8. Drone warfare and the erosion of traditional limits on war powers

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I. INTRODUCTION

Drones. There are few words that symbolize more things to more people. For a military commander, it symbolizes precision lethality that can prove decisive against an enemy. For the enemy, it symbolizes a terrifying silent killer, necessitating constant caution to avoid detection and attack. For legal, national security, and social science scholars it symbolizes everything from the inherent illegitimacy of expansive notions of war and authority to kill, to the decisive tool for disrupting international terror organizations, to simply a tool of war, no different than any other weapon. For political leaders, it symbolizes flexibility and risk avoidance in the scheme of leveraging national power to destroy or disrupt national and international threats.

The debate about the legality and legitimacy of drone operations has raged since the United States began to conduct lethal drone operations as a staple of military and paramilitary operations. This debate has progressed along two primary vectors. First, whether use of lethal drone attacks outside 'hot' or 'active' areas of combat operations comply with international law. Second, whether employing deadly force as a measure of first resort violates international law. These two lines of inquiry and debate have, to a significant extent, conflated the nature of the weapon system with broader questions related to the controlling international legal framework for counter-terror operations, and the international legal authority to conduct military operations in the territory or airspace of a sovereign state absent that state's consent.

There are no easy answers to these questions, but one thing is clear: the ability to conduct highly precise lethal attacks with minimal risk to

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friendly forces has incentivized the use of drones, even amidst the fog of legal uncertainty. While this trend stresses traditional understandings of international humanitarian law and international human rights law, it also has a significant influence on the willingness of national leaders to employ military force as a tool of national security. Like all national decisions to use combat power to advance national security objectives, the decision to employ lethal drones must be founded upon assessments of international and domestic legal authority. These assessments must ensure compliance with both domestic and international law. While there will be times when both these legal regimes empower national leaders to unleash the tools of war on an enemy, in most situations it is quite the opposite, and international and domestic law actually constrain such actions.

One important question related to the increasing availability and efficacy of drone capability is whether it dilutes these traditional legal barriers or constrains them to the use of military force. This chapter will explore this question. Section II considers how, at least from a functional standpoint, drones offer national level decision-makers a combat capability that is really different from the other tools in the military force arsenal. Section III considers how this capability has influenced the assessment of when a threat triggers the law of armed conflict (LOAC), and more specifically the international legal authority to use lethal force as a measure of first resort against a threat. This section also explains why the impact of drones does not extend across the so-called spectrum of conflict, but instead is limited to the assessment of non-international armed conflict. Section IV then considers how drone capability impacts the assessment of constitutional war powers, specifically focused on the dilution of political risk associated with drone-dominated military action.

II. ARE DRONES DIFFERENT?

Drones, or remotely piloted vehicles armed with lethal combat power, are a relatively new capability. However, at the fundamental level, a drone is just another weapon system—a combination of capabilities that enables commanders to employ lethal combat power against an enemy. Indeed, proponents of drones frequently assert that vilifying drones distorts the legal and policy debate because drones are just weapons. Reality, however, probably lies between the two extreme ends of this argumentative spectrum.

Drones are highly effective weapon systems. They are lethal, precise, and situationally-aware. They afford significant stand-off capability while

maintaining cost effectiveness, and are largely immune from enemy counter-measures. Unsurprisingly, they have become the weapon of choice for conducting precision strikes against individual enemy targets whose conduct complicates distinguishing them from the general civilian populations in which they operate.

Individually, none of these attributes are unique to drones. What is unique is the combination of these attributes in one weapon system. From the inception of armed drones, no other existing weapon system has offered national and operational-level leaders an analogous capability—the ability to seek out, identify, and engage a target with a high degree of precision, all while posing little to no risk to friendly forces. This capability has proven especially valuable in the post-11 September era, largely due to the nature of the non-state enemies that the United States has placed within its war-making crosshairs. Like any other conflict, synchronizing available resources to maximize the effects of combat power is essential to disrupt this enemy. However, in this type of ongoing, asymmetric conflict, the capability provided by drones has become highly coveted. Intelligence accuracy and precision engagement are essential when facing an enemy who makes no effort to distinguish himself from the civilian population, who exploits the presence of civilians to seek functional immunity from attack, and who exploits any civilian casualty for strategic information gain.

Of course, other tools in the combat arsenal offer some of the capabilities of drones. Aircraft, cruise missiles, and even platforms as basic as a sniper, all offer precision engagement through the employment of smart munitions. Of these examples, only the sniper offers anything close to the real-time surveillance capability of the drone, although how close is a matter of degree based on any specific tactical situation. In contrast, the drone can linger for extended periods of time over a suspected target, gathering highly precise information to support both target verification and identification of the ideal attack options and situations. Significantly, unlike the human operative, the drone can provide this package of capabilities with virtually no risk to friendly forces. Even in the rare situation where an enemy is armed with a counter-measure effective against the drone, the worst-case scenario is loss of the physical asset; the operator remains immune from the effects of any such attack.

Being safe, accurate, and precise, the drone obviously offers strategic and operational leaders tremendous advantages over the many other tools at their disposal. What makes this attack option even more appealing is the nature of the enemy's center of gravity in asymmetrical warfare: *command and control*. Unlike more conventional opponents, it is this

ability to disrupt enemy leadership that proves so decisive in achieving the objective of disruption and dispersal. For a conventional opponent, this might involve using a range of capabilities to attack enemy command, control, and communication structures. But for the terrorist organization, it is the individual leaders who are the focal point of such attacks. Furthermore, because these leaders routinely co-mingle with the civilian population, the accuracy, precision, and lethality of drones are all the more decisive.

At the strategic level, drones offer one additional advantage: a minimal footprint. In the aftermath of the 11 September attacks, the United States adopted a clear position that the struggle against al Qaeda and associated groups qualified as an armed conflict, with an accordant assertion of authority to strike this enemy when he presented himself.[1] This led to invocation of what is commonly referred to as the 'unable or unwilling' test to justify projecting US military power into the sovereign territory of other states to conduct lethal attacks on high value enemy targets, even without the state's consent.[2] Because drones provide the capability to conduct attacks in such locations with minimal physical intrusion into the state's territory with virtually no risk of mission compromise or loss to US personnel, the drone option fits ideally within this legal paradigm.

All of these attributes and considerations point to two almost indisputable conclusions. First, like any other weapon system, drones are just one of the many tools within a mosaic of lethal and non-lethal options available for strategic and operational leaders to leverage in achieving a desired effect against an enemy. Second, the nature of this weapon system is uniquely suited for producing these effects. Therefore, it is no surprise that drones have become so central to both the conduct and criticism of the so-called US 'war on terror'. But there are other unique consequences of the rise of drone warfare, consequences that transcend military or operational considerations and almost certainly also explain why drones have become the symbolic focal point for debates over the

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[1] See Authorization for the Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001); Int'l Comm. of the Red Cross, Commentary on Article 3: Conflicts Not of an International Character, of the Geneva Convention of 12 August 1949, para. 400 (2016), accessed 4 May 2017 at https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#_Toc452041779 [hereinafter ICRC Art. 3 Commentary] (In 2016, the ICRC released an updated commentary to common Article 3, which is used throughout this chapter.)

