

2013

Fixing the War Powers Resolution in the Age of Predator Drones and Cyber-Warfare

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Recommended Citation

Alexander Chanock, *Fixing the War Powers Resolution in the Age of Predator Drones and Cyber-Warfare*, 78 J. AIR L. & COM. 453 (2013)
<https://scholar.smu.edu/jalc/vol78/iss2/5>

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**FIXING THE WAR POWERS RESOLUTION IN THE AGE
OF PREDATOR DRONES AND CYBER-WARFARE**

ALEXANDER CHANOCK*

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I. INTRODUCTION

“THE MILITARY don’t start wars. Politicians start wars.”¹ Considering the constitutional framework of the United States, General William Westmoreland was correct when he uttered these famous words.² The Executive and Legislative Branches have separate constitutional powers with regard to decisions concerning war. Under Article II, Section Two of the

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¹ THE QUOTABLE POLITICIAN 40 (William B. Whitman ed., 2003).

² See *id.*

Constitution, the President is the "Commander in Chief of the Army and Navy of the United States."³ This constitutional provision provides the President with the power to control the military in times of war.⁴ Under Article I, Section Eight, Congress has the power "[t]o declare war," to "raise and support Armies," and "[t]o provide and maintain a Navy."⁵ This gives Congress the power to determine when to engage in war.⁶

From the birth of the United States to the Vietnam War, the United States had only declared war five times, the last time being during World War II.⁷ Although Congress has not "declared" war in numerous circumstances, it has often authorized war by passing resolutions.⁸ One of the most prominent examples is the Gulf of Tonkin Resolution of 1964, which authorized the President to take action to "repel any armed attack against the forces of the United States and to prevent further aggression" in southeast Asia.⁹ The Executive Branch extended and expanded the Vietnam War far beyond what Congress had initially authorized, which resulted in thousands of American soldiers losing their lives.¹⁰

In 1973, after the end of the tumultuous Vietnam War, Congress believed that the Executive Branch had abused its war power.¹¹ Congress wanted to restore its constitutionally mandated control over the war-making process and assure Americans that Congress would "prevent similar tragedies in the future."¹² As a result, Congress enacted the War Powers Resolution (WPR) with enough votes to overcome a presidential veto

³ U.S. CONST. art. II, § 2, cl. 1.

⁴ *See id.*

⁵ *Id.* art. I, § 8, cl. 11–13.

⁶ *See id.*

⁷ JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RESEARCH SERV., RL 31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 1 (2013), available at <https://www.fas.org/sgp/crs/natsec/RL31133.pdf>.

⁸ *See id.*

⁹ H.R.J. RES. 1145, 88th Cong. (1964) (enacted).

¹⁰ *See* Edwin B. Firmage, *The War Power of Congress and Revision of the War Powers Resolution*, 17 J. CONTEMP. L. 237, 248 (1991).

¹¹ *See id.* at 248–49.

¹² Robert F. Turner, *The War Powers Resolution: An Unnecessary, Unconstitutional Source of "Friendly Fire" in the War Against International Terrorism?*, FEDERALIST SOC'Y FOR L. & PUB. POL'Y STUD. (Feb. 15, 2005), <http://www.fed-soc.org/publications/detail/the-war-powers-resolution-an-unnecessary-unconstitutional-source-of-friendly-fire-in-the-war-against-international-terrorism>.

by Richard Nixon.¹³ As this article points out, the WPR—and more specifically, the Hostilities Provision of the WPR (Hostilities Provision)—is imperfect and flawed. The intention of Congress did not come to fruition, and it can be argued that the Executive Branch has even more power than before the enactment of the WPR. Although it was almost impossible to predict at the time, the WPR and the Hostilities Provision were not adequately designed to address the future of warfare. The emergence of new military tactics such as Predator drones and cyber-warfare has exposed the weaknesses of the WPR¹⁴ and illustrates that the United States needs to update this law. This article focuses on the unique and complex issues posed by drones and cyber-warfare, and proposes possible ways to update the WPR to properly accommodate these new warfare strategies. However, the proposed prescriptions for the WPR and the Hostilities Provision regarding drone warfare and cyber-warfare are not the same because each tactic poses its own unique problems and requires a different approach to the solution.

II. PROVISIONS OF THE WAR POWERS RESOLUTION

The WPR is divided into nine sections, the first five of which are relevant to this discussion.¹⁵ The first section declares that the President can only “introduce” the U.S. military “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.”¹⁶ The second section requires the President to consult with Congress “in every possible instance” before “introducing the [U.S. military] into hostilities or into situations where [hostilities are] imminent,” and to continue such consultations as long as U.S. Armed Forces remain in “such situations.”¹⁷ The third section sets forth the reporting requirements for the Executive Branch.¹⁸ The fourth section, which will be referred to as the Hostilities Provision, concerns congressional actions and procedures.¹⁹ The most important part of the Hostilities Provision is

¹³ Firmage, *supra* note 10, at 249.

¹⁴ See Judah A. Druck, *Droning On: The War Powers Resolution and the Numbing Effect of Technology-Driven Warfare*, 98 CORNELL L. REV. 209, 209–10 (2012).

¹⁵ 50 U.S.C. §§ 1541–1548 (2006).

¹⁶ *Id.* § 1541.

¹⁷ *Id.* § 1542.

¹⁸ *Id.* § 1543.

