, § 1
\textsuperscript{41} U.S. Const. art. I, sect. 1, §9
\textsuperscript{42} U.S. Const. art. I, sect. 1, §10
§11. To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;\textsuperscript{43}

§12. To raise and support Armies…;\textsuperscript{44}

§13. To provide and maintain a Navy;\textsuperscript{45}

§14. To make Rules for the Government and Regulation of the land and naval Forces;\textsuperscript{46}

It is obvious from reading these statements that the war powers granted to the Congress in the Constitution are vast. The Congress is, here, given the powers not only to set the budget for the military, but also to regulate the military, to declare war, to set up military tribunals, and to prosecute those who violate the “Law of Nations” (i.e., war criminals). Article II, Section 1 outlines the war powers of the Executive, which are not quite so broad:

§1. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;\textsuperscript{47}

As the Commander in Chief of the Army and Navy it is also understood that the President has the power to lead the Marine Corps (since it is a department of the Navy) and the Air Force (which did not come into existence until well into the 20\textsuperscript{th} Century). Also, the President is responsible for ensuring that the laws are faithfully executed.

On the face of these Articles, it appears that the war powers granted to the legislature heavily outweigh those of the executive. However, it has historically been the case that the

\textsuperscript{43} U.S. Const. art. I, sect. 1, §11
\textsuperscript{44} U.S. Const. art. I, sect. 1, §12
\textsuperscript{45} U.S. Const. art. I, sect. 1, §13
\textsuperscript{46} U.S. Const. art. I, sect. 1, §14
\textsuperscript{47} U.S. Const. art. II, sect. 1, §1
President has played a dominant role in taking on and conducting conflicts that follow war rules. In recognition of this fact, the Congress attempted to reign in presidential power by passing the War Powers Act of 1973 toward the end of American involvement in Vietnam.\textsuperscript{48} As the nation grew more dissatisfied with the ongoing Vietnam War, the legislative branch began to look into how it could constitutionally limit the power of Presidents to involve American forces in future conflicts without congressional support. They turned to the “necessary and proper clause” of the Constitution.

Article I, Section 8, §18 declares that the Congress shall have the power “To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer therof.”\textsuperscript{49} The legislature took this statement to mean that it had the authority to make any laws that were needed to enforce its constitutionally enumerated powers over the military and the conduct of war, even if this meant encroaching upon the powers the executive believed he possessed.

In passing the War Powers Act, the Congress explicitly stated that the purpose of the act was to ensure that the legislature, as well as the executive, would share responsibility for deploying troops in support of hostile actions and for deciding upon their continued deployment as such campaigns are carried on.\textsuperscript{50} In order for this to be the case, the act explains first that there are only three situations under which a President, acting as Commander-in-Chief, may deploy troops: there is a declaration of war (made by the legislature), the legislature makes a law specifically authorizing the use of military force, or

\textsuperscript{49} U.S. Const. art. I, sect. 1, §18
there is “a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”\textsuperscript{51} The act (which was vetoed by President Nixon and eventually passed over his veto\textsuperscript{52}) attempts to further limit presidential power by setting out several other requirements in instances where troops are deployed in support of combat operations (or operations that are likely to involve hostilities) with neither a formal declaration of war (which the U.S. has not made since World War II) nor a law being passed to authorize such actions. First, the act requires that the President provide a written report to the Speaker of the House of Representatives and to the President pro tempore of the Senate within forty-eight hours of deploying troops.\textsuperscript{53} This report must outline the President’s reasons for the deployment as well as the projected end of the hostilities. In addition, following the initial report, the President is required to periodically (and upon request) provide updated reports.

A second, more heavy-handed restriction on presidential power called for by the War Powers Act is that the President may only deploy troops for sixty days in the previously mentioned circumstances unless the legislature declares war, extends the allowance of deployment for an additional sixty days, or is unable to meet as a result of ongoing hostilities.\textsuperscript{54} Additionally, the President is allowed thirty days to bring the troops home if the allowable deployment period is not extended, leaving the President with the ability to deploy

\textsuperscript{51} 50 U.SC. § 1541(c). 1973.
\textsuperscript{52} U.S. Const. art. I, sect. 7, §2 allows that once a bill is vetoed by the President, it may still be passed by the Legislature but it requires a vote of at least two thirds each of the House of Representatives and the Senate.
\textsuperscript{54} 50 U.SC. § 1544(b). 1973.
American troops anywhere in the world without congressional approval for a total of ninety days.

It must be recognized that even with the War Powers Act in place, presidential power to use the military is vast. First, the War Powers Act does not provide any means to ensure that the President follows its requirements. Although the legislature could, theoretically, cut off funding for any war effort, it seems unlikely that it would do so. The President, as the most highly visible political figure in the U.S., could easily cast members of the legislature as being against the troops or weak on defense if such funding were restricted (two possibilities which could be devastating to congressmen and senators when it comes time for reelection). Additionally, the power to deploy American troops for ninety days gives the President the ability to respond to terrorist actions, within war rules, anywhere in the world. Finally, it must be recognized that when it comes to responding to acts of terrorism or protecting the U.S. against what appear to be threats to U.S. security, the legislature often seems to go along with Presidential decision making. For example, since the introduction of the War Powers Act, the Congress has passed specific laws to allow the deployment of troops in Lebanon,\(^{55}\) Somalia,\(^{56}\) Panama,\(^{57}\) Iraq in 1991\(^{58}\) and 2002,\(^{59}\) as well as anywhere in the world in the *Authorization for use of military force against those responsible for attacks launched against United States on Sept. 11, 2001*, which was passed only seven days after


\(^{56}\) P.L. 103-139, Title VIII, \S\ 8150, 107 Stat. 1475. Nov. 11, 1993.


In addition, the legislature often passes resolutions in response to presidential actions in war that do nothing more than voice its disapproval as opposed to taking actions that will actually have an effect on presidential policies. One example was House Concurrent Resolution (HCR) 63, which the House of Representatives passed and the Senate concurred with in 2007. HCR 63 was passed to show opposition to President Bush’s surge of 20,000 troops in support of Operation Iraqi Freedom. However, as a nonbinding resolution, HCR 63 did nothing to change the policy, and the surge was carried out. Of course, the legislature could have cut the funding necessary for the surge, which would have made it impossible to carry out.

This track record seems to show that although the Congress at times has attempted to hamper the war powers of the President, it has often been compliant and even supportive of his use of the military for combat operations. The combined power of the legislative and executive branches has made it the case that the government has often and repeatedly turned to American hard power and war rules as a way of resolving conflicts with other nations and non-governmental organizations. The War Powers Act, however, is not the only legal hurdle that the executive branch has to deal with when choosing a war (kill/capture) paradigm.

Another set of restrictions on the U.S. government when it comes to using war rules for fighting terrorism are international conventions. Although the President is legally bound by the U.N. Charter, Article 51 allows that “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to

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maintain international peace and security.\textsuperscript{62} With ongoing terrorist threats and attempted attacks against the U.S. and its allies, it seems clear that this statement would prevent the U.N. from standing in the way of U.S. actions to fight terrorism. The other major international security agreement the U.S. is a part of is the North Atlantic Treaty Organization (NATO). When President George W. Bush feared he would not receive backing for using war rules in Iraq (three out of five permanent members of the U.N. Security Council were against attacking: China, Russia, and France), he turned to his NATO allies for support. Article 5 of the North Atlantic Treaty reads as follows:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.\textsuperscript{63}

The wording in both the U.N. Charter and the NATO Treaty clearly explain that nations involved have the right to defend themselves against foreign threats. In the case of Iraq, however, the threat was not so clear. The Bush administration went to great lengths to try to make connections between Iraq and 9/11. When that seemed to fall through, the

\textsuperscript{63} North Atlantic Treaty (1949), Art. 5
administration claimed the threat posed was from Saddam Hussein’s possession of weapons of mass destruction (which also came to naught). Yet, there has been no major international backlash against the U.S. It seems, then, that the ability of the U.S. to choose war paradigms (even when it may not be justified) is not really constrained by either NATO or the U.N. Although there are sometimes self-imposed restraints placed upon the U.S. when it comes to international charters (these self-imposed restraints, discussed later in this section, mostly apply to the use of military commissions), it seems that neither the American Constitution and American laws nor international institutions and laws can prevent the President and Congress from using war rules in the pursuit of terrorists. The only other restriction on the use of a kill/capture (war rules) paradigm seems to be posed against the use of the military in pursuing terrorists within the United States by the Posse Comitatus Act.

The Posse Comitatus Act was passed on June 18, 1878, and has been revised several times since. Its original enactment came towards the end of the Reconstruction era, in which the military had continued to occupy the southern states after the northern victory in the Civil War. Although at its inception the Act referred only to the Army it was later updated to include the Air Force. The entire text of the Act, as updated in 1956, reads as follows:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

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64 18 U.SC. § 1385. 1956.  
65 A posse comitatus is a temporary police force.  
66 18 U.SC. § 1385. 1956.
As a result of its vague wording, it has mainly been through later court cases and additional laws that restrictions on the use of the military put forward by the Posse Comitatus Act have become clear.

Even before the passing of the Posse Comitatus Act, the Insurrection Act of 1807 authorized the President to use the military on property of the states (the Posse Comitatus Act does not apply to federal land) to suppress “insurrection, domestic violence, unlawful combination, or conspiracy” when he felt it was necessary. Further stipulations require that the state in which the Insurrection Act is applied be unable to suppress the insurrection and that the President get the consent of either the governor of the state or its legislature. The fact that the Insurrection Act was not repealed at the signing of the Posse Comitatus Act meant that the Insurrection Act outlined instances in which the military could still be used to enforce the law domestically. Presidents used the military under the Insurrection Act several times in the 20th century: President Eisenhower sent troops to Little Rock, Arkansas to attempt to uphold court ordered desegregation, President Kennedy sent troops to Alabama and Mississippi in response to opposition to desegregation, and President George H.W. Bush deployed troops to quell riots in Los Angeles.

Besides those provided by the Insurrection Act, there are several other exceptions to the Posse Comitatus Act. First, the Posse Comitatus Act does not prohibit use of the Coast

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Guard, which is part of the Department of Homeland Security as opposed to the Department of Defense. Although the Act, in and of itself, does not apply to the Navy, the Department of Defense has applied the constraints of Posse Comitatus to the Navy as a matter of Department of Defense policy. However, courts have found that the Navy may be used domestically to assist the Coast Guard in its duties. In fact, courts have additionally found that the military may participate in most domestic law enforcement activities as long as its role is passive and not active, prohibiting such active law enforcement activities as “…arrest, seizure of evidence, search of person, search of building, investigation of crime, interviewing witnesses, pursuit of escaped civilian prisoners, search of area for suspects and other like activities.” Nonetheless, later congressional legislation has allowed the military to have what appear to be very active roles in drug interdiction and immigration control. One example of the impact such legislation has had may be found in the case of People v. Wells, in which a court decided that military personnel may act as “undercover informants” in sting operations without violating the Posse Comitatus Act. Despite this clear erosion of the Act, the government has in recent years gone even further in undermining its purpose.

Since the Posse Comitatus Act is a law as opposed to an amendment to the Constitution, subsequent laws can change its provisions with only a majority vote in the

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78 10 U.SC. § 333-381. 1956.
Congress. The John Warner National Defense Authorization Act for Fiscal Year 2007\textsuperscript{80} included a small provision that authorized the President to use the military and National Guard to restore order in cases of natural disaster, epidemic or other public health emergency, terrorist attack or incident, or domestic violence, or other condition.\textsuperscript{81} The only restriction placed on the President in doing so is that he notifies the Congress within fourteen days. The implication of the Act was that the President no longer needed to get the permission of a state’s governor when he thought troops should be used in accordance with the Insurrection Act. This shift in power which left the choice of whether to use the military within the U.S. (under certain circumstances) completely up to the President quickly had major implications.

Not long after the John Warner Act was passed, President Bush had the 3\textsuperscript{rd} Infantry’s 1\textsuperscript{st} Brigade Combat Team assigned to United States Northern Command (USNORTHCOM).\textsuperscript{82} With its headquarters located at Peterson Air Force Base in Colorado, “USNORTHCOM conducts homeland defense, civil support and security cooperation to defend and secure the United States and its interests.”\textsuperscript{83} Although USNORTHCOM has been in existence since 2002 (it was created partly in response to the attacks of 9/11), the assignment of the 1\textsuperscript{st} BCT marked the first time since the Civil War that active duty military personnel were given full-time responsibilities for homeland defense within the United States. The USNORTHCOM website lists its specific mission responsibilities as including

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response to natural disasters, drug interdiction, and terrorist attacks involving weapons of mass destruction.\textsuperscript{84} It was not long, however, until members of Congress noticed the implications of the John Warner Act.