[2] Geoffrey S Corn et al, *U.S. Military Operations: Law Policy and Practice* (Oxford University Press 2016) 108.

legitimacy of the US assertion of an armed conflict against transnational non-state enemies, such as al Qaeda. Most notable among these is the impact drones seem to have had on how law is perceived as a limitation or constraint on the use of military force to advance national security objectives.

III. DRONES AND THE ASSERTION OF ARMED CONFLICT

One of the most fundamental obligations of any state is to protect itself and its population from internal and external threats. When necessary, the state authorizes its agents to use lethal force to achieve this objective. When and under what conditions this authority is properly exercised is, however, dictated by law. International law establishes limitations on the state's power to use force in response to threats in both peacetime and during armed conflicts.[3] Peace is the normal condition of national and international affairs, and therefore it is the peacetime legal framework that should be applied as the 'default' rule.[4] That legal framework is provided by international human rights law (IHRL).[5]

IHRL protects individuals from the arbitrary deprivation of life at the hands of state agents.[6] Accordingly, such agents are legally permitted to use lethal force in response to a threat only where there exists actual

[3] Kenneth Watkin, 'Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict' (2004) 98 Am J Intl L 1, 2; see generally Kenneth Watkin, 'The Humanitarian Law and Human Rights Interface' in *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict* (Oxford University Press 2016) 121, 121–58.

[4] Watkin (n 3) 2; Gábor Kardos, 'The Relationship Between International Humanitarian Law and International Human Rights Law: A Legal Essay' (1993) 34 Annales U Sci Budapestinensis Rolando Eotvos 49, 50. Though, IHRL is not exclusively applicable to solely 'peacetime' situations. IHRL applies at all times; however, it may be derogable where permitted by treaty. Derogations must still remain proportional, and are still limited by IHL. Ibid; see also ICRC Advisory Service on Int'l Humanitarian Law, *Int'l Humanitarian Law and Int'l Human Rights Law: Similarities and Differences* (January 2003), available 4 May 2017 at https://www.icrc.org/en/download/file/1402/ihl-and-ihrl.pdf [hereinafter ICRC Advisory Service].

[5] ICRC Advisory Service (n 4).

[6] International & Operational Law Department, The Judge Advocate General's Legal Center & School, US Army, Judge Advocate 422, *Operational Law Handbook* 45 (2013) 45; see also ICRC Advisory Service (n 4).

necessity, and when resort to deadly force is a measure of last resort.[7] Use of military forces to achieve state security objectives does not automatically alter this fundamental IHRL legal equation, even when those forces operate outside national territory. Unless operating within the alternative international humanitarian law legal framework, military forces, like police forces, are subject to IHRL-based obligations and legal limitations on the use of lethal capabilities.[8]

International humanitarian law (IHL) fundamentally alters the use of force legal equation applicable to state agents. Unlike IHRL, IHL does not restrict the use of lethal force to a measure of last resort based on individualized assessments of necessity.[9] Instead, IHL permits use of lethal force as a measure of first resort based on status determinations.[10] Because armed conflict is defined fundamentally as a contest between organized belligerent groups, use of force authority is not triggered by individualized assessments of actual threat, but instead by the presumptive threat resulting from an assessment that an individual is a member of an enemy belligerent group. Once that status determination is made, state agents may employ lethal force as a measure of first resort, limited only by a conclusion that the enemy is rendered incapable of continued participation in hostilities (*hors de combat*) as the result of wounds, sickness or capture.[11]

The line between peacetime response to security threats and armed conflict is therefore profoundly significant. While both IHRL and IHL impose important limits on the state's authority to implement measures to incapacitate such threats, the existence of armed conflict substantially expands the scope of authority available to the state and its agents. Historically, that line was defined as the line between war and peace—the laws and customs of war applied only during war. However, until

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[7] *Operational Law Handbook* (n 6) 51 (While IHL may provide for expressed derogations, IHRL already contemplates the balance between military necessity and humanity.).

[8] Geoffrey Corn, 'Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict' 44 (Journal of Int'l Humanitarian Legal Studies, Working Paper), accessed 4 May 2017 at http://ssrn.com/abstract=1511954 [hereinafter 'Mixing Apples and Hand Grenades'].

[9] Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd edn Cambridge University Press 2016) 301.

[10] Ibid ('[U]nder the law of war [IHL], deadly force may be the lawful *first resort*; under human rights law [IHRL], deadly force is the *last resort'*); Corn (n 8) 44.

[11] Solis (n 9) 301–2; Corn (n 8) 30.

1949, international law, or more specifically treaties codifying international law, did not define what constituted 'war' for purposes of bringing the laws of war, or IHL, into force. Furthermore, prior to 1949, it was unclear whether a situation of domestic instability and/or violence could ever qualify as a war for purposes of legal regulation. It was true that some civil wars might fall within the scope of the doctrine of belligerency, thereby bringing into force the laws and customs of war applicable to inter-state wars. However, brutal and bloody 'internal' conflicts of the early 20th century—like those in Spain and Russia[12]—indicated a gap in international law, wherein major conflicts might rage within the borders of a state with no consensus on the applicability of international legal regulation.[13]

The international community sought to fill this gap by including articles in the four Geneva Conventions of 1949 indicating when the obligations established in the treaties become applicable.[14] Common Article 2 of the treaties defines what is today known as international armed conflict (IAC).[15] Common Article 3 defines non-international armed conflict (NIAC).[16] By adopting the notion of armed conflict as the trigger for treaty application, the Conventions fundamentally altered the law applicability equation. The existence of a war was no longer the decisive question. Instead, a more pragmatic and fact-oriented assessment of armed conflict became decisive. Furthermore, common Article 3 extended baseline treaty-based regulation to conflicts between a state and

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[12] Specifically, reference being made to the Russian Civil War that ensued after the 1917 Bolshevik October Revolution; and also the Spanish Civil War between democratic Republicans, and Nationalists led by General Francisco Franco, among others. Each multi-year conflict resulted in the death of hundreds of thousands, and national regime change.

[13] Corn et al (n 2) 77.

[14] See generally Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 [hereinafter GWS]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 [hereinafter GWS-Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 [hereinafter GPW]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 [hereinafter GC]. Collectively, each of these treaties contains a set of articles that are common to each, which are referred to as the Common Articles.

[15] GWS (n 14) Article 2; GWS-Sea (n 14) Article 2; GPW (n 14) Article 2; GC (n 14) Article 2.

[16] GWS (n 14) Article 3; GWS-Sea (n 14) Article 3; GPW (n 14) Article 3; GC (n 14) Article 3.

a non-state group, or even between multiple non-state groups.[17] Thus, after 1949, armed conflict, no matter the location or nature of the contestants, fell under the scope of humanitarian regulation.