¹⁹ See *id.* § 1544.

the sixty-day time limit, which states that once hostilities begin, Congress has sixty days to approve continued military action unless Congress "is physically unable to meet as a result of an armed attack."²⁰ If this time passes with no congressional authorization, the President must remove the forces.²¹ The fifth part is the definition section.²²

The Hostilities Provision has created ambiguity and serious problems for the WPR because it is very difficult to define. Congress did not espouse a clear definition of what constitutes "hostilities" under the WPR,²³ but the history surrounding it provides some insight. In drafting the WPR, the House Subcommittee on National Security Policy and Scientific Developments inserted the word "hostilities" for "armed conflict" so that the resolution would be broader in scope.²⁴ This change was meant to "encompass[] a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict."²⁵ After the WPR was passed, the House Committee on Foreign Affairs further tried to clarify "hostilities" by explicitly stating that it includes combat and any situation "where there is a clear and present danger of armed conflict."²⁶ However, history has shown that this definition has not cleared up the Hostilities Provision's ambiguity problem.²⁷ In light of the ambiguity, many Presidents have sought to avoid the Hostilities Provision's sixty-day clock by asserting that the use of military forces did not involve hostilities and thus the sixty-day clock was not triggered.²⁸

One of the Hostilities Provision's key functions is defining when the sixty-day clock is triggered.²⁹ However, this Provision has never been directly utilized to stop a military engagement.³⁰

²⁰ *See id.*

²¹ *Id.*

²² *Id.* § 1545.

²³ *See id.* § 1541(a).

²⁴ RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL 32267, THE WAR POWERS RESOLUTION: AFTER THIRTY YEARS (2004), available at <http://www.fas.org/man/crs/RL32267.html>.

²⁵ *Id.*

²⁶ H.R. REP. NO. 93-287, at 2351 (1973).

²⁷ Louis Fisher & David Gray Adler, *The War Powers Resolution: Time to Say Goodbye*, 113 POL. SCI. Q. 1, 3 (1998), available at <http://www.loufisher.org/docs/wpr/430.pdf>.

²⁸ *See, e.g.*, GRIMMETT, *supra* note 24.

²⁹ *See* 50 U.S.C. § 1544(b) (2006).

³⁰ *Realism, Liberalism, and the War Powers Resolution*, 102 HARV. L. REV. 637, 638 (1989).

Despite this, no operation before the Kosovo conflict exceeded the sixty-day period without a grant of express congressional authorization.³¹ The Hostilities Provision's ineffectiveness has also harmed the reporting requirements of the second and third sections. Only when the President reports under § 1543(a)(1) that U.S. Armed Forces have been introduced into hostilities or situations where hostilities are imminent does the clock begin.³² As a result, although there have been over a hundred cases where the President reported to Congress concerning his actions, many Presidents have refused to report military engagements to Congress under § 1543(a)(1) due to fears of triggering the clock and limiting the potential duration of a campaign.³³ Only President Ford reported to Congress under § 1543(a)(1) during the capture of the *U.S.S. Mayaguez*, but he did so after the hostilities had ceased.³⁴ This deficiency affords the President more time to take unilateral action because it is harder for the sixty-day clock to be triggered under other provisions.³⁵

A. JUDICIAL BRANCH INTERPRETATION OF THE HOSTILITIES PROVISION

The term "hostilities" has not been clearly defined in large part because of the reluctance of the Judicial Branch to grapple with the question. In *Campbell v. Clinton*, the Court of Appeals for the District of Columbia dismissed Congressman Tom Campbell's claim that President Clinton violated the WPR by not removing military forces from hostilities absent congressional authorization.³⁶ The court reasoned that there were other lawful means that Congress could "use to stop a President's war making" besides resorting to the Judicial Branch.³⁷ Also, in *Crockett v. Reagan*, the court stated that it would be inappropriate for the court to decide when the hostilities (and therefore the sixty-day clock) began.³⁸ The court did mention that there could be clear-cut cases where it could determine that hostilities had begun, such as the Vietnam War, but the court gave no standard

³¹ Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149, 1176 (2001).

³² 50 U.S.C. § 1544.

³³ See GRIMMETT, *supra* note 24.

³⁴ Fisher & Adler, *supra* note 27, at 11.

³⁵ See *id.*

³⁶ *Campbell v. Clinton*, 203 F.3d 19, 24 (D.C. Cir. 2000).

³⁷ *Id.* at 23.

³⁸ *Crockett v. Reagan*, 558 F. Supp. 893, 898 (D.D.C. 1982).

for this determination.³⁹ Most recently, the Judicial Branch dismissed a claim brought by ten members of Congress that President Obama had violated the WPR with regard to the Libyan Civil War,⁴⁰ which will be discussed subsequently. The District Court for the District of Columbia concluded that the plaintiffs failed to demonstrate they had standing—either in their capacity as members of the House of Representatives or as taxpayers.⁴¹

It should also be noted that this reluctance on the part of the Judicial Branch to adjudicate matters of presidential authority to use military force is not confined to issues relating to the WPR. Traditionally, the Judicial Branch has mostly refrained from interfering with the Executive Branch on matters of foreign policy. Thus, it is very unlikely that the judiciary will step in and solve the Hostilities Provision's ambiguity problem except in clear-cut cases of full-blown war.⁴² As a result, Congress is forced to develop its own means of enforcing the Hostilities Provision if it wants to curb executive power.