One of the most outspoken opponents of the John Warner Act was Senator Patrick Leahy (D-VT). According to the Senator, section 1076 of the John Warner Act

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\ldots‘subverts solid, longstanding posse comitatus statutes that limit the military’s involvement in law enforcement, thereby making it easier for the president to declare martial law. The changes to the Insurrection Act will allow the president to use the military, including the National Guard, to carry out law enforcement activities without the consent of a governor.’\textsuperscript{85}
\end{quote}

Eventually Senator Leahy, along with Senator Kit Bond (R-MO) managed to get the changes made to the Insurrection Act repealed by the National Defense Authorization Act for Fiscal Year 2008.\textsuperscript{86} However, the President had one more tool to help ensure that his newfound power over the military was not revoked.

If President Bush had vetoed the National Defense Authorization Act for Fiscal Year 2008 (and had the Congress not overridden his veto) it would have done away with the entire bill, as opposed to the specific provisions he wanted to remove. In 1996 the Congress passed a law allowing Presidents to perform what are referred to as line-item vetoes.\textsuperscript{87} As opposed to the traditional veto, line-item vetoes gave the President the power to veto specific provisions of a bill and sign the rest into law, greatly speeding up the law making process.

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However, in 1998 the Supreme Court of the United States, in Clinton v. City of New York, found the line-item veto law to be unconstitutional because it gave the president a type of law making power (through his ability to amend laws) that the Constitution did not allow. This would seem to imply that if a President were unhappy with a proposed law, as written, he would either have to veto the entire bill or sign it into law as is. Yet, that is not the case. When President Bush signed the National Defense Authorization Act for Fiscal Year 2008 he included the following statement:


Today, I have signed into law H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008. The Act authorizes funding for the defense of the United States and its interests abroad, for military construction, and for national security-related energy programs.

Provisions of the Act, including sections 841, 846, 1079, and 1222, purport to impose requirements that could inhibit the President’s ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief. The executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President.

Called a signing statement, a short blurb like this is basically a back-door version of a line-item veto. Although they are nothing new, they have only come into common usage in recent times. The first presidential signing statement was issued during the Monroe

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Between the time of the Monroe and the Reagan administrations, they were rarely used, and when they were it was most often for their most uncontroversial purpose, clarification of wording in a law.

Presidential signing statements have three functions. First, they may be used to clarify the president’s interpretation of ambiguous parts of a bill. Second, they may be used to pose Constitutional/legal objections to a portion of a bill. Finally, the statements may be used to notify members of the Executive branch of how they are to interpret parts of a bill or to disregard portions of a bill the President believes to be unconstitutional. In the past, the majority of signing statements were issued with the first purpose in mind: clarification. Yet, with the most recent Bush administration, a large majority, nearly eight out of every ten signing statements specifically challenged the constitutionality of provisions of bills that were signed into law. This was a major change over President Clinton, who only posed constitutional objections in 18% or 70 out of 381 signing statements. This change in direction for signing statements in the Bush administration was a sign that the President’s power to respond as he sees fit has been greatly expanded in recent years. The more than 1,000 provisions labeled as unconstitutional by President Bush included not only the repeal of the John Warner Act, but also a provision limiting presidential power in the USA PATRIOT Improvement and Reauthorization Act of 2005, and the McCain Amendment in

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91 Halstead, 1.
92 Halstead, 9.
the Detainee Treatment Act\textsuperscript{94} which “prohibited the use of torture, or cruel, inhuman, or degrading treatment of prisoners.”\textsuperscript{95}

With the use of presidential signing statements becoming common practice, future and current presidents may find it even easier to use the military as they see fit when combating terrorism. In addition, any measure put forward by Congress (short of a constitutional amendment) to reign in the power of the President can be overridden by more signing statements. Although these statements may not be in line with the intent of our founding fathers, the Constitution seems to lack any opposition to their use. Yet, even if the Supreme Court should eventually restrict the use of presidential signing statements,\textsuperscript{96} it is clear that between the war powers given to the Congress and President through Articles I and II of the Constitution, respectively; the weakness inherent in the Posse Comitatus Act, and the lack of binding strength in international charters, that the U.S. government is constitutionally and legally free to choose a war (kill/capture) paradigm in the fight against terrorism. The next question to explore, then, is whether the government has the same constitutional/legal freedom in deciding between prosecuting terrorists as war criminals under military tribunals and prosecuting terrorists as civilian criminals in courts called for by Article III of the Constitution.

\textsuperscript{95} Halstead, 9.
\textsuperscript{96} The Supreme Court has not yet directly commented on the constitutionality of presidential signing statements but there have been arguments that such statements may violate the Take Care Clause of the Constitution. For further discussion of this issue see: United States. Congressional Research Service. American Law Division. \textit{Fas.org}. By T. J. Halstead. Congressional Research Service, 17 Sept. 2007. Web. 03 Apr. 2011. <http://www.fas.org/sgp/crs/natsec/RL33667.pdf>.
Judicial Interference in the Use of Military Tribunals.

Although the roles of the executive & legislative branches seem at times to conflict, what is clear is that the framers of the Constitution intended that both branches serve a major role when it comes to the use of the military and ensuring the safety of the American people. The same cannot necessarily be said when it comes to the judicial branch. Article III of the U.S. Constitution does not explicitly give the judicial branch any power over the military, nor does it state that the Supreme Court has the ability to control the actions of the other branches. Yet, since Justice Marshall’s 1803 ruling in Marbury v. Madison it has been recognized that the Supreme Court, through the power of judicial review, can rule congressional and executive actions to be unconstitutional. Although the power of judicial review is not mentioned anywhere in the Constitution, it has posed what seem to be the most significant restrictions on presidential and legislative decisions to use military tribunals for trying terrorists.

One of the first Presidents to have his actions during wartime brought before the Supreme Court was Abraham Lincoln. In 1863, James L. Vallandigham, a member of the House of Representatives from Ohio, was arrested for violating General Order No. 38. The order, which was issued by General Ambrose Burnside, made it a crime to speak out against the Northern military effort or the Lincoln administration. Vallandigham was charged with doing both in a speech he gave criticizing Lincoln’s actions in the Civil War. His charges read as follows:

Publicly expressing, in violation of General Orders No. 38, from Head-quarters Department of Ohio, sympathy for those in arms against the Government of the United States, and declaring disloyal sentiments and opinions, with the object and purpose of weakening the power of the Government in its efforts to suppress an unlawful rebellion.\textsuperscript{98}

Vallandigham was brought before a military commission and convicted of violating General Order No. 38. He was sentenced to spend the duration of the war as a prisoner in Fort Warren but President Lincoln commuted his sentence and had Vallandigham sent to Tennessee, since it was beyond the Northern military lines.\textsuperscript{99} Vallandigham subsequently filed with the Supreme Court for a writ of certiorari as an attempt to challenge his conviction by the military commission. The Supreme Court, however, denied Vallandigham’s petition and decided that they did not have jurisdiction over the military commission.\textsuperscript{100} The Court’s decision left Lincoln with the power to use military commissions throughout the duration of the war, unobstructed by judicial interference. Yet, it was not long after the end of the Civil War (and Lincoln’s assassination) that the Supreme Court made a decision, in Ex parte Milligan, which greatly diverged from their position in the Vallandigham case.

Lambdan P. Milligan, who was an Indiana resident, was sentenced to be hanged by a military commission in 1864.\textsuperscript{101} Although not a member of the military, Milligan was convicted by a military tribunal of having planned to aid the Confederate war effort.

\textsuperscript{100} Ex parte Vallandigham.
Following his conviction, Milligan applied to the Indiana Circuit Court for a writ of habeas corpus.

A writ of habeas corpus is a court order demanding that the government produce an imprisoned person for the court so that the court may decide whether the prisoner is being held lawfully. Although the right to request such writs is not explicitly contained in the Constitution, Article I contains a prohibition against suspending habeas corpus rights unless certain circumstances exist: “The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”\(^{102}\)

In order to aid the war effort in the Civil War, President Lincoln suspended the right to habeas corpus so that citizens who opposed the North could be imprisoned without court interference.\(^{103}\) In 1861 Lincoln’s ability to suspend the right of habeas corpus was challenged in Ex parte Merryman.\(^{104}\) Although the Merryman Court decided that Lincoln could not suspend the right, the decision was ignored (until the end of the war) and Merryman, who was imprisoned, was not produced.\(^{105}\) It was the fact that Lambdan Milligan waited until the end of the Civil War to apply for a writ of habeas corpus, which made it possible for the Court to hear his case.

In Ex parte Milligan the Supreme Court overruled Milligan’s conviction by a military commission. Although the Court did not challenge the President’s ability to suspend habeas corpus rights during wartime, it decided that military commissions could not try American

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\(^{102}\) U.S. Const. art. I, sect. 9, §2


\(^{105}\) Greenberg.
citizens where Article III courts are fully functional. Brushing previous court rulings off as having been made in error as a result of “the temper of the times,” the Supreme Court also ruled that military tribunals could only be used for civilians as a last resort, when no one other than the military can handle the trials. The strong stance of the Court in Milligan was a far cry from the earlier court decisions around the time of the Civil War. This strong stance, though, would not remain set in stone as the issue of military commissions would once again be brought before the Supreme Court seventy-six years later in Ex parte Quirin.

Once again at war, the U.S. government made use of military commissions in 1942. Ex parte Quirin involved eight German saboteurs who had ridden a German submarine to the eastern coast of the United States. Once they reached the shore the eight men, who had been carrying “explosives, fuses, and incendiary and timing devices,” removed their uniforms. They were subsequently apprehended by the Federal Bureau of Investigations and tried before a military commission for violating “the law of war and the Articles of War, 10 U.S.C.S. §§ 1471-1593.” Despite the fact that one of the saboteurs was an American citizen, all eight were sentenced to death. The saboteurs then petitioned the Supreme Court for a writ of habeas corpus and subsequently for a writ of certiorari, both of which were granted.

In their argument to the Supreme Court, the saboteurs claimed that their fifth and sixth amendment rights had been violated: the rights to due process and trial by jury,

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106 Indiana was not a rebellious state.  
107 Ex parte Milligan.  
108 Ex parte Milligan.  
110 Ex parte Quirin.
respectively. The saboteurs also claimed that they could not be labeled as enemy belligerents (which was necessary to their being tried by a military commission) since they had not carried out their plans. Finally, the saboteurs cited the decision in Ex parte Milligan to show that the Court had previously forbade the use of military commissions, particularly of American citizens, (as one of the defendants, Herbert Haupt, was in this case) when civilian courts were functioning properly.

In response to the claims of the saboteurs, the Supreme Court first explained that the rights provided by the fifth and sixth amendments did not preclude the use of military commissions (which could exclude these rights) for violations of the laws of war. The Court also decided that whether the saboteurs had been successful in completing their goals was irrelevant since they had removed their uniforms within the United States (violating the laws of war) in order to carry out their plans. Finally, the Court responded to the citation of Ex parte Milligan. Although it seemed that Haupt’s situation was analogous to that of Milligan (they both intended to assist an enemy force in damaging the ability of the U.S. military), the Court found that the holding in Ex parte Milligan did not apply to the situation in Ex parte Quirin. According to Chief Justice Harlan F. Stone, “Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as -- in circumstances found not there to be present, and not involved here -- martial law might be constitutionally established.”111 In other words, Milligan was not closely associated with enemy forces to the extent that he could be labeled as an enemy belligerent and tried by a military commission. Although Chief Justice Stone refrained from setting out exact instructions on when an American citizen can and cannot be labeled an

111 Ex parte Quirin.
enemy belligerent, he made it clear that Haupt fell within the former category.\textsuperscript{112} Six of the eight men were executed in 1942, with the other two having their death sentences commuted by President Roosevelt, to thirty years for one and life in prison for the other.\textsuperscript{113} The decision by the Court in \textit{Ex parte Quirin} gave the President much more leeway to use military commissions in the future, and signaled a stepping back of the Court from the strong posture it took in \textit{Ex parte Milligan}.