Of course, as a matter of treaty obligation, common Articles 2 and 3 dictate applicability of the Geneva Conventions only, treaties that are almost exclusively devoted to humanitarian protection. Nothing in these treaties provides authority to employ lethal force, even against an enemy during an armed conflict. However, these law-triggering provisions of the Conventions have evolved to be considered the definitive standard for assessing when the entire corpus of IHL, to include so-called 'conduct of hostilities' rules, become applicable.[18] Accordingly, the IAC and NIAC definitions in these common articles evolved into a customary international law standard for assessing if and when a state is engaged in an armed conflict. Importantly for this discussion, once that line is crossed, it triggers not only humanitarian protection, but also the expanded scope of authority to employ force to bring the enemy into submission.

The two types of armed conflicts coined and defined by the Geneva Conventions, IAC and NIAC, are assessed quite differently.[19] Hostilities between two or more opposing organized belligerent groups is the common element of both IAC and NIAC. This is only logical, as the entire notion of armed conflict, as noted above, is a contest between organized belligerent groups. But assessing when such hostilities exist is relatively apparent in the context of IAC. This is because such conflicts require some hostile action between state armed forces, action that is usually not difficult to identify, as state armed forces rarely interact with violence in anything other than such a contest, even if brief and limited in scope.

In contrast, state police authorities—and in some cases even military authorities—constantly interact with internal and even external non-state threats across a broad 'spectrum of conflict'. In many situations, this interaction is insufficient to qualify as an armed conflict within the meaning of IHL. Thus, in a very real sense, when comparing IAC with NIAC, there is an inverse relationship between the use of military force

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[17] GWS (n 14) Article 3; GWS-Sea (n 14) Article 3; GPW (n 14) Article 3; GC (n 14) Article 3.

[18] See ICRC Art 3 Commentary (n 1) paras 351–356; see also Geoffrey S Corn, 'Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict' (2007) 40 Vand J Transnatl L 295, 300–301.

[19] See GWS (n 14) arts 2, 3; GWS-Sea (n 14) arts 2, 3; GPW (n 14) arts 2, 3; GC (n 14) arts 2, 3.

and what that use indicates in terms of the legal status of a conflict. In interstate relations, confrontations between state armed forces that result in the use of force almost always qualify as armed conflicts, even if brief in duration. This is because there are few situations where such hostilities will occur below the armed conflict threshold. Thus, it is the exception, and not the rule, that such confrontations fall within the scope of a law enforcement or non-armed conflict legal framework.

In contrast, it is common for states to utilize armed forces in response to internal disturbances that challenge the response capacity of domestic law enforcement, or even to use armed forces to augment extraterritorial law enforcement activities. Accordingly, such use does not necessarily, or even normally, indicate the existence of an armed conflict against a non-state threat. Instead, it is necessary to focus on the nature of the threat demanding the use of military force in assessing when that use qualifies as an armed conflict.

When common Article 3 was first proposed, states were hesitant to consent to application of IHL to purely internal conflicts.[20] As the ICRC Commentary to common Article 3 indicates, not all civil or internal disturbances are to be considered armed conflicts.[21] However, the Commentary also indicates that recognition of an armed conflict has no impact on the legal or political status of a non-state opposition group.[22] Nonetheless, the Commentary also indicates that the states that agreed to common Article 3 expressed concerns over the impact of acknowledging when a situation of armed conflict existed within their borders.[23] In response, the Commentary not only challenges the validity of such a concern, but emphasizes the de facto nature of the armed conflict

[20] ICRC Art 3 Commentary (n 1) paras 361–362.

[21] Ibid paras 387–392 (A situation of violence crosses the threshold of becoming an armed conflict only when a requisite level of violence of a certain degree of intensity, which is a factual determination); see also *Operational Law Handbook* (n 6) 15.

[22] GWS (n 14) Article 3; GWS-Sea (n 14) Article 3; GPW (n 14) Article 3; GC (n 14) Article 3; ICRC Art 3 Commentary (n 1) paras 861, 864–869.

[23] ICRC Art 3 Commentary (n 1) para 417. The 2016 Commentary cites notable discussion from Pictet's 1952 Commentary on the First Geneva Convention, stating: '[M]any of the delegations feared that it might be taken to cover any act committed by force of arms—any form of anarchy, rebellion, or even plain banditry. For example, if a handful of individuals were to rise in rebellion against the State and attack a police station, would that suffice to bring into being an armed conflict within the meaning of the Article?' Jean S Pictet, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary* (ICRC 1952).

assessment and the purely humanitarian consequence of crossing this threshold.[24]

Ultimately, the line between internal disturbances that do not qualify as NIACs and situations justifying, or perhaps more importantly necessitating that characterization, was blurry from inception. Consistent with the Commentary discussion, no single factor was, or is, dispositive in assessing the existence of a NIAC.[25] Not even use of military force is dispositive, as it is common for states to use such forces to augment civil law enforcement capabilities, or even to even assume law enforcement functions in situations that do not objectively qualify as armed conflicts. Instead, this determination must be based on an assessment of the totality of the circumstances, to include, the nature of the threat, threat capabilities, and the nature of the government response.[26]

But this assessment methodology inevitably led to, and will continue to lead to, disparate conclusions between states, non-state groups, and external organizations like the ICRC or the United Nations. And, because prior to the US response to the 11 September terrorist attacks, the NIAC was almost universally considered synonymous with 'internal' armed conflicts, more simply stated to be conflicts between states and internal opposition groups, these disparate interpretations almost always focused on the point at which states must comply with IHL in response to such internal challenges. In this context, the concerns expressed during the discussions of Common Article 3 seem to be manifested by state practice: it is almost axiomatic that states resist acknowledging that an internal challenge qualifies as an armed conflict.

Why do states resist acknowledging when an internal threat crosses the threshold into the realm of armed conflict? Inverting the question may reveal the most obvious answer: why would states want to acknowledge such a state of affairs? According to the Commentary to common Article 3, the answer is that it advances humanitarian protection for all victims of the armed conflict.[27] However, the reality is that states seem to continue to view such acknowledgment as carrying with it a host of negative consequences. These include providing some level of legitimacy or credibility to the non-state opposition group (even though the Commentary to common Article 3 clearly indicates that no legal consequence

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[24] ICRC Art 3 Commentary (n 1) paras 414–421.

[25] Ibid paras 419–421; see also Corn et al (n 2) 74. ('These "convenient criteria" are merely indicative … Nonetheless, if met, the "convenient criteria" may certainly indicate the existence of a non-international armed conflict'.)

[26] Corn et al (n 2) 74.

