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# The Only Game in town: the Relationship Between Drones and the Just War Tradition

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**THE ONLY GAME IN TOWN:  
THE RELATIONSHIP BETWEEN DRONES AND THE JUST WAR TRADITION**

**A thesis submitted to  
Regis College  
The Honors Program  
in partial fulfillment of the requirements  
for Graduation with Honors**

**by**

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**August 2014**

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## **INTRODUCTION**

It was a normal Tuesday morning when my sister and I were getting ready to go to school. While my mom prepared and packed our lunches, I was sitting at the counter eating a bowl of cereal and playing Pokémon on my Game Boy. Suddenly, my dad gets a call on his cell phone. I could hear the voice of my Aunt Susan on the other end of the line. As he is listening to her, my dad picks up the TV remote and turns on CNN. Immediately I noticed the New York City skyline and in the center of the screen I could see the two tall towers, one of which was on fire and billowing smoke. My parents and I all remained motionless and in that moment watched as a plane crashed into the South Tower. To this day, the events of that morning are still one of the clearest memories I have from my childhood. Although I did not understand what had happened at the time, somehow I knew at a fundamental that the terrorist attacks of September 11 on the World Trade Center and the Pentagon were a tragic, profound, and a historic moment.

It is undeniable that the events of September 11, 2001 marked a turning point in our nation's history. Since then I have grown up and watched as the United States invaded Afghanistan and Iraq, expanded the scope of their surveillance through the PATRIOT Act, captured and held detainees at the infamous military detention facility at Guantanamo Bay, and brought to justice the mastermind behind the September 11 terrorist attacks, Osama bin Laden. At the same time, my worldview has been shaped not only by the shadow of September 11, but it has also developed through my affiliation and experience as a Roman

Catholic. Being born and raised in a Catholic family, I came to understand the importance of leading a life based on values including love, respect and integrity. From my first day back in the fall of 2010, Regis University has built upon those principles and taught me how to think critically about important issues and how to approach them from a broader perspective that incorporates a sense of justice and morality. My time at Regis has challenged me to grapple with the ethical issues at stake in some of the most controversial debates that are driving current affairs. In particular, my experience writing research papers for classes about politics and U.S. foreign policy, including my internship experience on Capitol Hill, sparked an interest in exploring the topic of counterterrorism and contemplating some of the most difficult moral questions it raises that our nation faces today.

In particular, one aspect of our government's counterterrorism strategy that has captured my interest has been the use of remotely piloted aircraft commonly referred to as drones. Since 2002, the United States has taken targeted, lethal action against al Qaeda and its associated forces through a covert drone program to disrupt terrorist activity and prevent them from launching attacks against the homeland. This new weapon raises profound questions that are as old as war itself – about who is targeted, and why; about civilian casualties, and the risks of inaction; about the legality of such strikes under international law; and about accountability and morality. As a Catholic, I believed that my discernment about this issue would be best focused through the lens of the Just War tradition, for the purpose of limiting the scope of the project and guaranteeing personal relevancy.

What follows here, is a study of the relationship between the principles of Just War Theory and the use of drones, and more importantly, an exploration of the ethical implications of this new technology. The first half (Chapter 1-2) surveys some of the most

significant contributions to traditional Just War doctrine through time, including select writings from St. Augustine of Hippo, St. Thomas Aquinas, Reinhold Niebuhr, Jean Bethke Elshtain, and Michael Walzer. The survey engages various aspects of the Just War tradition, but is in no way comprehensive, and leaves considerable room for further research and reflection. It asks, what are the core principles of Just War Theory, and how have they developed over time? How does the Just War tradition address the issue of terrorism? Can the “global war on terror” be considered a just war? The second half (Chapters 3-4) analyzes the dynamic relationship between Just War Theory and the use of drones, and considers the challenges of applying a set of theoretical standards to the complex and difficult problem posed by counterterrorism, raising various additional questions. These questions include what are the strategic and tactical advantages and disadvantages of drones, and how do they inform our moral approach to drone strikes? Which principles of Just War Theory are at stake in the debate about drones? How do President Barack Obama and his administration justify the moral, legal, and practical use of drones as an instrument of counterterrorism? Finally, what are the ethical issues that remain unresolved that are relevant to the evolution to the Just War tradition?

In President Obama’s Nobel Peace Prize acceptance speech, “A Just and Lasting Peace,” he argued that in order to adequately address the challenges of our time we are required to think in new ways about the notions of just war and the imperatives of a just peace. He professed his belief in the idea that despite all of the cruelty and hardship of our world, we are not mere prisoners of our fate, and that “our actions do matter, and can bend

history in the direction of justice.”<sup>1</sup> Before I begin, I want to echo my agreement with the president’s statement that our actions do matter, especially in this particular national policy debate about the use of drones. It is important to remember that for the time being this new weapon is still under the guidance and control of human strategists and operators. The fact that human reasoning and action is involved at every stage of the decision-making process keeps a moral agent at work within the drone program. If we hope to adhere to the principles of the just war tradition, and bend history towards justice, then we must recognize the moral force and precedent being set by how we use drones.

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<sup>1</sup> Barack Obama, “A Just and Lasting Peace” (lecture, The Nobel Peace Prize 2009, Norway, Oslo City Hall, April 23, 2014).

# I

From Plato to Kant:

## A Survey of the Development of Traditional Just War Theory

The tradition of Just War is a two-thousand-year-old conversation about the legitimacy of war. It has, over time, organized itself into several core principles and sub-traditions. It shapes our judgments about war, and offers a justificatory framework that asks soldiers and politicians alike to legitimize their actions and outsiders to evaluate those rationalized assertions. Just War is considered a theory in the loosest sense because it contains so many different sub-traditions; however, they are united by three common factors: first, they share the idea that war ought to be limited and that the conduct of war be as humane as possible; second, they originated in Western traditions of theological, legal and philosophical reasoning; and, third, they adhere to a common set of rules governing the decision to wage war, *jus ad bellum*, and its conduct, *jus in bello*, although they differ in both their interpretation of the rules and the relative weight they attach to them.<sup>2</sup> It is the third factor concerning the cause and conduct of war that creates the most variance between the sub-traditions within the Just War tradition. Through this perspective we will examine the context and philosophical reasoning that established the modern theory of Just War.

The earliest traces of the Just War tradition from the West originate from where every discipline from science to philosophy began: Ancient Greece. Between 431 and 404 the

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<sup>2</sup> Alex J. Bellamy, *Just Wars: From Cicero to Iraq* (Cambridge: Polity Press, 2006), pg. 2.

Greek city-states were at war with another that saw a breakdown of Hellenic customs that characterized earlier Greek warfare. The aftermath of the war prompted new forms of philosophy and ways of thinking about war. In *The Laws*, Plato argued that war was an eternal feature of human society and revealed both the good side and the bad side of man.<sup>3</sup> Therefore, the purpose of the state was to establish peace by punishing the worst side of human nature and promoting humanity's positive qualities. Plato also addresses the question of how wars should be fought in *The Republic* by outlining a series of restraints on the conduct of war, which included refraining from burning villages and only killing combatants rather than all men, women and children of the enemy state. Aristotle refined these ideas further by introducing some of the first notions about the legitimate causes of war and argued that there were certain prerequisites for waging a "just war" which included self-defense, to exact vengeance on those who caused harm, to assist allies, to advance the interests of the city-state and to maintain authority over those considered unfit to rule themselves.<sup>4</sup> These causes were derived from Aristotle's belief that humanity had a natural order, and that war could be considered legitimate if it restored or maintained order among the people. However, the Ancient Greeks believed that these rules and restraints governing warfare were applicable only in internal Greek wars and did not extend to conflicts with other nations, which is where the Romans make their mark on the Just War tradition.

As the Greek city-states were in decline, Rome began its ascent by engaging in multiple wars and conquests until it controlled virtually all of Europe, much of the Middle East, and North Africa. Remaining in a state of war actually fulfilled three purposes: it kept the army busy, reduced the likelihood of civil war and brought glory to the conquerors.

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<sup>3</sup> Plato and Trevor J. Saunders, *The Laws* (Harmondsworth: Penguin), § 631.

<sup>4</sup> Aristotle, *The Politics*, trans. Ernest Barker, ed. R. F. Stalley (Oxford: Oxford University Press), § 199.

Roman leaders were focused on acquiring military glory because it created the perception of security, which it was believed, rested on the empire's appearance of greatness through the demonstration of military might. However, this desire for glory was linked to the idea that victory depended on satisfying the gods, therefore the conditions were very loose as to the justification for waging war, thus there was little to no restraint on Roman expansionism and their conduct in warfare.

In an effort to return to the ideas of justice and virtue, the Roman philosopher Cicero argued that war could only be fought to protect the safety or honor of the state, and that even wars for glory must be motivated by a desire to live in peace.<sup>5</sup> Therefore, expansionist wars could be justified if they brought greater peace and happiness to humanity, but Cicero had two other principle concerns that he sought to address. First, in order to avoid civil war, he insisted that wars should be formally declared by the proper authorities and that only soldiers were entitled to fight; and, second, he argued that there should be limits on how the state may treat its enemies through redistribution or punishment. Roman law and ethics contain many of the core elements of the later Just War tradition, particularly just cause and proper authority, yet they were notably silent when it came to outlining any constraints on the conduct of war, which is where early Christianity adds its voice to the conversation about just war.

After the collapse of the Roman Empire, early Christians were confronted with the dilemma of deciding how to interpret scripture and relate it to the government of the time, which posed a contradiction between teaching and practice. The problem that Christians faced was that, on the one hand, the God of the Old Testament was partially a God of war

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<sup>5</sup> Cicero, *De Re Publica, De Legibus*, trans. Clinton W. Keyes (London: W. Heinemann, 1928), pg. 211-213.

who dealt punishment to sinners and urged his followers to show no restraint. On the other hand, there was the Gospel and Jesus' teachings which preached compassion and forgiveness. Overall, a majority of Christians refrained from participating in the military because they believed that the Second Coming of Christ was close at hand. They also rejected idolatry that accompanied military service because of the fractured relationship between the Christian community and Rome as a result of imperial persecution. Finally, there was a general consensus among Church leaders who interpreted the New Testament as a renunciation of violence and instead called for non-resistance and pacifism.<sup>6</sup>

The change in Christian attitude towards military service occurred over decades and for a variety of reasons which was reflected in the writings of new Church leaders, including Ambrose of Milan and Augustine of Hippo. Ambrose was one of the first Christian thinkers to synthesize Christian teaching with Roman law and philosophy, in which he agreed with Cicero that wars could be justified and that there was a difference between abhorrent civil wars and wars fought against foreign enemies, which protected both the empire and Christian orthodoxy. He also believed that Jesus' teaching forbade killing another to save one-self; Ambrose argued that violence was justified in order to protect others from harm and that it was *required* on moral grounds or even commanded by God. Ambrose's contribution helped reconcile the dilemma early Christians faced between teaching and practice; however, it was Augustine that truly fleshed out the criteria of *jus ad bellum* within the Just War doctrine.

Looking back there can be no doubt about St. Augustine's significant contribution to the Just War tradition. While Augustine did write a comprehensive account of his ethical framework concerning war, his commentary and specific references about war and military

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<sup>6</sup> Roland H. Bainton, *Christian Attitudes Toward War and Peace: A Historical Survey and Critical Re-evaluation* (Nashville: Abingdon Press, 1960), pg. 32.

service helped to refine earlier work put forward by Cicero and Ambrose. It is important to understand that when Augustine addressed issues concerning the use of violence he was acknowledging an individual's civic duty here on earth while maintaining that the ultimate goal was to spend eternal life with God after death. The starting point for Augustine's justification for war is his position that it is wrong to kill in self-defense. He asked how a person could be free from sin if "they are stained with human blood in defense of things which ought to be despised?"<sup>7</sup> Augustine believed that those who killed to save their own life merely desired to live in order to enjoy the pleasures of temporal existence. Therefore, it was not really the *act* of killing in self-defense that was wrong, but the *inward disposition* that inspired the action. For Augustine, the sin of war lay in the hatred, greed, and lust for power that it generated, rather than the act of killing, so as long as individuals acted in defense of others, public order, or the common good, then war would be justified.