Not long after \textit{Ex parte Quirin}, the Supreme Court made decisions in \textit{Korematsu v. United States} (1944) and \textit{Johnson v. Eisenstrager} (1950), both of which further bolstered the power of the President in times where national security seemed to be at risk. In \textit{Korematsu v. United States}, Justice Black decided that it was constitutional for the President to relocate persons of Japanese decent on the West Coast to internment camps during World War II. In \textit{Johnson v. Eisenstrager}, the court decided that it had no jurisdiction over German war criminals held by the American military overseas. This left the President free, once again, to use military commissions without interference from the Supreme Court. Even without the use of military commissions, though, the executive branch has strong powers to try those who are not American citizens (which constitute a large portion of those accused of terrorist activities) before Article III courts, since several court decisions have shown that non-citizens do not enjoy the full range of constitutional protections guaranteed to citizens.

\textsuperscript{112} \textit{Ex parte Quirin}.
In 1990 the Supreme Court heard U.S. v. Verdugo-Urquidez.\textsuperscript{114} Urquidez was a Mexican citizen brought to the United States on drug-related charges. The U.S. Drug Enforcement Agency, with the consent of Mexican authorities had searched the Urquidez residence in Mexico without a search warrant. At trial, Urquidez claimed that the evidence collected during the DEA’s investigation was inadmissible, since the fourth amendment bars unreasonable search and seizure. In his decision, Justice Rehnquist explained that the wording of the Bill of Rights, in some sections, specifically refers to “the people” as those to whom certain rights apply. According to Justice Rehnquist, it would seem that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.\textsuperscript{115} His decision in this case implied that not only are those who are labeled as enemy belligerents allowed to be tried before military tribunals with limited rights, but that those people who are not part of the American “community” may be tried by Article III courts without the full array of Constitutional rights as well. Indeed, it was only two years later that Chief Justice Rehnquist decided in US v. Alvarez-Machain that those who were accused of violating American laws could be tried within the United States no matter how they came to be here, even if that included (as it did in the Machain case) forcible abduction.\textsuperscript{116}

\textsuperscript{115} U.S. v. Verdugo-Urquidez.
It seemed clear, then, that well into the 1990s the ability of the executive branch to try enemy belligerents (including American citizens) and those who were not part of the American community was largely unopposed by the courts. Military tribunals could try enemy belligerents, while only allowing them to enjoy limited rights. Those who were not enemy belligerents yet could still be cast as outside the American community (and some strong arguments have been made that those who participate in terrorist activities remove themselves from the American community\footnote{Terwilliger, George, Theodore Cooperstein, Shawn Gunnarson, Daniel Blumenthal, and Robert Parker. "The War on Terrorism: Law Enforcement or National Security?" The Federalist Society, 15 Feb. 2005. Web. 16 Jan. 2011}) could be tried in Article III courts with limited rights as well. To most American citizens, these issues did not seem particularly salient. In more recent times, however, the attacks of 9/11 and the subsequent war on terror have brought these issues to the forefront. A series of cases following 9/11 has brought further investigation into what resistance courts will may pose to decisions of the President and national security/law enforcement officials in trying those believed to be involved in terrorist activities.

In June, 2004, the Supreme Court rendered decisions in two cases, Rasul v. Bush\footnote{Rasul Et. Al. v. Bush, President of the United States, Et. Al. Supreme Court of the United States. 28 June 2004. \textit{LexisNexis Academic}. Web. 16 Jan. 2011} and Hamdi v. Rumsfeld,\footnote{Hamdi Et Al. v. Rumsfeld, Secretary of Defense, Et Al. Supreme Court of the United States. 28 June 2004. \textit{LexisNexis Academic}. Web. 16 Jan. 2011} which may have been the strongest stands the Court has made against a President’s power to limit habeas corpus rights since Ex Part Milligan. Hamdi v. Rumsfeld concerned an American citizen, Yaser Hamdi, who was captured by American forces fighting in Afghanistan. Detained as an “enemy combatant,” he was to be held until the end of hostilities in the War on Terror as was authorized by Congress’s Authorization for
Although the Court in *Hamdi* recognized that it was well within the power of the President (when authorized by Congress) to hold enemy combatants throughout the duration of hostilities, it decided that detainees must be given the opportunity to challenge the designation before a neutral decision maker as part of their right to due process. According to James Wilson Professor of Law at Pepperdine University School of Law, Robert J. Pushaw Jr., “*Hamdi* represented the first time the Court had ever recognized that Congress authorized a presidential war power, yet had struck it down as unconstitutional.” As Pushaw explains in his article “Creating Legal Rights For Suspected Terrorists: Is the Court Being Courageous or Politically Pragmatic?” the Court’s decision was most likely the result of several circumstances arising around the time of Hamdi v. Rumsfeld.

As the only unelected branch of the federal government, the judiciary is inherently undemocratic. In order to balance this with the idea of America as a “government of the people, by the people, and for the people,” the Supreme Court must be careful to choose its battles with the other branches carefully. Although we do have a system of checks and balances, judicial review tends to make the court look political. This is why, as Pushaw points out, the Supreme Court is most likely to interfere with congressional and presidential actions in reference to national security issues when (i) the severity of the threat has

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121 *Hamdi* v. Rumsfeld.  

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diminished, (ii) the support of Congress for the President has waned, (iii) the severity of intrusion on individual rights is high, and (iv) the political strength of the President is low. All of these factors seemed to have come into play at the time of Ex parte Milligan and they were also coming into effect around the time of Hamdi v. Rumsfeld: It had been several years since 9/11, President Bush’s approval rating had begun to dip below 50%, and it seemed possible that those detained in the War on Terror could be held permanently. The only factor that was not fulfilled was the waning in congressional support, but along with Bush’s approval ratings, it would have seemed likely at the time that Bush would lose Republican seats in the House of Representatives and Senate in the 2006 mid-term elections.

On the same day that the Supreme Court released its decision on the Hamdi case, it also rendered its decision in Rasul v. Bush. Rasul v. Bush concerned four non-American detainees in the War on Terror who were being held at Guantanamo Bay, Cuba. The detainees petitioned the Supreme Court for a writ of habeas corpus, which the government claimed they could not do since they were neither American citizens nor were they being held in an area under U.S. sovereignty. Nonetheless, Justice Stevens decided that the Court did have jurisdiction over the detainees and that habeas corpus rights were not limited to American citizens. Rasul, like Hamdi, was a major blow to the efforts of the Bush administration in battling terrorism. Yet, following the loss of Republican control of the

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127 Unlike most traditional wars, the War on Terror didn’t seem to have any clear end point so it could carry on indefinitely.
128 Rasul v. Bush
129 Rasul v. Bush
House of Representatives and the Senate in 2006, the weakened President would still have
two more cases in which the Supreme Court stood in defiance.

In response to the Supreme Court’s decisions in *Rasul* and *Hamdi*, the Department of
Defense created Combatant Status Review Tribunals (CSRT), which gave detainees at
Guantanamo Bay the opportunity to challenge their designation as enemy combatants.\(^\text{130}\) Additionally, the Congress issued the Military Commissions Act of 2006\(^\text{131}\) which
“authorized and formalized the creation and use of military commissions for [trying those
designated as enemy combatants].”\(^\text{132}\) Still the Court became even bolder in 2006 with the
case of *Hamdan v. Rumsfeld*.\(^\text{133}\)

When another detainee at Guantanamo Bay, Salim Hamdan, was designated as an
enemy combatant (in accordance with the standards required in the CSRT), he filed for a writ
of habeas corpus. Although the writ was granted by a district court and then denied by the
Court of Appeals for the D.C. Circuit, the Supreme Court quickly granted Hamdan’s petition.
The Court decided to hear the case despite the fact that Congress “then enacted DTA section
1005(e) (1), which provided that as of December 30, 2005, ‘no court, justice, or judge’ had
jurisdiction to consider habeas actions by alien detainees at Guantanamo.”\(^\text{134}\) In its decision,
the Court explained that the particular military tribunal was illegal because it had violated

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\(^{130}\) United States. Department of Defense. The Secretary of the Navy. *Implementation of
Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at


\(^{132}\) United States v. Ahmed Khalfan Ghailani. United States District Court Southern District

\(^{133}\) Salim Ahmed Hamdan, Petitioner v. Donald H. Rumsfeld, Secretary of Defense, Et Al.

\(^{134}\) Pushaw. 2010.
both the Geneva Convention and the Uniformed Code of Military Justice.\textsuperscript{135} Although this decision did not completely ban the use of military commissions it did require that different procedures be used when prosecuting detainees at Guantanamo Bay.

In response to the Supreme Court’s decision in Hamdan v. Rumsfeld, the Congress passed the Military Commissions Act of 2006, part of which explicitly gave the President power to continue trying enemy combatants before military commissions.\textsuperscript{136} However, the Supreme Court, once again, restricted this power by ruling in Boumedine v. Bush, that the portion of the Act that authorized the commissions violated habeas corpus rights protected by the Constitution. This decision was later followed by another Act authorizing executive use of military commissions: the Military Commissions Act of 2009.\textsuperscript{137} Although the Act still allows the use of military commissions for trying enemy combatants, it outlines the rules for the commissions as being much closer to those rules applied in Article III courts, making it more likely that the rights of those prosecuted will be protected. This once again means that the executive branch can continue trying those captured or arrested for acts of terrorism under either military commissions or Article III trials. What the future holds for Supreme Court interference is not completely clear, but in order to avoid being drawn further into the political realm, the Court will most likely keep a lower profile when it comes to these matters in the near future. It also remains to be seen what the President’s next steps will be in dealing with those held at Guantanamo, since the first high-profile trials of detainees are only

\textsuperscript{135} Hamdan v. Rumsfeld.
really beginning to take place now.\textsuperscript{138} What can be said is that if the current political situation changes (e.g., a President comes into power with a higher approval rating or there is another major terrorist attack) the Court will be much less likely to stand in the President’s way. Additionally, as pointed out by Pushaw:

\begin{quote}
America has experienced cycles before in which the Court has asserted broad authority to review the exercise of war powers. But that approach has never lasted. Rather, the Justices typically have exercised their discretion to yield to the political branches in military matters, often because they had no other realistic choice. This history suggests that the “enemy combatant” cases will not have a profound lasting impact.\textsuperscript{139}
\end{quote}

After reviewing the constitutional war powers granted to the executive and legislative branches and the subsequent legislation and case law, it seems clear that when it comes to choosing between a war (kill/capture) or crime (arrest/prosecute) paradigm the government is relatively unconstrained. Despite the fact that there have recently been some minor obstacles put before the President in deciding whether to use military commissions or Article III courts to prosecute terrorists, the authority of the President to make the final decision will eventually win out. Therefore, it seems clear that by responding to 9/11 with the wars in Afghanistan and Iraq, the Bush administration acted both constitutionally and legally. Yet, there is more to evaluating the actions of our government in response to terrorism than legal evaluation. In addition to being legal, we tend to want our government to do what is “right.” That is why the Section IV will provide an ethical evaluation of the Bush administration’s response to 9/11 in Afghanistan and Iraq.

\textsuperscript{139} Pushaw. 2051.
IV

Ethical Considerations

In evaluating our current counter-terrorism policy, one important consideration we should take into account is the policy’s ethical basis. In this section, the moral basis for the current U.S. “war on terror” will be evaluated. Additionally, I will consider not only whether the current wars are just, but also whether there can be such a thing as a just counter-terror war. Finally, I will make an ethical evaluation of the U.S. hybridization of the war and crime paradigms as part of U.S. counter-terror policy.

Although there are some who would deny the existence of an objective morality, that view does not seem to correspond with our intuitions about the world. On a daily basis we all make judgments and evaluations about what is right or wrong. We try to edify our moral values to our children, our elders and our teachers try to pass their values on to us, and we like to think that we are doing our best to live up to these values. There are certainly instances where morality is clear (e.g., the Holocaust was obviously a moral outrage), but there are also instances in which it is more difficult to identify which actions are or are not morally acceptable (Philippa Foot’s “trolley problem” is a particularly troubling example). Yet, despite these complications, we all seem to have some sense of what is generally right and wrong (e.g., most people seem to recognize that donating money to charity is good and

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140 Many children grow up hearing the same lessons of “If you don’t have anything nice to say, don’t say anything at all.” or “Do unto others only as you would want done unto you.”

murdering is bad, even if they don’t do what is right in either instance). There is no good reason, then, to exclude this sense of ethics from our political decision-making.