[27] ICRC Art 3 Commentary (n 1) para 388.

derives from acknowledging the existence of a NIAC), signaling a loss of control or authority by the state, and opening the proverbial door to increased international legal regulation and involvement of international actors in domestic affairs.[28]

Of course, the applicability of humanitarian protection is not the only consideration relevant to NIAC recognition. Responding to non-state groups that threaten state authority necessitates the use of state power, and the characterization of the threat will significantly impact that response authority, at least in theory. For states fully committed to compliance with both IHRL and IHL, acknowledging the existence of a NIAC results in an expansion of response authorities through the conduit of customary international law. While, as noted above, common Article 3 only addresses humanitarian constraints applicable during the NIAC,[29] the existence of the NIAC also brings into effect the fundamental principles of IHL related to methods and means of warfare, most notably status-based targeting authority and preventive detention authority. Thus, this expansion of state response authority would seem to provide an important incentive for NIAC acknowledgment.

In practice, however, this incentive has produced a relatively insignificant influence on states, as most states confronting internal threats seem to simply expand response authorities without acknowledging the existence of a NIAC. Instead, a pattern of legal and operational fictions seems to define state response to internal armed threats: states refuse to acknowledge the existence of NIAC, but nonetheless employ military power in a manner that cannot be squared with a law enforcement legal framework. While there is some diplomatic and supra-national judicial risk associated with such practices, this seems to be a relatively consistent state practice, a pattern that continues to this day. The unwillingness of the Syrian government to acknowledge the existence of NIAC while it was pummeling Syrian communities with indirect fire and air attacks,[30] or the extensive violence among armed groups in Mexico, illustrate how states invoke IHL-type authority without acknowledging the existence of armed conflicts.

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[28] GWS (n 14) Article 3(4); GWS-Sea (n 14) Article 3(4); GPW (n 14) Article 3(4); GC (n 14) Article 3(4); see also ICRC Art 3 Commentary (n 1) paras 861–869.

[29] Infra, p 5, fnn 9–10.

[30] Cf, e.g., SC Res 2139, para 10, UN Doc S/RES/2139 (22 February 2014) (illustrating the UN Security Council's acknowledgment of an armed conflict in Syria).

What happens, however, when the non-state threat is not confined to the territory of the threatened state—when a state faces a non-state threat operating internationally? Between 1949 and 2001, such situations rarely arose, or at least if they did, states rarely (if ever) considered them to qualify as NIACs. While there are examples of states acting against extraterritorial non-state threats before 2001, such as the Israeli hostage rescue raid against Palestinian terrorists in Entebbe,[31] or the US cruise missile attack against al Qaeda training camps in Afghanistan, it is unclear how these operations were legally classified. Are they considered NIACs? Extraterritorial law enforcement actions executed by military forces? Or short duration IACs against the states allowing their territory to be used by non-state groups?

The US decision to characterize its military response to the 11 September terrorist attacks as a NIAC opened a new chapter in conflict characterization. For the first time since the advent of common Article 3, a state unequivocally asserted it was engaged in a NIAC with a transnational non-state group. This characterization triggered widespread criticism, but also initiated a process of conflict classification reassessment. While it would be an exaggeration to assert that NIAC is today understood to include NIACs of international scope—what is often referred to as 'transnational' armed conflicts—there does seem to be growing support for this interpretation.[32]

The assertion of transnational NIAC was significantly influenced by a number of factors. First among these was the assessment of the non-state threat capability and the resulting conclusion that law enforcement authority and capability was insufficient to effectively address this threat. This led to the conclusion that only an expanded invocation of the nation's military power would be effective in addressing this threat. Reliance on law enforcement authority would not allow these forces to

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[31] On 4 July 1976, the Israeli Defense Force conducted a hostage rescue operation (Operation Thunderbolt) at Entebbe Airport in Uganda. One hundred and two of the hostages, passengers of an Air France flight hijacked by members of the People's Liberation Front for the liberation of Palestine, were rescued by the IDF. Aside from the success of the raid in the midst of a mixed reaction from the international community, the incident has gained notoriety for the sole death on the IDF task force—Lt Col Yonatan Netanyahu, the brother of current Israeli Prime Minister Benjamin Netanyahu.

[32] See generally Watkin (n 3) ch 2.4.5; Geoffrey Corn and Eric Talbot Jensen, 'Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations' (2009) 42 Israel L Rev 1, 5; Monica Hakimi, 'International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide' (2008) 33 Yale J Intl L 369.

fully leverage their combat power, power that could only be employed within an armed conflict legal framework. And, while there was tremendous uncertainty at the inception of these operations as to the true nature of the applicable legal authority, over time the proverbial legal dust settled to reveal an unavoidable conclusion: the US viewed the struggle against al Qaeda as an armed conflict.

The authority to employ lethal combat power as a measure of first resort—quite often through an armed drone—is perhaps the most significant consequence of this armed conflict determination. Drones were and are certainly not the only tool for employing such power, but they are often considered ideal, for all the reasons discussed above.[33] The rapid evolution of lethal drone capability in many ways complemented, or perhaps responded to, the assertion of transnational NIAC. And this dual evolution has produced both an expanded scope of legal authority to attack non-state opponents and an expanded capability to do so.

The international legal standards for assessing the existence of armed conflict is not generally understood as a constraint on the state's authority to engage in armed conflict, but rather as addressing the distinct question of the law applicable to such conflicts. From inception, the law of NIAC and the 'test' for assessing the existence of a NIAC has had a constraining effect, if not de jure, then at least de facto. This de facto constraint flowed from the perceived second and third-order consequences of treating an internal threat to state authority as an 'enemy' in an armed conflict. As noted above, states have been and remain reticent to acknowledge the existence of internal NIAC based on these concerns, which inevitably constrain the invocation of armed conflict authority to address internal threats.

The de facto consequence of the transnational NIAC interpretation is arguably the exact opposite. Unlike an internal domestic threat, what the US response to al Qaeda indicates is that states may often perceive a powerful political benefit from asserting a more aggressive response to transnational non-state threats. Confining responses to such threats to the more limited authority permitted outside the context of armed conflict risks a perception of national weakness. Indeed, in the realm of US political and policy discourse, even strategically and operationally motivated restrictions on armed conflict authority in the form of rules of engagement are condemned as manifestations of national weakness.

Thus, when confronting an external non-state threat, the state will not perceive recognition of armed conflict as an indication of national

[33] See section II.

weakness, but instead one of national strength. And because of the NIAC classification, the responding state is much less constrained by jus ad bellum considerations; the NIAC classification allows the state to disavow any intention to act aggressively against another state. Instead, by invoking 'failed state' or 'unable or unwilling' theories, the state using force against the transnational non-state opponent minimizes concerns related to jus ad bellum constraints.

Ultimately, unlike in the domestic context, there seem to be powerful incentives for an aggressive assertion of transnational NIAC, with few disincentives. From a tactical and operational perspective, the classification opens the door to assert otherwise unavailable national military power: the power to kill as a measure of first resort, the power to detain preventively without charge or trial, and the power to use extraordinary criminal tribunals to punish captives. From a strategic perspective, it facilitates the use of national military power largely free of the legal constraints that flow from the jus ad bellum and the practical risks of escalation resulting from attacking another state. And, from a political perspective, the invocation of armed conflict signals a message of strength and resolve, not of loss of control.

