

# War, Responsibility, and Killer Robots

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## I. Introduction

In *War and Responsibility*, John Hart Ely argues that Congress has willingly and cravenly surrendered its rightful role as the branch responsible for determining when and the extent to which

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the United States engages in armed conflicts.<sup>1</sup> Since the publication of this seminal work on the war power, presidents have continued to commit troops to hostilities absent or outside of explicit congressional authorizations—and the legislature and the judiciary rarely challenge such actions.

Meanwhile, the United States is investing heavily in unmanned military weapon systems,<sup>2</sup> and the U.S. Department of Defense has described increasing weapons' autonomous capabilities as a "high priority."<sup>3</sup> In its annual "Unmanned Systems Integrated Roadmap," the Department discusses its intended "continued development, production, test[ing], training, operation, and sustainment of unmanned systems technology across DoD" for the next twenty-five years.<sup>4</sup> One of the ultimate goals is to "[t]ake the 'man' out of unmanned [systems]."<sup>5</sup> How might increasingly autonomous weapon systems—also known as "killer robots"—affect the constitutional war power?

Drones, cyber operations, and other technological advances in weaponry already allow the United States to intervene militarily with minimal boots on the ground, and increased autonomy in weapon systems will further reduce risk to soldiers. As human troops are augmented and supplanted by robotic ones,<sup>6</sup> one of the remaining incentives for Congress to check presidential

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<sup>1</sup> JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (Princeton University Press, 1993). Ely's understanding of the appropriate division of the war power is shared by many contemporary scholars. *See, e.g.*, HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 158–61 (Yale University Press, 1990); John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 *STAN. L. REV.* 793, 794 (2004) (acknowledging "that Ely's view [of the constitutional design of war powers] represents the majority view among academics and has a certain intuitive attraction by appealing to the standard working model of the separation of powers that prevails in domestic affairs" but arguing that it is no longer appropriate in an age of terrorism).

<sup>2</sup> *See* Jack Browne, *UAV Markets Robust Despite Declining Spending*, *DEF. ELEC.* (Feb. 15, 2012), <http://defenseelectronicsmag.com/electronic-countermeasures/uav-markets-robust-despite-declining-spending>.

<sup>3</sup> U.S. DEP'T OF DEF., *UNMANNED SYSTEMS INTEGRATED ROADMAP FY 2013-2038* 67 (2013) [hereinafter "ROADMAP"].

<sup>4</sup> *Id.* at v.

<sup>5</sup> *Id.* at 25.

<sup>6</sup> Jeffrey S. Thurnher, *No One at the Controls: Legal Implications of Fully Autonomous Targeting*, 67 *JOINT FORCE Q.* 77, 79 (2012) ("The expectation is that robots on the battlefield will form the bulk of detachments, such as infantry units that would be comprised of 150 human soldiers working alongside 2,000 robots.").

warmongering—popular outrage at the loss of American lives—will diminish. By making it politically easier to justify the use of military force, autonomous weapon systems will contribute to the growing concentration of the war power in the hands of the Executive, with potential implications for the international doctrine of humanitarian intervention.

## II. The Constitutional War Power

### A. *The Academic War Power*

Under international law, states enjoy various rights by virtue of their sovereignty; these include the right to create binding international legal obligations via treaty, the right to use defensive force against armed attacks on their territory, and the right to decide when to engage in hostilities.<sup>7</sup> Which domestic authority has the power to exercise these sovereign rights, however, is left to the discretion of the state.<sup>8</sup>

The U.S. Constitution does not clearly assign the war power to any single branch. It grants Congress the powers to create military forces and to “declare war,”<sup>9</sup> which has long been understood to include authorizations of minor uses of military force.<sup>10</sup> The President, meanwhile, is the “commander in chief of the Army and Navy of the United States”<sup>11</sup> and is assumed to have the authority to act unilaterally to repel attacks on U.S. territory.<sup>12</sup> Through its power of the purse, Congress has an implicit ability to end military engagements by eliminating their funding.<sup>13</sup> For example, the

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7 By joining the United Nations, most modern states have accepted the Charter’s limitations on the lawful exercise of this right. U.N. Charter art. 2, para. 4.

8 *Cf.* U.N. Charter art. 43 (providing that states making armed forces available to the United Nations will do so “in accordance with a special agreement or agreements” which “shall be subject to ratification by the signatory states in accordance with their respective constitutional processes”).

9 U.S. CONST. art. I, § 8.11.

10 *Little v. Barreme*, 6 U.S. 170, 177-78 (1804); *Bas v. Tingy*, 4 U.S. 37, 40–41, 43, 45 (1800).

11 U.S. CONST. art. II, § 2. Matt Waxman highlights the President’s additional ability to threaten war and discusses its implications for the war powers debate. Matthew C. Waxman, *The Power to Threaten War*, 123 *YALE L.J.* 1626 (2014).

12 *Cf.* *The Prize Cases*, 67 U.S. 635, 668 (1863); *see also* Michael D. Ramsey, *Textualism and War Powers*, 69 *U. CHI. L. REV.* 1543, 1623 (2002).

13 U.S. CONST. art. I, §§ 8(1), 9(7). Even the strongest advocates for a powerful Executive concede that Congress may control the Executive in this manner. John C.

Foreign Assistance Act of 1974, in conjunction with prior funding bans, helped end the Vietnam War by terminating all military financial support for the government of South Vietnam.<sup>14</sup> Should all else fail to check an overzealous president, Congress retains the power of impeachment.<sup>15</sup>

Most war power scholars today agree that, as a matter of constitutional law, a president wishing to engage in a significant military action must receive advance congressional authorization. This authorization may but need not take the form of a formal declaration of war. Ely put it somewhat more strongly: “[A]ll wars, big or small, ‘declared’ in so many words or not . . . ha[ve] to be legislatively authorized.”<sup>16</sup> Additionally, Congress has the ability to impose binding limitations on the president’s possible uses of force.<sup>17</sup> Thus, excepting defensive uses of force, although the president may determine how best to conduct hostilities, he or she may exercise that discretion only with congressional authorization and within congressionally proscribed boundaries.

Despite these formal limitations, as will be discussed in greater detail below, modern presidents regularly employ military force without congressional authorization or outside of congressionally approved bounds. Accordingly, a minority of scholars read the Commander-in-Chief Clause and the Constitution’s grant of Executive power to permit the president to unilaterally initiate or expand military action.<sup>18</sup>

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Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1674 (2002). Bruce Ackerman and Oona Hathaway argue, however, that the idea that Congress needs to do nothing to stop an unwanted Executive war is false: rather, “Congress has to act affirmatively if it wants to stop a war in its tracks,” and, because of the threat of a presidential veto, Congress must fight an uphill battle to impose spending limitations. Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 477, 486 (2011).