When it comes to our choice of paradigms for counter-terrorism policy, the crime paradigm seems morally uncontroversial. Although there have been many critiques made about pre-9/11 U.S. counter-terrorism policy, these critiques have been aimed more at the policy’s inefficiency or poor organization than at any moral deficiencies. In vast contrast, it seems that a large portion of the critiques of the post-9/11 policy have been morally based. For example, Professor of Law and Philosophy at Georgetown University, David Luban, has said that the particular style of the U.S. war on terror “increased American power while decreasing the rights of both the enemy and the innocent bystander.” 142 For this reason it makes sense, first, to assess whether the war on terror has been morally just.

In order to evaluate the morality of the war on terror we need some sort of ethical framework from which to judge it. Unfortunately, making a moral assessment of a war is a complicated process, which neither Kantian Deontology nor Utilitarianism, two of the most prominent ethical theories, can satisfactorily accomplish.

The Shortcomings of Kantian Deontology

Kantian Deontology, based on the ethical views of the German philosopher, Immanuel Kant, claims that in order to evaluate the morality of actions we need to test them

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against what he calls the Categorical Imperative.\textsuperscript{143} In the \textit{Fundamental Principles of the Metaphysics of Morals}, Kant gave two versions of the Categorical Imperative:

1. Act only according to that maxim by which you can at the same time will that it should become a universal law.\textsuperscript{144}
2. So act that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.\textsuperscript{145}

Without getting too far into analysis of Kant’s Categorical Imperative, what can be said is that neither version offers a clear guiding principle for how to act in war. In Kant’s first version, he is claiming that each time we act, our action can be thought of as following a maxim (for example, if someone robs a bank, they are following the maxim “I will rob a bank.”). He then explains that our action is only morally acceptable if we, the person performing the action, would find it acceptable that everyone acts according to that maxim. The implication of this is that for it to be moral for me to rob a bank I must find it acceptable that everyone rob a bank. A hidden issue here, though, is that Kant seems to assume the rationality of all people. In other words, the first version of the Categorical Imperative would lead to the implication that if a suicidal leader of a nuclear power (leader X) found it acceptable that everyone act on the maxim “I will fire my nuclear weapons at neighboring states,” it would be morally acceptable for leader X to do so. Of course, one could attempt to salvage this version of the Categorical Imperative by claiming that making these judgments

\textsuperscript{145} Rachels 18.
should be restricted to rational people, but then it will become very complicated to figure out who can and who cannot make moral judgments. Additionally, it seems possible that rational people would disagree about which maxims are acceptable, leaving us with the same action being immoral for some and moral for other.

The second version of the Categorical Imperative also has some problems. In the second version, Kant is claiming that we ought to treat people not as means, but as ends in themselves. When it comes to the military, this is particularly troubling because almost every order given from a superior to an inferior serviceman treats that serviceman as a means to accomplish whatever end the superior had in mind. Yet it certainly seems morally acceptable for a senior officer to ask his soldiers, for example, to defend their position should they come under attack. In such an instance the officer is treating his soldiers as means to accomplishing the end of protecting their position. According to Kant, then, the officer is acting immorally. Of course, this same problem of superiors treating inferiors as means to ends would arise in all hierarchical organizations (e.g., police departments, the Department of Motor Vehicle, etc...). With problems of this sort, it is clear that neither version of Kant’s Categorical Imperative is up to the task of evaluating actions in war. Although Utilitarianism suffers from different problems, it will not be up to the task of performing the evaluations needed here either.

The Shortcomings of Utilitarianism

Utilitarianism, which is arguably the best-known version of consequentialism, goes in the opposite direction of Kant’s theory by judging actions not by the intent of the actor but by the results of each action. In his book, *Utilitarianism*, the British philosopher, John
Stuart Mill, claimed, “All action is for the sake of some end, and rules of action, it seems natural to suppose, must take their whole character and colour from the end to which they are subservient.” The specific end that Mill felt each action should be measured by was the amount of happiness or as Mill called it, utility, it brought to the world. So in the case of choosing between two actions, one must always choose that which would have the greatest utility, i.e., produce the most happiness. Yet, despite Utilitarianism’s seeming clarity compared to Kantian Deontology, some of its implications are wildly counter-intuitive.

One problem with Utilitarianism is that it fails to grasp the fact that as people, we tend to judge the morality of actions not only by their results, but by the intended purpose of the action as well. So, for example, helping an elderly woman to cross the street because we feel it is the right thing to do, according to most intuitions, is morally better than helping her across the street because we are hoping she will give us a few dollars in return. Yet, utilitarianism would claim that these actions are morally equivalent if they have the same result. Likewise, if while attempting to cross the street we were to trip and accidentally knock the elderly woman in front of a bus, Mill would have us believe that this was no different than had we intentionally shoved the woman in front of the bus (assuming that the utility or negative utility produced by each action was the same). In response to this, utilitarian philosophers would likely claim that the problem lies not in Utilitarianism but in our intuitions. Yet even if we were to accept that intentions do not matter, there are still actions that can be justified by Utilitarianism which are not only counter-intuitive but seem to be morally repugnant.

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Although there are many horrible actions that can be justified by Utilitarianism (Judith Jarvis Thomson’s organ harvest\textsuperscript{147} and Robert Nozick’s experience machine\textsuperscript{148} scenarios do a great job of pointing out some examples), these atrocities seem to be most salient when utilitarian judgments are made regarding war. Since the only goal of Utilitarianism is to maximize the amount of happiness in the world, it seems that this can justify outrageous acts of inhumanity. For example, imagine that there is a school filled with 200 innocent children in country X. Additionally, the leader of country X, leader X, is getting ready to wage a war against country Y that will cost thousands of lives on either side. However, if country Y were to bomb the school and kill all the children, leader X would likely call off the war (this can be for any number of reasons, e.g., war would be politically unpopular after such a massacre). According to Utilitarianism, if the calculations show that by killing the children, country Y can preserve the lives of thousands of others and maximize the amount of happiness in the world, it would be morally acceptable for Country Y to carry out the attack. As should be clear, this logic can lead to the result that horrendous actions in war are morally acceptable. What must be recognized is that the main fault in Utilitarianism is that it disregards each individual’s right to life (which was discussed in Section I). To recap, as humans we enjoy certain basic rights. Professor of Philosophy and Frank Henry Sommer Professor of Law at New York University, Rondald Dworkin, may best explain this in his book \textit{Terror & the Attack on Civil Liberties}: 

Among the most fundamental of all moral principles is the principle of shared humanity: that every human life has a distinct and equal inherent value. This principle is the indispensable premise of the idea of human rights, that is, the rights people have just in virtue of being human....

Most fundamental amongst these rights is the right to life. If as humans we have any rights, certainly one of them must be the right to continue living. Furthermore, this right to life must imply some duty on others not to interfere with it, for it is otherwise nearly meaningless. This means that, not only do we have a right to continue living, but that others are morally required not to interfere with that right. In the previously discussed case of country Y bombing a school in country X, the bombing would directly interfere with the right to life of the children and so is immoral. Regardless of whether people would generally be better off, bombing the school ignores the individual right to life of each child in the school.

Since it is clear that the two most prominent moral theories run into so many problems when it comes to war, any moral evaluation must use alternative means. In order to evaluate war, then, the best approach would be to focus on a more practical moral assessment. Instead of taking a universal moral principle and then trying to apply it to all situations, including war, it would be more useful to simply codify the factors that make actions in war just or unjust. One approach, and the approach which I believe better accounts for the individual right to life, is what is known as Just War Theory.

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Just War Theory

Just War Theory is a collection of doctrines that have been examined by philosophers stretching as far back as Aristotle in ancient Greece\textsuperscript{150} to contemporary philosophers, most notably the Institute for Advanced Study’s Michael Walzer. The basis of the doctrines lie on a continuum between pacifism and realism. The Just War theorist denies the pacifist’s claim that going to war is never justified, while also denying the realist’s claim that morality should have no role in war. Not only does this view seem to bode well with most of our intuitions but it has, additionally, served in some way as a guide for U.S. Presidents. Just to give a few examples, Presidents Barack Obama, George W. Bush, and Jimmy Carter have all claimed to have been influenced, at times, by Just War Theory.\textsuperscript{151} Most recently, while accepting the Nobel Peace Prize in December of 2009, President Obama pointed out that “There will be times when nations — acting individually or in concert — will find the use of force not only necessary but morally justified.”\textsuperscript{152} It will be useful, then, both to evaluate whether Just War Theory gives us morally acceptable rules to follow in a counter-terror war, as well as whether those rules have been followed in the War on Terror.

According to the Stanford Encyclopedia of Philosophy, Just War Theory is traditionally broken up into three parts: \textit{jus ad bellum}, \textit{jus in bello}, and \textit{jus post bellum}.\textsuperscript{153} \textit{Jus ad bellum} or the “law up to war” deals with distinguishing under what conditions a group


may go to war. *Jus in bello*, which means “law in war” governs what may be done within a war. Finally, *jus post bellum* or “law after war” deals with what conditions are morally required at the conclusion of war. As the wars in Afghanistan and Iraq are still under way (despite the President’s claims that “combat-operations” have ended in Iraq), I will not consider *jus post bellum*. I will, thus, begin this analysis with *jus ad bellum*.

**Jus Ad Bellum**

In order to begin a just war, there are several *jus ad bellum* criteria that must be met. The first, and possibly the most important, is that the war has a just cause. Although, in the past, just cause has been thought to include many different factors, today, according to a Baruch College Professor of Philosophy, Douglas P. Lackey, the only cause for war that can be considered just is “self-defense.”\(^{154}\) Although the cause of self-defense has been expanded lately to include defense of others, as well as preemption (going to war prior to an impending attack), it has not been expanded to include prevention (going to war to prevent the possibility of a future attack). Simply based on this initial criterion, it is clear that the war in Iraq has been unjust.

In the Authorization For Use of Military Force Against Iraq Resolution of 2002, there were several reasons cited for the war.\(^ {155}\) Amongst those reasons were the Iraqi regime’s possession of WMDs, their connection to the 9/11 attacks, and their providing safe havens for terrorists. Although it seems that any one of these reasons could have added support for, if not satisfied the requirements of the first criterion of *jus ad bellum*, nearly eight years after

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\(^{154}\) Lackey 164.  
the initial invasion it seems clear that none of the three justifications had any credibility. In fact, the entire basis of the claim that Saddam had a fully functioning WMD program seems to have been based on faulty intelligence provided by a single individual.156 After the invasion of Iraq failed to yield any sign of a WMD program, it seems that the war had shifted from having justifications based on actual self-defense to justifications based on the spread of democracy and defeat of terrorists who had moved into Iraq to create an insurgency. What is clear, then, is that the war in Iraq was not undertaken in response to an actual, but to a perceived need for self-defense.

Last September, Jeffrey Montrose pointed out in the Royal Institute of Philosophy’s Journal, Think, “Because the evidence given for the war [in Iraq], namely weapons of mass destruction, proved to never exist, it wouldn’t be too hard to argue the war as unjust.”157 In fact, it is simply based on the first criterion of jus ad bellum that the war is shown to be unjust. There was neither an actual attack nor a pending attack on the U.S. by Iraq, nor was there an ongoing massacre of Iraqi civilians for the U.S. to stop (the defense of others can only be used to justify going to war when there is ongoing or impending harm posed by the aggressor state). As pointed out by a Boston University professor, Neta Crawford, in referring to the war in Iraq, “the administration’s ‘preemption’ strategy is actually, in large degree, a preventive (early offensive) war strategy that seeks to maintain U.S. preeminence by reducing or eliminating the military capabilities of potential adversaries even before potential rivals have acquired those capabilities—and in the absence of clear intention and

plans to use weapons against the United States.\textsuperscript{158} The lack of a just cause for Operation Iraqi Freedom meant that the war was unjust and so will require no further analysis. Fortunately, the same critique cannot be made of the U.S. war in Afghanistan.

The U.S. went to war in Afghanistan in direct response to the attacks of 9/11, which, according to the principles of \textit{jus ad bellum}, provided a just cause for Operation Enduring Freedom. Of course, there were other factors that went into the decision to invade Afghanistan, but in general, it seems that the U.S. was justified in responding to 9/11 with such an attack. To further clarify, I would say that an attack like 9/11 can be seen as a just cause for going to war based on the rights to life that have been discussed throughout this paper.