Drones substantially contribute to this incentive equation. Indeed, almost all the potential incentives associated with an aggressive NIAC characterization are enhanced by the availability of drones. The tactical and operational benefit of drones is almost self-evident, in that they are highly precise and effective weapons ideally suited to strike the non-state enemy's center of gravity—*leadership*. Strategically, drones facilitate the use of deadly combat power within the sovereign territory of another state. It is true that any attack will inevitably implicate jus ad bellum considerations and the risk of a military response by that state. However, the minimal sense of physical intrusion into that territory, coupled with precision engagement, mitigates these considerations.

Perhaps the most significant impact of drones on this incentive equation is political. Drone operations against non-state actors seem to offer national political leaders a windfall of benefits. First, drone operations are routinely marketed as highly effective at striking at the enemy's center of gravity, producing a powerful disruptive effect.[34] Whether these assertions are justified or exaggerated is almost impossible to assess. Critics of drone warfare routinely argue that they produce more

[34] James Igoe Walsh, *The Effectiveness of Drone Strikes in Counterinsurgency and Counterterrorism Campaigns* 14, accessed 4 May 2017 at http://www.strategicstudiesinstitute.army.mil/pdffiles/pub1167.pdf.

harm than good, driving up support for the very enemy we seek to undermine.[35] But because the nature of this enemy necessitates minimal public disclosure of the threat identification characteristics that justify attack, it is almost impossible to determine the true efficacy of these operations. Thus, even if critics are correct, the political benefit resulting from the perception of aggressive and decisive action cannot be ignored.

Drones also offer another political advantage: avoiding complex issues related to non-lethal incapacitation efforts.[36] Few issues have generated more legal and political complexity than the indefinite preventive detention of captured al Qaeda and Taliban operatives. While the common thread that runs through these detentions and drone operations is the assertion of a transnational NIAC, detention is simply more complicated than lethal attacks. A lethal drone attack avoids this complexity.

Drones are, of course, not uniquely responsible for incentivizing aggressive assertions of armed conflict authority to deal with transnational non-state threats. However, it is difficult to ignore how the intersection of an expanded notion of NIAC and drone capability have influenced the perceived political incentives for treating counter-terror operations as an armed conflict. In this sense, drones truly are 'different', as they offer a specialized attack capability that allows low risk/high payoff action against the transnational terrorist or non-state threat. This perceived risk/reward imbalance may often result in situations where failing to authorize attack is perceived as producing unacceptably high risk, both strategically and politically. Strategically, foregoing an opportunity to strike an elusive enemy with a highly lethal and accurate capability will almost certainly enhance the pressure to exploit windows of attack opportunity. Furthermore, failing to do so will generate concerns over potential political blowback in the event some future harm to the United States or its interests is attributed, even in part, to an alleged failed opportunity to neutralize a particular threat.

The significance of this pressure is confirmed by the debates that continue to this day over the consequence of alleged presidential hesitation to employ decisive military force against high level al Qaeda operatives before and shortly after the 11 September attacks.[37] The

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[35] Ibid v.

[36] Some opine that the Obama administration has resorted to the use of drones as a practical alternative to staving off the issues the Bush Administration encountered pertaining to Gitmo detainees. See John B Bellinger III, 'Will drone strikes become Obama's Guantanamo?', *Washington Post* (2 October 2011).

[37] See, e.g., Kurt Eichenwald, 'The Deafness Before the Storm' *New York Times* (10 September 2012).

political risks for any president who appears hesitant to exploit potentially high payoff attack opportunities against threats to national interests are immense. This risk is substantially increased when the means available to take decisive action produce minimal risk to either US military personnel or of triggering an escalation of military violence with another nation. Drones are the tool that has created this dilemma for US presidents, a reality candidly acknowledged by the former legal adviser to the Secretary of State, John Bellinger, in a presentation made at the University of Texas.[38] To paraphrase a well-known parable, 'when the best tool in your toolbox is a hammer, almost every problem starts looking like a nail'.

IV. DRONES AND CONSTITUTIONAL WAR POWERS

The decision to use military force in response to national security threats is influenced not only by international law considerations, but also by considerations related to constitutional war powers. Since the inception of our nation, war powers have been exercised pursuant to a complex balance of power among our three branches of government (and occasionally even state governments). Indeed, few issues have implicated greater national strategic, political, and social significance than decisions of when, where, how, and for how long US military forces should be committed into hostilities.

An extensive discussion of presidential war powers is well beyond the scope of this chapter. Quite generally, the president's constitutional authority to commit US armed forces into hostilities lies somewhere between two extremes. One end of the spectrum posits that the president's vested authority as commander in chief is purely operational, and that he possesses constitutional authority to direct congressionally authorized military operations.[39] Under this theory, the president has no constitutional authority to *initiate* hostilities, and must always seek

[38] John B Bellinger, Former Legal Advisor of the Dept of State, Address at the Texas International Law Journal Symposium (14 April 2016).

[39] See Richard Brust, 'Constitutional Dilemma: The Power to Declare War is Deeply Rooted in American History', *ABA Journal* (1 February 2012), accessed 4 May 2017 at http://www.abajournal.com/magazine/article/constitutional_dilemma_the_power_to_declare_war_is_deeply_rooted_in_america, citing Harvey Rishikof et al, *Patriot Debate: Contemporary Issues in National Security Law* (American Bar Association 2012) (this position being a stance taken by Louis Fisher); see also Louis Fisher, 'Lost Constitutional Moorings: Recovering the War Power' (2006) 81 Ind L J 1199 (notably, see part I).

congressional authorization for any military action that goes beyond peaceful, 'military diplomacy'.[40] The other end of the spectrum posits that, absent enactment of statutory authority to legally prohibit the president from initiating or continuing hostilities, the president may authorize such hostilities.[41] This view treats congressional war powers as primarily faciliatory in nature: Congress provides the sinew of war, and may also choose to legally perfect wars through declaration or other statutory endorsement.[42] But short of express prohibition, the president is free to act when, where, and how he determines it is necessary.[43]

Neither of these extremes has been manifested by war-making practice. Instead, a much more complex equation evolved, one in which presidents exercise a broad range of war-making initiatives based on indicators of implicit congressional consent, or perhaps more accurately, an absence of congressional opposition. Furthermore, based on the seminal Supreme Court decision in the Civil War-era *Prize Cases*, there is widespread support for the proposition that the president is vested with inherent constitutional authority to use military force in response to attacks, either ongoing or imminent, against the nation or its armed forces.[44] Protection of nationals abroad is also generally considered to fall within the scope of this inherent presidential authority,[45] although the level of consensus is not as strong as that associated with defensive war powers.

Historical practice and the rare forays into war powers by the judicial branch call into question the validity of either extreme view of presidential war powers. Perhaps more importantly, these sources of authority have armed presidents with powerful support for asserting authority to

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[40] Ibid.

[41] Burst (n 39) (this position being a stance taken by John Yoo); John Yoo, 'War Powers Belong to the President', *ABA Journal* (2 February 2012), accessed 4 May 2017 at http://www.abajournal.com/magazine/article/war_powers_belong_to_the_president.