<sup>14</sup> This congressional check was subverted during the Iran-Contra scandal. For a detailed account, see KOH, *supra* note 1.

<sup>15</sup> U.S. CONST. art. I, §§ 2(5), 3(6).

<sup>16</sup> ELY, *supra* note 1, at 3; *see also* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2057 (2005).

<sup>17</sup> Ackerman & Hathaway, *supra* note 13, at 452–57 (discussing relevant constitutional text and historical precedents).

<sup>18</sup> *See* John C. Yoo, *The Continuation of Politics By Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 174 (1996) (arguing that the Constitution was written to encourage unilateral presidential action).

In short, despite the fundamental and sovereign nature of the war power, its implications for American lives and treasure, and the long history of U.S. military engagements,<sup>19</sup> whether and the extent to which the president can legitimately engage U.S. troops in hostilities absent congressional authorization remains a question of heated academic debate.<sup>20</sup>

### *B. The War Power in Practice*

As the academic debate rages on, presidents regularly assert the right to use U.S. force unilaterally. For much of early American history, presidents deferred to Congress in making decisions regarding when to commit American troops to hostilities and understood the “self defense” exception to be quite circumscribed.<sup>21</sup> As time passed, however, presidents came to read the self defense exception so broadly that an autonomous tank could drive through it. While originally understood as being limited to repelling attacks on American soil or possibly on American ships, this exception has since been expanded to justify using force abroad to protect American lives, property, or national interests—or even foreign citizens.<sup>22</sup> Congress rarely challenges such justifications.<sup>23</sup>

As a result, presidents today are seen as having “a very free hand in using military force that does not rise to the level of ‘war’ in the constitutional sense—that is, force not rising to large-scale and long-duration uses of ground troops.”<sup>24</sup> Most recently, the Obama Administration asserted that it need not seek congressional

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<sup>19</sup> See CONGRESSIONAL RESEARCH SERVICE, INSTANCES OF THE USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2015 (2013) (noting that the United States has used force hundreds of times).

<sup>20</sup> See William Michael Treanor, *The War Powers Outside the Courts*, 81 IND. L.J. 1333, 1333 (2006) (“Few areas of constitutional law have produced as much heated debate as the war powers area, heat produced in no small part by the passionate belief that this is a subject of incalculable consequence.”); see also William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 700 (1997) (discussing the debate).

<sup>21</sup> See Waxman, *supra* note 11, at 1626 (citing sources); Curtis A. Bradley, *Constitutional Custom and the President’s War Authority* 5, 8 (Aug. 26, 2014) (unpublished manuscript on file with author).

<sup>22</sup> See Bradley, *supra* note 21.

<sup>23</sup> See Waxman, *supra* note 11, at 1626 (citing sources); Bradley, *supra* note 21.

<sup>24</sup> Waxman, *supra* note 11, at 1628.

authorization for military strikes in Syria in response to Bashar al-Assad's alleged use of chemical weapons against civilians<sup>25</sup>—notwithstanding the fact that such strikes would “push the legal envelope further even than Kosovo, the outer bound to date of presidential unilateralism.”<sup>26</sup>

Accordingly, some have concluded that a resolution to the academic debate is purely academic. Even if the majority academic position—that presidents often exercise a war power that rightly belongs to Congress—is correct, it sometimes seems that “[l]aw does little to constrain the modern executive.”<sup>27</sup>

### C. Checks on the Executive's Exercise of the War Power

What legal checks do exist to limit the Executive's war power? Given the constitutional emphasis on the importance of the separation of powers, it is natural to look to the legislature and the judiciary. Ely suggests, for example, that both of these branches have a constitutional obligation to prevent a president from unilaterally waging war without congressional authorization.<sup>28</sup> Congress, via the power of the purse, can refuse to fund unauthorized engagements; judges can rule unauthorized wars “unconstitutional unless and until such authorization [is] forthcoming” and thereby force the legislative branch to fulfill its constitutional duties.<sup>29</sup> In practice, however, neither the legislature nor the judiciary has much incentive or interest in interfering with Executive decisions regarding the use of military force.<sup>30</sup>

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<sup>25</sup> Office of the Press Sec'y, Statement by the President on Syria (Aug. 31, 2013) (transcript available at <http://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria>).

<sup>26</sup> Jack Goldsmith, *Why Doesn't President Obama Seek Congressional Approval for Syria?*, LAWFARE (Aug. 28, 2013, 8:25 AM), <http://www.lawfareblog.com/2013/08/why-doesnt-president-obama-seek-congressional-approval-for-syria/>.

<sup>27</sup> ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 15 (2010); see also Ackerman & Hathaway, *supra* note 13, at 494 (concluding that the Obama Administration's continuation of the Bush Administration's war policies creates a precedent that “stacks the deck further against the responsible use of the power of the purse”); Bradley, *supra* note 21, at 34–35 (discussing the possibility that “there is no real ‘law’ of war powers”).

<sup>28</sup> *But see* Yoo, *supra* note 18, at 174 (arguing that the only constitutional limitations on the President's war power are the congressional powers of funding and impeachment).

<sup>29</sup> ELY, *supra* note 1, at 54.

<sup>30</sup> See ARTHUR SCHLESINGER JR., *THE IMPERIAL PRESIDENCY* ix (1973) (noting that

Congress often seems eager to punt decisions regarding deployment of troops to the president. Both the 2002 Iraq resolution and the Gulf of Tonkin Resolution, for example, were broadly worded resolutions that allowed the President to determine whether or not to involve the United States in the Iraq and Vietnam wars, respectively.<sup>31</sup> Punting is a win-win political option: if the engagement goes well, legislators can claim partial credit for it; if it goes badly, they can distance themselves and criticize. And, once troops are committed to hostilities, Congress is even less likely to exercise its power of the purse, either because it fears allegations of not adequately supporting our men and women in uniform or because it is institutionally incapable of acting.<sup>32</sup>

After Vietnam, Congress attempted to reassert its role with regard to decisions concerning the deployment of U.S. troops by passing the 1973 War Powers Resolution.<sup>33</sup> The Resolution provides that a president can send U.S. armed forces into action only after a formal congressional declaration of war, a statutory authorization, or a national emergency “created by attack upon the United States, its territories or possessions, or its armed forces.”<sup>34</sup> If the president commits armed forces to military action, he or she must notify Congress of this within forty-eight hours and, if Congress does not authorize the deployment, the troops must return after sixty days (with an additional thirty day withdrawal period).<sup>35</sup>

The most damning of the varied critiques leveled at the Resolution has been borne out by history: it has been utterly ineffective at forcing Congress to clearly authorize U.S. involvement in hostilities. Nearly all would agree with Ely’s assessment that, “thanks to a combination of presidential defiance,

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the erosion of the legislature’s control over the war power “was as much a matter of congressional abdication as of presidential usurpation”).