As was mentioned earlier, individuals enjoy a right to life that implies a corresponding duty on others not to interfere with that right. In addition, I would say that this right to life implies a right to self-defense. If a right to continue living is to have any substance, it must be the case that one is justified in defending their right life should others try to interfere with it. Additionally, I believe that one can view a country, such as the United States, as a collection of people who enjoy a right to life. In circumstances such as ours, in which we become part of the same society, it seems that there would clearly be some collective right to self-defense: Just as a mother is justified not only in defending the rights to life of herself but of her children, the members of a society are not only justified in defending their own right to life but the right to life of their fellow citizens. As was the case with 9/11 (and the continued existence of Al Qaida), although it was only New York and

Washington, D.C. that came under attack, the collective right of self-defense in the United States meant that the country had a right to defend itself against further attack.

It is not only a just cause, though, that is required for *jus ad bellum* to be satisfied. In order to further analyze whether Operation Enduring Freedom is a just war, it must be tested against all of the other criteria of *jus ad bellum*, which are as follows:

1. A just war must be fought for the purpose of peace and reconciliation.\(^\text{159}\)
2. A just war must be fought as a last resort.\(^\text{160}\)
3. A just war must be undertaken by a legitimate or “competent” authority.\(^\text{161}\)
4. A just war must have a probability of success.\(^\text{162}\)
5. A just war must have ends proportional in good to the evil associated with war.\(^\text{163}\)

Although there have been attempts at formulating additional criteria, these five plus the original just cause criterion seem to be universally accepted amongst Just War theorists. In fact, the leading modern Just War theorist, Michael Walzer, supported all of these criteria in his book, *Just and Unjust Wars*.\(^\text{164}\) Additionally, these criteria are particularly useful in their relative clarity compared to theories like Utilitarianism and Kantian Deontology. First, the requirement of fighting for peace simply means that the *goal* of the war should not be retribution or justice. This requirement is based on the idea that war is an intrinsically bad thing and should only be conducted for the purpose of limiting further violence (and not for the sake of punishing aggressors). On a similar line of thought, the second criterion points

\(^{159}\) Crawford 7.

\(^{160}\) Crawford 7.

\(^{161}\) Lackey 162.

\(^{162}\) Orend.

\(^{163}\) Orend.

out that since war is bad, alternate means of accomplishing its goals should be sought before it is used. How much of an effort is required when attempting to seek alternative means to war is not completely clear, but as was the case with the actions of the Bush administration, the opposing state or group should be offered some means through which to avoid war.\textsuperscript{165}

The third criterion, that a just war requires a legitimate or competent authority simply limits wars to being undertaken by sovereign or legitimate powers, which in most cases (but not always) are states. The fourth and fifth requirements, similar to the first and second, recognize that war is bad and so require that a war be likely to end in success (otherwise undertaking the war would cause pointless suffering) and that there be some measure of proportionality in undertaking the war (you should not launch a war which may kill thousands over a single bullet shot across a border), respectively.

Of the \textit{jus ad bellum} criteria, they all seem to be not only reasonable restrictions on war but neither overly restrictive nor overly permissive. First, if all nations followed them there would obviously be no wars (since the only justified attacks are made in self-defense). Even in the event that there are wars (as a result of one group being an aggressor), they would only be fought under limited circumstances that eliminate wars that are immoral. Additionally, it seems that the U.S., in deciding to go to war in Afghanistan, has followed these criteria to some extent. There are a few critiques that some may raise (e.g., the U.S. went to war for the sake of retribution or the war was not fought as a last resort) but it seems that the U.S. made a reasonably just decision in deciding to go to war in response to 9/11.

\textsuperscript{165} In the case of Afghanistan, the Bush administration demanded that the Taliban turn Osama bin Laden over to the United States. It was the Taliban that refused to comply.
When it comes to the criteria of *jus in bello*, however, Operation Enduring Freedom has not done quite so well.

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**Jus In Bello**

Although there have been many different attempts at making clear restrictions on what is and is not permissible conduct in war, there are three principles which are central to *jus in bello*: necessity, proportionality, and discrimination.¹⁶⁶ Necessity is the requirement that any combative action taken in war be necessary, or in other words, serve the aim of successfully completing the war. This means that killing, just for the sake of killing is prohibited. In addition, as Crawford points out, “The proportionality criterion [distinct from the *jus ad bellum* requirement] prescribes that violence be in proportion to the aims of war; gratuitous violence should be avoided.”¹⁶⁷ Finally, the principle of discrimination, also known as the principle of discrimination and non-combatant immunity, draws a line between who and what is and is not an acceptable target of attack. According to Brian Orend, Director of International Studies and Professor of Philosophy at the University of Waterloo, the principle of discrimination requires that “armies are to discriminate or distinguish between military and civilian targets, and aim their lethal force only at legitimate military, and military supply, targets.”¹⁶⁸ The typical sentiment, then, is that it is morally acceptable to attack combatants and unacceptable to attack “innocents.” As a side note, the term “innocence,” when it comes to war does not refer to someone’s lack of guilt or as New

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¹⁶⁶ Lackey 168.
¹⁶⁷ Crawford 7.
York University professor; Thomas Nagel calls it, “moral innocence.” In war innocence is a reference to whether someone directly contributes to the harm posed by a combative force, e.g., innocents are civilians and non-innocents are combatants.

In addition to these three principles, one common restriction is on the types of tactics and weapons used in war, so as to avoid a feeling of future animosity that will make a lasting peace less likely. Typically referred to as means *mala in se* (wrong in itself), these restrictions are on the use of weapons and tactics that are considered particularly brutal or indiscriminate (these include flamethrowers, napalm, cluster bombs, chemical and biological agents, etc…). 170

In evaluating the war in Afghanistan, it is particularly tough to identify violations of the necessity and proportionality doctrines. Especially since the war is ongoing, it is tough to say whether, for example, all of the actions being taken are necessary for the success of the war, although it is likely that some were not. Yet, with the lack obvious violations of either principle at this point in time, we can assume that, for the most part, American actions in Afghanistan have stayed within the confines of proportionality and necessity. The same cannot necessarily be said, though, for the principle of discrimination.

When it comes to the principle of discrimination, it stands out that what is banned is the killing of civilians, yet it goes without saying that there are not and most likely have never been any wars free of civilian death. This leaves the Just War theorist in a tough position: either allow that there be some justifiable civilian deaths or accept that there can

170 Cluster Bombs as Arms mala in se: An Ethical Framework for Assessing the Means and Methods of Warfare Brad Archer Journal of International Service
only be theoretical but not actual just wars. It is in response to this point that the principle of double effect is added to the just war doctrine.

**Double Effect**

The principle of double effect draws a distinction between intentions and effects. In war, it is said, that when a justified attack is carried out against an appropriate target, foreseeable civilian casualties are not the moral responsibility of the attacker. In other words, the attacker is responsible for the destruction caused to the intended target (the military target) but is not responsible for the civilian deaths since they were not intended but were just a side effect or collateral damage. Although this may sound suspect at first, we do actually apply the doctrine of double effect in our daily lives. For example, when construction workers create roads or when engineers build cars, it is foreseeable that some people will die as a result (the Center for Disease Control counted 42,031 motor vehicle traffic deaths in the U.S. in 2007). We do not, however, think that what the construction workers and engineers do is immoral. It seems correct to say that their intentions were only to provide us with cars and roads and that any deaths that result were just an unfortunate side effect that they did not intend. Now, what must be said is that, as Walzer points out, “due care” must be taken to avoid unnecessary negative side effects. So, for example, should the factory worker run out of screws and use bubble gum to secure a tire or the construction worker fails to put up stop signs at the corner of adjacent streets, we would say that although

172 Walzer 156.
they did not intend resultant deaths they are still morally responsible. The same due care should be applied in war before double effect is allowed to be used.

In response to the aforementioned examples of the application of double effect, it may certainly be noted that construction and vehicle production are not clearly analogous to actions in war. What must be recognized, though, is that when we judge the morality of people’s actions, especially when they have some bad results, we give a large amount of weight to their intentions. This is exactly why double effect is so important: it restricts moral blame to the intentions of actions, as long as the actor took due care to avoid other negative effects. For the sake of clarification, another scenario should be helpful.

Imagine a pilot is attempting to land a passenger plane, but he misjudges the approach to the runway and ends up hitting a large office building. On 9/11 we found the results of such an action (flying a plane into a building) to be morally horrendous. Yet although the results of the pilot’s actions are the same as those of the hijackers, we would probably think of it as more of a tragedy than a moral outrage. So, in this case, with the results being identical, the distinguishing feature is that the hijackers intended to kill innocent people and the pilot did not. If the pilot failed to take due care (for instance, if he was drunk), we would feel that he was morally responsible, but in this case he was not. Of course, there are still discrepancies between this scenario and actions in war. As a result, one may claim that while double effect applies in this case, it does not in war because the pilot here did not intend to kill anyone and was also a victim himself. Both of these issues, however, can be easily resolved.

173 Of course, the hijackers did not think their actions were morally repugnant. However, I would assume that had American terrorists performed similar attacks in the Middle East, the 9/11 hijackers would think the American actions were horrendous.
Imagine one more scenario. Again, there is a pilot, but this time of a fighter jet. When attempting to maneuver for a bombing run on some enemy combatants, the pilot misjudges his approach and is about to crash into an office building. This time, though, the pilot manages to eject himself in the nick of time, but the plane still crashes into the building, killing innocent people. Again, imagine that the pilot took due care: he honestly believed he would not hit the building, there was no other way for him to approach the targeted individuals, and the people in the building were notified beforehand that they should evacuate but chose not to. In this case, it still seems that the pilot is not morally responsible for the deaths of the innocent individuals. So, it must be the case that double effect can apply in war, as well. In order to explain how this works further what is really needed is an account of when deaths in war are and are not morally acceptable, especially if a final evaluation of the war in Afghanistan is going to be possible.

Earlier in this section I rejected the use of purely Utilitarian reasoning for evaluating the morality of warfare. The problem with the Utilitarian principle seemed to be that it counts people strictly as functions of utility, not as individual people who have rights. It seemed that, in some way, no matter what the results of not attacking the school full of children in the scenario I provided would be, there was just something horrible about doing it (even if the results of not doing it would turn out worse for other people). What I think can help provide us with a better guide than Utilitarian calculations is creating a framework, based around rights of individuals, to distinguish between acceptable and unacceptable attacks. In order to formulate this framework, it will be necessary further to distinguish between innocents and combatants by breaking people up into the following categories
Categories of Individuals

What I will say first is that if we are going to have a moral war there must be a complete prohibition on intentionally attacking civilians. I would attribute this both to the idea that attacks of this sort are intentional violations of noncombatants’ rights to life and also to the fact that civilians pose no direct threat to the opposing force. It is the fact that by becoming combatants people directly contribute to the harm posed by a combatant force that they become legitimate targets of attack. Likewise, it is because noncombatants do not directly (although they may indirectly) contribute to this threat that they are not.\textsuperscript{174} Additionally, if one claims that it is morally acceptable for civilians to be the direct object of attack under the doctrine of double effect (for example, the claim might be made that the intention of the attack is really to end a war more quickly by forcing the opposing government into surrender, and that the civilian deaths are side effects), they would have to make the same evaluations of some terrorist attacks. In fact, it must be said that not only are terrorist attacks immoral (since by nature they are attacks on innocents) but that, as pointed out in section I of this paper, many of the allied attacks in World War II both on Japan and Germany targeted the civilian populations, and so were not only immoral but were actually acts of terrorism themselves. It seems, then, that we must account for the jump from it being, always and everywhere, unacceptable to directly target civilians to wars having acceptable

civilians. This is because if there were no acceptable civilian deaths, the collective right of self-defense (which was discussed earlier) would be meaningless. Since the only way to defend a nation, at times, is to go to war and all modern wars involve civilian deaths, it must be the case that some civilian deaths are morally acceptable.

In outlining the five categories of people in these conflicts, I have also laid out the rights that they enjoy. Again, I wish to make the claim that all humans enjoy a right to life and that in their natural state (non-combative) all humans enjoy it equally. What happens in war, however, is that combatants, be they soldiers, mercenaries, or insurgents, limit their own right to life. One piece of evidence for this claim is the oath U.S. servicemen take upon enlisting:

I, (NAME), do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.