[42] Ibid.

[43] Ibid.

[44] The *Prize Cases*, 67 US 635, 669 (1862) (When war is thrust upon the nation, the president needs no congressional authorization to use appropriate measures to quell the invasion or insurrection); Furthermore, the War Powers Resolution of 1973 arguably expanded the president's power to this end by acknowledging the existence of such ability and by explicitly stating that it extended to US territories and soldiers stations abroad.) See The War Powers Resolution of 1973, 50 USC §§ 1541 (c)(2–3) (1973).

[45] See *In re Neagle*, 135 US 1, 63–4 (also, notably, the *Neagle* court's discussion of the Koszta Affair).

engage in war-making initiatives.[46] Nonetheless, the cryptic nature of this shared constitutional power almost always injects a certain degree of uncertainty into the validity of these assertions. Ironically, this uncertainty was increased by the 1973 War Powers Resolution (WPR), a law Congress enacted (over President Nixon's veto) for the express purpose of defining the extent and limits of presidential war-making power.[47] In an overt effort to prevent presidents from initiating hostilities without express congressional authorization, the WPR provides that:

> The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.[48]

The apparent clarity of this provision of the WPR was, however, substantially eroded by the mechanisms incorporated into the statute to implement the obvious congressional objective of restraining presidential war-making initiatives. Most notable among these provisions is the so-called 60-day clock. According to § 1544 (a):

> Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.[49]

The WPR also provides, in § 1547(d)(2), that nothing in the WPR, 'shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the

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[46] See generally *Holtzman v Schlesinger*, 484 F 2d 1307 (2d Cir 1973) (once Congress has acted to allow the president to conduct war-making initiatives, the judiciary will likely not interfere unless the president is subsequently acting contrary to an expressed revocation of such authority by Congress).

[47] 50 USC §§ 1541–48.

[48] Ibid § 1541(c).

[49] Ibid § 1544(a).

circumstances which authority he would not have had in the absence of this chapter'.[50]

It is therefore clear that the 60-day clock cannot properly be interpreted as a congressional authorization for presidents to initiate and conduct hostilities for up to 60 days. Nonetheless, taken has a whole, the WPR produces that precise effect. This effect was exacerbated when the Supreme Court struck down the constitutionality of the so-called legislative veto in *INS v Chadha*.[51] This is because the WPR also provides that Congress may, at *any* time prior to the termination of the 60-day period, order termination of hostilities by a majority vote of both houses.[52] Because such a concurrent resolution is considered a legislative veto, this provision was effectively nullified by *Chadha*. As a result, only by enacting a law—ostensibly requiring the requisite super-majority to overcome a presidential veto—will Congress be able to direct termination of hostilities already initiated (or even contemplated) by the president.[53]

The combined effect of the WPR, post-enactment practice, and the invalidation of the legislative veto, has arguably strengthened the presidential war-making hand. This is especially the case when hostilities are expected to be of short duration. Of course, nothing in the WPR nor its legislative history suggest that Congress intended the law to apply only to hostilities that extend beyond 60 days, or which are expected to involve a magnitude likely to produce such a duration.[54] The best evidence of this is found in the text of the law itself, which includes no 'intensity', 'gravity', or 'magnitude' qualifiers, and also includes a provision that expressly prohibits treating anything in the statute as a source of authority to initiate or continue hostilities. Indeed, the clear purpose of the WPR was to prevent presidents from committing the nation to conflicts based on an expectation of quick or limited involvement, precisely because of the inherent risk of escalation associated with such military ventures.

But a presidential judgment that a military objective can be achieved within a 60-day period substantially mitigates both the risk of congressional opposition, and judicial action in response to a challenge to the action. An effective congressional challenge would require Congress to muster the political will to enact a law to restrict the president, a daunting task at any point in during a conflict, but especially so at the outset. Nor

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[50] Ibid § 1547(d)(2).
[51] See *INS v Chadha*, 462 US 919, 959 (1983).
[52] 50 USC § 1544(c).
[53] *Chadha,* 462 US at 951–9.
[54] Cf 50 USC §§ 1541–48.

could opposition members of Congress turn to the courts to enforce the WPR, as the doctrine of legislative standing would almost certainly function as an impenetrable barrier to judicial action absent enactment of a prohibitory statute.

Where hostilities can be conducted without subjecting US forces to significant risk, it further mitigates the risk of political opposition. Hence, the capability offered by drones produces a potentially significant advantage for presidents who seek to employ US military power without congressional authorization. The ability to achieve the strategic and operational objectives without ever subjecting US forces to the mortal risks of combat may, like drones themselves, make such operations almost unnoticed. And when military operations are not noticed, it is unlikely congress will seriously question the president's authority to conduct them.

The limited US risk associated with drone operations is not just a practical political consideration; it actually is at the core of what may be an emerging theory of presidential war powers. In 2011, President Barack Obama ordered US armed forces to participate in the 2011 military action against Libya, Operation Odyssey Dawn.[55] President Obama emphasized that the US role in the broader coalition effort would be limited, focused primarily on suppression of enemy air defense, surveillance, intelligence, and logistics.[56] However, there was no question that the President had authorized initiation of hostilities. Without either congressional authorization or an assertion that the mission was ordered in response to an attack on the nation or its armed forces, his action seemed to clearly violate the WPR.[57]

From inception, President Obama asserted inherent executive authority as the constitutional basis for ordering the US participation.[58] However,

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[55] President Barak Obama, Remarks by the President on Libya (March 29, 2011) (transcript accessed 4 May 2017 at https://www.whitehouse.gov/the-press-office/2011/03/19/remarks-president-libya) [hereinafter Libya Remarks].

[56] Ibid.

[57] Jeremiah Gertler, Congressional Research Service, R41725, Operation Odyssey Dawn (Libya): Background and Issues for Congress 3–4 (2011), accessed 4 May 2017 at https://www.fas.org/sgp/crs/natsec/R41725.pdf (In President Obama's remarks from 18 March 2011, he makes no reference to an attack on, or a threat to, the United States. Instead, President Obama alludes only to the United States' commitment to a broader, international coalition tasked with enforcing a cease-fire between Libyan troops and civilians).

[58] *Libya and War Powers: Hearing before the Committee on Foreign Relations*, 112th Cong 8 (2011) (statement of Harold Koh, Legal Adviser, US Dept of State) ('[F]rom the outset, we noted that the situation in Libya does not

he also emphasized the extremely limited exposure of US personnel involved in the operation.[59] Like the air campaign against Serbia in 1998, the expectation of short duration proved erroneous, and the operation dragged on for several months. And, also like the Serbia air campaign, once operations exceeded 60 days, addressing compliance with the WPR became a significant issue. In the case of US operations against Serbia (the first US military campaign subsequent to enactment of the WPR involving ongoing hostilities that exceeded 60 days without express statutory authorization), the extended duration led to litigation between the President and members of Congress.[60] President Clinton had, like prior presidents, asserted he was not bound by the WPR due to its impermissive intrusion into his inherent constitutional authority.[61] However, his Justice Department asserted, and the DC Circuit Court relied on, justiciability considerations to terminate the litigation without ever reaching the constitutional question.[62]

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constitute a war requiring specific congressional approval under the Declaration of War Clause of the Constitution'.) [hereinafter Koh Report]; Libya Remarks (n 55) (President Obama states that 'after consulting the bipartisan leadership of Congress, I authorized military action to stop the killing and enforce U.S. Security Council Resolution 1973'. This language is carefully articulated to be consistent with the WPR, however still reverent of inherent executive war power authority, chiefly in the words, 'I authorized'.).