However, critics questioned how killing in defense of others or to protect the state was morally permissible, since it was also linked to self-preservation. Augustine defended his original claim by asserting that social life was an essential part of humanity, and that if society was without law and public order then there could be no organized Christianity and thus no chance for divine redemption, in effect justifying the defense of the state as a moral necessity. Therefore, the central difference between a just and unjust war was that a just war sought to restore peace and repair an injury received. It is through Augustine's moral reasoning that the principle of right intention takes its place in *jus ad bellum* alongside proper authority and just cause as the primary justifications for going to war. However, what

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<sup>7</sup> Augustine, *The Problem of Free Choice*, trans. Mark Pontifex (Westminster, MD: Newman Press, 1955), pg. 51.

constituted just conduct in war had not yet been defined, which is where another famous theologian writes the next chapter of Just War theory almost a thousand years later.

Towards the end of the Middle Ages, before the dawn of the Renaissance, the influence of reason and scientific understanding gained traction as a medium of understanding human existence. This intellectual shift took form in the methodology of scholasticism, which held that while theological doctrine could not be challenged, it should be defensible in terms of human reason. St. Thomas Aquinas, a scholastic philosopher and theologian, worked to blend theology and philosophy so that they may each complement the other without requiring a person to agree with Aquinas' belief in God in order to accept his arguments. While he built his approach to war on similar foundations to Augustine, Aquinas started from the position of a "presumption against war." This suggested that war could never be totally *just* because the very act of killing contained some element of injustice; however, war could be *justified* if the total justice delivered was greater than the total injustice inflicted. Like Augustine, Aquinas addressed the question of whether it was ever right for a Christian to kill in self-defense; however, his answer differed from Augustine's because Aquinas believed that self-preservation was natural. Aquinas offered two ideas to support this argument: the doctrine of double effect and the associated principle of proportionality.

Aquinas recognized the fact that an act can have two effects, and following the example of killing in self-defense, he wrote that one effect is "the saving of one's life, the other is slaying the aggressor. Therefore this act, since one's intention is to save one's own life, is not unlawful, seeing that it is natural to keep itself in being." However, what could be

considered unlawful if it was “out of proportion to the end.”<sup>8</sup> The doctrine of double-effect possesses two fundamental elements; the first is that an act may have two consequences, one that is intended and one that is not. Aquinas makes it clear that the lawfulness of an action is dependent upon the original intention, and so an individual bears the responsibility of prioritizing the preservation of life rather than strictly kill an assailant. The second element of double-effect leads into the consequences of a proportionate response, for even if the war was waged with good intention, the injustice that is halted must prevail over the injustices of the war itself – the good must outweigh the bad. Interestingly enough, Aquinas was not particularly influential in his own time, and it would be another three centuries before the significance of his work became evident. However, there can be no doubt that the concepts of double-effect and proportionality became core elements of the Just War tradition and serve as the primary principles for restraining war.

The advent of the Renaissance and the Reformation in the sixteenth century initiated some important transformations in the conduct of war. The most significant development is the secularization of the Just War tradition that downplayed the theological precepts that guided the justifications for going to war and instead emphasized a reliance on natural law and application of human reason. This caused the emergence of three sub-traditions that had a profound impact on the Just War tradition: realism, legalism and reformism. Realism’s most important proponent in the sixteenth century was Machiavelli, who rejected the scholastic methodology and claimed that man’s state of nature was inherently selfish and driven by self-interest in desire for wealth, honor, and power. Machiavelli insisted that the state itself was a source of good and what was good for the state was therefore good for

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<sup>8</sup> Thomas Aquinas, *Political Writings*, trans. R. W. Dyson (Cambridge, UK: Cambridge University Press, 2002), § 423.

mankind. In his mind, the primary role of the prince as head of state was to protect the political community through force of arms and justice, which required the prince to remain above the law to act as necessity dictated, regardless of law and morality. This allowed unrestrained warfare, particularly where it concerned the safety of the state, in which case there was no consideration of “just or unjust, or merciful or cruel, of praiseworthy or disgraceful; instead, setting aside every scruple one must follow to the utmost any plan that will save her life and keep her liberty.”<sup>9</sup> However, it did not permit the prince to commit any act of cruelty in the name of the state, only that which was necessary, proportionate and prudent. In terms of Just War, Machiavelli rejected just cause and right intentions as the only justification for going to war, and instead asserted that any war fought by a sovereign in service of the state and in defense of the common good was justifiable, so long as the war itself was proportionate to the desired ends.

Machiavelli’s realist argument that a war could be justified so long as it served the best interests of the state raised serious concerns among the proponents of legalism. Although legalists broadly accepted the value and sovereignty of the state, they believed that states were a part of an international society whose mutual relations were governed by laws and norms. For example, Alberico Gentili, one of the best-known legalist writers of the sixteenth century, rejected the realist notion that sovereigns could justifiably wage war whenever they saw fit, for while they were above moral law, they remained below natural and international law. Gentili argued that no war was just unless it was absolutely necessary, and only if all other possible avenues for resolving a conflict had been explored and exhausted. He wrote extensively about specific causes that could justify going to war including out of necessity to

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<sup>9</sup> Niccolò Machiavelli, *Machiavelli: The Chief Works and Others*, trans. Allan H. Gilbert (Durham, NC: Duke University Press, 1965), pg. 89.

defend against an aggressor, out of expediency to prepare for an imminent attack and out of honor to protect foreign subjects from their sovereign. This doctrine of necessity, expediency and honor served as just causes for offensive wars and wars intended to maintain the political community, which included reclaiming property unjustly taken, to exact vengeance on those who committed a wrong, and to enforce customary and natural rights in situations where they were denied.<sup>10</sup>

Given the multitude of causes that could justify a sovereign's decision to wage war it raised the question of whether or not a war could be just on both sides. Gentili and other legalists believed that a war could be *objectively* just on both sides because it was most unlikely that one side would enjoy a monopoly on justice. If this was the case then the concern of just causes was less important than just conduct in determining a war's overall legitimacy. By insisting that sovereigns were constrained by natural and international law, focusing on just conduct as a condition of legitimacy, legalism directed the conversation going on within the Just War tradition from *jus ad bellum* to *jus in bello*. This began placing restrictions on attacking certain types of civilians and discriminating between combatants and non-combatants. However, it wasn't until the Enlightenment that Just War theorists considered what steps could be taken to prevent war in the first place and establish a just and lasting peace.

Towards the beginning of the nineteenth century theorists and intellectuals began looking beyond the philosophy of law for a new ethics of war. It was at this time that reformism made its way into the conversation and made a lasting impact on the Just War tradition. Immanuel Kant, a prominent German philosopher, championed the reformist

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<sup>10</sup> Alberico Gentili, *De Jure Belli Libri Tres*, trans. John C. Rolfe (Oxford: Clarendon Press, 1933), pg. 175.

agenda by making a realist argument that international law could not constrain states because it had no binding power. In his mind, the law of nations rested on the voluntary agreement of states, therefore the challenge was to persuade states to willingly accept the creation of a normative order and submit to international law that would constrain them in matters of war and peace. The reforming principle Kant introduced was a modern conception of sovereignty in which states ought to bind themselves to the rule of law because the rights enjoyed by states were bestowed upon them by the society of states itself. Kant also made two key contributions that placed substantive restraints on war: the idea of lasting peace and the categorical imperatives.

In *Perpetual Peace*, Kant laid down six articles outlining practices that should be abolished and three articles demanding positive actions, such that *if* states were to be voluntarily bound together, international society would become more peaceful. Kant was not content with simply describing the state of international law or assuming that particular actions would be prohibited by natural law. However, it was Kant's broader philosophy based on the categorical imperatives that served as a framework for guiding action before a perpetual and lasting peace could be established. Beyond *Perpetual Peace*, he argued that two categorical imperatives in particular formed the basis of universal moral law which also shaped his approach to war. The first imperative was to act only on maxims that could be applied universally, and the second was to treat human beings never as means but as ends in themselves.<sup>11</sup> According to these maxims, Kant proposed basic rights relating to war, including the right for a state not to be invaded, to be self-governing and to make treaties with other voluntarily.

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<sup>11</sup> Herbert J. Paton, *The Categorical Imperative: A Study in Kant's Moral Philosophy* (London: Hutchinson's University Library, 1962), pg. 206.

## II

9/11 and the Global War on Terror:

### Just War Theory in Response to the Threat of Terrorism

With the passage of time comes a multitude of opportunities and challenges, some are entirely new, and others are simply remnants of the past. Moments of discord and strife have shaped the Just War tradition in profound ways. Just War Theory itself has never been static, for those philosophers, lawyers and public officials who contributed to its development did so within the context of the conflicts they faced and the intellectual trends of the time. The core principles of the Just War tradition have remained intact for hundreds of years because they addressed battles between states. However, the nature of some important threats faced today does not fit that condition. Given the advances in technology and rapid pace of globalization, non-state actors, including small organizations and even individuals, have the ability to access, develop, and deploy weapons that can inflict tremendous damage anywhere at any time.

On the morning of September 11, 2001, the world witnessed a devastating attack on American soil that killed nearly 3,000 innocent men, women, and children, which was planned, organized and executed by al Qaeda, a global militant Islamist organization that exists entirely separate from any national government or military. This moment compelled the United States to directly confront the threat of terrorism, and thrust the question upon Just War theorists of whether or not their tradition could justify a military response against a non-

state organization that does not adhere to the laws of war. What follows is an exploration of the contemporary arguments and ethical considerations of how Just War Theory responds to the rise of terrorism.

In order to properly evaluate the relevance of the Just War tradition to the terrorist threat, it is necessary to understand exactly what inspired the September 11<sup>th</sup> attacks and to specifically define the concept of terrorism. By being clear about the facts of what happened, rational and thoughtful distinctions can be made between what is right and wrong about a just war on terror. The attacks on the World Trade Center, the Pentagon, and the hijacking of those commercial airliners were inspired by a fatwa, a religious ruling, issued against the United States for its perceived crimes and sins which included our military occupation in Saudi Arabia and Kuwait, our support for the Jewish state of Israel, and our persecution of the Muslim population. Osama bin Laden, the mastermind of the September 11<sup>th</sup> attacks and the leader of al Qaeda, released these charges and accusations in his 1998 declaration of war against the United States and its allies. He urged every Muslim “who believes in Allah and wishes to be rewarded to comply with Allah’s order to kill the Americans and plunder their money wherever and whenever they find it.”<sup>12</sup> This ruling specifically argued that it was the duty of every Muslim to kill Americans and our allies by targeting both “civilians and military.” Al Qaeda’s hostility and intent was not strictly limited to fight against our armed forces, but was meant to plunder and murder American civilians, wherever they were to be found.

The intentional targeting and killing of civilians is one of the defining aspects of terrorist attacks. Michael Walzer, a Just War theorist, argues that the purpose of terrorism is

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<sup>12</sup> “World Islamic Front Statement Urging Jihad Against Jews and Crusaders,” accessed April 23, 2014, [www.fas.org/irp/world/para/docs/980223-fatwa.htm](http://www.fas.org/irp/world/para/docs/980223-fatwa.htm).

to destroy the morale of a political community, to undercut its solidarity by engaging in the random murder of innocent people. “Randomness is the crucial feature of terrorist activity,” he says, “If one wishes fear to spread and intensify over time, it is not desirable to kill specific people identified in some particular way with a regime, a party, or a policy. Death must come by chance.”<sup>13</sup> A terrorist attack is meant to instill fear in the heart of the enemy, and this panic rapidly spreads because of the random nature of their occurrence. Walzer also identifies the second characteristic of terrorism which is to hope that fear compels the opponent to enact a change or reversal of policy. In the case of al Qaeda and their mission, it was bin Laden’s hope and intention that by killing as many Americans as possible and sowing wider resentment against the West across the Arab world, the United States would have no other choice but to withdraw from the Middle East entirely and cut off its support to Israel. These were the policy objectives and political outcomes that al Qaeda and its affiliates wanted to achieve, all of which they believed depended on the effective application of terrorism as a tactic against the United States. Therefore, it is important to understand that al Qaeda’s actions on September 11<sup>th</sup> can rightly be considered terrorist attacks that were deliberately directed against America, with the intention of killing as many innocent civilians as possible in order to achieve certain political goals. This is why the United States declared a war on terror.