<sup>31</sup> Louis Fisher, *Deciding on War Against Iraq: Institutional Failures*, 118 POL. SCI. Q. 389, 405 (2013) (“[T]he resolutions are virtually identical in transferring to the president the sole decision to go to war and determine its scope and duration . . . . Instead of acting as the people’s representatives and preserving the republican form of government, [Congress] gave the president unchecked power.”).

<sup>32</sup> See Ackerman & Hathaway, *supra* note 13, at 450.

<sup>33</sup> War Powers Resolution, 93 P.L. 148, 87 Stat. 555 (1973).

<sup>34</sup> *Id.* § 1541(c).

<sup>35</sup> *Id.* §§ 1543, 1544.

congressional irresolution, and judicial abstention, the War Powers Resolution has not worked.”<sup>36</sup>

One of the more powerful incentives for Congress to check Executive war-making would seem to be public opinion.<sup>37</sup> Popular protests famously (if only eventually) spurred Congress to defund the Vietnam War. Accordingly, in arguing that the legislature needs to reclaim its war power authority, the Cato Institute concludes that “Congressional courage of the kind needed to reclaim the war power will not be forthcoming unless and until American citizens demand it.”<sup>38</sup> Absent wars as deadly and widely felt as Vietnam, however, it seems unlikely the American public will make any such demands.

Meanwhile, the judiciary shows little enthusiasm for limiting Executive usurpation of the war power, especially given the legislature’s apparent acquiescence.<sup>39</sup> Ely might correctly read the Constitution as requiring federal courts to intervene if the President wages war absent congressional approval: “[T]he court would ask whether Congress had authorized [the war], and if it had not, rule the war unconstitutional unless and until such authorization was forthcoming.”<sup>40</sup> But the judiciary has shown little desire, then or now, to police the appropriate division of the war power.<sup>41</sup> Citing the political question doctrine, plaintiffs’ lack of standing, mootness, and ripeness concerns, judges largely avoid ruling on the merits of the issue.<sup>42</sup>

A remaining legal check on the Executive Branch is—somewhat counter-intuitively—applied by the Executive Branch itself. Curtis Bradley and Trevor Morrison argue that the

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<sup>36</sup> ELY, *supra* note 1, at 49.

<sup>37</sup> Public outrage at American deaths will affect both political branches, but presidents are somewhat more insulated than congresspersons.

<sup>38</sup> Gene Healy, *Reclaiming the War Power*, in CATO HANDBOOK FOR POLICYMAKERS 107, 114 (7th ed. 2009).

<sup>39</sup> *See, e.g.*, *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000); *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011).

<sup>40</sup> ELY, *supra* note 1, at 54.

<sup>41</sup> *See* Robert E. Paradise, *The Least Interested Branch*, 107 HARV. L. REV. 2117, 2120–22 (1994) (reviewing JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993)) (discussing how, even at the time *War and Responsibility* was published, the judiciary had long avoided deciding cases brought to check unilateral executive uses of force).

<sup>42</sup> *See id.* at 2120.

Executive Branch is constrained by law in two ways: through “the internalization of legal norms by relevant actors within the Executive Branch and the threat of external sanctions for violating those norms.”<sup>43</sup> The Executive Branch contains thousands of lawyers with a common socialization to take law “seriously.” Additionally, entities like the Justice Department’s Office of Legal Council, which advises the White House on the legality of proposed actions, issue credible opinions largely because of internal procedures that standardize interpretations of the law across administrations.<sup>44</sup> Bradley and Morrison suggest that these actors are constrained by law, both in terms of what actions they believe appropriate or possible and because of individual reputational and general political costs associated with being perceived as acting lawlessly.<sup>45</sup> But while law may act as a general internal check on the Executive Branch, in areas where the law itself is unclear—as is the case regarding the proper division of the war power—Executive practice over time may alter the common understanding of what the law permits or forbids.<sup>46</sup>

Scholars tend to agree that the constitutional war power is intended to be a shared one, such that both the president and Congress are involved in decisions regarding the deployment of U.S. troops. In reality, modern presidents regularly commit the United States to military action without express congressional authorization or expand hostilities outside of congressionally imposed limitations. While there are some legal, political, and practical checks on excessive unilateral uses of force by the Executive, practice is establishing a constitutional “gloss” that expands the president’s war power authority at the Legislature’s

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<sup>43</sup> Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1132 (2013).

<sup>44</sup> *Id.* at 1133.

<sup>45</sup> *Id.* at 1132–40. While law likely does constrain options available to the Executive Branch, it is important not to overstate its influence. Both Presidents George W. Bush and Barack Obama have been critiqued, for example, for circumventing OLC procedures to get legal cover for a desired policy position. See Jack Balkin, *George W. Obama and the OLC*, BALKINIZATION (June 18, 2011, 8:35 AM), <http://balkin.blogspot.com/2011/06/george-w-obama-and-olc.html>.

<sup>46</sup> See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (suggesting that, where the text of the Constitution is unclear, how the government operates in practice over time can create a constitutional “gloss” on presidential power); see also Bradley & Morrison, *supra* note 43, at 1148 (discussing the potential “gravitational pull” of Executive action on the law).

expense.<sup>47</sup> Given this context, how is the advent of autonomous weapon systems—so-called “killer robots”—likely to affect the war power?

### III. Killer Robots and the Expansion of the Executive War Power

#### A. *What Are Autonomous Weapon Systems?*

An “autonomous weapon system” is “a weapon system that, based on conclusions derived from gathered information and preprogrammed constraints, is capable of independently selecting and engaging targets.”<sup>48</sup> In contrast, a weapon system will be merely “semi-autonomous” if a human operator must take some affirmative action before a specific target is selected or engaged.<sup>49</sup> Thus, a remote-controlled drone that suggests a target to a human operator but that cannot engage that target without approval is semi-autonomous; a drone that independently selects and engages targets after deployment is autonomous. Weapon systems with autonomous capabilities must also be distinguished from “automated” weapons, like trip-wire sentry guns or weight-based

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<sup>47</sup> See *Youngstown*, 343 U.S. at 610–11. Scholars regularly discuss historical practice in evaluating whether and when the President may use military force absent congressional authorization. See, e.g., Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 19 (1970); Jane C. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845 (1996) (reviewing LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995)); see also ELY, *supra* note 1, at 9–10; Bradley, *supra* note 21, at 1 (“[H]istorical practice has played an especially large role in constitutional claims and debates in the war powers area.”).