[59] Libya Remarks (n 55).

[60] *Campbell v Clinton*, 203 F 3d 19, 19, 24 (DC Cir 2000). (Members of congress filed suit seeking declaratory relief against the President in an effort to force congressional action. The Court, however, held that no vote of Congress was being nullified by the President, and that the legislators lacked standing; therefore, essentially, so long as the legislature has options at their disposal, they lack standing in Court.)

[61] 'Letter to Congressional leaders reporting on airstrikes against Serbian targets in the Federal Republic of Yugoslavia (Serbia and Montenegro)' (1999) 1 Published Papers of William Jefferson Clinton 459, 459 ('United States and NATO forces have targeted the [Yugoslavian] government's integrated air defense system, military and security police command and control elements, and military and security police facilities and infrastructure … I have taken these actions pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive'.).

[62] *Campbell*, 203 F 3d at 19, 24 (The government challenged the jurisdiction of the federal courts to adjudicate this claim on three separate grounds: the case is moot, appellants lack standing (as the district court concluded), and the case is non-justiciable. The Court never reached the mootness and political question assertions, as they agreed with the government in that the congressmen lacked standing to bring the claim.).

Unlike President Clinton, President Obama was confronted with almost no congressional opposition when the Libya campaign crossed the same temporal phase-line. Nonetheless, President Obama directly addressed the issue of WPR applicability and compliance. In a controversial speech, Harold Koh, the Legal Adviser to the Secretary of State, presented the administration's new theory of WPR inapplicability: de minimis risk.[63] According to Koh, the WPR trigger of situations where commitment of US armed forces into hostilities or situations where hostilities were imminent was intended to prevent the type of incrementally escalating quagmires typified by the Vietnam conflict—the conflict that originally motivated enactment of the law.[64] Koh posited that where the nature of the hostilities posed little to no risk of escalation, especially an escalation that would require putting US ground forces at risk, the law was inapplicable.[65]

The limited nature of the US involvement in the Libya campaign nullified the type of risks the administration concluded were necessary predicates for applicability of the WPR.[66] The bulk of the US forces participating in the operation performed combat support functions, and were not directly engaged in confrontation with Libyan forces.[67] Furthermore, even when US forces did conduct combat operations against Libyan forces, only air and missile assets were being used, with no 'boots on the ground'.[68] As a result, the administration concluded the commitment of US forces did not fall within the intended scope of the WPR.[69]

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[63] See Koh Report (n 58) 7–11, 11–40.

[64] Ibid 9–10.

[65] Ibid 9.

[66] Ibid; see also Office of the President, United States Activities in Libya (2011), accessed 4 May 2017 at https://www.scribd.com/fullscreen/57965200?access_key=key-1u10mi6mo7qaatybceao.

[67] Ibid. For example, President Obama's report states the following:

> The overwhelming majority of strike sorties are now being flown by our European allies while American strikes are limited to the suppression of enemy air defense and occasional strikes by unmanned Predator UAVs against a specific set of targets, all within the UN authorization, in order to minimize collateral damage in urban areas … The United States provides nearly 70 percent of the coalition's intelligence capabilities and a majority of its refueling assets, enabling coalition aircraft to stay in the air longer and undertake more strikes.

[68] Koh Report (n 58) 9–10.

[69] Ibid 8.

In-depth analysis of the relative merit of this interpretation is beyond the scope of this chapter. Suffice to say that it seems difficult to reconcile this 'de minimis risk' or 'no boots on the ground' theory with a statute that evolved from the difficult US experience in Vietnam, obviously intended to prevent presidents from what might best be called 'incremental escalation'. The mere fact that the WPR addresses not only commitment of US armed forces into hostilities, but also into situations indicating an imminence of hostilities—which is defined, inter alia, to include a substantial increase in the presence in any given area of US armed forces equipped for combat[70]—seems to contradict this interpretation. Ultimately, no matter how credible or incredible the interpretation, the bottom line remains that it opened a new theory of WPR avoidance.

The assertion is, therefore, in itself a significant development in the evolution of constitutional war powers. And, the fact that there was little congressional resistance to this interpretation of the WPR, much less any effort to enforce its terms, increases this significance. It is not difficult to imagine that subsequent presidents will look back on this campaign and President Obama's assertion of constitutional authority as an example of how to frame their own assertions of executive war powers.

Drones may very well be central to any future assertion of this de minimis risk theory of executive war power. Almost no other weapon system capable of employing analogous lethal and destructive power with virtually no risk to US forces is currently available in the US military arsenal. While long-range weaponry such as cruise missiles and other, 'beyond the horizon' strike assets may present virtually no risk to US forces, they lack the analogous real-time information dominance and precision engagement offered by drones. This capability is, therefore, an ideal fit within this theory of virtually unconstrained presidential war power.

This raises serious concerns. It may be true that the constitutionality of the WPR remains uncertain. It is certainly true that all presidents have aligned themselves with President Nixon's initial conclusion that the law unconstitutionally infringed on Article II authority.[71] However, it would

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[70] 50 USC § 1543 (a)(3).

[71] *See*, e.g., Letter (Regarding Cameroon) from Barak Obama, President, United States, to John Boehner, Speaker of the House of Representatives, United States, and Orrin Hatch, President Pro Tempore of the Senate, United States (14 October 2015), accessed 4 May 2017 at https://www.whitehouse.gov/the-press-office/2015/10/14/letter-from-president-war-powers-resolution-cameroon; Letter (Regarding Iraq) from Barak Obama, President, United States, to John Boehner, Speaker of the House of Representatives, United States, and Patrick Leahy,

be misleading to conclude the WPR has been a complete failure. To the contrary, perhaps because its constitutionality and ultimate impact on national security policy remains uncertain for *both* presidents *and* Congress—it has generated greater war powers interaction between these branches of government. As noted above, only twice since enactment of the law has the United States conducted a military campaign beyond 60 days without express congressional authorization. Furthermore, even when presidents believe they are initiating hostilities that fall within the scope of their constitutional authority, they have routinely provided notice to Congress, 'consistent' with the notification provisions of the WPR.