B. COMPREHENDING THE HOSTILITIES PROVISION THROUGH HISTORICAL PRACTICE

Since the enactment of the WPR, the ambiguous Hostilities Provision has caused confusion and problems for Congress in enforcing the WPR as originally intended.⁴³ "While Congress is not bound to employ a definition of hostilities construed from prior military involvements," failing to adhere to precedent "would discourage the President and Congress from working together" and would also "encourage future redefinitions of hostilities motivated by political considerations at the expense of legitimate national security concerns."⁴⁴ From the start, the Hostilities Provision has not been absolute. This is exemplified by the Ford Administration's statement that periodic exchanges of fire with hostile forces were not enough to invoke hostilities.⁴⁵

³⁹ *Id.* at 898–99; *see also* *Lowry v. Reagan*, 676 F. Supp. 333, 337 (D.D.C. 1987) (holding that the court cannot determine whether the U.S. Armed Forces were "engaged in hostilities or in situations where imminent involvement in hostilities is clearly indicated by the circumstances") (internal quotations omitted).

⁴⁰ *Kucinich v. Obama*, 821 F. Supp. 2d 110, 125 (D.D.C. 2011).

⁴¹ *Id.*

⁴² *Fisher & Adler*, *supra* note 27, at 12.

⁴³ *Id.* at 1.

⁴⁴ Deanna M. Tuley, *The War Powers Resolution: The Questionable Solution*, 25 A.F. L. REV. 244, 261 (1985).

⁴⁵ COMM. ON FOREIGN AFFAIRS, 97TH CONG., 2D SESS., THE WAR POWERS RESOLUTION 202 (Comm. Print 1982).

President Reagan's decision to send troops to Lebanon further demonstrates the Hostilities Provision's ambiguity.⁴⁶

On August 10, 1982, American troops entered Lebanon for peacekeeping purposes during the process of removing the Palestinian Liberation Operation (PLO).⁴⁷ The American troops were ordered to not engage the enemy, but they could act in self-defense.⁴⁸ For about a year, there were periodic engagements that included U.S. naval vessels firing at the PLO and Marines engaging in small firefights.⁴⁹ However, these hostile encounters did not lead to the invocation of the Hostilities Provision until September 27, 1983, when Congress ultimately invoked the WPR and stated that the rationale was the death of four Marines and the wounding of thirty-eight others.⁵⁰ As such, it is evident from this conflict and the Ford Administration's position that the Hostilities Provision will trigger the sixty-day clock when the hostile engagements are not periodic and the United States has suffered casualties.⁵¹

As for the imminence standard of the Hostilities Provision, the First Persian Gulf War provides some insight. On August 7, 1990, President George H.W. Bush ordered American troops into Saudi Arabia.⁵² President Bush stated that the United States would not engage in hostilities, but would serve only to defend Saudi Arabia from Iraqi aggression.⁵³ Despite President Bush's assertion that U.S. troops would not engage in hostilities, Bush stated before the first report that "Iraq has massed an enormous war machine on the Saudi border capable of initiating hostilities with little or no additional preparation."⁵⁴ President Bush also stated on September 16, 1990, that the United States and Iraq were "'on the brink of war.'"⁵⁵ As a result of these statements,

⁴⁶ See Jack Goldsmith, *A Way out of the Libya Conundrum: The Lebanon and Somalia Analogies*, LAWFARE (June 21, 2011), <http://www.lawfareblog.com/2011/06/a-way-out-of-the-libya-conundrum-the-lebanon-and-somalia-analogies/>.

⁴⁷ Tuley, *supra* note 44, at 258.

⁴⁸ *Id.*

⁴⁹ *Id.* at 259–60.

⁵⁰ *Id.* at 259.

⁵¹ *Id.* at 256–57.

⁵² George Steven Swan, *Presidential Undeclared Warmaking and Functionalist Theory: Dellums v. Bush and Operations Desert Shield and Desert Storm*, 22 CAL. W. INT'L L.J. 75, 80 (1991/1992).

⁵³ *Id.*

⁵⁴ George H.W. Bush, *Address on Iraq's Invasion of Kuwait*, MILLER CTR. (Aug. 8, 1990), <http://millercenter.org/president/speeches/detail/5529>.

⁵⁵ Michael J. Glennon, *The Gulf War and the Constitution*, 70 FOREIGN AFF. 84, 100 (1991).

the Bush Administration “cast serious doubt on its claim that troops were not ‘in imminent danger of hostilities.’”⁵⁶ However, despite this confusion, Congress never specified that the deployment satisfied the imminence standard of the Hostilities Provision, and thus, the sixty-day clock was not enforced.⁵⁷ If this conflict is taken as a precedent for the imminence standard, then it is clear that imminence requires something more than a massive military buildup on the border of the enemy’s country and the President’s statement that the United States is on the brink of war.⁵⁸ Although far from clear, the imminence standard likely pertains to direct, immediate, and inevitable risk of American casualties.

When the conflict intensified in January 1991, Congress finally gave statutory authorization for U.S. military intervention.⁵⁹ It is worth noting that prior to the Authorization for Use of Military Force Against Terrorists (AUMF), the Persian Gulf War was the only instance after the enactment of the WPR where U.S. military engagements were “preceded by express statutory authorization.”⁶⁰ The Persian Gulf War was an overwhelming military success for the United States,⁶¹ but it did not resolve the ambiguity of what constitutes “hostilities” and “imminent hostilities” under the WPR.

C. THE LIBYAN CIVIL WAR AND THE FUTURE OF AMERICAN WARFARE

The recent Libyan Civil War was another military success for the United States and its allies.⁶² However, President Obama’s interpretation of the Hostilities Provision illustrates that this law and the WPR have become even less effective.⁶³ Many of the military strategic decisions contemplated during this war do not fit

⁵⁶ Eileen Burgin, *Rethinking the Role of the War Powers Resolution: Congress and the Persian Gulf*, 21 J. LEGIS. 23, 33 (1995).

⁵⁷ *Id.* at 34.

⁵⁸ *See id.* at 33–34.