By enlisting in the U.S. military, servicemen take this oath, swearing to follow all constitutional orders of their superiors. As a member of the U.S. military, servicemen sacrifice, in part, their rights to freedom of speech and freedom of movement. Of course, this is not the only way someone may knowingly sacrifice a right. For example, if you are arrested in the United States, you are allowed to waive your right to remain silent. Additionally, as Lackey points out in “The Truth About Pacifism,” “…it is always

175 As the current war only involves voluntary combatants, I will not consider the moral status of involuntary (conscripted) combatants.
permissible to waive one’s right to self-defence.” 177 Furthermore, even combatants who do not take an oath limit their right to life, since participating in hostile actions a combatant, as Walzer explains, “alienates himself from me…and from our common humanity.” 178 I do not mean to claim, though, that combatants sacrifice all their rights, nor that they sacrifice their right to life in its entirety, as Walzer seems to claim. 179 The reason this is important is that since combatants sacrifice some of their right to life, they are charged with sacrificing some of their own safety if it means that it will provide more safety for those who have not made such right sacrifices. All of this leaves one to ask what the implications are of the combatant’s forfeiture of rights. As the most highly protected class, innocent civilians should be considered first.

As mentioned earlier, direct targeting of innocent civilians is unjust. Moreover, it is not until certain criteria are met that double effect can excuse a combatant from causing the deaths of innocent civilians, who are not directly targeted. Between the requirements of jus in bello as well as the consideration of rights, I believe that there are some general requirements that may be extracted in order to formulate criteria for when double effect may be applied. First, like a direct attack on civilians, an attack on a structure where civilian death is clearly foreseeable is also unjust (otherwise double effect could be used to justify all sorts of terrorist attacks). Second, an attack on enemy combatants in which civilians are also killed (and it was reasonably foreseeable that they would be) is morally acceptable if and only if the following criteria are met:

178 Walzer 142.
179 Walzer 142.
1. The attack is taking place as part of a war that meets all of the *jus ad bellum* criteria.
2. It is not the intention of the attacker that the civilians would be harmed.
3. The attack is a military necessity as required by *jus in bello*.
4. The attacker cannot take on more reasonable risk in order to limit the risk to innocent civilians.
5. The proportion (in numbers) of enemy combatants to innocent civilians killed must be large.

These criteria warrant some explanation. The purpose of the first criterion should be obvious. If any attack is carried out as part of a war that is already unjust, there is no way that deaths of innocent civilians, much less any deaths, can be justified on account of just war criteria.\(^{180}\)

For the second criterion, it is necessary that the innocent civilian deaths not be intended or double effect is not operational. Additionally, the requirement of the third criterion should be clear from the earlier discussion of the doctrine of necessity. When it comes to the fourth criterion, though, the explanation is not quite so simple.

As was mentioned earlier, all humans enjoy the same rights to life, but combatants waive those rights to a large degree. This means that civilian lives (even of the opposing group) must be given greater regard than those of the combatants (even of one’s own forces). So if a military leader is tasked with choosing between an airstrike that will not cause any military deaths for his own force but ten civilian deaths, whereas a ground assault will have similar success but with ten military deaths and no civilian deaths, it is required that he choose the ground assault. It is not the case, however, that the military leader must have his

\(^{180}\) It may, however, be the case that certain deaths that occur during an unjust war are still morally acceptable on bases which are extrinsic to the just war doctrine. For instance, although Operation Iraqi Freedom was unjust, the deaths of Saddam Hussein and his sons seem to be a morally acceptable side effect.
soldiers take unlimited risks. For example, imagine that in the same scenario, the ground assault would be successful, but the military leader would lose 1,000 of his combatants. In a case like this, it would be acceptable to choose the airstrike. Of course, the choices the military leader must make are clear in extreme cases like this, but when closer numbers of combatant (of the attacking force) and civilian deaths are likely to result, it is more difficult to point out which courses of action are just. What must be said, then, is that in choosing between one method of attack and another, significantly more weight must be given to the lives of innocent civilians, who have not sacrificed any of their rights, than lives of the combatants who have. A good rule of thumb may be, as Walzer claims, that “The limits of risk are fixed…roughly at the point where any further risk-taking would almost certainly doom the military venture or make it so costly that it could not be repeated.”\textsuperscript{181}

Finally, the fifth criterion that must be met in order to carry out an attack in which deaths of innocent civilians are clearly foreseeable relates to the proportion of deaths of enemy combatants to civilians killed. In other words, if a military force is to carry out an attack on enemy combatants, it ought to be the case that there are more combatant deaths than civilian. The implication of this criterion is that the attacking force is not allowed to carry out indiscriminate attacks, for example, on crowded marketplaces, weddings, etc…where a small number of enemy combatants may be surrounded by large numbers of innocent civilians. This, of course, does not rule out more accurate approaches, like raids. Additionally, there is one problem with this criterion that must be addressed.

When discussing the fifth criterion (for when it is acceptable to apply double effect to attacks with clearly foreseeable civilian casualties) it must be recognized that there is an

\textsuperscript{181} Walzer 157.
issue with its application: If no particular ratio of acceptable enemy combatant to civilian deaths is prescribed, this rule will probably have very different implications in attacks carried out under different leaders. One way around this issue is to set a particular acceptable ratio but then we will run into what is called a sorites paradox.\footnote{The sorites paradox, also known as “the problem of the heap” can cause problems when you are trying to identify certain measurements. The classic example is the problem of how many pebbles piled together make a heap. It seems that everyone knows what a heap of pebbles is but at what point a pile of pebbles becomes a heap is not clear. Although this can be pointed out as a limitation of language, in identifying an acceptable ratio of civilian to combatant deaths, the same problem will arise.} In other words, if we set an acceptable ratio of 100 enemy combatant deaths for every five civilian deaths, we run into the issue that six civilian deaths would be unacceptable. Yet, claiming that five civilian deaths are acceptable but six civilian deaths are not is treating nearly identical situations in wildly different manners. However, compared to the alternative strategy (of not setting an exact ratio and leaving commanders on the ground to make moral judgments of this sort in the heat of battle), it is likely to have far worse consequences than setting an arbitrary ratio. For that reason, a policy attempting to follow just war criteria should include an acceptable combatant to civilian death ratio for attacks involving foreseeable civilian deaths.\footnote{Setting limits like these are not unheard of. In “The Morality of Tactical Nuclear Weapons,” Richard Brandt points out a rule from an Army Field Manual that sets this same sort of ratio for the use of tactical nuclear weapons: “…a nuclear weapon may not be used if its employment would cause more than five percent civilian casualties…” See: Brandt, Richard, and Thomas Nagel. "The Morality of Tactical Nuclear Weapons: A Philosopher's Debate." \textit{Parameter, Journal of the US Army War College} XI.3 (1981): 75-86. Web. 02 Feb. 2011.}

A closely related question to the one just discussed is how to apply double effect for innocent civilian deaths in circumstances where civilian deaths seem unlikely. In such instances, the restrictions will be almost identical to the restrictions on instances with clearly foreseeable deaths, except for criteria four and five. Again, restrictions four and five are:
4. The attacker cannot take on more reasonable risk in order to limit the risk to innocent civilians.
5. The proportion (in numbers) of enemy combatants to innocent civilians killed must be large.

In an instance where it seemed unlikely that civilians would be killed, it still is reasonable to hold combatants to criteria one, two, and three of the double effect criteria for instances in which civilian death seems likely. What criterion four is calling for is due care, as was pointed out earlier by Walzer. Yet in the circumstances we are now talking about, the combatant is unaware of the threat he will pose to civilians. What criterion four should be, then, is that the combatant must take reasonable steps to investigate whether it is likely that civilians will be killed (in cases where the combatant is relying on intelligence provided by a third party it is the moral responsibility of the third party to provide such information). If at that point it turns out that it is likely that civilians will be killed, the combatant’s responsibilities revert to the five criteria for double effect in such circumstances. If, however, the combatant takes reasonable steps to investigate whether it is likely that civilians will be killed and it still seems unlikely, step five should no longer apply. In other words, if steps one through four are properly followed and civilian death still seems unlikely, any civilian deaths that occur under such circumstances are not the moral responsibility of the combatant. This is double effect acting at full capacity. Again, what we are talking about here is a case of an actual accident in which soldiers were both doing their duty and trying to act morally (as in the scenario of the fighter jet that crashed into an office building earlier in this section). It seems, then, that even in cases where there are civilian deaths and no enemy combatant deaths that a set of criteria for these deaths to be morally acceptable may be formatted as follows:
1. The attack is taking place as part of a war that meets all of the *jus ad bellum* criteria.
2. It is not the intention of the attacker that civilians would be harmed.
3. The attack is a military necessity as required by *jus in bello*.
4. The attacker (or those responsible for providing the attacker with intelligence) made a legitimate effort to verify that civilian deaths were unlikely.

Just to clarify, then, we can imagine a scenario likely to have occurred in Iraq or Afghanistan. In both Operations Iraqi Freedom and Enduring Freedom, a major threat to American soldiers has been the use of VBIEDS (vehicle-borne improvised explosive devices). Because of the large amount of explosives that can be held in a vehicle, a very effective way to overcome the protective abilities of armored coalition vehicles is to drive a VBIED up to a coalition vehicle and detonate it. Even if the armor is not pierced by the detonation, it is still possible to kill combatants inside because the impact may be worse than that in a car accident. As a way of countering this tactic, coalition forces have required that when they are driving through certain areas of Iraq and Afghanistan, all vehicles pull off to the side of the road. In order to protect civilians, the directive in these areas has also been that if a vehicle is not complying (they are driving towards a coalition convoy), the coalition forces must first waive an orange flag and use hand signals to try to get the approaching vehicle to pull off the road. If the vehicle continues towards the coalition convoy, they must then shoot a flare, followed by warning shots fired into a safe direction, followed by shooting at the approaching vehicle’s tires, followed by shooting at the approaching vehicle’s engine block, and finally, if there is no other way to prevent the vehicle from approaching the convoy the soldiers can fire on its occupants. All of these precautions are taken to avoid an instance where a civilian driver, who is unaware of the rules or is oblivious to what is going
on around him or her, becomes the target of a defensive attack. Unfortunately, all of these steps put the coalition forces at further risk but, as has obviously been recognized by the area commanders in Iraq and Afghanistan, combatants have a responsibility to take due care in avoiding civilian death. Were civilians to be killed while driving what seemed to be a VBIED up to a coalition convoy in Afghanistan, and had the coalition forces followed the four criteria for such circumstances, the death would be unfortunate but not the moral responsibility of the combatants.

Besides innocent civilians there are still four other groups of people to be discussed. These groups, however, have slightly easier statuses to deal with. First, combatants must have the least number of restrictions on attacking, since they, as pointed out by Walzer, largely sacrifice their right to life. Assuming that the means used in an attack against combatants are not mala in se, all of the previously discussed rules require only that the attack be part of a war, which satisfies all of the jus ad bellum and jus in bello criteria. In an article for the Ford Institute for Human Security, Jeff McMahan explains, “it is not the posing of a threat but only the posing of an unjust threat that can make a person liable to defensive violence.”\textsuperscript{184} This means “that in general the only combatants who are morally justified in fighting are those who fight for a just cause in a just war.”\textsuperscript{185} Additionally, it must be recognized, though, that they do “gain war rights as combatants and potential prisoners…”\textsuperscript{186} Codified in the Geneva Conventions, these rights include, among other things, protections as prisoners of war, “particularly against acts of violence or intimidation

\textsuperscript{184} McMahan 31.
\textsuperscript{185} McMahan 31.
\textsuperscript{186} Walzer 136.
Additionally, prisoners of war must be treated for illnesses and released at the end of hostilities. The only exceptions to these rules are when those captured have violated the principles of international charters or jus in bello (this will be discussed further toward the end of this section). When it comes to complacent civilians, however, the restrictions more closely resemble those of innocent civilians than those of combatants.