Although Osama bin Laden and al Qaeda made it clear that they are at war with the United States because of its foreign policy towards the Middle East, their real target is the modern world of the West. Those who believe in Islamic fundamentalism subscribe to the worldview that there should not be a separation between church and state; they deem a

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<sup>13</sup> Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), pg. 73.

theocracy as the best form of government, where civil law follows a strict interpretation of the moral and religious law of Islam. Now, is it possible that the United States would not have been attacked on September 11<sup>th</sup> or be at war with al Qaeda if our political leaders simply negotiated with Osama bin Laden and satisfied his demands? Not likely. Francis Fukayama, writing in *Newsweek*, noticed from first-person accounts, reports, fatwas, and the manuals of Islamic extremism that the reason the groups celebrated the September 11<sup>th</sup> attacks was because “it humbled a society that they believe was at its base corrupt. This corruption was not just a matter of sexual pervasiveness, homosexuality and women’s rights as they exist in the West, but stemmed in their view from secularism itself.”<sup>14</sup> He believes that what Islamic fundamentalists hate is that the state in Western societies is dedicated to religious tolerance and pluralism, rather than in service towards religious truth. Fukayama asserts that this is not merely a “war” against terrorists, as the American government understandably portrays it, nor, as many Muslims argue, is the real issue American foreign policy towards the Middle East and a military presence in the Persian Gulf. Unfortunately, the basic conflict is a much broader struggle between secularism and religious extremism. As a result, it is reasonable to assume that Islamic fundamentalism and terrorism itself would still pose a grave threat due to the intractable and opposite nature of the political, cultural, and religious differences between the United States and al Qaeda.

What is at stake in the war on terror is more than just the lives of innocent civilians, but the entire way of life of the modern world and secularism itself. Al Qaeda and militant Islamic fundamentalism in general, is a threat not only to the national interests of the United States, but more importantly to the core principles that define the American character and are

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<sup>14</sup> Francis Fukayama, “Their Target: The Modern World,” *Newsweek*, December 17, 2001, accessed April 23, 2014.

embedded in our founding documents. Jean Bethke Elshtain, an American political philosopher, believed that those who condemn America as a land of pagans and infidels do not respect our secular tradition. She wrote that “Americans accept on principle a constitutional order that keeps church and state separate even as, on the level of political culture and civil society, religion and politics commingle in many and diverse ways. Thus, our opponents disdain our principles, not simply our practices.”<sup>15</sup> How is it possible for the United States, or any government, to abandon the rights, freedoms and principles that constitute its national identity and political structure? Those who use religion to justify the unequal and brutal treatment of women, who despise the free exercise of religion, and who seek to destroy the secular state cannot as a matter of principle find common ground with advocates of the secular state. Elshtain believed that “authentic cultural dialogue can go forward only when the threat of terror is removed,” and that it would be naïve “to assume that rational grievances in reaction to American policy or even American perfidy lie at the root of the terrorist threat.”<sup>16</sup> Neither political reconciliation nor a diplomatic agreement can be achieved because groups like al Qaeda hate America for what it stands for. This is what makes their brand of terrorism both dangerous and wrong; for they believe victory can only be accomplished by the sword, after the world is purged of all Americans and the state of Western society ceases to exist. In light of the complex and unconventional nature of the threat, our government faced the choice of either appeasing al Qaeda with the hope they would no longer harm Americans, or respond with the use of force in order to apprehend those who were responsible for the terrorist attacks on September 11<sup>th</sup>. It is clear at this point

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<sup>15</sup> Jean Bethke Elshtain, *Just War Against Terror: The Burden of American Power in a Violent World* (New York: Basic Books, 2003), pg. 24.

<sup>16</sup> *Ibid.*, pg. 27.

how America chose to respond, and since then there has been a public debate about the merits of our actions and our conduct in the war on terror. Now is the time to return to intellectual tradition of Just War Theory in order to determine whether or not America's war on terror is just or not.

Before an evaluation is made about the war on terror, it is necessary to emphasize the importance of providing security and why just war theory is particularly relevant to the threat of terrorism. Security is the prerequisite to bring calm and order to society, a task which has been born by every government and nation-state. Returning to Elshtain, she draws on the works of St. Augustine and asserts that the "primary responsibility of government is to provide basic security – ordinary civic peace. St. Augustine calls this form of earthly peace *tranquillitas ordinis*," or tranquility of order.<sup>17</sup> This civic peace is essential if a nation hopes to be safe, content and prosperous. The reason the government is vested with this responsibility is because they have the capacity to do so, and only the state is trusted to enforce the law in an objective and universal way. Without basic security and law enforcement, no other power exists to guarantee the safety and liberty of the people. If the government is unable or unwilling to establish ordinary civic peace then it is possible that society would no longer function, and what would be left would be a deranged Darwinian social existence. Thomas Hobbes, an English political philosopher, believed that civil war and the brute situation of a state of nature could only be avoided by a strong undivided government. In *Leviathan*, he wrote that if society reverted to that state of nature every man, woman and child would live in continual fear, face the danger of death, and the life of man

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<sup>17</sup> Ibid., pg. 33.

would be “solitary, poor, nasty, brutish, and short.”<sup>18</sup> That is why it is the primary responsibility of the government to provide basic security, which above all creates a safe and stable environment for the state and its people to survive and succeed. Above all, this civic peace depends on the right and proper use of force.

There are also other ways of thinking about the use of force beyond Just War Theory. The first is absolute pacifism, which holds that the use of force is never justifiable under any circumstances. This form of pacifism is associated with the attitude and practices of the early Christians who attributed their pacifism to certain austere norms and withdrawal from the world. However, public officials and organized political bodies cannot simply withdraw from the world or abandon their responsibility to provide security for the population; they must authorize the use of force in certain circumstances. The Just War tradition limits those circumstances because it shares with pacifism a strong presumption against violence and force. The other alternative to just war theory is *realpolitik*, or realism, which severs politics from ethics and is concerned only with seizing, retaining and expanding the reins of power. From the realist perspective, there is no room to consider the ethical concerns about how and when to resort to force.

The Just War tradition understands the complex nature of the world and respects the primary responsibility of the government to provide security. While pacifists are only concerned with peace, and realists are merely concerned with power, just war thinkers prioritize justice. Elstain believes that force can be used as an instrument of justice and that “peace may sometimes be served by the just use of force, even as power is most certainly

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<sup>18</sup> Thomas Hobbes, *Leviathan* (New York: Penguin Books, 1983), pg. 153.

involved.”<sup>19</sup> What makes the Just War tradition particularly relevant is that it requires the philosopher, the moralist, the politician, the soldier, and the ordinary citizen to consider a variety of complex criteria when thinking about war.

Just War Theory focuses on striking the proper balance between pacifism and realism in regards to the use of force, which makes it highly capable of addressing the threat of terrorism. Joseph Boyle, another contemporary political philosopher, writes that traditional Just War Theory has the potential to highlight issues raised by the response to terrorism because, on the one hand “it is related historically and conceptually to the forms of just war thinking embedded in international law, and on the other, it is rooted in a normatively richer and distinctive conception of practical life than is current just war doctrine.”<sup>20</sup> He believes it is important to distinguish current from traditional Just War doctrine because each framework relies on a different rationale. In traditional Just War doctrine, the purpose of determining a war’s justice by the application of a conception of what is morally good to the hostile threat is central. Ultimately, Just War Theory is a pragmatic doctrine that enables the government to provide a balanced measure of security and adequately respond to the threat of terrorism.

In order to determine whether or not the use of force is both right and just, it is necessary to evaluate it in light of the core principles of the traditional just war doctrine. The use of force may only be sanctioned if it meets the criteria of *jus ad bellum*. First, the state has the right to go to war if it is authorized by the proper authority. Only the leaders of a sovereign political community have the responsibility and the authority to respond to terrorist

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<sup>19</sup> Elshtain, *Just War Against Terror*, p. 41.

<sup>20</sup> Joseph Boyle, “Just War Doctrine and the Military Response to Terrorism,” in *The Morality of War: Classical and Contemporary Readings*, ed. Larry May, Eric Rovie, and Steve Viner (Upper Saddle River: Pearson, 2006), pg. 335.

acts against their community or its allies. Boyle writes that both “the wrongs to innocents and the use of the fear these wrongs create for political purposes are of profound public concern. Those responsible for the welfare of the community are duty-bound to respond.”<sup>21</sup> This imperative that Boyle establishes relates to the idea Augustine proposed about a government’s responsibility to provide basic security and civic peace. Right after September 11<sup>th</sup>, the U. S. Congress passed the Authorization for the Use of Military Force (AUMF) and it was signed into law by President George W. Bush. This law authorized the armed forces to bring to justice those who were responsible for the terrorist attacks and to prevent similar attacks in the future, which paved the way for the war in Afghanistan and broadened the United States approach to counterterrorism. A similar version of this legislation was sanctioned in a resolution by the United Nations Security Council, as a sign of approval and show of support from the international community, all of which gives a clear indication that the war on terror began with the proper authority.

Second, there must be a just cause to go to war, or else the use of force could be used on a whim or for any reason. Elshstain writes that when an act of terrorism “aims to disrupt fundamental civic peace and tranquility... Preventing further harm and restoring the preconditions for civic tranquility is a justifiable *casus belli*.”<sup>22</sup> Given Osama bin Laden’s declaration of war against the United States and al Qaeda’s subsequent terrorist attacks on September 11<sup>th</sup>, it is understandable such actions constitute a just cause to use force.

The last two criteria of *jus ad bellum* are considered the most difficult to apply when defending against terrorism, and raise the most difficult questions about the use of force. For

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<sup>21</sup> Ibid., pg. 339.

<sup>22</sup> Elshstain, *Just War Against Terror*, pg. 58.

starters, the use of force must also be approved and executed with the right intent. Boyle writes that right intent is revealed through the “war aims a state adopts, the relation of its bellicose actions to those war aims, and ultimately, by whether the state removes obstacles to peace that are of its own making.”<sup>23</sup> In other words, the use of force should align a military’s actions with the overall objectives of the war, and in the end, strive to bring about peace. Consequently, violence is justified only by an ongoing terrorist threat, and should not be used as a means to punish terrorists or seek revenge for past grievances. In this case, right intent has been met since the AUMF specifically designated the military to target those who were responsible for the terrorist attacks on September 11<sup>th</sup>.

Another important criterion of *jus ad bellum* is that force may be used only as a means of last resort. There are some who argue that this means that force may only be used after all other options have been exhausted and given time to take effect. Elshtain argues that the proper understanding of last resort is the use of force after deliberation, and that it “does *not* compel a government to try everything else in actual fact but rather to explore other options before concluding that none seems appropriate or viable in light of the nature of the threat.”<sup>24</sup> For this reason, determining the imminence of a terrorist attack is the most effective way to judge whether the use of force meets the standard of last resort. This compels the government to use force on a case-by-case basis. Overall, the criteria under *jus ad bellum* establish reasonable limits on right to go to war, which is an idea that governs how force is used on the battlefield.

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<sup>23</sup> Boyle, “Just War Doctrine and the Military Response to Terrorism,” pg. 340.

<sup>24</sup> Elshtain, *Just War Against Terror*, pg. 68.