⁵⁹ H.R.J. RES. 77, 102d Cong. (1991) (enacted).

⁶⁰ Corn, *supra* note 31, at 1175.

⁶¹ *See* GRIMMETT, *supra* note 24.

⁶² *See* Owen Jones, *The War in Libya Was Seen as a Success, Now Here We Are Engaging with the Blowback in Mali*, INDEP. (Jan. 13, 2013), <http://www.independent.co.uk/voices/comment/the-war-in-Libya-was-seen-as-a-success-now-here-we-are-engaging-with-the-blowback-in-Mali-8449588.html>.

⁶³ Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES (June 15, 2011), http://www.nytimes.com/2011/06/16/us/politics/16powers.html?pagewanted=all&_r=0.

easily within the confines of the WPR.⁶⁴ As such, this war provides an excellent example of the need to overhaul the WPR to effectively accommodate the changing nature of warfare.

On March 21, 2011, the President submitted a report to Congress that he had directed “U.S. military forces [to] commence[] operations to assist an international effort authorized by the United Nations (U.N.) Security Council . . . to prevent a humanitarian catastrophe and address the threat posed to international peace and security by the crisis in Libya”; the President claimed that his actions were consistent with the WPR.⁶⁵ Following this declaration, the U.S. military enforced a no-fly zone around Libya, used Predator drones to conduct bombing missions, and provided assistance to the rebel fighters.⁶⁶ However, pursuant to the President’s report, the U.S. military did not deploy ground troops.⁶⁷

Although the United States’ intervention was limited, critics of the Obama Administration contend that the war was illegal because the Hostilities Provision had been implicated and Congress did not explicitly authorize the use of force before the end of the sixty-day clock.⁶⁸ Harold Koh, Legal Adviser to the U.S. Department of State, responded to such criticism by stating that the Administration had complied with the WPR because the government “act[ed] transparently and in close consultation with Congress for a brief period[,] with no casualties or ground troops.”⁶⁹ In the executive report to the Speaker of the House of Representatives, the Administration also argued that the “military operations [were] distinct from the kind of ‘hostilities’ contemplated by the Resolution’s [sixty-day] termination

⁶⁴ See *id.*

⁶⁵ *Letter from the President Regarding the Commencement of Operations in Libya*, WHITEHOUSE.GOV (Mar. 21, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>.

⁶⁶ Martha Raddotz & Kirit Radia, *Pentagon Confirms First Predator Drone Strike in Libya*, ABC NEWS (Apr. 23, 2011), <http://abcnews.com/international/pentagon-confirms-predator-drone-strike-libya/story?id=13442570>.

⁶⁷ *Letter from the President Regarding the Commencement of Operations in Libya*, *supra* note 65.

⁶⁸ Jim Geraghty, ‘1, 2, 3, 4 We Don’t Want Your Illegal Kinetic Military Action!’, NAT’L REV. ONLINE (May 19, 2011, 6:57 AM), <http://www.nationalreview.com/campaign-spot/267624/1-2-3-4-we-dont-want-your-illegal-kinetic-military-action>.

⁶⁹ See *Testimony by Legal Adviser Harold Hongju Koh, U.S. Department of State on Libya and War Powers: Hearing Before the Senate Foreign Relations Committee*, 111th Cong. 12, 14 (June 28, 2011).

provision.”⁷⁰ The Administration further argued that “U.S. forces [played] a constrained and supporting role” and that the “U.S. operations [did] not involve sustained fighting or active exchanges of fire with hostile forces, nor [did] they involve . . . U.S. casualties or a serious threat thereof.”⁷¹ This final contention that U.S. involvement did not involve casualties illuminates a pressing and complex legal issue regarding Predator drones. During the Libya campaign, the United States conducted 146 drone strikes;⁷² however, since Predator drones are robotic and involve no risk of casualties for American soldiers, their use sets a dangerous precedent of unchecked Executive Branch power—power used to conduct war-like campaigns without authorization from Congress.⁷³

Another key issue raised by the Libya conflict is the use of cyber-warfare. Although the United States ultimately decided against conducting cyber-attacks on the Libyan defense infrastructure, the Obama Administration “intensely debated” whether to execute this new type of warfare.⁷⁴ The Administration balked due to fears that the action might set a dangerous precedent for other nations and because they were unable to quickly resolve the issue whether the President had the power to proceed with such an attack without informing Congress.⁷⁵ The intense discussion of the issue, however, illustrates that cyber-warfare is becoming a vital instrument of the U.S. military.⁷⁶ Similar to the Predator drone problem, the use of cyber-warfare poses difficult and complex questions regarding the reach of the WPR and the potential for an unchecked Executive Branch.

⁷⁰ DEP’T OF DEF. & DEP’T OF STATE, UNITED STATES ACTIVITIES IN LIBYA 25 (2011), available at <http://s3.documentcloud.org/documents/204673/united-states-activities-in-libya-6-15-11.pdf>.

⁷¹ *Id.*

⁷² Peter W. Singer, *Do Drones Undermine Democracy?*, N.Y. TIMES, Jan. 22, 2012, at SR5, available at http://www.nytimes.com/2012/01/22/opinion/sunday/do-drones-undermine-democracy.html?_r=1&pagewanted=all.

⁷³ *See id.*

⁷⁴ Eric Schmitt & Thom Shanker, *U.S. Debated Cyberwarfare in Attack Plan on Libya*, N.Y. TIMES (Oct. 17, 2011), <http://www.nytimes.com/2011/10/18/world/africa/cyber-warfare-against-libya-was-debated-by-us.html>.