Of complacent civilians, there are those who are passively complacent and those who are actively complacent. The difference is that passively complacent civilians gain their status (rather than remaining innocent civilians) through an omission, such as knowing where insurgents are hiding but doing nothing to notify the opposing force. On the other hand, actively complacent civilians take actual steps or actions to aid the insurgents, whether they be feeding them, providing them with shelter, or even allowing them to use their land for storage of weapons. What seems to be happening in each of these cases is that the complacent civilians take a step away from innocence by adding to the threat of harm posed by a combatant force. That being the case, the difference between complacent and innocent civilians is that the former group has slightly less of a claim to life. One can picture, then, to some extent, a spectrum on which people lie from the greatest to the least right to life: innocent civilians, passively complacent civilians, actively complacent civilians, combatants (with there being a large distance between the actively complacent civilian and the

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combatants since the combatant takes a much larger step towards posing harm). The practical difference between innocent and complacent civilians is only the effect on the ratio of acceptable combatant to civilian deaths in attacks with foreseeable civilian casualties. For example, if the ratio for combatant to innocent civilians was set at 100:5, as discussed earlier, we might want to set the ratio at 100:8 for the passively complacent civilians and 100:20 for the actively complacent civilians. Of course, these are once again arbitrary ratios, but they reflect the fact that these complacent civilians have taken some steps, be they acts or omissions, to add to the danger posed to soldiers, and so have forfeited some of their right to life.

The final group that must be considered is the child soldier. Just as with other groups of people, child soldiers enjoy some right to life but they pose a peculiar problem in their seeming lack of moral responsibility for some actions. In “An Ethical Perspective on Child Soldiers,” Jeff McMahan points out that in dealing with the issue of child soldiers, we must ask whether there is a “moral requirement to exercise restraint in fighting them…” and whether just combatants ought to “accept greater risks to themselves in order to minimize the harm they inflict on child soldiers?”189

In the war on terror, it has fortunately been the case that the use of child soldiers has been rare. There have, however, been isolated incidents. For example, in September of 2007 insurgents in Iraq’s Anbar Province outfitted a fourteen-year-old boy with an explosive-laden suicide vest. The boy, who was likely following the instructions of an adult, walked into an outdoor common area where several families had gathered to eat dinner (a common practice during Ramadan). The boy began handing candy out to the children at the dinner and once

189 McMahan 27.
they had all gathered around him detonated the device, killing nearly everyone there, including himself. Imagine that this same scenario was about to take place in Afghanistan, but a coalition soldier could stop it but only by killing the boy. Certainly in this instance the soldier should stop the attack, even if it means killing a fourteen-year-old boy. In this instance this may justified on the grounds that the boy is old enough that he is at least minimally responsible for the attack, and so he loses the large right to life enjoyed by civilians.

Imagine a similar scenario but now the child is six and he is unaware that what he is wearing is a bomb that will detonate at a predetermined time. It is much tougher in this instance to say that the boy is even minimally responsible for the threat he is posing. He seems to be, what McMahan refers to as a “nonresponsible threat.” In other words, the child is causally involved in the threat but is not morally responsible for it. Additionally, imagine that instead of it being innocent families who are being threatened, it is one soldier who must either kill the child or be killed himself. It seems that in this particular situation the soldier may kill the child because the child will die in the explosion and so their right to life will be violated either way. We can, though, imagine that the child will somehow survive the explosion but the soldier will die. Now, in either case only one person will die, the soldier or child. Again, the child is a nonresponsible threat. In this scenario it seems, then, that if we say the soldier can kill the child, he would also be able to do so with an innocent civilian who was somehow posing a nonresponsible threat (we can imagine a scenario in which an innocent civilian is driving a car, unaware that it has a bomb in it that will be detonated by a timer). Yet, as was pointed out earlier, it is unacceptable to directly

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190 McMahan 33.
target an individual who you believe to be a civilian. What we must conclude, then, is that in a case where the child is a truly non-responsible threat, the only basis on which the soldier can choose his or her own life is personal preference. Furthermore, just as with innocent civilians, child soldiers in this case do not do anything, if they are non-responsible, to sacrifice their right to life, and so must their life must be taken to outweigh the adult soldier’s life. Indeed, the soldier must choose the life of the child over his own. Of course, this seems to go against common intuition. We tend to feel that people have a right to self-defense but that right seems to come from the diminished rights of the attacker because of their moral responsibility for the attack. Fortunately, this common intuition does not have to be overridden in practice because it seems that there really are not any non-responsible threats of this sort.

As explained by McMahan, “the idea that even terribly abused children can be morally responsible for their action is not implausible.” We commonly hold children to be morally responsible for their actions from a very early age. For example, McMahan points out that “If one’s own child or the neighbor’s child torments the cat, one regards it very differently from the way one regards the dog’s efforts to harm the cat.” When a pitbull attacks a passerby we tend to place all of the moral blame on the owner, since the dog is incapable of taking on moral responsibility. In the case of humans, though, it seems that even children (who have developed basic mental capacities) have more responsibility for their actions than animals, and so must be at least minimally responsible for their actions. It being that case that children are at least minimally responsible for their actions, the

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191 McMahan 38.
192 McMahan 38.
restrictions on soldiers in dealing with child combatants should be very similar to the restrictions for dealing with adult combatants: attacks that follow *jus ad bellum* and *jus in bello* requirements are morally acceptable.

Because the basic guidelines for attacks on child and adult combatants are the same, though, does not imply that the attacks can be carried out in the same way. Taking the proportionality requirement into consideration, we should recognize that the means acceptable for neutralizing the threats from those who are fully morally responsible are not all acceptable for use against those who are not. For example, there is nothing wrong with using an air-to-surface missile to kill a group of adult combatants who are currently posing no harm, but the same cannot be said of a similar attack on a group of child soldiers. In dealing with child soldiers, then, the requirement must be that the least amount of force possible is used, but that soldiers are not required to sacrifice their lives in order to avoid taking those of minimally responsible child soldiers. The key here is the level of restraint that ought to be shown, which is unnecessary in combat against fully morally responsible adult soldiers. Once again referring to McMahan, “Just combatants should show them [child soldiers] mercy, even at the cost of additional risk to themselves, to try to allow these already greatly wronged children a chance at life.”

As a side note, it is worth mentioning that when child soldiers are killed in justified attacks, their deaths are at least partially the moral responsibility of the adults who turned them into combatants. What this means is that even if these adults do not participate in combat directly, they can be considered combatants themselves and so are liable to attack.

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193 McMahan pg 15
With all of the categories of people worked out, all that is left to do is analyze Operation Enduring Freedom according to these requirements. There are two aspects of the war that we can analyze in regards to these requirements: whether particular attacks have been violating these rules and whether particular styles of attack in the war are *mala in se*.

**Jus In Bello in Afghanistan**

In evaluating the impact of the War in Afghanistan on noncombatants, it is difficult to come up with reliable figures for civilian deaths and whom those deaths can be attributed to. One reason for this is obviously that the U.S. coalition has a vested interest in civilian casualty statistics being low, and the opposite is true for the insurgents. Another reason for problems with the collection and analysis of civilian death rates is that the war is still going on, making it especially dangerous for human rights groups to collect such information. Still, some groups have tried to do this work and there are a few points that can be extracted from their research and put towards a moral evaluation.

Statistics on noncombatant deaths in Afghanistan seem to have become more widely available in the most recent years of the war. According to Human Rights Watch “In 2006, at least 929 Afghan civilians were killed in fighting related to the armed conflict.”\(^{194}\) Of those deaths they attributed 230 to the U.S. coalition, 116 of which were attributed to airstrikes. In the following year, 2007, Human Rights Watch tallied 1,633 noncombatant deaths, with 321 being caused by U.S. Coalition airstrikes.\(^{195}\) These totals are similar to those put forward by the United Nations Mission in Afghanistan, which put civilian deaths...
from 2006 to 2008 at 929, 1523, and 2118, respectively.\textsuperscript{196} According to a meta-analysis by the Human Security Report Project, in 2009 there were 2,412 noncombatant deaths, with 596 caused by pro-government forces (which include Afghani forces).\textsuperscript{197} Most recently the Afghanistan Rights Monitor, put the 2010 civilian death toll in Afghanistan at “at least 2,421” with 512 being attributable to U.S./NATO forces.\textsuperscript{198}

There are several points that can be made about these statistics. First, insurgents have caused the majority of noncombatant deaths in Afghanistan (most of which have been attributed to IEDs). Additionally, it is hard to tell what the causes of each civilian death attributable to U.S./NATO forces were but it is likely that as with 2006, the majority were caused by airstrikes. What this data will not tell us though, is how many of these strikes took place after the precautions necessary for double effect to apply were followed. There are some factors, however, which seem show that at least some of the civilian deaths in these cases were not justified according to \textit{jus in bello} requirements.

One issue with the tactics used in Afghanistan is the reliance on indiscriminate weapons that pose an unnecessary risk to civilians. In a New York Times Article published in 2001, Eric Schmitt and James Dao boasted about the precision of U.S. weapons. According to Schmitt and Dao, “New guidance systems have been strapped onto older weapons, like the cluster bombs dropped near Kunduz, making them devastatingly

accurate.\textsuperscript{199} Unfortunately, as pointed out by the Project on Defense Alternatives’ Carl Conetta, with the increased usage of “smart” weapons in Afghanistan (as compared to Kosovo), there was also a switch from laser-guided to GPS-guided weapons. According to Conetta, “Most current GPS directed weapons, such as the Joint Direct Attack Munition (JDAM), are simply less accurate than laser-guided bombs.”\textsuperscript{200} The difference, between the accuracy of laser and GPS guided weapons does seem to only be several meters, but when targeting houses, as is often done in Afghanistan, this can certainly be the difference between a successful attack and a slaughter of innocent civilians.

In addition to the use of GPS guided munitions, the U.S. has, at least at times, used cluster bombs. According to the Afghanistan Rights Monitor,

Cluster munitions are large weapons which are deployed from the air and ground and release dozens or hundreds of smaller submunitions also called “bomblets,” or “grenades” which pose two main risks to civilians. First, their widespread dispersal means they cannot distinguish between military targets and civilians so the humanitarian impact can be extreme, especially when the weapon is used in or near populated areas.

Additionally, cluster submunitions often fail to detonate. These “dud” submunitions can be very unstable and so are very dangerous to people in the area that may step on them (which is relatively easy since submunitions are often between the size of a baseball and a football.)

When it comes to cluster bombs, it seems that their use should be stopped completely. The danger they pose to civilians is a direct violation of the due care called for in the criteria

for the use of double effect. Additionally, the use of other weapons should be restricted to the most accurate and least damaging weapons that can carry out the missions. Often weapons like the JDAM are used when they do not have to be. For example, while I was deployed to Iraq, the military would often use JDAMs to destroy houses that were likely rigged with explosives. As explosive ordnance disposal technicians, my team and I were qualified to go into these houses and disarm any explosive devices by hand. Of course, doing so would have put my team and I at risk, but that is a necessary risk if due care is to be taken.

Another example of JDAMs being used when alternative means were available was in Baquba Iraq, in spring of 2008. Several industrial chlorine tanks had been left in a field and instead of disposing of them properly the military decided to drop JDAMs on them. In this case it was American troops and not civilians who were harmed because the tanks were not destroyed but only damaged and the chlorine gas from the tanks was carried downwind, leaving several soldiers in need of immediate medical treatment. Certainly, had the wind been blowing in a different direction (it seems that in this case there was no attention paid to the wind direction), a nearby town full of civilians could have been exposed to chlorine gas. It is this type of carelessness and lack of precaution in combat that leads to immoral civilian death. When alternative means are available which can carry out the mission and have less potential for civilian death they must be used if the civilian right to life is to be protected. Besides these specific types of weapons and their overuse there is another issue regarding when and how often airstrikes are used.