Perhaps the WPR is responsible for presidents seeking express statutory authorizations for the conflicts they intend to initiate. But even if the WPR has accomplished nothing more than stimulating more dialogue between presidents and Congress, it has been a success. WPR notifications and the discussions they stimulate provide Congress with an early opportunity to endorse or constrain presidential war-making initiatives. And, where Congress is silent or ambivalent in response, presidents may consider even this as acquiescence that may be treated as a constitutional 'green light' to move forward with the military action. In fact, the importance of robust inter-branch war powers dialogue was recognized by the Baker-Warren proposal to replace the WPR with a new law titled the War Powers Consultation Act, which would focus exclusively on ensuring such dialogue.[72]

The capabilities provided by drones may stifle the positive trend of increased inter-branch war powers dialogue. When presidents are armed with a capability that allows for the rapid and highly effective use of combat power with almost no perceived risk to US personnel, assertions

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President Pro Tempore of the Senate, United States (23 September 2014) accessed 4 May 2017 at https://www.whitehouse.gov/the-press-office/2014/09/23/letter-president-war-powers-resolution-regarding-iraq. From these letters, note the redundancy in language used to show consistent action with the WPR: 'I am providing this report as part of my effort to keep the Congress fully informed, consistent with the War Powers Resolution …' Compare this 'consistent with' language to 'in accordance with', for example, and reflect this as an indication that US presidents do not find the WPR obligatory. This language, or variations thereof, has been used by presidents since the enactment of the WPR during the Nixon administration.

[72] See generally The War Powers Consultation Act of 2014, S 1939, 113th Cong. (2014); James A Baker III et al, *National War Powers Commission Report* (Miller Center Public Affairs 2009), accessed 4 May 2017 at http://web1.millercenter.org/reports/warpowers/report.pdf.

of unilateral executive power will almost certainly become more likely. Presidents confronted with threats vulnerable to drone attacks will perceive significant pressure for swift action; action that will be perceived as in the national interest because of its speed and decisiveness. Where an attack option offers a high probability of neutralizing a target in a short period of time with no risk to US forces, the risk of congressional backlash for failing to provide notification will likely be considered minimal. In such situations, it is more likely a president will assess the risk of congressional backlash to actually be more significant in response to a lost attack opportunity resulting from efforts to involve Congress or even congressional leaders in the discourse.

V. CONCLUSION

The military, diplomatic, political, legal, and moral consequences of lethal drone capability have been a central focus of discourse since drones emerged as a weapon of choice for US national security decision-makers. From a purely tactical perspective, a drone is just a weapon system, offering many beneficial attributes, most notably accuracy. Indeed, as Professor Oren Gross has noted, the efficacy of drones implicates international humanitarian law obligations related to civilian risk mitigation, and may result in obligatory use in certain situations.[73]

But should drones be considered simply as just another weapon system? Or is something inherent in this capability that distinguishes drones from other weapons? This question has been a constant focal point of debate, one laced throughout the other chapters of this book. While perhaps indistinct from a tactical or operational perspective, it does seem that drones present unique strategic implications.

The strategic impact of drones cannot be assessed in a vacuum. Instead, it is essential to consider how drone capability interacts with international and domestic law. In this context, drones are indeed different than other weapon systems. For the United States, and an increasing number of like-minded states, once it is determined that a threat is of sufficient magnitude to trigger the international legal right of self-defense, the inability or unwillingness of the 'host' state to eliminate

[73] See generally Oren Gross, 'The New Way of War: Is There a Duty to Use Drones?' (2016) 67 Florida L Rev 1.

that threat will open the door to the use of military force in self-defense.[74] Ironically, the capability provided by drones does not significantly impact this ad bellum legality assessment, which focuses primarily on the capacity of the host state to address the threat and not so on the capacity of the state to neutralize the threat.

In contrast, the intersection of 'conflict classification' law and drone capability seems to be far more significant. Ironically, unlike the jus ad bellum, this law was never intended to function as a limitation on the use of military force. Nonetheless, state practice suggests that since the concept of NIAC emerged in 1949,[75] states have been extremely conservative in their willingness to acknowledge that a non-state threat has risen to the level of NIAC.[76] The law of NIAC is clear that such acknowledgment does not impact the legal status of the non-state opposition forces.[77] However, perception is often more powerful than reality, and it seems relatively clear that states prefer to avoid the perception that the magnitude of an internal non-state threat necessitates characterization as an armed conflict. But once the notion of NIAC was extended internationally, and recognized as the so-called transnational armed conflict, the incentives and disincentives for an armed conflict characterization were flipped. In this context, a NIAC characterization not only opens the door to more robust response authority, but also involves little risk that it will be perceived as somehow validating or legitimizing the threat.

Drones, therefore, provide the ideal tool to exploit this expansion of military response authority. This advent of the transnational armed conflict theory, coupled with the capacity to conduct virtually risk-free attacks with decisive lethal force, has arguably incentivized an aggressive invocation of armed conflict. If this is true, how should international law respond? Ultimately, drones are central to significant evolutions of law and practice related to state response to non-state threats: dilution of the

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[74] See *Operational Law Handbook* (n 6) 7; Yoram Dinstein, *War Aggression and Self Defence* (5th edn, Cambridge University Press 2011) 226.

[75] See generally GWS (n 14) Article 3; GWS-Sea (n 14) Article 3; GPW (n 14) Article 3; GC (n 14) Article 3; see also *Operational Law Handbook* (n 6) 37 ('With respect to NIACs, Common Article 3 of the Geneva Conventions recognizes the prerogative of the ICRC or other impartial humanitarian organizations to offer its services to the parties to the conflict').

[76] ICRC Art 3 Commentary (n 1) paras 357–383.

[77] GWS (n 14) Article 3(4); GWS-Sea (n 14) Article 3(4); GPW (n 14) Article 3(4); GC (n 14) Article 3(4); ICRC Art 3 Commentary (n 1) paras 861–869.

restraining effect of the jus ad bellum by the tendency of states to invoke self-defense in response to non-state transnational threats, and the incentives associated with characterizing the response to such threats as an armed conflict. This evolution can only be effectively managed if it is accurately assessed.

Drones are also at the center-point of a similar evolution of constitutional war powers. The capability to employ decisive combat power with virtually no US military 'footprint' and equally minimal risk to US personnel has incentivized assertions of unilateral presidential war powers. The 'de minimis' risk, or 'no boots on the ground' theory invoked by President Obama to avoid compliance with the WPR during the extended US involvement in the military campaign against Libya may forecast an emerging trend. Drones enable presidents to employ military force that offers high strategic payoff and almost no political risk. As a result, this weapon system may dilute the post-WPR trend for more, rather than less inter-branch war powers interaction.

Drones are not going away. No nation would abandon such a highly effective combat capability, especially one that offers relatively unique strategic, political, and diplomatic advantages. But the impact of this capability, especially in an era of external non-state threats that will often push states to consider a military response, must be carefully assessed. Both international law and our Constitution create an expectation that war will be an exceptional situation, and that our nation will cross this profoundly significant threshold only when doing so is legitimately necessary. In such situations, drones will often quite appropriately be a weapon of choice. But if the weapon drives the decision to cross that threshold, what should be exceptional may become the norm.