⁷⁵ *Id.*

⁷⁶ Scott Shane & Eric Schmitt, *C.I.A. Deaths Prompt Surge in U.S. Drone Strikes*, N.Y. TIMES (Jan. 23, 2010), http://www.nytimes.com/2010/01/23/world/asia/23drone.html?_r=0.

III. INTRODUCTION TO PREDATOR DRONES

The use of drone warfare by the U.S. military has increased tremendously in recent years.⁷⁷ Drone strikes began early on in the Afghanistan War when President George W. Bush “initiated cross-border incursions into Pakistan.”⁷⁸ Since then, the use of drones has grown exponentially.⁷⁹ “[I]n 2009, the U.S. Army reported a 400% increase” in use over the last ten years.⁸⁰ The increase in drone strikes does not appear to be on the decline, and this military tactic will very likely become more popular in the future.⁸¹ Since the military and the CIA operate the drone program, the Executive Branch has control over it.⁸² It is also worth noting that there are many contentious legal issues related to drone strikes;⁸³ however, this article will only focus on the issues that directly relate to separation of powers and the Hostilities Provision.

Under the Obama Administration, the drone program has been used all over the world to initiate hostilities.⁸⁴ Under the guise of the AUMF, President Obama has ordered strikes in Yemen, Pakistan, and Somalia.⁸⁵ The effectiveness of these strikes and whether the AUMF actually applies have been hotly contested.⁸⁶ The Bureau of Investigative Journalism claims that as of August 2012, there have been 3,247 deaths, including 852 civilian deaths, attributed to drone strikes.⁸⁷ The Obama Administration claims that drone strikes produce very few civilian

⁷⁷ See *id.*

⁷⁸ Kurt Larson & Zachary Malamud, *The United States, Pakistan, the Law of War and the Legality of Drone Attacks*, 10 J. INT’L BUS. & L. 1, 9 (2011).

⁷⁹ See *id.*

⁸⁰ Laurie R. Blank, *After “Top Gun”: How Drone Strikes Impact the Law of War*, 33 U. PA. J. INT’L L. 675, 675 (2012).

⁸¹ See Shane & Schmitt, *supra* note 76.

⁸² See Tabassum Zakaria & Mark Hosenball, *Pentagon to Take Over Some CIA Drone Operations: Sources*, REUTERS (May 20, 2013), <http://www.reuters.com/article/2013/05/21/us-usa-drones-idusBRE94k03720130521>.

⁸³ See generally Samuel Issacharoff & Richard H. Pildes, *Drones and the Dilemma of Modern Warfare* (N.Y. Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 13-34, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2268596.

⁸⁴ See Blank, *supra* note 80, at 675–76.

⁸⁵ See John Odle, Comment, *Targeted Killings in Yemen and Somalia: Can the United States Target Low-Level Terrorists?*, 27 EMORY INT’L L. REV. 603, 616 (2013).

⁸⁶ See *id.* at 629.

⁸⁷ Simon Rogers, *US Drone Strikes Listed and Detailed in Pakistan, Somalia and Yemen*, GUARDIAN (Aug. 2, 2012), <http://www.theguardian.com/news/datablog/2012/aug/02/us-drone-strikes-data>.

deaths,⁸⁸ however, a joint study by Stanford Law School and New York University School of Law argues that the Administration has grossly misrepresented the civilian casualty numbers and only 2% of casualties are “‘high-level’ targets.”⁸⁹ Although it is virtually impossible to determine which of these accounts is accurate, it seems likely that the government has not adequately reported the casualty figures because the Administration wants to downplay any potential controversy for diplomatic reasons; but the extent of this possible downplay is also difficult to ascertain. Despite the uncertain casualty statistics, it is worth noting that drone strikes are more precise and can minimize civilian casualties better than long-range artillery strikes or high aerial bombings.⁹⁰

A vital aspect of the drone program is that it does not directly lead to American casualties.⁹¹ The drone pilots work in the United States, far away from any enemy return-fire.⁹² However, drone strikes alienate the local civilian population,⁹³ and there is mounting evidence that drone strikes are related to retaliatory attacks on America and its allies.⁹⁴ One prominent example of such retaliation is the would-be Times Square bomber, who “was drawn into terrorism by” drone strikes in Pakistan.⁹⁵ Similarly, a Yemen strike in May 2010 “provoked a revenge attack on an oil pipeline by local tribesmen and produced a propaganda bonanza for Al Qaeda in the Arabian Peninsula.”⁹⁶ It is difficult to fully comprehend the degree of influence that these drone strikes have on terrorist recruitment and whether these attacks or similar attacks would have occurred absent the drone program. However, they illustrate that the risk of American casualties is not eliminated just because Americans are not directly in harm’s way during these strikes.

⁸⁸ Odle, *supra* note 85, at 652.

⁸⁹ CNN Wire Staff, *Drone Strikes Kill, Maim and Traumatize Too Many Citizens, U.S. Study Says*, CNN.COM (Sept. 25, 2012), <http://www.cnn.com/2012/09/25/world/asia/pakistan-us-drone-strikes/index.html>.

⁹⁰ Cheri Kramer, *The Legality of Targeted Drone Attacks as U.S. Policy*, 9 SANTA CLARA J. INT’L L. 375, 388 (2011).

⁹¹ *See id.*

⁹² *Id.*

⁹³ *Id.* at 389.

⁹⁴ *See* Singer, *supra* note 72.

⁹⁵ *Id.*

⁹⁶ Scott Shane et al., *Secret Assault on Terrorism Widens on Two Continents*, N.Y. TIMES (Aug. 15, 2010), <http://www.nytimes.com/2010/08/15/world/15shadow-war.html>.