The war in Afghanistan has been different than many previous wars in the small number of troops dedicated to carrying out its operations. Instead of using large units to go
after insurgents, the idea was to use technology and special operations forces. The result has been that airstrikes have often been unplanned. As was discussed earlier in this section, to carry out an attack there is a level of care that must be taken in order to satisfy the duty not to interfere with the civilian right to life. However, in instances where airstrikes are unplanned (for example, the lightly armed special forces teams often call in air support when they come under fire), the care that can be taken with planning is no longer possible. In a report by Human Rights Watch called “‘Troops In Contact’ Airstrikes and Civilian Deaths in Afghanistan,” they explain that

Whether civilian casualties result from aerial bombing in Afghanistan seems to depend more than anything else on whether the airstrike was planned or was an unplanned strike in rapid response to an evolving military situation on the ground. When aerial bombing is planned, mostly against suspected Taliban targets, US and NATO forces in Afghanistan have had a very good record of minimizing harm to civilians. In 2008, no planned airstrikes appear to have resulted in civilian casualties. In 2007, it appears that only one planned airstrike resulted in civilian casualties. In 2006, at least one attack resulting in civilian deaths may have been a planned attack.201

The war in Afghanistan has been fought, or at least had been for the past few years with an astoundingly low number of troops for the size of the country and population. The following chart shows the number of American troops deployed to Afghanistan throughout the course of the war:202

As can be seen in this chart from the Brookings Institute, for the first six years of the war in Afghanistan, the United States dedicated less that 25,000 troops. Similarly, the 48 other countries that have dedicated troops to the U.S./NATO coalition deployed a total of 10,500 or less troops through June of 2006. Meanwhile, the midyear population of Afghanistan in 2002 was 23,051,000. If we focus, for example, on November of 2002, there were 9,500 U.S. troops and 9,400 Non-U.S. Coalition troops in Afghanistan, meaning that for every troop deployed to Afghanistan there were 1,219 Afghans. Besides the fact that large numbers of those troops were not combat troops (every military unit depends on a support structure made up of other troops, for example, administrative and logistical support troops), the sheer size of the Afghan population meant that providing a reasonable level of safety for the civilian portion of the population would be almost impossible. Of course, I am not claiming that the force deployed to a foreign country in a war has to be large enough to

203 Livingston 4.
provide absolute protection to the civilian population against harm from the enemy. What I am claiming, though, is that the force must be large enough so that unplanned airstrikes do not serve as the primary response to attacks on friendly forces. In other words, if a war is to be fought morally, it will require a large enough force. The war in Afghanistan has not, until more recently, received a force even relatively near adequate to carry out this task and so the War in Afghanistan has largely been fought immorally. Before completely condemning actions in the war, though, I would like to point out a few of the American effort’s saving graces.

First, it seems that what civilian deaths Americans have caused in Afghanistan have mostly been unintentional. What has been missing in Afghanistan, as compared to other wars, are intentional massacres of civilians. Vietnam, for example, was full of terrible instances, such as the My Lai Massacre in which American troops intentionally slaughtered somewhere over 300 civilians. Likewise, the heavy aerial bombardment that intentionally killed civilians in World War II has not been present either. Secondly, the U.S. has more recently been taking steps to make it clear that airstrikes should not be used except in instances where they absolutely must be. In a new Tactical Directive released in 2010, General Patraeus wrote that

Prior to the use of fires, the commander approving the strike must determine that no civilians are present. If unable to assess the risk of civilian presence, fires are prohibited, except under one of the following two conditions...

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Unfortunately, these conditions are classified and so we cannot evaluate whether they are sufficient to warrant not taking further steps to ensure civilian safety before attacking. Furthermore, these directives have come out much too far into the war to have prevented a lot of civilian death that could have been avoided. Finally, the amount of troops needed to fight the war in a more just manner is now being dedicated. Nearly ten years into the war there are more than 140,000 Coalition troops in Afghanistan\textsuperscript{207} and the administration is finally beginning to take responsibility in situations where civilians are killed because of a lack of due care.\textsuperscript{208} It is safe to say then, that while the war in Afghanistan has not been fought in a completely just manner it has been fought in a more just, or less unjust manner than many previous wars and is improving, despite the war being carried on for nearly 10 years. Unfortunately, there is one more major problem with the war in Afghanistan, but this has to do not with how it is being fought but with what is being done with enemy combatants once they are captured.

\textbf{Hybridization}

In Section II of this paper the distinctions between the crime and war paradigms were outlined. It was clear then, that the war paradigm requires that once an enemy combatant is captured, whether that be as a result of injury or surrender, they take on the status of a prisoner of war. Earlier in this section, it was explained that although combatants largely sacrifice their right to life, they do enjoy a new set of rights in exchange. Amongst these

\textsuperscript{207} Livingston 6.
rights, some of which are laid out in the Geneva Conventions, are the rights to medical care, humane treatment, and repatriation at the end of hostilities.\textsuperscript{209} As a matter of both international norms and morality, once an enemy combatant is captured they can no longer be treated as a combatant. They are neither subject to punishment (unless they have committed war crimes) nor torture. If it is the case that a combatant has committed war crimes, they are to be allowed a fair trial. The reason for this is that while following the war paradigm, soldiers are allowed (and expected) to kill enemy combatants and in turn enemy combatants can (according to international norms) fight back, assuming they are using legitimate means of fighting. That being the case, we cannot, after trying to kill enemy combatants, capture them and treat them as though their fighting back was a crime. In other words, as pointed out by George Washington University Professor David Luban, “It is impermissible to punish him [a combatant] for his role in fighting the war. Nor can he be harshly interrogated after he is captured.”\textsuperscript{210} Unfortunately, in Afghanistan, the U.S. has largely disregarded these norms and uniformly treated enemy combatants who are captured as criminals, no matter what their actions were in the war.

In an essay by Vincent-Joel Proulx, a law clerk at the International Court of Justice in the Hague, “In mounting Operation Enduring Freedom, the United States was adamant in expounding that Taliban members would be stripped of prisoner of war (‘POW’) status, while it also claimed that members of the Al Qaeda network would not benefit from the


protection of the Geneva Conventions.” In an announcement by Press Secretary Ari Fleischer on February 7, 2002 he explained that …President Bush today has decided that the Geneva Convention will apply to the Taliban detainees, but not to the al Qaeda international terrorists…. Under Article 4 of the Geneva Convention, however, Taliban detainees are not entitled to POW status. To qualify as POWs under Article 4, al Qaeda and Taliban detainees would have to have satisfied four conditions: They would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war.

In other words, the Bush administration had made it a crime, to fight against the U.S. in Operation Enduring Freedom, combining both the war and crime paradigms. This new hybrid model stripped all human rights from the enemy forces by allowing that we try to kill them according to the war model (in which combatants largely lose their right to life) and then indefinitely detain them (as criminals without any prisoner of war rights) and torture them, in direct violation of the Geneva Conventions.

The implications of the Bush administration’s decision to uniformly deny the Taliban and Al Qaeda forces prisoner of war statuses were significant. The decision denied the opposing forces of any of the rights allowed by the war or crime paradigms, while

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simultaneously allowing the administration the benefits of both paradigms: Not only could we now kill the opposing forces, but we could also treat them as criminals if they were captured. Yet, the basis for doing so, especially in the case of the Taliban, was extremely flimsy.

As pointed out by Press Secretary Fleischer, according to the Geneva Conventions there are several requirements that must be followed for combatants to be protected, amongst which are the requirements to be distinguishable from civilians and to fight according to the laws of war. When it comes to being distinguishable from civilians, it is not completely clear that all of the Taliban forces violated this rule. First of all, it may have been the case, at least in some instances, that some of the Taliban were distinguishable by their black turbans, carrying of weapons, or possibly by their uniform maintenance of beards. Additionally, although this does not justify any lack of distinction on the part of the Taliban, U.S. forces have a habit of using civilian attire and sterile uniforms in combat themselves, but expect that they are protected by the Geneva Conventions. The point, here, is not that the administration was wrong in denying Taliban members protection under the Geneva Convention due to their lack of distinction in all cases (or even any case), but that a uniform designation of this sort is not justified. It may be that some of the Taliban fought within the criteria of the Geneva conventions and so should have been afforded its protections. In an article for the American Journal of International Law, George H. Aldrich explained how the administration should have dealt with the issue of the enemy forces not distinguishing themselves from civilians:

I would suggest that a necessary first step would be for the United States to make public both the basis and the reason for
denying POW status to all Taliban prisoners, not simply by asserting that the Taliban armed forces neither distinguished themselves adequately from the civilian population nor conducted their military operations in accordance with the laws of war, but by documenting such assertions and accompanying this evidence with a convincing explanation of the gravity of these matters and some elaboration of the evidently felt need to deprive them of POW status.214

The real issue here is that the administration has attempted to treat all enemy combatants as war criminals. Yet, not distinguishing oneself is not sufficient for being labeled as such. To be a war criminal, and sacrifice prisoner of war status rights, one must actually commit a war crime.215 In this case a combatant must not only not distinguish himself but must carry out an attack simultaneously. If that were not the case then it would be a near impossibility for any combatant, on either side, to keep prisoner of war status if captured. In other words, to claim that a combatant loses prisoner of war status as soon as they fail to distinguish themselves would prevent combatants from ever removing their uniform in a combat zone (for example, while returning to base, since there are almost always civilians present on a base). Furthermore, although it may be possible that no enemy combatant distinguished himself from civilians in OEF, there should be an investigation done into each case to see whether they had simultaneously performed hostile actions. If a combatant has not, then they have done nothing to sacrifice their rights as a captured combatant. In order to protect the rights of combatants, it should certainly be the case that everyone captured is given prisoner of war status if there is doubt about whether they qualify.216 Only after an investigation

215 Proulx.
216 Proulx.
should a combatant’s war rights be revoked, and that is after it has been shown that they are a war criminal.

It is not the denial of prisoner of war status to those captured in Afghanistan, though, that has been the worst moral issue with hybridization. Far worse has been the fact that prisoners have been tortured at the hands of Americans. Once captured, the enemy forces should be detained until hostilities have ended and then repatriated. In the meantime they should be held in conditions that respect their rights as human beings. This does not mean, however, that there are not many detainees that should be punished. When it is found that there is sufficient evidence to try a detainee before a military commission for violation of the rules of war that is what should be done. Maintaining this restriction on punishing only those who have violated the rules of war means maintaining the distinction of the crime and war paradigms and respects the basic rights that must be accounted for if American actions are to be just.

Finally, there have been some who have objected to the detention of combatants who are captured until the end of hostilities on the grounds that the war on terror can have no identifiable end. As Luban points out, “In the War on Terrorism, no capitulation is possible. That means that the real aim of the war is, quite simply, to kill or capture all of the terrorists—to keep on killing and killing, capturing and capturing, until they are all gone.”\textsuperscript{217} What can be said in response to this claim is that the war in Afghanistan must specifically be looked at as that, a war within a specific country, against specific forces: the Taliban and Al Qaida in Afghanistan. What relationship there is between the other aspects of the War on Terrorism (Al Qaida in the Arabian Peninsula, Al Qaida in Iraq, etc…) must be looked at as

\textsuperscript{217} Rachels 188.
related but not one and the same conflict. Those who are captured within Afghanistan can, within the moral restrictions of the war paradigm, be held until the cessations of hostilities within Afghanistan.

**Conclusion**

After reviewing the U.S. response to 9/11 through what has largely been a war paradigm with some elements of the crime paradigm intermingled, there are many lessons to be learned. As was pointed out, in Section III, the President is largely free to respond to acts of terrorism through a war paradigm. Additionally, one form of guidance in instances where a war paradigm is chosen should be ethical considerations.

As was discovered in this section, Operation Iraqi Freedom was an unjust war for its violations of the principles of *jus ad bellum*. In contrast, Operation Enduring Freedom has been a just war according to *jus ad bellum*, but has violated some of the requirements of *jus in bello*. However, in comparison to most other wars, OEF has been less unjust, and the efforts of the U.S./NATO have done far less to violate human rights than the actions of the Taliban and Al Qaeda.

If the U.S. was to respond to a future terrorist attack through the war paradigm I would make several suggestions in order for the war to come closer to the ideal of a just war. First, the U.S. should dedicate a large number of troops and should also try to have as much international cooperation as possible to provide security for the civilian population and avoid an immoral overreliance on unplanned airstrikes. A side note to this point is that dedicating a large enough force may very possibly help to avoid unnecessarily long conflicts. As was pointed out in a study by the RAND organization, a minimum soldier to population ratio of
twenty soldiers for every thousand citizens is required for successful stability operations.218 With a similar line of thought, Colin Powell has formulated what has come to be known as the Powell Doctrine: “military action should be used only as a last resort and only if there is a clear risk to national security by the intended target; the force, when used, should be overwhelming and disproportionate to the force used by the enemy; there must be strong support for the campaign by the general public; and there must be a clear exit strategy from the conflict in which the military is engaged.”219 Whether following the RAND recommendation or the Powell Doctrine would lead to a military victory is beyond the scope of this paper. What can be said, though, is that sticking to such standards would make it more likely that a war can and would be fought justly.

The U.S. response to 9/11 in OIF and OEF has been constitutionally sound but not completely ethical according to a just war analysis. The major downfall of Operation Enduring Freedom has been the back end inclusion of the punishment elements of the crime paradigm. In future conflicts, in order for a war to be conducted justly it must strictly stay within the confines of the war paradigm. That said, although the U.S. response to 9/11 through Operation Enduring Freedom has not been completely just, it has been better than most wars, and through stricter adherence to the principles of Just War Theory, it may be possible for future counter-terror wars to be just.