The Just War tradition articulates principles not only for the reasons and intentions that support a nation's right to go to war, but also for setting limits on the means of force. This is particularly important given the fact that an enemy who exploits terrorism as a tactic is ready to use all means necessary to achieve their objective. Terrorists do not consider the collateral damage of an attack or assess casualties against traditional war aims: Their war aim is to inflict damage, to kill civilians and spread fear. Caleb Carr, an author and war historian, writes that "Terror must never be answered with terror; but war can *only* be answered with war, and it is incumbent on us to devise a style of war more imaginative, more decisive, and yet more humane than anything terrorists can contrive."<sup>25</sup> This lesson is manifest in the two crucial *jus in bello* requirements established within Just War Theory which are proportionality and discrimination. Proportionality refers to the need to use force commensurate with the nature of the threat, and discrimination calls for the need to differentiate between combatants and noncombatants. When a nation must defend against terrorism, how is it possible to develop a proportional response to a disproportionate threat? Elshtain says that we can and should do everything in our power to "interdict, disarm, and demolish training camps, weapons stashes, and active combatants, and we can deploy the weapons appropriate to that purpose."<sup>26</sup>

In the case of the war in Afghanistan, the United States decided to put boots on the ground so that they could do a better job to disrupt, dismantle and defeat al Qaeda and their allies. The principle of proportionality prevents the United States from using biochemical weapons, biological agents, or nuclear bombs. Therefore, it is fair to say that in Afghanistan,

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<sup>25</sup> Caleb Carr, *The Lessons of Terror: A History of Warfare Against Civilians: Why It Has Always Failed and Why It Will Fail Again* (New York: Random House, 2002), pg. 14.

<sup>26</sup> Elshtain, *Just War Against Terror*, pg. 73.

the United States is doing its best to respond proportionately. On the rule of discrimination, our military is taking steps to distinguish combatants from noncombatants, and that intentionally targeting civilians has been ruled out as a specific tactic. Michael Walzer stresses that in the case of terrorism, discrimination implies that force must be directed systematically at the terrorists themselves, never at the people they claim to represent or act on behalf of. He also warns that terrorists will welcome counterterrorism because “it makes the terrorists’ excuses more plausible and is sure to bring them... the small number of recruits needed to sustain the terrorist activities.”<sup>27</sup> This is the balance the United States has to strike in its response to the threat of terrorism, and it must only use force in a way that is constrained by the same moral principles that rule out terrorism itself. The demands of proportionality and discrimination are strenuous and cannot be alternatively satisfied or ignored, depending on whether they serve one’s war aims.

The principles of Just War Theory are useful in establishing a set of criteria to justify a nation’s right to go to war and how it fights, but it fails to provide the moral certainty to use force in the first place. A common critique of the Just War tradition is that it has become an excuse to cause violence, rather than actually prevent states from going to war. This argument has gained traction within modern Christianity more than anywhere else and is inspired by their pacifist roots. They call for forgiveness and reconciliation, and that the best way to eliminate the threat of terrorism is to change the hearts and minds of those who are drawn to violence and religious extremism. Reinhold Niebuhr, one of the most prominent American theologians of the 20<sup>th</sup> century, believed that this view was unrealistic and failed to grasp the complex challenges of the world. Chiding what he called “Christian moralism,”

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<sup>27</sup> Michael Walzer, *Arguing About War* (New Haven: Yale University Press, 2004), pg. 42.

Niebuhr argued that justice “requires discriminate judgments between conflicting claims.” By contrast to simplistic moralism, a “profounder Christian faith must encourage men to create systems of justice” in a world that presents “tragic choices, which are seldom envisaged in a type of idealism in which all choices are regarded as simple.”<sup>28</sup> This system of justice insists that Christianity is not solely a religion of love, for the God of mercy is also a God of judgment. Justice and love go together. Forgiveness and reconciliation are an important part of God’s message but not the totality of the Christian faith. Those who hope for the peace of God equate it with the peace of detachment, and Niebuhr was especially harsh in his criticism of those who advocate a withdrawal from what he called “moral responsibility” – people who refuse to confront the inevitable moral ambiguities of politics.

In the contemporary war on terrorism, Niebuhr’s message makes the case that political leaders have a duty to respond to the threat posed by terrorists because they are expected to establish and enforce systems of justice that a coherent conception of what is morally good. He understands the emphasis Christians place on love and that war and conflict tempt some to hatred, but this “hatred is not nearly as universal as our idealists assume. And it is least general among those who are engaged in the actual horrors of belligerency.”<sup>29</sup> Governments may struggle against terrorists who are determined and ruthless in their efforts to kill civilians and spread fear without hating them or those they represent. The Just War tradition explicitly eschews a nation’s right to go to war with the intent to seek punishment or revenge. The thought of Christian realism that Niebuhr made great contributions towards is embodied in traditional just war doctrine, and gives world

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<sup>28</sup> Reinhold Niebuhr, *Love and Justice: Selections from the Shorter Writings of Reinhold Niebuhr*, ed. D. B. Robertson (Philadelphia: Westminster Press, 1957), pg. 28-29.

<sup>29</sup> Robertson, *Love and Justice*, pg. 218. “Love Your Enemies” was first published in *Christianity and Society* (Autumn 1942).

leaders and nation-states a moral platform to justify their responsibility to use force and respond to the threats of the modern world.

Even in today's complex and dangerous environment, the Just War tradition provides a way for governments to respond to the threat of terrorism. Just War Theory is relevant because it requires leaders to consider a variety of complex criteria when thinking about war. The criteria under *jus ad bellum* and *jus in bello* set standards and limits on a nation's right to go to war and how force should be used. These principles do not justify violence in all circumstances, nor do they allow the use of force to go unchecked. Instead, the Just War criteria implicitly recognize the imperfection of man and offer a realistic approach to address conflict. Above all, traditional Just War doctrine rejects the simplistic moralism of Christian pacifists that is detached from reality, and it transcends *realpolitik* by forcing governments to concern themselves with the ethical considerations that come with power. Force and violence are not the ultimate solution to eliminating terrorism, but those in power are charged with the responsibility to provide basic security and ensure civic order. Elshstain observes that the "world of political action is one that may give rise to moral regret as we confront what political theorists call the problem of 'dirty hands,' for we cannot remain pure in a difficult and often dangerous world."<sup>30</sup> In the contemporary war on terrorism, if we hope to remain true to our values the United States must not lose the language and behavior of justice, for it reminds us of what is at stake and of the importance of keeping justice alive in how we fight.

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<sup>30</sup> Elshstain, *Just War Against Terror*, pg. 39.

### III

#### New Weapons, Old Arguments:

#### The Relationship Between Just War Theory and the Use of Drones

Once upon a time, in a quiet corner of the Middle East, there lived a shepherd named Gyges. Despite the toils and hardships in his life Gyges was relatively satisfied with his meager existence. Then, one day, there came to pass a great earthquake that opened up a chasm in which Gyges found a gold ring. But this was no ordinary ring; it rendered whoever wore it invisible. When Gyges became aware of this, he immediately arranged to become a messenger of the king. Before long, he seduced the queen of the land and conspired to overthrow her husband. One evening, Gyges placed the ring on his finger sneaked into the royal palace, murdered the king, and took over as ruler. In his *Republic*, Plato recounts this tale to consider whether a person would be moral if he did not have to fear being caught and punished.<sup>31</sup> I believe the myth of Gyges is a perfect allegory to the debate on morality of the United States' use of unmanned aerial vehicles, or drones, in our approach to counterterrorism. Only recently has the use of drones begun to touch on these questions of morality, perhaps because the answers to these questions appear self-evident. What could be wrong with the use of drones if they limit the cost of war, both in blood and treasure? In our attempts to avoid the political, legal, and ethical consequences of actions like firebombing or putting boots on the ground, we are left vulnerable to more subtle, moral dangers. This

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<sup>31</sup> Plato, *The Republic of Plato*, trans. Allan D. Bloom (New York: Basic Books, 1991), pg. 15-16.

chapter will describe a brief history of the drone program, the advantages and disadvantages of unmanned aerial vehicles, highlight the moral and political issues at stake, and consider the relationship between just war theory and the use of drones.

The idea of military surveillance dates back to the Civil War, when both the Union and the Confederacy used hot air balloons to track troop movements and help direct artillery fire. The first modern use of drones came during the Vietnam War, when the Pentagon began testing unmanned aerial vehicles for intelligence, surveillance and reconnaissance. Aviation historian, David Cenciotti, told the *Rolling Stone* that “Vietnam was decisive to the development of drones as the perfect tools to perform dangerous missions without the risk of losing a pilot.”<sup>32</sup> Following Vietnam, many of the technological advances on drones were made by Israel, which had used them to monitor the Gaza Strip and carry out targeted assassinations. The Israeli air force sold some of its models to the Pentagon, who quickly put them to use during the First Gulf War. By 2000, the Pentagon was pushing for a massive expansion of the drone program, and the MQ-1 Predator was well known inside the small group of military engineers and intelligence analysts were working on the cutting edge of electronic surveillance. At the time, the White House and the CIA decided to develop a weapon that could hunt down Osama bin Laden and kill him immediately. Funding for the program had been channeled through the Air Force’s “Big Safari” office which was in charge of developing secret intelligence programs for the military.<sup>33</sup>

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<sup>32</sup> Michael Hastings, “The Rise of the Killer Drones: How America Goes to War in Secret,” *Rolling Stone*, April 16, 2012, accessed April 23, 2014, <http://www.rollingstone.com/politics/news/the-rise-of-the-killer-drones-how-america-goes-to-war-in-secret-20120416>.

<sup>33</sup> Richard Whittle, *Predator’s Big Safari*, report, Mitchell Paper 7 (Mitchell Institute for Airpower Studies, 2011).

In *The Way of the Knife*, Mark Mazzetti recounts how a small group of test pilots at Creech Air Force Base in Nevada were trying to turn the Predator from a hunter into a killer. On February 16, 2001, Curt Hawes, one of the Predator pilots at the base, remembered going over the preflight checklist in his head, and eyes closed, he practiced the moves his hands would make as he controlled the joystick and fired the missile. Shortly after sunrise, Hawes took control of the Predator and lined up the shot. With the help of a laser beam pointed at the target in the desert, Hawes pressed a button on the control panel and launched the Hellfire missile.

Yet, despite the success of the flight test, the CIA remained divided at the top about whether to send armed Predators to Afghanistan to hunt for Osama bin Laden. A major concern that was shared among the staff was what exactly could be the repercussions of the CIA carrying out targeted assassinations? John McLaughlin, then the CIA's deputy director, said that "You can't underestimate the cultural change that comes with gaining lethal authority."<sup>34</sup> Weeks later, when the September 11 attacks killed nearly three thousand Americans, the difficult questions about assassination, covert action, and the proper use of the CIA in hunting America's enemies were quickly pushed aside. Along with this shift in the mindset among policymakers came their acceptance of the drone as a tool in the fight against this new enemy. It was a tool that killed quietly, did not place a pilot in jeopardy, and was not bound by the normal rules of accountability in combat. Now the United States had found, in the armed Predator, the ultimate weapon in the war on terror – a modern day Ring of Gyges.

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<sup>34</sup> Mark Mazzetti, *The Way of the Knife: The CIA, a Secret Army, and a War at the Ends of the Earth* (London: Penguin Books, 2013), pg. 58.

The armed drone has changed the face of warfare in profound ways that have much to do with its advantages. In short, the drones have become the weapon of choice because they are effective. According to data compiled by the New America Foundation, since the drone program became operational in 2002, U.S. drones have killed an estimated 3,577 al Qaeda, Taliban, and other jihadist militants; that number also includes dozens of senior leaders of al Qaeda and top Taliban commanders.<sup>35</sup> Drones have also undermined terrorists' ability to communicate and train new recruits. A tip sheet found among jihadists in northern Mali advised militants on how to mislead drones and even avoid being detected by electronic surveillance.<sup>36</sup> This has turned al Qaeda's command and training structure into a liability, and diminished their ability to travel and coordinate.