A. PROPOSED SOLUTIONS TO THE WPR FOR INCORPORATING
DRONE WARFARE

The unique, virtual impossibility of direct American casualties raises serious issues about the WPR's relevance and Congress's ability to authorize such attacks.⁹⁷ Given the history of the WPR, it is highly unlikely that the President will report drone warfare under § 1543(a)(1) and limit his decision-making power.⁹⁸ Historical practice leads to the conclusion that the Hostilities Provision will only be invoked by an act of Congress or automatically when American troops are killed in combat.⁹⁹ However, since Congress rarely invokes the Hostilities Provision and American troops do not face the risk of death under a drone strike policy, the President has extremely broad authority to conduct drone warfare campaigns with few to no limitations imposed by Congress.¹⁰⁰

A recent example that highlights these concerns is the crash of a U.S. drone in eastern Iran in late 2011.¹⁰¹ The U.S. military claimed that the drone was not in Iranian airspace and that it had malfunctioned, while the Iranians claimed that the drone was shot down in Iranian airspace.¹⁰² Although it is difficult to ascertain which story is correct, the downed drone illustrates a dangerous proposition: the Executive Branch can potentially send a drone into another country without authorization from Congress and still not face the repercussions of the Hostilities Provision.¹⁰³ If the Iranian story is correct, the Hostilities Provision still would not have been invoked even though a U.S. military aircraft entered another country because, although the drone was shot down, there were no American casualties.¹⁰⁴ Even the imminence standard of the Hostilities Provision¹⁰⁵ could not be invoked because there was never any risk of Ameri-

⁹⁷ See *id.*

⁹⁸ Charlie Savage, *Clock Ticking on War Powers Resolution*, N.Y. TIMES (Apr. 1, 2011), <http://thecaucus.blogs.nytimes.com/2011/04/01/clock-ticking-on-War-Powers-Resolution>.

⁹⁹ See *id.*

¹⁰⁰ Patrick D. Robbins, Comment, *The War Powers Resolution After Fifteen Years: A Reassessment*, 38 AM. U. L. REV. 141, 175 (1988).

¹⁰¹ CNN Wire Staff, *Unclear Whether Iran Shot Down Drone, a U.S. Official Says*, CNN (Dec. 5, 2011), <http://www.cnn.com/2011/12/04/world/meast/iran-drone/index.html>.

¹⁰² *Id.*

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ See 50 U.S.C. § 1542 (2006).

can casualties. If the Hostilities Provision cannot be automatically invoked, a dangerous situation could exist where the Executive Branch secretly and continually sends drones into Iran over a period of sixty days, creating tensions that could easily escalate into war. Yet, in this hypothetical situation, Congress would have had no involvement in the decisions; this highlights the ineffectiveness of the WPR in the drone warfare context.

Because the capabilities of Predator drones pose serious problems to the WPR, Congress and the Executive Branch need to work together to amend the WPR to appropriately accommodate this new military strategy. If the WPR is not adequately amended, its original intention of involving Congress in war-making decisions will become moot. One possible solution is to explicitly adjust the Hostilities Provision to address drone strikes. Congress can do this in a number of ways. First, Congress can amend the Hostilities Provision to state that drones are the equivalent of U.S. forces for purposes of the provision. This amendment would solve the casualty dilemma for drones because, under this framework, Congress would consider a shot-down drone in the same manner as a killed U.S. soldier.

Another potential solution is for Congress to set a historical precedent that implies that hostilities necessarily include drone strikes. For example, in the context of the Libyan Civil War, Congress could have passed a resolution stating that the Hostilities Provision had been implicated and the sixty-day clock had therefore started because of drone warfare. Passing such a resolution would alert future Presidents that using drones would force Congress to start the sixty-day clock. Although it is similar in effect to amending the WPR, this solution would likely be easier to implement because Congress would not have to agree on the specifics of amending the Hostilities Provision. Also, by setting a historical precedent, there would be a framework within which Congress could work. This framework would not solve all the ambiguities of the Hostilities Provision, but it would give Congress more avenues to invoke the Provision when it seems clear that the Executive Branch's deployment of drones has overstepped its bounds. This potential solution would also make it clear that using drones to initiate a conflict without congressional approval will not be tolerated.

One of the counterarguments to these proposed solutions is that the WPR does not need to be amended to incorporate solu-

tions to the problems associated with drones.¹⁰⁶ To respond to criticism that there is no congressional oversight of the drone program, Senator Feinstein wrote an op-ed article stating that the Senate Intelligence Committee devotes a significant amount of time and attention to the program.¹⁰⁷ She stated that they “receive notification with key details shortly after every strike,” and the Committee “hold[s] regular briefings and hearings on these operations.”¹⁰⁸ Senator Feinstein’s comments illustrate the counterargument that Congress is involved in the decision-making process¹⁰⁹ and that the WPR’s original intention of involving Congress in war-making decisions has been satisfied, albeit in a different manner than originally intended,¹¹⁰ but in a manner that is strategically practical in contemporary military affairs.¹¹¹ Therefore, further changes are unnecessary.¹¹²

This counterargument is insufficient for a couple of reasons. One reason is the Legislative Branch as a whole does not participate in the decision-making process.¹¹³ Only select members of Congress have access to the data.¹¹⁴ Also, congressional involvement is *ex poste* and not *ex ante*.¹¹⁵ According to Senator Feinstein, the Senate Intelligence Committee oversees the program and its effectiveness, but it is not involved in the decision-making process.¹¹⁶ Granted, after reviewing the program, the Committee could try to institute changes through the legislative process. However, this type of limited, *ex poste* oversight does little to quell the fears that the Executive Branch can use drones to avoid invoking the Hostilities Provision.