<sup>48</sup> Rebecca Crootof, *The Killer Robots Are Here: Legal and Policy Implications*, 36 CARDOZO L. REV. (forthcoming 2015), at 16, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2534567](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2534567); see also U.S. DEP'T OF DEF., DIR. 3000.09, AUTONOMY IN WEAPON SYSTEMS 13–14 (Nov. 21, 2012) (defining “autonomous weapon systems” as ones which, “once activated, can select and engage targets without further intervention by a human operator”); MAJOR ANDRE HAIDER, UNMANNED AIRCRAFT SYSTEMS OPERATIONS IN CONTESTED ENVIRONMENTS (2014), available at [http://www.dglr.de/fileadmin/inhalte/dglr/fb/q3/veranstaltungen/2013\\_uav\\_autonomie/US OPS\\_in\\_Contested\\_Environments.pdf](http://www.dglr.de/fileadmin/inhalte/dglr/fb/q3/veranstaltungen/2013_uav_autonomie/US OPS_in_Contested_Environments.pdf) (noting that NATO defines “autonomous unmanned aircraft” as those “capable of understanding higher-level intent and direction, sensing its environment, and, based on a set of rules and limitations, choosing from alternatives and taking actions to bring about an optimal but potentially unpredictable state without human input”).

<sup>49</sup> See Crootof, *supra* note 48, at 27–28.

landmines, which are purely reactive.<sup>50</sup>

Once the stuff of science fiction, weapon systems with growing levels of autonomy are increasingly being integrated into states' armed forces.<sup>51</sup> South Korea's SGR-A1s are stationary, armed robots used to monitor the demilitarized zone: allegedly, they can identify potential human targets, voice commands to surrender, and use lethal force independently when operating in an autonomous mode.<sup>52</sup> The Israeli Harpy Loitering Weapon is designed to detect, attack, and destroy enemy radar emitters.<sup>53</sup> Although the individual launching the Harpy knows that it will only engage radars within the programmed parameters, he or she does not know which specific radars will be attacked.<sup>54</sup> Russia and China are both employing PMK-2 encapsulated torpedo mines—a sea mine that, instead of exploding when triggered, opens a capsule that releases a torpedo that then selects and engages a target.<sup>55</sup> Not to be outdone, the United States is developing and employing a host of increasingly autonomous ground, air, and sea-based weapon systems.

### *B. How Autonomous Weapon Systems Make War “Easier”*

Recently, some states, non-governmental organizations, and individuals have called for a complete ban on the development and use of autonomous weapon systems.<sup>56</sup> Ban advocates advance a number of powerful moral, policy, and strategic arguments, the

<sup>50</sup> See *id.* at 27; see also HAIDER, *supra* note 48 (noting that NATO distinguishes “autonomous” from “automated” aircraft on the grounds that the latter’s “actions and outcomes are scripted and predictable”).

<sup>51</sup> See Crootof, *supra* note 48, at 32-35.

<sup>52</sup> See Samsung Techwin SGR-A1, Sentry Guard Robot, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/rok/sgr-a1.htm> (last visited Apr. 11, 2015).

<sup>53</sup> See Harpy Loitering Weapon, ISR. AEROSPACE INDUST., <http://www.iai.co.il/2013/16143-16153-en/IAL.aspx> (last visited Apr. 11, 2015).

<sup>54</sup> See Paul Scharre, *Autonomy, “Killer Robots,” and Human Control in the Use of Force—Part I*, JUST SEC. (July 9, 2014, 11:17 AM), <http://justsecurity.org/12708/autonomy-killer-robots-human-control-force-part/>.

<sup>55</sup> See *id.*

<sup>56</sup> See, e.g., HUMAN RIGHTS WATCH & INT’L HUMAN RIGHTS CLINIC, HARVARD LAW SCH., *LOSING HUMANITY: THE CASE AGAINST KILLER ROBOTS* (2012) [hereinafter *LOSING HUMANITY*]; Sarah Knuckey, *Start of First Inter-Governmental Expert Meeting on Autonomous Weapons*, JUST SEC. (May 13, 2014, 3:17 PM), <http://justsecurity.org/2014/05/13/start-inter-governmental-expert-meeting-autonomous-weapons/> (reporting that Ecuador, Egypt, and Pakistan have called for a ban).

most relevant one for this paper is the suggestion that autonomous weapon systems will make war “too easy.”<sup>57</sup> This claim takes various forms, but a shared animating concern is that the use of autonomous weapon systems will increase risks to civilians. First, many fear that the use of autonomous weapon systems will transfer the human costs of war from the technologically superior state’s soldiers to its enemy’s civilians. Second, some worry that by reducing risks to combatants, states will be more willing to use force (as opposed to diplomacy or non-violent coercive measures) to achieve political objectives and, as a result, more civilians will be harmed.

### 1. *Transferring Risk from Combatants to Civilians?*

Technological advances in weaponry are often intended to decrease risks to the operator. The crossbow, the bomber, and the unmanned aerial vehicle have all supplanted earlier weapons largely because they reduce combatants’ exposure to physically and psychologically dangerous situations. Autonomous weapon systems promise similar benefits. Many are troubled, however, by the possibility that these benefits to the weapons’ operators will come at the expense of enemy civilians.<sup>58</sup>

Some of these concerns are not well founded. One such claim deals with the distinction requirement, a foundational norm in the law of armed conflict.<sup>59</sup> Parties to a conflict must at all times distinguish between lawful targets (combatants, other military objectives, and civilians directly participating in hostilities) and unlawful targets (civilians, civilian objects, and wounded combatants).<sup>60</sup> As corollaries, parties are prohibited from using inherently indiscriminate weapons or launching indiscriminate attacks.<sup>61</sup> With this in mind, some advocates of a complete ban on autonomous weapon systems argue that, because such weaponry is currently incapable of distinguishing between lawful and unlawful

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<sup>57</sup> *But see* Crotoof, *supra* note 48, at 36–47 (critiquing pro-ban legal arguments).

<sup>58</sup> *See, e.g.*, LOSING HUMANITY, *supra* note 56, at 39–41.