A major advantage of drones is their comparative use against alternative methods that are either too risky or not feasible. Raids, arrests and interrogations can produce vital intelligence and can be less controversial, but in war zones or unstable countries, apprehending militants is highly dangerous and raises the issue of detention. Given the fact that the Obama administration is in the process of shutting down the detention facility at Guantanamo Bay, it is more difficult to justify holding suspected terrorists indefinitely. This was an important distinction that Obama made between himself and his opponents in the 2008 presidential election. He argued that closing these kinds of detention facilities would send a message to the rest of the world that the United States was willing to stand by its

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<sup>35</sup> Pater Bergen and Katherine Tiedemann, "The Year of the Drone." New America Foundation, accessed April 24, 2014, [http://www.newamerica.net/publications/policy/the\\_year\\_of\\_the\\_drone](http://www.newamerica.net/publications/policy/the_year_of_the_drone).

<sup>36</sup> Rukmini Callimachi, "Al Qaeda Tipsheet On Avoiding Drones Found in Mali," Yahoo! News. February 22, 2013, accessed April 24, 2014, <http://news.yahoo.com/al-qaeda-tipsheet-avoiding-drones-found-mali-173015912.html>.

values and lead by example. That is why all of these factors have made it more politically palatable for the United States to kill rather than detain suspected terrorists.

Finally, although a drone strike does violate a state's sovereignty, it does so in a different way than would be putting U.S. troops on the ground or conducting a large-scale air campaign. Daniel Byman, a professor at Georgetown University and a Senior Fellow at the Brookings Institution, writes that drones have become Washington's weapon of choice because they have devastated "al Qaeda and associated anti-American militant groups," and done so "at little financial cost, at no risk to U.S. forces, and with fewer civilian casualties than many alternative methods would have caused."<sup>37</sup> Overall, drones have given Washington the ability to limit its military commitments abroad while keeping Americans safe. Despite such advantages, some remain skeptical about the drone program.

Even though drones have proven themselves to be tactically useful, critics question whether they help advance the strategic goals of counterterrorism. One of the main goals of U.S. counterterrorism is the strategic defeat of al Qaeda and groups affiliated with it. However, targeted killings have not thwarted the group's ability to fill leadership positions, nor have they undermined its propaganda and recruitment efforts, and in some cases they have significantly enhanced them. Sahab, the propaganda branch of al Qaeda, has been able to attract recruits by broadcasting footage of drone strikes, highlighting the number of civilians killed, and portraying them as an indiscriminate crusade against Muslims. In effect, drones have replaced Guantanamo Bay as the new international symbol of recruitment for al Qaeda and its affiliates.

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<sup>37</sup> Daniel L. Byman, "Why Drones Work: The Case for Washington's Weapon of Choice," *Foreign Affairs*, July/August 2013, accessed April 24, 2014, <http://www.foreignaffairs.com/articles/139453/daniel-byman/why-drones-work>.

Another consequence of the drone campaign is that it has encouraged violence to spread to neighboring countries and regions which undercuts U.S. counterterrorism efforts. Groups with longstanding local grievances across the Middle East and North Africa now claim some connection to al Qaeda, including al Qaeda in the Arabian Peninsula, al Qaeda in the Islamic Maghreb, al Shabab, and Boko Haram. These groups and organizations have begun characterizing the drone as a symbol of American oppression, using this message as a tool to recruit new members and sow anti-American sentiment. The long-term effect of drone strikes may be that the threat of terrorism continues to metastasize.

It also remains far from uncertain that drones can adequately preserve the security of the American people compared to conventional armed forces. Devoting military and intelligence resources to the drone program carries the opportunity cost of not investing in conventional aerial platforms, training military personnel in new skills, or capitalizing on other methods of intelligence gathering. In an era of austerity, spending more time and money on armed drones means spending less on other capabilities that are well suited for certain emerging threats.

Drones come with important tactical and technical limits as well. Because they fly low and make noise they are easy to shoot down, and they require clear airspace in which to operate, which cannot be always be guaranteed. They also rely on cyber-connections that are increasingly vulnerable, and require extensive maintenance. Yet perhaps the most significant drawback to the use of drones is that they destroy valuable intelligence that could be collected and examined to make U.S. counterterrorism smarter and more effective.

Another important issue is that the drone campaign presents a fundamental challenge to U.S. national security law, as evidenced by the controversial killing of four American

citizens in attacks in Yemen and Pakistan. Audrey Cronin, a political scientist at George Mason University, believes that in order for U.S. counterterrorism to be successful it must respond with a coherent strategy, and that the problem for Washington today is that the “drone program has taken on a life of its own, to the point where tactics are driving strategy rather than the other way around.”<sup>38</sup> She argues that the problem is that Washington now finds itself in a perpetual battle with an amorphous and geographically dispersed foe, one with an increasingly marginal connection to those who planned and orchestrated the September 11<sup>th</sup> terrorist attacks. It is important to acknowledge the disadvantages about the use of drones in order to understand the broader issues at stake.

Beyond the strengths and weaknesses of drones, it is the capabilities of the drone as a weapon that resurrect old arguments and raise new questions that hint at the larger debate of the moral and political issues at stake between technology and warfare. One of the issues at the heart of this dilemma is what economists call moral hazard – a situation in which greater risks are taken by individuals who are able to avoid shouldering the costs associated with these risks. In this case, because drones separate the operator from the danger of the warzone they carry no risk to those who fire the missile and kill the enemy without facing similar repercussions. The military engineers and intelligence analysts who developed the armed drone should be proud of their work in creating a weapon that is more precise and efficient than ever before, but to say that we *can* target individuals without incurring casualties it does not imply that we *ought* to engage in such activity. Technology itself is neither moral nor immoral; it can be used more or less precisely, but precision and efficiency are not inherently morally good. John Kaag and Sarah Kreps write that what they find most unsettling is the

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<sup>38</sup> Audrey K. Cronin, “Why Drones Fail: When Tactics Drive Strategy,” *Foreign Affairs*, July/August 2013, accessed April 24, 2014, <http://www.foreignaffairs.com/articles/139454/audrey-kurth-cronin/why-drones-fail>.

idea that those capabilities are being confused with moral justification, and that “the impressive expediency and accuracy in drone targeting may also allow policymakers and strategists to become lax in their moral decision-making about who exactly should be targeted.”<sup>39</sup> The implication here is that policymakers could end up loosening the standards on who is deemed a threat, thus expanding the list of suspects who could be targeting for killing, which would infringe upon the principle of distinction.

This gets at the issue of why it is important to clearly identify who can be targeted and killed. While untargeted, random killing is morally wrong and reprehensible, there are limits to targeted killing. On the one hand, the assassination of political leaders is not justified because they are necessary to negotiate and pursue peace, while on the other, military leaders are legitimate targets during wartime because they are engaged in ongoing hostilities and do not represent their political community. Individuals who plan, or organize, or recruit for, or participate in a terrorist attack are also legitimate targets. However, it is not always easy or possible to make a distinction between the political and military leadership of a state. For example, the president of the United States is the head of state and the commander-in-chief of the armed forces or this logic could extend to the leadership of the Chinese government. This task becomes more complicated when dealing with a transnational terrorist organization. Michael Walzer believes that the targeted killings of individuals in wartime is subject to the same constraints as any other act of war, and that the ultimate moral and political advantage of drones is their precision “which depends on using them only against individuals whose critical importance we have established and about whom we have

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<sup>39</sup> John Kaag and Sarah Kreps, “The Moral Hazard of Drones,” *The New York Times Opinionator*, July 22, 2012, accessed April 24, 2014, [http://opinionator.blogs.nytimes.com/2012/07/22/the-moral-hazard-of-drones/?\\_php=true&\\_type=blogs&\\_r=0](http://opinionator.blogs.nytimes.com/2012/07/22/the-moral-hazard-of-drones/?_php=true&_type=blogs&_r=0).

learned a great deal.”<sup>40</sup> What Walzer is attempting to do here is reinstate a stricter application of the principle of distinction so that drones are not used to target any individual who engages in suspicious activity.

Another political issue at stake is who bears the responsibility and repercussions of these drone strikes. When politicians can avoid the political consequences of the condolence letter, it is possible that they may no longer treat the previously weighty matters of war and peace the same way. New and advanced technology creates the opportunity for policymakers to circumvent the decision-making process for what is considered to be the most important choice a democracy can make. Peter Singer, a Senior Fellow at the Brookings Institution, writes that we “must now accept that technologies that remove humans from the battlefield ... are becoming the new normal in war,” and, like it or not, “the new standard we’ve established for them is that presidents need to seek approval only for operations that send people into harm’s way – not for those that involve waging war by other means.”<sup>41</sup> Drones mark one of the most significant steps towards a semiautonomous form of warfare that removes soldiers and pilots from combat. This means that there is one less step impeding the ability to use force, which reduces the opportunity to exercise control over these types of weapons. Overall, the use of drones highlights the essential role of technology in warfare. Even though assassinations and targeted killings are not new, never before in the history of warfare have they been so cheap and easy. What has become clear is that as weaponry becomes more precise, the language of warfare has become more ambiguous about who

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<sup>40</sup> Michael Walzer, “Targeted Killing and Drone Warfare,” *Dissent Magazine*. January 11, 2013, accessed April 24, 2014, [http://www.dissentmagazine.org/online\\_articles/targeted-killing-and-drone-warfare](http://www.dissentmagazine.org/online_articles/targeted-killing-and-drone-warfare).

<sup>41</sup> Peter W. Singer, “Do Drones Undermine Democracy?” *The New York Times*, January 21, 2012, accessed April 24, 2014, <http://www.nytimes.com/2012/01/22/opinion/sunday/do-drones-undermine-democracy.html?pagewanted=all>.

should be targeted. All of this shows just how the moral and political issues about the drone program have profound implications on the just war tradition.

The Just War tradition has come to be understood as a moral framework with evolving normative categories about the ethics of war, and is now being renegotiated again in light of the ethical challenges posed by the use of drones. Some of these challenges raise questions about how to interpret the criteria of *jus ad bellum* in the context of counterterrorism, in particular, the principle of just cause. It is well established that lethal action is justified against terrorists if the state is doing so in self-defense, so long as the response is proportional to the threat. Drones provide a better means to act on just cause more proportionately in responding to such a threat because they require minimal logistical support, are less invasive than ground troops, and can more narrowly target terrorists themselves. However, the United State must not be seduced by the belief that technologically advanced drones increase the probability of success while decreasing the risk to our soldiers and of collateral damage.

Daniel Brunstetter, a professor of political science at the University of California, Irvine, warns that the obsession with minimal collateral damage leads to what he calls the “drone myth.” Brunstetter argues that this belief may lead to “more frequent and less stringent interpretations of just cause that actually reduce the long-term probability of success in diminishing the external threat.”<sup>42</sup> Proponents of the drone campaign argue that because they are a more proportional response to the threat posed by terrorists, then drones arguably can raise the threshold of engaging in large-scale war. However, this argument depends on how war is defined. Walzer makes an important distinction between “measures short of war”

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<sup>42</sup> Daniel Brunstetter and Megan Braun, “The Implications of Drones on the Just War Tradition,” *Ethics & International Affairs* 25, no. 03 (September 20, 2011): pg. 337-58. Doi:10.1017/S0892679411000281.

(no-fly zones, pinpoint strikes) and “actual warfare” (ground invasion, extended bombing campaigns). He recognizes the grey area of moral ambiguity between such military actions, and to which “the argument about *jus ad bellum* needs to be extended” to include the justice of force.<sup>43</sup> Considering the fact that drones provide a limited, pinpoint, covert strike, this makes such an argument even more urgent to address so that a clear distinction can be made to inform policymakers when they consider the use of drones to counter a threat.