Another potential solution is for Congress to take the position that indirect U.S. casualties are still within the framework of the

¹⁰⁶ Matthew Fleischman, Note, *A Functional Distribution of War Powers*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 137, 137–38 (2010).

¹⁰⁷ Dianne Feinstein, *Letters: Sen. Feinstein on Drone Strikes*, L.A. TIMES (May 17, 2012), <http://articles.latimes.com/2012/may/17/opinion/la-le-0517-thursday-feinstein-drones-20120517>.

¹⁰⁸ *Id.*

¹⁰⁹ *See id.*

¹¹⁰ *See* Firmage, *supra* note 10, at 249.

¹¹¹ *See* Sara Sorcher, *National Security Insiders: It’s Possible for Congress to Oversee Drone Program*, NATIONALJOURNAL.COM (May 30, 2013), <http://www.nationaljournal.com/insiders-polls/nationalsecurity/national-security-insiders-it-s-possible-for-congress-to-oversee-drone-program-20130311>.

¹¹² *See id.*

¹¹³ *See* Feinstein, *supra* note 107.

¹¹⁴ *See id.*

¹¹⁵ *See id.*

¹¹⁶ *Id.*

Hostilities Provision. This position would allow Congress to deem drone strikes as hostilities because of the increased violence that results from the strike. If Congress sets this precedent, it would alert the current and future Presidents that drone campaigns, which lead to aggressive acts against Americans, will not be considered exempt from the WPR.

This proposal is weaker than amending the WPR or setting a historical precedent because incorporating indirect U.S. casualties into the Hostilities Provision will only cause more confusion and ambiguity. It is often very difficult to ascertain the relationship between a retaliatory attack and a drone strike.¹¹⁷ As such, the best solution for fixing the WPR in the context of drone warfare is to either amend the Hostilities Provision or set a historical precedent that clearly establishes limitations to the Executive Branch's power to conduct drone strikes.

IV. INTRODUCTION TO CYBER-WARFARE

Another warfare tactic of the future that poses serious problems for the WPR is cyber-warfare. As mentioned above, President Obama opted not to use cyber-warfare in the Libyan Civil War, but his intense deliberation on the issue demonstrates the emergence of this new strategy.¹¹⁸ Today, the United States is one of the world leaders in cyber-warfare; however, its defensive capabilities against cyber-attacks have been questioned.¹¹⁹ Admiral Mike McConnell, former Director of National Intelligence, stated in 2009 that the United States is not adequately prepared for cyber-warfare.¹²⁰ As a result, the United States and many other state and non-state actors are actively trying to increase their technological capabilities because there is a real possibility that many of the wars of the future will be fought not on the battlefield but in the arena of cyber-space.¹²¹

Cyber-warfare is a relatively new tactic, but in the last five years, it has become an increasingly popular one. Russia's invasion of Georgia in 2008 provides the most prominent example

¹¹⁷ See Singer, *supra* note 72.

¹¹⁸ See Schmitt & Shanker, *supra* note 74.

¹¹⁹ *Cyber War: Sabotaging the System*, CBS News (June 15, 2010), http://www.cbsnews.com/8301-18560_162-5555565.html.

¹²⁰ See *id.*

¹²¹ *Id.*

of a state actor using cyber-warfare.¹²² The Russians used cyber-warfare to shut down many of Georgia's defense capabilities right before the military invasion began.¹²³ This was the first publicly known time that a state used cyber-warfare in an armed conflict with another state.¹²⁴ The United States has also implemented cyber-tactics, but not yet in an armed conflict. Beginning during the George W. Bush Administration and accelerating during the Obama Administration, the United States has been targeting Iran's nuclear facilities with viruses.¹²⁵ The most famous cyber-attack against Iran was the virus, Stuxnet.¹²⁶ It must be noted that it is not altogether clear whether the United States was responsible for the virus because it has not claimed responsibility.¹²⁷ However, there is widespread belief that the United States at least played a role in Stuxnet's creation.¹²⁸ This virus targeted nuclear facilities and caused centrifuges "to spin out of control, ultimately destroying [them]" and setting back the Iranian nuclear program.¹²⁹ This well-known example illustrates the capabilities of cyber-warfare because cyber-technologies have now advanced to a point where they can cause actual destruction through cyberspace.

A. DEFINING CYBER-WARFARE AND ITS EFFECTS

Cyber-warfare has been defined in multiple ways. Major Arie Schaap of the U.S. Air Force defines "cyberwarfare operations" as the "'use of network-based capabilities of one state to disrupt, deny, degrade, manipulate, or destroy information resident in computers and computer networks, or the computers and net-

¹²² Jon Swaine, *Georgia: Russia "Conducting Cyber War"*, TELEGRAPH (Aug. 11, 2008), <http://www.telegraph.co.uk/news/worldnews/europe/georgia/2539157/Georgia-Russia-conducting-cyber-war.html>.

¹²³ See *id.*

¹²⁴ Tom Gjelten, *Cyberattack: U.S. Unready for Future Face of War*, NPR (Apr. 7, 2010), <http://www.npr.org/templates/story/story.php?storyId=125598665>.

¹²⁵ David E. Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES (June 1, 2010), <http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html>.

¹²⁶ See *id.*

¹²⁷ Lee Ferran, *Edward Snowden: U.S., Israel "Co-Wrote" Cyber Super Weapon Stuxnet*, ABC NEWS (July 9, 2013), <http://abcnews.go.com/blogs/headlines/2013/07/edward-snowden-u-s-israel-co-wrote-cyber-super-weapon-stuxnet/>.