<sup>59</sup> Among other places, this customary rule is codified in the First Additional Protocol. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts arts. 48, 51, 52, Dec. 12, 1977, 1125 U.N.T.S. 3.

<sup>60</sup> *See id.*

<sup>61</sup> *See id.* art. 51.

targets, its use will unlawfully endanger civilians.<sup>62</sup> However, just because autonomous weapon systems do not (yet) have the capacity to distinguish between lawful and unlawful targets, that does not mean they cannot be used in a discriminating manner.<sup>63</sup> And, as evidenced by autonomous weapon systems in use today, it is possible to employ them without unnecessarily endangering civilians or undermining the distinction requirement, provided they are used in environments or in ways where there is little to no threat to unlawful targets.<sup>64</sup>

Two other arguments focus on the role human empathy plays in reducing risk to enemy civilians. First, some believe that substituting robot for human soldiers will result in more civilian deaths, precisely because robots are emotionless.<sup>65</sup> While it may sometimes be lawful to use lethal force, human combatants may choose not to for a variety of reasons that may not be captured in an algorithm. This concern may well be valid; only time will tell whether robots will ever be capable of showing mercy.

That being said, human emotion hardly can be credited with consistently ensuring civilian protection: “[H]istory is replete with tragic examples of unchecked emotions leading to horrendous suffering” in situations of armed conflict.<sup>66</sup> Indeed, removing human beings from the immediacy and high emotions associated with combat may allow for more considered and humanitarian determinations regarding when and how to use lethal force.<sup>67</sup>

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<sup>62</sup> See, e.g., LOSING HUMANITY, *supra* note 56, at 30–32.

<sup>63</sup> See Michael Schmitt, *Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics*, 4 HARV. NAT’L SEC. J. 1, 10 (2013).

<sup>64</sup> See Crotofof, *supra* note 48, at 36–39.

<sup>65</sup> See LOSING HUMANITY, *supra* note 56, at 4, 37–39.

<sup>66</sup> Schmitt, *supra* note 63, at 13 (citing examples); see also RONALD ARKIN, GOVERNING LETHAL BEHAVIOR IN AUTONOMOUS ROBOTS 30–31 (2009) (arguing that, with a perfected “ethical governor” algorithm, robot soldiers might better comply with the law of armed conflict than human soldiers).

<sup>67</sup> See Kenneth Anderson, *Efficiency in Bello and ad Bellum: Making the Use of Force Too Easy?*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 374, 381 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012) (“The U.S. military has known since Vietnam at least that increased safety for fighting personnel allows them greater latitude in using force, encourages and permits greater willingness to consider the least damaging alternatives, and that putting violence at a remove reduces the passions and fears of war and allows a coolly professional consideration of what kinds, and how much, violence is required to accomplish a lawful military mission.”).

A second and related argument is that, by increasing the temporal as well as the geographic distance between a human operator's decision to use lethal force and the resulting deaths, operators of autonomous weapon systems will be less emotionally sensitive and therefore more willing to use lethal force.<sup>68</sup> Drone warfare, for example, has been critiqued on the grounds that the physical distance between the weapon's operator and its targets contributes to the operator's emotional distance and a general dehumanization of enemy civilians.<sup>69</sup> A frightened individual is no longer a fellow human being; he or she becomes merely a pixelated image. As a result, drone operators are presumed to be more comfortable using lethal force than would a soldier in the field. D. Keith Shurtleff, an Army chaplain and ethics instructor for the Soldier Support Institute at Fort Jackson, summarized this concern: "[A]s war becomes safer and easier, as soldiers are removed from the horrors of war and see the enemy not as humans but as blips on a screen, there is a very real danger of losing the deterrent that such horrors provide."<sup>70</sup>

But, because drones are remotely piloted, geographically distant operators do witness the effects of their actions: "blips" representing human beings disappear; buildings blow up. Indeed, some observe that because drone operators personally monitor their targets—sometimes for days before the target is engaged—they are more prone to develop an emotional connection with their targets than, say, pilots of manned bombers.<sup>71</sup>

Autonomous weapon systems, in contrast, would allow for both geographic and temporal—and consequently perhaps greater emotional—space between an operator's decision to deploy the weapon and the effects of that decision. As operators become more disconnected in space and time from the consequences of

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<sup>68</sup> See Mary Ellen O'Connell, *Banning Autonomous Killing: The Legal and Ethical Requirement That Humans Make Near-Time Lethal Decisions*, in *THE AMERICAN WAY OF BOMBING: HOW LEGAL AND ETHICAL NORMS CHANGE* 224, 234 (Matthew Evangelista & Henry Shue eds., 2014) (arguing that a new norm of international law, requiring a close temporal distance between force deployment and target engagement, is necessary to "keep a human conscience" in the decision to use lethal force).

<sup>69</sup> See, e.g., PETER SINGER, *WIRED FOR WAR* 395 (The Penguin Press ed. 2009).

<sup>70</sup> *Id.* at 396.

<sup>71</sup> Elisabeth Bumiller, *A Day Job Waiting for a Kill Shot a World Away*, *N.Y. TIMES*, July 29, 2012, [http://www.nytimes.com/2012/07/30/us/drone-pilots-waiting-for-a-kill-shot-7000-miles-away.html?\\_r=0](http://www.nytimes.com/2012/07/30/us/drone-pilots-waiting-for-a-kill-shot-7000-miles-away.html?_r=0).

their actions, they may be more willing to authorize the use lethal force, possibly at the expense of enemy civilians.

It is far from certain, however, that the use of autonomous weapon systems will result in more civilian harm. To the extent that they allow for greater precision in targeting, their use may well decrease civilian risk.<sup>72</sup> Additionally, because they need not be programmed to prioritize self-preservation, autonomous weapon systems could be used to draw fire (or otherwise behave in a self-sacrificing manner) before returning it, which a human combatant might not be willing or able to do.<sup>73</sup> Some even hope to develop weapon systems that target only the weapon borne by a combatant, not its wielder, which could potentially minimize both combatant and civilian harm.<sup>74</sup>

In summary, one of the primary incentives for states to invest in increasingly autonomous weapon systems is that such technology will reduce its soldiers' war-related risks. However, because the weapon systems themselves are emotionless and because their use may encourage human operators to distance themselves emotionally, their use may well result in additional enemy civilian harm. Further, as discussed in the next section, the minimization of combatants' risks—potentially at the expense of enemy civilians—may make it easier for states to enter into armed conflicts in the first place.