Another fundamental part of *jus ad bellum* where drones fit in is the threshold of last resort. Traditionally, the threshold of last resort does not stipulate that everything has to be tried before going to war; instead, it has been an indicator that all reasonable alternatives have been tried and failed. Mark Totten argues in his book, *First Strike*, that “against the new threat on global terrorism the point of last resort may arrive prior to the point of imminence.”<sup>44</sup> Last resort thus becomes a measure of necessity, where force is justified based on the perception of imminence of an attack, and in particular, the nature of the threat and the potential of alternative means to subdue it. Drones arguably provide leaders with a minimally violent means of addressing a perceived threat. However, what is unsettling about viewing drones from this lens is that while drone strikes are clearly acts of violence, the question is, at what point their use provokes large-scale war?

Some argue that drones fall within a gray area where they limit the type of operations that involve force, yet they still put pressure on the need to receive consent in order to avoid the provocation of all out war. Brunstetter states that the risk then becomes that “drones forestall the threshold of last resort for larger military deployment, but that last resort

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<sup>43</sup> Walzer, *Just and Unjust Wars*, pg. 57.

<sup>44</sup> Mark Totten, *First Strike: America, Terrorism, and Moral Tradition* (New Haven: Yale University Press, 2010), pg. 39.

criterion does not apply to drone strikes themselves because the targeted killings of (alleged) terrorists becomes the default tactic.”<sup>45</sup> Therefore, it is possible that a broad military intervention could be averted so long as drones achieve the mission of disabling the threat, but their ability to prolong or prevent reaching the threshold of last resort is limited by the need to have consent – tacit or explicit – to operate within the territorial borders of the sovereign states where terrorists reside and operate. Since most types of foreign intervention require the official sanction of international bodies this raises the question of what kind of consent is required for a government to unilaterally deploy drones without the approval of the other nation or the international community. Currently there is no official system by which countries collaborate on authorizing drone strikes in sovereign territory, thus complicating the traditional distinction between verifiable consent and rogue military activity.

This leads to the last essential criterion of *jus ad bellum* and a subject of significant controversy of the drone campaign: whether a country has the legitimate authority to target individuals in noncombat zones with the tacit consent of the state government. In an April 2010 statement from the U.S. House Congressional Subcommittee on National Security and Foreign Affairs, Mary Ellen O’Connell argues that “one cannot use military force against individuals in their territory when law enforcement measures are appropriate.”<sup>46</sup> She asserts that drone strikes are lawful in a combat zone, such as Afghanistan, but are not lawful outside the combat zone, like Pakistan or Yemen. According to O’Connell’s standards, explicit consent must be given to the country operating drones in their territory and a recognized conflict must be legally declared. However, such preconditions do not address the issue if

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<sup>45</sup> Brunstetter, “The Implications of Drones on the Just War Tradition,” pg. 346.

<sup>46</sup> House, Committee on Oversight and Government Reform, 111<sup>th</sup> Cong., 2d sess., H. Rept., pg. 21, accessed April 24, 2014, <http://oversight.house.gov/hearing/rise-of-the-drones-ii-examining-the-legality-of-unmanned-targeting/>.

those countries are either unwilling or unable to adequately deal with the security risks within their own borders, or at what point threatened nations rely on their recourse to use force in self-defense.

One possible way to identify areas where force can be used without the prerequisite of explicit consent is by officially designating areas that exist outside the influence of governing authorities. Walzer's distinction of places in between a zone of war and a zone of peace can help arbitrate the potential legitimacy of drone strikes. He writes that "in states that lose control of parts of their country or are wracked by civil war...the situation has a different 'feel' because...it happens outside the moral and legal conventions of ordinary warfare."<sup>47</sup> Walzer argues that in these places violent means can be employed only after all other options have failed. The thrust of his argument compels states to do everything in their power to disrupt, disable and defeat terrorists before resorting to lethal force. However, if drone strikes are justified in this context, the need to undertake efforts other than force to neutralize the threat may be diminished.

As countries come to increasingly depend on drones to respond to situations that are morally and legally ambiguous, it is important to evaluate how they are used in the fight against terrorism under the category of *jus in bello*. The core of the *jus in bello* debate focuses on the concept of noncombatant immunity – the idea that civilian casualties should be avoided to the greatest extent possible, a goal which the principles of proportionality and discrimination are intended to achieve. Proponents argue that the drone's ability to conduct surveillance and carry out targeted strikes on terrorists make it more capable of adhering to the principle of proportionality and should satisfy the condition of discrimination. For

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<sup>47</sup> Michael Walzer, "On Fighting Terrorism Justly," *International Relations* 21, no. 4 (2007): pg. 480-84, doi:10.1177/00471178070833073.

example, when General Stanley McChrystal assumed command in Afghanistan he made the use of drones a major part of his initiative to reduce civilian casualties. On his watch, the overall number of air strikes decreased, drone strikes increased, all of which corresponded to a 28 percent drop in civilian casualties according to a United Nations report.<sup>48</sup> This downward trend marks a considerable improvement of discrimination and highlights the technical capacity of drones to act more proportionately compared to aerial bombing or a ground invasion, in effect reducing the overall military impact on the ground. The point is that drones arguably cause less damage than the often unpredictable and destabilizing effects of large-scale uses of force. Nevertheless, it has been previously noted that drones are only as precise and discriminate to the extent that the intelligence is accurate and their human operators, both planners and pilots, exercise their best judgment.

Theoretically, the fact that the pilot of the drone is safely far away should increase adherence to *jus in bello* principles. Brunstetter considers this “separation factor” to be potentially problematic because “the removal of the drone operators from the combat zone may have psychological effects that magnify the challenges of adhering to the principle of discrimination.”<sup>49</sup> Part of the concern lies in the fact that the information the operator receives is assessed in a safe environment may alter a pilot’s ability to assess threats. Therefore, it is possible that a drone operator’s assessment could also be affected if their ground forces were in danger which may induce a tendency to err on the side of protecting

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<sup>48</sup> Spencer Ackerman, “Under McChrystal Drones in Afghanistan Quietly Rise as Civilian Casualties Drop,” The Washington Independent, January 14, 2010, accessed May 2, 2014, <http://washingtonindependent.com/73915/under-mcchrystal-drone-strikes-in-afghanistan-quietly-rise-as-civilian-casualties-drop>.

<sup>49</sup> Brunstetter, “The Implications of Drones on the Just War Tradition,” pg. 350.

one's troops. Since drones remove the risk factor to U.S. combatants' altogether, they arguably change the way we think about discrimination.

This highlights an additional concern that centers on the question of targeting. Assuming that drone strikes are permissible, one way to determine who constitutes a legitimate target is to turn to international law. However, the asymmetric nature of the fight against terrorism opens the door for reconsideration of tactics previously regarded as against both domestic and international law, such as assassination. Michael Gross, a professor of political science at the University of Haifa in Israel, argues that assassination could be legitimate if it serves a military purpose, similar to Walzer's justification of targeting military leaders, and prioritizes the protection of civilians from undue harm by adhering to *jus in bello* principles.<sup>50</sup> In order to determine whether drones satisfy these principles, any government that conducts drone strikes must be transparent and accountable to ensure everything possible is done to avoid civilian casualties. Without transparency, there is no way to know why a specific strike was undertaken, if it was undertaken with discrimination and proportionality in mind, or even whether it reflected military necessity. Ultimately, the principles of the Just War tradition require accountability to arbitrate these *jus in bello* issues, and highlight the need to update our moral thinking in ways that take into account the technological advantages and disadvantages of drones.

Despite the strategic and tactical advantages of drones, this new technology challenges our ability to adhere to the traditional principles of Just War Theory. According to Singer, "the introduction of unmanned systems to the battlefield doesn't change simply how we fight, but for the first time changes who fights at the most fundamental level. It

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<sup>50</sup> Michael Gross, *Moral Dilemmas of Modern War: Torture, Assassination, and Blackmail in an Age of Asymmetric Conflict* (Cambridge: Cambridge University Press, 2010), pg. 107.

transforms the very agent of war, rather than just its capabilities.”<sup>51</sup> While it may be a long time before drones or robots entirely replace humans on the battlefield, it is already clear that drones have achieved, and will increasingly continue to play, a vital role in military affairs. Their state of the art surveillance imagery and payload of precision guided missiles makes them a unique addition to the military arsenal. In the fight against terrorism, they offer the best chance to limit collateral damage, minimize the risk of civilian casualties, and arguably raise the threshold for large-scale war. Proponents believe that drones represent a major step in the right direction toward a more discriminate and proportionate use of force in war and self-defense. Yet critics remain skeptical given the limited amount of public transparency and accountability of the drone program, and grow concerned with the trend for both state and nonstate actors to acquire increasingly sophisticated drone technology. The key issue that both of these perspectives highlight is the extent to which we adhere to the principles of discrimination and proportionality. Furthermore, this depends upon the level to which a government is honest and forthcoming about the details of these drone strikes. As with any tool, drones can either be a force for good or an instrument of evil depending on how they are used. At the end of the day, the only factor that determines the morality of drones is the character and intention of the policymakers and operators who select the targets and who carry out the operation. Walzer points out that “there can be no justice in war if there are not, ultimately, responsible men and women.”<sup>52</sup> Just like the Ring of Gyges, the morality of drones rests in the hands of mankind.

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<sup>51</sup> Peter W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21<sup>st</sup> Century* (New York: Penguin Press, 2009), pg. 194.

<sup>52</sup> Walzer, *Just and Unjust Wars*, pg. 288.

## IV

### The Lethal Presidency of Barack Obama:

#### The Obama Administration's Justifications for the Use of Drones

On a late September morning a squadron of drones took off from a remote airstrip that the CIA had built in southern Saudi Arabia. The drones entered Yemeni airspace and soon caught sight a group of trucks that were clustered in a desert patch in Jawf Province. A group of men who had just finished their breakfast hurried to the trucks. One of the men was Anwar al-Awlaki, a radical preacher born in New Mexico who had become a senior operative in Al Qaeda's branch in Yemen, and another was Samir Khan, also an American citizen who was the creative force behind the English-language version of Al Qaeda's internet magazine. As they were about to drive away, two of the Predator drones used laser sights to pinpoint the targets while two larger Reaper drones loaded with Hellfire missiles, operated by pilots thousands of miles away, readied their weapons and fired.

The targeting and assassination of Anwar al-Awlaki and Samir Khan was the first time since the Civil War that the United States government had authorized the killing of an American citizen as a wartime enemy outside of judicial review.<sup>53</sup> This incident raised the level of public scrutiny and debate about a program that has been shrouded in secrecy for years. During his time as Commander-in-Chief, President Obama has accelerated and expanded the use of remotely piloted aircraft in the war on terror to seek out and destroy

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<sup>53</sup> Mark Mazzetti, Charlie Savage, and Scott Shane, "How a U.S. Citizen Came to Be in America's Cross Hairs," *The New York Times*, March 09, 2013, accessed April 23, 2014, [http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/03/10/world/middleeast/anwar-al-awlaki-a-us-citizen-in-americas-cross-hairs.html?pagewanted=all&_r=0).

those individuals and networks that were responsible for the September 11 attacks and who continue to pose a threat to the United States. This weapon raises profound questions and confronts policymakers with difficult issues that have only just begun to shape national conversation about freedom, security, and warfare. Using the execution of al-Awlaki as a case study, I will describe the events and intellectual debate that made the drone a primary tool of counterterrorism; the Obama administration's rationale for lethal strikes, particularly the targeted killing of al-Awlaki; and highlight the main concerns about the drone program.