## 2. *Making War Politically Easier*

For all of its horrific human costs, war is often an attractive option for leaders. It can divert attention from domestic problems, spur economic growth, and boost popularity ratings. Indeed, one of the primary arguments for vesting the war power in Congress is that many Framers believed that overbold presidents might involve the country in unnecessary wars.<sup>75</sup> James Madison noted, “the Executive is the branch of power most interested in war, and most prone to it,”<sup>76</sup> and concluded:

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<sup>72</sup> See Schmitt, *supra* note 63, at 25.

<sup>73</sup> See ARKIN, *supra* note 66, at 29.

<sup>74</sup> John S. Canning, *You've Just Been Disarmed. Have a Nice Day!*, 28 IEEE TECH. & SOC'Y MAG. 16 (2009).

<sup>75</sup> ELY, *supra* note 1, at 3.

<sup>76</sup> Letter from James Madison to Thomas Jefferson (Apr. 2, 1798) (*in* 6 THE WRITINGS OF JAMES MADISON 312–13 (G. Hunt ed. 1906)).

In no part of the Constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the Executive department . . . . It is in war, finally, that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions, and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.<sup>77</sup>

Because the Executive derives “power and importance from a state of war,” Madison also argued that the President should not be involved in negotiating peace treaties.<sup>78</sup> The more the war power vested with Congress, the more difficult it would be for a belligerent president to justify unilateral actions.

All leaders in a representative democracy, however, must provide reasons for entering a conflict that justify the loss of their constituents’ lives. Indeed, one strand of democratic peace theory—the theory that liberal democracies tend to go to war less frequently than other forms of government—rests on the assumption that a state’s citizens usually prefer peace to war. As a result, their political representatives are constrained from pursuing war when it is not in the public interest. Similarly, Ely links America’s history of military success to the fact that wars must be congressionally authorized, as that ensures broad public support for military interventions.<sup>79</sup>

Conversely, it is less politically costly for representative leaders interested in using military force to do so when there is little threat to their citizens. Presidents are keenly aware of this and manage their media strategies accordingly. The George W. Bush Administration became embroiled in a controversy when it attempted to enforce a ban on news coverage of returning coffins from the Iraq War, likely because it wished to underplay the human costs of that war.<sup>80</sup> To drum up popular support for (or to minimize popular concern regarding) its intended military actions in Libya and against ISIL in Syria and Iraq, the Obama

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<sup>77</sup> James Madison, HELVIDIUS Number 4, at 15 THE PAPERS OF JAMES MADISON 106, 108 (Robert A. Rutland et al. eds., 1985).

<sup>78</sup> MAX FARRAND, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 540–41 (Yale University Press, 1911).

<sup>79</sup> See ELY, *supra* note 1, at 4.

<sup>80</sup> See Bill Carter, *Pentagon Ban on Pictures of Dead Troops is Broken*, N.Y. TIMES (Apr. 23, 2004), <http://www.nytimes.com/2004/04/23/national/23PHOT.html>.

Administration repeatedly emphasized that there would be “no boots on the ground.”<sup>81</sup>

If autonomous weapon systems reduce the need for human soldiers—a driving aim of those investing in such technology<sup>82</sup>—it will make committing troops to military engagements politically easier. As a Navy chief petty officer dryly observed on the loss of his unit’s PackBot: “[W]hen a robot dies, you don’t have to write a letter to its mother.”<sup>83</sup> Accordingly, some argue that autonomous weapon systems threaten to undermine an intrinsic check on excessive warmongering, at least in democratic states. Because they may make war “too easy,” their use may result in more wars—and therefore in more civilian casualties.<sup>84</sup> Further, to the extent democratic peace theory accurately describes an aspect of international relations, it too may be threatened by the increasing use of autonomous weapon systems.

This paper does not attempt to tackle the grander moral questions of whether there is ever an optimal amount of incentive for states to use force or whether it is ever possible for war to be

<sup>81</sup> See, e.g., Press Operations, Media Availability with Secretary Hagel on Iraq in Delhi, India, United States Department of Defense, (Aug. 8, 2014), <http://www.defense.gov/transcripts/transcript.aspx?source=GovDelivery&transcriptid=5477> [hereinafter Hagel on Iraq] (“The president has not taken any options off the table, except that he did reiterate again in his statement that under no circumstances would he be sending American troops, boots on the ground, back into combat in Iraq.”); Libya and War Powers: Hearing Before S. Comm. on Foreign Relations, 112th Cong. 14 (June 28, 2011) (statement of Harold Hongju Koh, Legal Adviser, Dep’t of State), available at <http://www.state.gov/s/l/releases/remarks/167250.htm#ftn16> [hereinafter Koh Testimony] (contrasting Libya with Vietnam in part because the latter involved “boots on the ground”).

<sup>82</sup> See, e.g., ROADMAP, *supra* note 3, at 25, 67.

<sup>83</sup> P.W. Singer, *Robots at War: The New Battlefield*, 2008 WILSON Q. 30, 31 (2008).

<sup>84</sup> See LOSING HUMANITY, *supra* note 56, at 39–41; see also Peter Asaro, *On Banning Autonomous Weapon Systems: Human Rights, Automation, and the Dehumanization of Lethal Decision-making*, 94 INT’L REV. RED CROSS 687, 692 (2012). The fear that new technology will make wars “too easy” is hardly a new one. Most recently, it has been made with regard to the U.S. use of drones for targeted killing missions. See, e.g., *Flight of the Drones*, ECONOMIST, Oct. 8, 2011, <http://www.economist.com/node/21531433> (“[T]here are fears that [unmanned aerial systems] and other robotised killing machines will so lower the political threshold for fighting that an essential element of restraint will be removed. Robert E. Lee said ‘it is well that war is so terrible, otherwise we would grow too fond of it.’ Drones might make leaders fonder of war.”).

“too easy.”<sup>85</sup> However, as autonomous weapon systems are increasingly integrated into the U.S. military and less boots on the ground are necessary for engagements, it will certainly become politically easier to justify uses of force.

*C. How Autonomous Weapon Systems Might Affect the War Power*

U.S. military engagements take one of three forms: global wars, like World War II; so-called limited wars, like Vietnam or the recent Iraq War; and short-term military interventions, like Kosovo or Grenada.<sup>86</sup> The possibility of employing autonomous weapon systems will have different implications for the war power depending on the type of engagement.