From the moment President Obama took office, the new commander in chief expressed strong interest in the use of drones and targeted killings, a policy that has become the central paradox of his presidency. As a candidate he had argued forcefully against waterboarding, illegal detentions, and the enhanced interrogation techniques of the Bush administration. He promised to restore America's reputation in the world by upholding international law and defending human rights. However, to those who paid attention to his rhetoric during the campaign the administration's embrace of the drone program should come as no surprise. In August 2007, Obama delivered a speech at the Woodrow Wilson Center where he said, "I will not hesitate to use military force to take out terrorists who pose a direct threat to America...I will ensure that our military becomes...more stealthy, agile, and lethal in its ability to capture or kill terrorists."<sup>54</sup> And so within the first year of his presidency it became clear that Obama was comfortable with the use of hard, lethal force in the fight against al Qaeda in the form of the drone program. In his mind, drones represented a more precise and restrained way of waging war, one with the ability to take out those individuals who posed a real and imminent threat while limiting U.S. casualties. Obama's team believed

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<sup>54</sup> Barack Obama, "A New Strategy for a New World." (speech, Director's Forum, Woodrow Wilson International Center for Scholars, Washington DC, August 1, 2007).

they saw an opportunity to wage war without the staggering costs of the big military campaigns that resulted in regime change, require years of occupation, and catalyze radicalization and extremism throughout the Muslim world. They believed in the need for a more surgical strategy, one that focused on demonstrable threats to the United States rather than indiscriminate executions. Those who have spoken to the president about the drone program say he was under no illusion that it would “win” the war on al-Qaeda.<sup>55</sup> Yet the president believed he had to remain focused not only on the big picture but also on the individual terrorists who might infiltrate U.S. defenses and attack the homeland.

Beyond the strategic and technological advantages of drones, President Obama and his administration came to rely on targeted killings as an important tool of counterterrorism because of the political cover they provided as well. During his first week in office, the president announced a plan to close the detention facility at Guantanamo Bay and issued a ban on all of the coercive interrogation methods used by the CIA in the wake of the September 11 attacks. These actions were immediately denounced by former Bush administration officials, including Dick Cheney, who argued that Obama was simply scoring political points at the expense of national security. The critique was meant to portray President Obama as “weak” on national security issues and blame his administration for denying the intelligence community the tools it needed to keep the country safe. John Rizzo, a career CIA lawyer who sat in on the meetings with the new team was surprised by the hawkish tone of Obama’s aides. “They never came out and said they would start killing people because they couldn’t interrogate them, but the implication was unmistakable,” Rizzo

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<sup>55</sup> Daniel Klaidman, *Kill or Capture: The War on Terror and the Soul of the Obama Presidency* (Boston: Houghton Mifflin Harcourt, 2012), pg. 127.

said, and that “once the interrogation was gone, all that was left was killing.”<sup>56</sup> In other words, once the options for detention and interrogation were limited, the only instrument that was left was the drone program. Drone strikes allowed the administration to avoid liberal criticism that came with capturing prisoners, and it made Obama appear tough and decisive on terrorism which left the Republicans in no position to challenge him. Although the political conditions were set to ramp up the use of drones and targeted killings, the Obama administration had yet to make the legal and ethical case publicly.

The Obama administration’s reluctance to make the case for drones both internally and to the public all changed after the events of one morning in December 2009. On Christmas Day in 2009, a 23 year old Nigerian named Umar Farouk Abdulmutallab tried and failed to blow up an airliner as it approached Detroit. During his interrogation, Mr. Abdulmutallab told F.B.I agents that while he was in Yemen he received preparation, instruction and approval for his suicide mission from Anwar al-Awlaki. After this incident, American officials concluded that al-Awlaki was actively plotting attacks against the United States, and in early 2010 President Obama approved the placement of al-Awlaki on the CIA’s kill list. This moment marked a turning point within the Obama administration about the standards that governed the use of drone strikes. Previously, all drone strikes were conducted against suspected individuals connected to al Qaeda, the Taliban, or their associated forces; the designation of al-Awlaki as a target was the first time that a U.S. citizen had been placed on the list of terrorist suspects selected for lethal assassination under the drone program.

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<sup>56</sup> Mazzetti, *The Way of the Knife*, pg. 159.

One of the most important voices at the center of the debate was Harold Koh, the Legal Advisor to the State Department. On the whole, Koh accepted the legality of targeted killings and believed they were more humanitarian because of their surveillance capability and precision weaponry. Like many others in the administration, Koh had no problem going after the senior leadership of al-Qaeda, but he began to feel uneasy when the military wanted to capture or kill members of other terrorist groups whose connections to al-Qaeda were unclear, and he had seen how quickly intelligence analysts would elevate the threat of suspected militants to imply they represented grave threats to the United States. Soon Koh faced questions from the human rights community and foreign allies who criticized the drone strikes as Obama's extrajudicial killing spree, which made him wonder whether the secrecy of the drone program was doing more harm than good. Finally, Koh lobbied Secretary of State Hillary Clinton and the White House to let him deliver a speech in defense of targeted killing.

On March 25, 2010, Koh gave a speech to the Annual Meeting of the American Society of International Law where he raised the issue of targeted killing. He argued that Obama administration's targeting practices and lethal operations with the use of unmanned aerial vehicles comply with all applicable law. Koh established the larger framework for his justification of targeted killings by stating that as a matter of both domestic and international law, the United States is in an ongoing armed conflict with al-Qaeda, the Taliban, and its associated forces in response to the terrorist attacks of September 11. He argued that the use of force, including lethal force, is consistent with its inherent right to self-defense and the responsibility to protect its citizens. Koh then addressed specific legal reasoning and standards considered by the United States when defending against high-level terrorist leaders

who are actively planning attacks. He said that a specific drone strike at a particular location “will depend upon considerations specific to each case, including those related to the imminence of the threat, the sovereignty of the other states involved, and the willingness and ability of those states to suppress the threat the target poses.”<sup>57</sup> He stated that the rules that govern targeting operations are consistent with principles under the laws of war which include distinction and proportionality which are recognized under international law as part of *jus in bello*. He describes distinction as the requirement that drone strikes must be limited to military objectives and civilians shall not be the intended target. He then explains how proportionality prohibited attacks that may cause incidental loss to civilian life, and how that would be excessive in relation to the direct military advantage anticipated.

Finally, Koh responded to four legal objections about targeted drone strikes: that suggested the act of targeting a particular enemy leader violates the laws of war; that advanced weapon systems, such as drones, are unlawful; that the use of force against specific individuals constitutes illegal extrajudicial killing; and, that drone strikes violate domestic law which ban assassinations.<sup>58</sup> Koh’s response was that first, individuals are belligerents and thus lawful targets. Second, he argued that the legality of targeting individuals does not depend on the type of technology used, so long as they are employed in conformity with the applicable laws of war. Third, during an armed conflict or in legitimate self-defense, a state is not required to provide targets with legal process before it may use lethal force. Finally, the use of lawful weapons systems of specific high-level belligerents when acting in self-defense or an armed conflict does not constitute an assassination. It is clear that Koh worked to

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<sup>57</sup> Harold Koh, “The Obama Administration and International Law,” (speech, Annual Meeting of the American Society of International Law, American Society of International Law, Washington DC, March 26, 2010).

<sup>58</sup> *Ibid.*

connect the Obama administration's legal rationale to the basic principles of international law. He concluded by stating that the Obama administration remained committed to ensuring that its targeting practices are lawful and appropriate.

Even though the legal reasoning and standards Koh articulated in his speech covered the main criteria that governed targeted killings, it did not address some of the most controversial aspects of the program. As the use of drones escalated over the next couple of years, both in their frequency and use beyond the borders of Afghanistan, the public clamored for more transparency and legal clarity. In February 2012, Jeh Johnson, the General Counsel at the Department of Defense at the time, addressed some of the issues raised by the drone program. The first topic that Johnson spoke about was the concept of an associated force which he described as the well-established concept of co-belligerency in the law of war. He argued that this concept has become more relevant over time as al Qaeda has developed into a more decentralized organization and relies more on its associates to carry out terrorist attacks. Specifically, Johnson stated that the Obama administration has come to determine an associated force as “an organized, armed group that has entered the fight alongside al Qaeda, and is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners.”<sup>59</sup> He was quick to point out that this concept does not authorize military force against anyone the executive branch labels a terrorist. Therefore, an associated force is a terrorist group that has entered the fight against the United States, and not just any group that merely embraces the ideology of al Qaeda.

Another contentious issue that Johnson addressed was whether drone strikes were limited to the “hot” battlefields of Afghanistan. Several lawyers, activists and officials

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<sup>59</sup> Jeh C. Johnson, “National Security Law, Lawyers and Lawyering in the Obama Administration.” (lecture, Dean’s Lecture, Yale Law School, New Haven, February 22, 2012).

expressed concern that most of the strikes were taking place in Pakistan, Yemen, and even Somalia, countries that are not at war with the United States. Johnson stated that although Afghanistan was clearly the focus when the 2001 Authorization for the Use of Military Force was enacted, it sanctioned the use of “necessary and appropriate force against the organizations and persons connected to the September 11<sup>th</sup> attacks – al Qaeda and the Taliban – without a geographic limitation.”<sup>60</sup> He argued that this legal point is important given how over the last 10 years al Qaeda has become more decentralized, and for the most part, migrated away from Afghanistan to other places where it can find safe haven and the space to operate. Yet, a question that was still left on the table was what individual or group constituted a significant threat to the United States and its allies.

John Brennan, President Obama’s former counterterrorism advisor and current director of the CIA, gave a speech later that year that provided a more detailed description of the kind of threat that would warrant the option to carry out a drone strike. He said that a significant threat might be posed by an individual who is an operational leader of al-Qaeda or one of its associated forces who is actively planning to carry out attacks against the United States, or someone who possesses unique skills that could be used in an attack.<sup>61</sup> However, this answer did not directly respond to the charge that many of the strikes were targeting individuals or groups of militants who were not a part of the senior leadership of a terrorist group. Also, in a broader sense, Brennan argued that targeted strikes are a wise strategic choice due to their surgical precision which makes them an essential counterterrorism tool. Overall, the Obama administration has come to defend the drone program and targeted

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<sup>60</sup> Ibid.

<sup>61</sup> John O. Brennan, “The Ethics and Efficacy of the President’s Counterterrorism Strategy” (speech, Woodrow Wilson International Center for Scholars, Washington DC, April 30, 2012).

killings because of their ability to eliminate terrorists who operate in some of the most remote places in the world; such targeting is narrowly aimed against those who pose a serious threat and is the course of action least likely to result in the loss of innocent life; and finally, they help achieve the defined effort to disrupt, dismantle and defeat specific networks of violent extremists that threaten the United States.

Even though President Obama and his national security team gradually revealed the legal rationale and principles that justified the use of drones to conduct targeted killings in the war on terror, the administration kept quiet about the legality of targeting Anwar al-Awlaki. The placement of al-Awlaki raised serious concerns among lawyers, human rights activists, politicians and the American public about whether the executive branch had the authority to target and kill a U.S. citizen without due process. Around the time that al-Awlaki was placed on the CIA's kill list, the task of deciding whether deliberately killing him would be lawful fell to David Barron and Martin Lederman, two lawyers who worked in the Justice Department's Office of Legal Counsel. Over the course of several months, Barron and Lederman threw themselves into the project, analyzing other bodies of law to see whether they would render a strike impermissible, and citing intelligence reports that supported the premise that al-Awlaki was actively plotting attacks against the United States.<sup>62</sup> Just before they returned to academia in the fall of 2010, the two lawyers finished their comprehensive memorandum, whose reasoning was widely approved by other administration lawyers that summer, and were narrowly tailored to al-Awlaki's circumstances.

Nearly three years later, just as John Brennan was in the midst of his confirmation process to become the CIA Director, the Justice Department released a "white paper" which

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<sup>62</sup> Mazzetti, "How a U.S. Citizen Came to be in America's Cross Hairs."

included a version of the legal analysis portions that authorized lethal force against a U.S. citizen who is a senior operational leader of a terrorist group. As the Obama administration stated on more than one occasion, the memo approved of the president's authority to respond to the imminent threat posed by al-Qaeda and its associated forces which arise from constitutional responsibility to protect the country, the inherent right to national self-defense under international law, and Congress's authorization for the use of military force. In regards to the targeted killing of an American citizen terrorist, the Department of Justice concluded that it would be appropriate and lawful to use force against a U.S. who is a senior operational leader of al-Qaeda or an associated force only if the following three conditions are met:

“(1) an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack the United States; (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and (3) the operation would be conducted in a manner consistent with applicable law of war principles.”<sup>63</sup>

Furthermore, it argued that a lethal operation conducted in a foreign nation would be consistent with the international legal principles of sovereignty and neutrality if it was carried out with the consent of the host nation's government, or after a determination that the host nation would be unable or unwilling to deal effectively with a threat to the United States. Although the legal memo specifically outlined certain conditions that had to be met before lethal action could be taken against a U.S. citizen, it left open to interpretation important categories that still gave the Obama administration substantial discretion. It failed to mention specifically what kind of individual constituted an “imminent” threat, the types of situations

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<sup>63</sup> “Justice Department Memo Reveals Legal Case for Drone Strikes on Americans,” NBC News. February 4, 2013, accessed April 24, 2014, <http://investigations.nbcnews.com/news/2013/02/04/16843014-justice-department-memo-reveals-legal-case-for-drone-strikes-on-americans?lite>.

that would make the possibility to capture infeasible, and what law of war principles would be particularly relevant to that type of lethal operation.

In March 2012, Attorney General Eric Holder spoke at Northeastern University School of Law where he elaborated on the major conditions articulated in the white paper.<sup>64</sup> On the issue of what constitutes an imminent threat, he said that such an evaluation incorporates considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of preventing future attacks. He stressed that whether the capture of a U.S. citizen terrorist is feasible is a fact-specific and potentially time-sensitive question, and depend on whether capture would prevent an attack and without undue risk to civilians or to U.S. personnel. Holder also reaffirmed that the use of lethal force by the United States against anyone will comply with the fundamental standards governing the use of force which include the principles of necessity, distinction, proportionality, and humanity. More importantly, he addressed the constitutional considerations with respect to the rights of U.S. citizens under the Due Process Clause and the Fourth Amendment. Holder argued that an individual's citizenship does not immunize him or her from a lethal operation, and that in cases arising under the Due Process Clause, "the Court has applied a balancing approach, weighing the private interest that will be affected against the interest the government is trying to protect, and the burdens the government would face in providing additional process."<sup>65</sup> Although the Obama administration's legal reasoning and criteria that govern the use of lethal force appear to establish strong parameters around targeted killings, the international community and critics

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<sup>64</sup> Eric Holder, (speech, Attorney General Eric Holder Speaks at Northeastern University School of Law, Northwestern University School of Law, Evanston, March 5, 2012).

<sup>65</sup> Ibid.

of the drone program remain skeptical about the precedent being set by this new tool of counterterrorism strategy.

The precedent the Obama administration has begun to set through drone strikes raises important ethical and political questions about the use of force and the proper balance between our values and our security. In particular, the targeted killing of Anwar al-Awlaki highlights the most controversial aspects of the drone program and the methods we use as a part of our counterterrorism strategy. The first issue is that the drone strike that killed Awlaki was in Yemen, a country that is not at war with United States and is considered outside of the original conflict zone of Afghanistan. This is a point that both Holder and Johnson addressed in their speeches, where they argued that the AUMF does not limit the ongoing armed conflict with al-Qaeda and their associated forces to one particular country or region. That is why Mary Ellen O’Connell and others have pushed for the United States to receive explicit consent from the host nation to use drones within their borders in order to respect their sovereignty.

This leads to one of the most controversial element of the drone program which is that a majority of the targeted killings are carried out by the CIA which can claim deniability and is shielded from public scrutiny. In an interview a week after releasing an exhaustive review on targeted killings, Philip Alston said that the reason he is deeply concerned about the United States’ use of drones by the CIA is because “they violate the rules relating to international accountability that the U.S. has very often demanded be observed by other governments.”<sup>66</sup> The lack of accountability and transparency has prevented the American public and the international community from knowing specific facts about these targeted

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<sup>66</sup> Scott Horton, “Rules for Drones: Six Questions for Philip Alston,” *Harpers Magazine*, June 9, 2010, accessed April 24, 2014, <http://harpers.org/blog/2010/06/rules-for-drone-wars-six-questions-for-philip-alston/>.

killings knowledge. This information includes when and where the CIA is authorized to kill, the criteria for individuals who may be killed, how the CIA insures the executions are legal, and what the follow-up process is when civilians are accidentally killed. The veil of secrecy that surrounds the CIA may offer certain advantages that make their operations more successful and efficient; however, it also creates the potential for the operators to escape the consequences of their actions. The danger of this precedent is that it does not give a separate source of authority or the public at large the opportunity to evaluate whether or not the CIA adheres to the principles of discrimination and proportionality. Yet, even if the drone program was considered appropriate and lawful in all instances, this should not dismiss the morality of targeted killings. Therefore, strong oversight and a greater measure of public transparency would go a long way towards ensuring that the CIA's targeted killing operations are clearly justified and adhere to the principles of Just War Theory, and guarantees there are effective mechanisms for investigation, prosecution and punishment if those laws and criteria are violated.

Finally, many scholars and legal experts are concerned that the United States' reliance on the doctrine of self-defense as a legal rationale are self-serving and do not strictly limit the size of and scope of the conflict with al-Qaeda and their associates. Even if the United States acts in self-defense, the targeting of a particular individual must still comply with the standards of conduct as established by the laws of war and international humanitarian law. The problem is that the Obama administration has interpreted the powers granted to them by Congress and the courts in broad terms that give the White House almost complete discretion related to matters of national security. This makes it difficult to verify the accuracy and accountability of the targeting killings as well as the constraints placed

upon the drone program. If the United States hopes to restore faith in its fight against terrorism then our leaders must do everything in their power to bring more accountability and transparency to the system so that we do not compromise our values for our security.

The global war on terror has been a defining moment of the 21<sup>st</sup> century, and any history of how the United States took the fight to al-Qaeda and their allies will feature the drone. Despite the difficult questions it has raised, no matter how uncomfortable it has made us feel, it is undeniable that the drone has been a remarkably effective weapon. In a speech at the National Defense University last May, President Obama spoke about how no president can promise the defeat of terror nor prevent every danger to our society; instead, he argued that “What we can do – what we must do – is dismantle networks that pose a direct danger, and make it less likely for new groups to gain a foothold, all while maintaining the freedoms and ideals that we defend.”<sup>67</sup> Even though the president’s goal is both pragmatic and noble, achieving this balance appears more difficult to achieve given the precedent being set by his administration. The targeted killing of Anwar al-Awlaki represents the gravest moral dangers and legal uncertainties of the drone program by the fact that these targeted killings are conducted outside of judicial review, beyond declared conflict zones, and overseen by an agency that operates in the shadows. Under these conditions it is impossible to determine who bears the moral responsibility for the outcomes of the drone program, and whether these targeted killings adhere to the principles of Just War Theory. What is absolutely clear is that the drone has become an indispensable tool and is here to stay. As more countries develop and expand their use of drone technology to gather intelligence and assist in law enforcement the need for a global conversation about the use of drones becomes more urgent. It is time for

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<sup>67</sup> Barack Obama, “Remarks by the President at the National Defense University” (speech, Fort McNair, Washington DC, May 23, 2013).

the United States to lead the world and establish a transparent and accountable framework that governs unmanned aerial systems to ensure they are used in accordance with the laws of war and respect the life and dignity of every human being.

## CONCLUSION

While I was intern in Washington, D.C. during the fall of 2013, I attended a public seminar about the drone program hosted by the *National Security Law Journal* at George Mason University. The event was set up to have a moderator interview members of a panel that included journalists, a national security fellow, and a member of the U.S. Air Force that would give their take about the drone program that would then open up to the audience to ask questions. Being the inquisitive and opportunistic student that I am, I raised my hand to ask a question that addressed the guiding principle of my thesis. When it was my turn to speak, I asked the panel, “Do you think the drone program as a whole raises any important ethical issues or concerns?” Almost immediately, I received an answer that I did not expect. Dr. James Carafano, a senior fellow at The Heritage Foundation, was the first member of the panel to respond and he said, “That was a stupid question.” Although he proceeded to go on an explain why he thought my question was not relevant to the topic of drones and raised other issues about the drone program that he found worrisome, I was still dumbfounded that he did not believe the drone program raised any moral questions. Yet, given what I had discerned from all the research I had done leading up to that point, it was clear that there were ethical issues surrounding the use of drones that had not been sufficiently addressed. In that moment I made a vow to continue my research, and hopefully to answer some of the important questions regarding the morality of the drone program.

Now, almost a year and a half later, I can say that I do have some answers to those questions that inspired me to pursue this challenging topic about the relationship between drones and just war theory. Contrary to Dr. Carafano, based on the research and analysis I have done, it is clear that the drone program does raise profound ethical questions that are not adequately addressed by the traditional laws of wars that arise from principles of just war theory. Although drones appear to be a more discriminate and proportionate use of force, the justification for their use rests solely on their technological advantages. I do not dispute or seek to diminish the benefits of drones as a means to protect the American people or eliminate those who pose a threat to the United States. Drones' capacity for both surveillance and surgical strikes, along with their ability to be remotely operated, is a great accomplishment that can significantly limit the cost of war in terms of both blood and treasure. However, that should not blind us from the reality that there are moral hazards that come with using drones.

First and foremost, we must ask ourselves whether we should use a weapon that further removes a soldier from combat; for what else will restrain us from unleashing the horrors of war if human life is not on the line? This should be in the back of our minds as we begin making the transition towards a more autonomous form of warfare that removes humans from the battlefield. We cannot hold ourselves accountable to the laws of war and the principles of just war theory if we do not make the drone program more transparent. The American people and the international community deserve to know the legal rationale that governs the use of drones. The criteria being used to select both foreign individuals and American citizens as targets in general should be made public. More accurate information about the number of civilian casualties and the level of collateral damage as a result of these

strikes would give the public the ability to assess whether the U.S. government adheres to the principles of Just War Theory. Furthermore, because drones represent a use of force that is a measure short of war that could raise the threshold of last resort for large-scale, conventional war. Yet this begs the question of at what point do drones strikes end, or does this open the door to a perpetual use of force in a war against terror? Finally, we must bear in mind that the drone strikes are carried out by human strategists and operators, who are making interpretive judgments and decisions based on the best intelligence available to them at the time. The fact that there is still plenty of room for error in the targeting process should compel us to exercise caution and restraint when it comes to using drones.

Throughout this project, I have been guided by the question, what is the right thing to do? Some consider what the most practical option is; others wonder what the ultimate ideal we wish to strive for. Even though some people may consider such matters irrelevant, I do believe the drone program raises profound questions about the relationship between technology and the traditional laws of war, including the moral questions that arise from this new weapon. By now we must accept the reality that the drone is here to stay, and it will certainly continue to operate in a military capacity in our war on terror given its technological advantages. So in this case, what is the right thing to do? Once again, I believe President Obama said it best in his Nobel Peace Prize acceptance speech that I referenced in the introduction. “Where force is necessary,” he said, “we have a moral and strategic interest in binding ourselves to certain rules of conduct. And even as we confront a vicious adversary that abides by no rules, I believe the United States of America must remain a standard bearer

in the conduct of war.”<sup>68</sup> This is a noble goal that I share with the president, but if we intend to set the right example then we must demonstrate careful adherence to both domestic and international law, and to the traditional laws of war. Going forward, we must be careful about the precedent we have begun to set over the past five years. For the moment, consider if another state were the sole arbiter of whether it could use force inside the borders of another state, or if a state was the sole arbiter of what constitutes an imminent threat or who represents a targetable enemy. It is possible to imagine that if the international community accepted the precedent being set by the U.S. covert drone program then we could see other countries use such arguments to justify the killing of dissidents, rivals, or unwanted minorities. In the long run, the precedent we set will matter more than eliminating another bad individual. Following our principles is not just morally and legally necessary, it is in our long-term interest, because the strikes themselves reinforce the anti-drone narrative, and inspire the kind of random, small-scale terror attacks that we witnessed on September 11, 2001. That is why we must always ask ourselves what the right thing to do is, and how ought we to live together, both in times of war and peace.

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<sup>68</sup> Obama, “A Just and Lasting Peace.”

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