For practical and political reasons, a president will probably not take unilateral action with the intention of embroiling the United States in a global war without congressional support. Not only does congressional authorization constitute “insurance” against political risk should the war go badly, long-term engagements will require sufficient funding.<sup>87</sup> Even when a president anticipates that a military engagement may be of a relatively limited form but will last for an extended period of time, the benefits of commencing it with congressional authorization will tend to outweigh acting unilaterally.<sup>88</sup> Accordingly, autonomous weapon systems will likely not have much of an effect on the division of the war power for long-term military endeavors that remain within proscribed legislative limits.<sup>89</sup>

In contrast, autonomous weapon systems will further empower presidents to act unilaterally when engaging in short-term military interventions and in expanding limited wars beyond legislative boundaries. Because such weaponry reduces the need for combat boots on the ground, there will be fewer flag-draped coffins returning home. Accordingly, one of the remaining incentives for

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<sup>85</sup> Cf. Anderson, *supra* note 67, at 395.

<sup>86</sup> See Ackerman & Hathaway, *supra* note 13, at 448–49 (outlining these distinctions and defining what I term “global wars” as “unlimited wars”).

<sup>87</sup> *Id.* at 501–02 (discussing incentives for an Executive to have legislative support when commencing extensive military endeavors).

<sup>88</sup> *Id.*

<sup>89</sup> That being said, a lowered risk to American troops may affect Congress’s willingness to grant requested authorizations.

Congress to take action to check the Executive—popular outrage at the loss of American lives—will be diminished.<sup>90</sup>

Autonomous weapon systems will therefore likely have a two-fold impact on the war power. First, autonomous weapon systems will allow a president to take unilateral action faster and with a lowered probability of a congressional check. Second, over time, these engagements will create precedent for future Executive unilateral action, regardless of whether those situations involve autonomous weapon systems. While a weapon may contribute to the ability to take a certain action or a lack of critique of that action, it may not be considered a relevant factor into later legal analyses.<sup>91</sup> For example, President Clinton tested the limits of unilateral uses of force by ordering the U.S. military to continue air strikes in Kosovo after the War Powers Resolution's sixty-day deadline had passed without a congressional authorization.<sup>92</sup> Today, Kosovo is often cited as a precedent for the Executive's war powers authority, usually without clarification that the precedent may only be relevant to aerial bombardment.<sup>93</sup>

Granted, the integration of autonomous weapon systems in U.S. armed forces will not result in a spectacular shift in the division of the war power. First, the Executive's ability to unilaterally use military force for short-term engagements has already been generally accepted.<sup>94</sup> Indeed, some would argue that it has even been legislatively endorsed by the War Power Resolution's sixty-day window, within which presidents can use force without congressional authorization.<sup>95</sup> Second, drones and other new technologies already reduce the need for human soldiers on the ground; weapon systems with greater levels of autonomy may not drastically further reduce that number. That autonomous

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<sup>90</sup> Alternatively, as armed forces in the field become more robotic, congresspersons might view armed conflicts as raising more of a budgetary than patriotic issue—and therefore more willing to eliminate funding for such engagements.

<sup>91</sup> Of course, the choice of weapon will continue to inform policy and political analyses.

<sup>92</sup> See, e.g., John C. Yoo, *Kosovo War Powers and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1682 (1999).

<sup>93</sup> Mark Landler & Michael R. Gordon, *Air War in Kosovo Seen as Precedent in Possible Response to Syria Chemical Attack*, N.Y. TIMES, Aug. 23, 2013, at A8.

<sup>94</sup> See Waxman, *supra* note 11, at 1628.

<sup>95</sup> See Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIAMI L. REV. 107, 110 (1995).

weapon systems will be incrementally integrated into the armed forces will further contribute to the gradual, rather than dramatic, nature of this shift.<sup>96</sup> Finally, the potential risk to soldiers is hardly the only consideration in a president's decision to use or expand the use of military force. Many factors counsel both for and against such actions, and when national security is on the line, this one will play only a minor role.<sup>97</sup>

That being said, any increase in the Executive's freedom to unilaterally use or expand the use of U.S. military force is hardly insignificant. Presidents may intentionally induce a war, as President Polk arguably did when he had U.S. troops occupy land claimed by Mexico.<sup>98</sup> Additionally, because new technology often inspires overconfidence, autonomous weapon systems may encourage presidents to underestimate the military commitment required to accomplish a foreign policy objective. As a result, even engagements intended to be minor may escalate into more extensive armed conflicts.<sup>99</sup> Finally, the United States will engage in far more small-scale uses of force than extensive wars, which means there will be more opportunity for the Executive to foster a perception that its unilateral action is appropriate.

Prediction is always a risky business. But it seems likely that, as autonomous weapon systems reduce the need for combat boots on the ground, congressional incentives to check a president's overreach will diminish—further concentrating the war power in the Executive's hands.

#### **IV. Implications for the Doctrine of Humanitarian Intervention**

New technology can affect international law in a variety of ways. A new development may raise novel legal questions<sup>100</sup> or

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<sup>96</sup> Kenneth Anderson & Matthew C. Waxman, *Law and Ethics for Autonomous Weapon Systems: Why a Ban Won't Work and How the Laws of War Can*, 2012 Hoover Inst. 1 (2012).

<sup>97</sup> See Anderson, *supra* note 67, at 392.

<sup>98</sup> See Bradley, *supra* note 21, at 10.

<sup>99</sup> Cf. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 101 (2d ed. 1996) (“Unfortunately, the line between war and lesser uses of force is often elusive, sometimes illusory, and the use of force for foreign policy purposes can almost imperceptibly become a national commitment to war.”).

<sup>100</sup> For example, who will be held liable for a war crime committed by an autonomous weapon system? The weapon system itself? Its deployer? His or her

require resolving long-standing legal grey areas.<sup>101</sup> Should new technology permit states to take previously impossible actions or render previous requirements ridiculous, new state practice may also cause international law to evolve in unanticipated ways.<sup>102</sup> This section discusses one possible implication of U.S. presidents who are less restrained in using military force for short-term engagements due to increasingly autonomous weapon systems: the development of the doctrine of humanitarian intervention.

If U.S. presidents enjoy greater leeway in short-term military engagements, it is entirely possible that they will be more willing to engage in humanitarian interventions. Unlike other decisions to use military force, which will be grounded primarily in national security concerns, humanitarian interventions require a state to weigh the lives of its nationals against its willingness to aid another state's civilians. Unsurprisingly, states are generally reluctant to engage in such actions unless the risk to their nationals is minimal (or unless an intervention is a fig leaf for accomplishing other objectives). Thus, to the extent autonomous weapon systems reduce risk to troops, U.S. presidents may be more willing to use military force to protect other states' civilians.

To some degree, this is already occurring.<sup>103</sup> As noted above, the Obama Administration relied heavily on the argument that there would be no "boots on the ground" to sell the American public on humanitarian interventions in Libya and Syria.<sup>104</sup>

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commander? Its programmer? Its manufacturer? Will this be a question of international criminal law, or rather some form of international products liability tort?

<sup>101</sup> The use of drones for targeted killing missions, for example, has reignited an ongoing debate regarding the interaction between the law of armed conflict and international human rights law. See Michael N. Schmitt, *Unmanned Combat Aircraft Systems and International Humanitarian Law: Simplifying the Oft Benighted Debate*, 30 B.U. INT'L L.J. 595 (2012). To the extent autonomous weapon systems are similarly employed, they will raise many of the same issues.

<sup>102</sup> See Rebecca Crootof, *Change Without Consent: How Customary International Law Modifies Treaties*, 41 YALE J. INT'L L. (forthcoming 2016), at 34–36 (discussing how the use of submarines modified treaty requirements and their associated civilian protections).

<sup>103</sup> See Anderson, *supra* note 67, at 391–92 (discussing how drone warfare may make humanitarian interventions more likely).

<sup>104</sup> See Hagel on Iraq, *supra* note 81; see Koh Testimony, *supra* note 81. Admittedly, the Syria example is hardly strong evidence that lessened threats to troops will increase humanitarian interventions. Although he maintained he did not need to, President Obama put the question of whether to engage in air strikes to Congress. But in the face of "implacable opposition" from Congress, he requested that the Senate delay a

Drones permit relatively riskless air strikes, but they do require considerable manpower for their operation. Weapon systems with greater levels of autonomy will allow militaries to do even more—in the air, at sea, on the ground, and in cyberspace—with less.

Should the United States engage in more humanitarian interventions, its actions will affect international law. Article 2(4) of the U.N. Charter provides: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>105</sup> There are two formal exceptions to this general prohibition: states may use force against another state pursuant to a Security Council resolution or in self-defense.<sup>106</sup> The doctrine of humanitarian intervention, however, suggests that individual states may also unilaterally use force to stop an ongoing atrocity perpetuated by a state against its citizens, especially when the Security Council cannot or will not authorize a use of force.<sup>107</sup> Some scholars argue that such a customary exception to Article 2(4) already exists.<sup>108</sup> But these writers are in the minority. Due

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vote on a resolution as he pursued a diplomatic solution with Russia. See Mark Landler & Jonathan Weisman, *Obama Delays Syria Strike to Focus on a Russian Plan*, N.Y. TIMES (Sep. 10, 2013), at A1, available at <http://www.nytimes.com/2013/09/11/world/middleeast/syrian-chemical-arsenal.html?pagewanted=all>. Clearly, then, risk to troops is hardly the only consideration in a state’s decision regarding whether to engage in a specific humanitarian intervention. That being acknowledged, there will be situations where more of the varied factors favor a humanitarian intervention—and in such circumstances, the possibility of minimizing risks to troops through the use of autonomous weapon systems may play a more determinative role.

<sup>105</sup> UN Charter art. 2, para. 4.

<sup>106</sup> *Id.* arts. 42, 51.

<sup>107</sup> See Eve Massingham, *Military Intervention for Humanitarian Purposes: Does the Responsibility to Protect Doctrine Advance the Legality of the Use of Force for Humanitarian Ends?*, 91 INT’L REV. RED CROSS 803 (2009) (discussing the history of the Responsibility to Protect (“R2P”) and distinctions between it and the older doctrine of humanitarian intervention).

<sup>108</sup> See, e.g., Michael N. Schmitt, *The Syrian Intervention: Assessing the Possible International Law Justifications*, 89 INT’L L. STUD. 744, 753 (2013) (“[I]t can be fairly argued that the right [to intervene unilaterally] has crystallized into customary law over the past decades.”); Jennifer Trahan, *Syria Insta-Symposium: Jennifer Trahan—The Legality of a U.S. Strike on Syria*, OPINIO JURIS (Aug. 31, 2013, 11:00 AM), <http://opiniojuris.org/2013/08/31/syria-insta-symposium-jennifer-trahan-legality-u-s-strike-syria/> (arguing that unilateral intervention in Syria for the purpose of preventing a mass atrocity would not be unlawful, even in the absence of a Security Council resolution or self-defense justification).

to both the sacrosanct nature of Article 2(4)'s prohibition and a lack of consistent state practice, the doctrine of humanitarian intervention is far from established customary international law.<sup>109</sup>

The United States, however, is a particularly influential international actor. Should it engage in unilateral humanitarian interventions more frequently, other states may be reluctant to criticize it—or they may also feel emboldened to engage in such actions. Over time, as certain justifications are accepted and others rejected by the international legal community, the doctrine of humanitarian intervention might evolve into a third, customary exception to Article 2(4)'s prohibition on the threat or use of force.

## V. Conclusion

In keeping with his thesis in *Democracy and Distrust*, Ely grounds his war powers argument on the assumption that correct representative process will produce the correct substantive result.<sup>110</sup> Vesting the war power with Congress, Ely argues, preserves the representative goals of the Constitution: it will minimize the number of wars by creating institutional roadblocks, and it ensures that the United States will only risk the lives of its citizens after careful deliberation and with broad public support.<sup>111</sup>

But is there a need for such deliberation when there is little risk to American lives? Perhaps there is less need to preserve Ely's envisioned deliberative process in such cases.<sup>112</sup> By extension, as autonomous weapon systems increasingly allow the Executive to react quickly and flexibly to changing world conditions—and especially to mass atrocities—without exposing American troops to danger, there may be little reason to be concerned with Executive usurpation of the war power.

The shared nature of the war power protects more than American lives. It protects American interests and values. In

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<sup>109</sup> See Dapo Akande, *The Legality of Military Action in Syria: Humanitarian Intervention and Responsibility to Protect*, EJIL: TALK! (Aug. 28, 2013), <http://www.ejiltalk.org/humanitarian-intervention-responsibility-to-protect-and-the-legality-of-military-action-in-syria/> (discussing the legality of unilateral intervention in Syria in the absence of Security Council authorization and a self-defense claim).

<sup>110</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

<sup>111</sup> ELY, *supra* note 1.

<sup>112</sup> See *id.* at 9 (“The Congress that adopted the War Powers Resolution was principally concerned with the safety of U.S. forces . . .”).

addition to the monetary costs of any military engagement, a decision to use lethal force reflects a collective American morality, as it requires answering an antecedent ethical question. That question used to be, "For what are we willing to die?" As autonomous weapon systems proliferate, that question may soon become, "For what is our President willing to kill?"