¹²⁸ See *id.*

¹²⁹ David Goldman, *Super-Virus Flame Raises the Cyberwar Stakes*, CNN (May 30, 2012), <http://money.cnn.com/2012/05/30/technology/flame-virus/index.htm>.

works themselves, of another state.’”¹³⁰ The California Law Review defines cyber-warfare as having: (1) an objective to undermine the function of a computer network; (2) a “political or national security purpose”; and (3) “[e]ffects equivalent to those of a conventional armed attack,” i.e. physical destruction, which is sometimes called kinetic damage.¹³¹ One important thing to note about this definition is how cyber-warfare differs from cyber-attacks: the latter consists of the first two elements, but no physical damage occurs.¹³² This one difference has substantial implications for determining whether the Hostilities Provision has been invoked.

The damage that cyber-warfare can potentially cause is substantial.¹³³ As illustrated in the Stuxnet example, cyber-warfare can directly cause physical damage. Although there were no casualties related to the Stuxnet virus,¹³⁴ the physical damage resulting from cyber-warfare can harm unlucky people who are near the targeted destruction. However, the more significant concern is the indirect effect of cyber-warfare.¹³⁵ As demonstrated in the Russia–Georgia war, cyber-warfare can knock out defensive capabilities of the opposing military, making it much easier to inflict more damage via traditional military means.¹³⁶ However, the greatest indirect concern is the effect that cyber-warfare will have on the civilian population of an attacked country.¹³⁷ Since cyber-warfare is often aimed at crippling the infrastructure of a state, cyber-attacks will likely knock out the power grid.¹³⁸ It is conceivable that power will be lost for weeks or even months.¹³⁹ Civilian deaths will multiply, first in hospitals and nursing homes, and then in cities and on the road as civil order

¹³⁰ Jay P. Kesan & Carol M. Hayes, *Mitigative Counterstriking: Self-Defense and Deterrence in Cyberspace*, 25 HARV. J.L. & TECH. 415, 452 (2012).

¹³¹ Oona A. Hathaway et al., *The Law of Cyber-Attack*, 100 CAL. L. REV. 817, 833–41 (2012) (internal quotation marks omitted).

¹³² *Id.*

¹³³ See Steward A. Baker & Charles J. Dunlap Jr., *What Is the Role of Lawyers in Cyberwarfare?*, A.B.A. J. (May 1, 2012), http://abajournal.com/magazine/article/what_is_the_role_of_lawyers_in_cyberwarfare.

¹³⁴ James A. Lewis, *In Defense of Stuxnet*, 4 MIL. STRATEGIC AFF. 65, 71 (2012), available at <http://i-hls.com/2013/04/in-defense-of-stuxnet/>.

¹³⁵ See Kesan & Hayes, *supra* note 130, at 445.

¹³⁶ See *id.* at 446.

¹³⁷ See Baker & Dunlap, *supra* note 133.

¹³⁸ *Id.*

¹³⁹ *Id.*

breaks down.¹⁴⁰ These risks will only increase as the world becomes more reliant on technology for safety needs.¹⁴¹

B. PROPOSED SOLUTIONS TO THE WPR FOR INCORPORATING
CYBER-WARFARE

Cyber-warfare poses a number of difficult and complex legal issues relating to separation of powers and the WPR. Congress has been largely silent on cyber-warfare matters, and this silence could be seen as giving the President full discretion under the analysis articulated by Jackson's concurrence in *Youngstown v. Sawyer*.¹⁴² Because Congress has largely been silent, the WPR is one of the few checks on the Executive Branch.¹⁴³ However, since cyber-warfare is a new tactic and is so unique compared to other types of warfare, the WPR offers little to no practical guidance.¹⁴⁴

This is especially true when examining the legal significance of the Hostilities Provision in the cyber-warfare context. Similar to the drone warfare issue, given the history of the WPR, it is highly unlikely that the President will report cyber-warfare under § 1543(a)(1) and limit his decision-making power.¹⁴⁵ As a result, the Hostilities Provision will invoke a sixty-day clock only when U.S. Armed Forces have suffered casualties or when there is an imminent risk of casualties.¹⁴⁶ However, under this framework, the United States' use of cyber-warfare against another state would not invoke the sixty-day clock because it is highly unlikely that U.S. troops would have suffered casualties.¹⁴⁷ Like the Predator drone problem, this creates a dangerous proposition under the WPR because the Executive Branch can conduct cyber-warfare around the world without congressional approval due to the nonexistent danger to American troops.¹⁴⁸ Because of this implication, changes to the WPR are necessary to keep it relevant in the context of cyber-warfare.

¹⁴⁰ *Id.*

¹⁴¹ *Cyber War: Sabotaging the System*, *supra* note 119.

¹⁴² Kesan & Hayes, *supra* note 130, at 503–05 (discussing Justice Jackson's test, which described "three different situations in which the President may exercise his powers").

¹⁴³ *See id.* at 452–53.

¹⁴⁴ Stephen Dycus, *Congress's Role in Cyber Warfare*, 4 J. NAT'L SECURITY L. & POL'Y 155, 162 (2010).

¹⁴⁵ *See, e.g.*, Robbins, *supra* note 100.

¹⁴⁶ GRIMMETT, *supra* note 24.

¹⁴⁷ Dycus, *supra* note 144, at 162.

¹⁴⁸ *See id.*

One potential solution is to amend the Hostilities Provision to incorporate cyber-warfare, much in the same way as stated above for Predator drones. Congress wrote the Hostilities Provision in the 1970s when cyber-warfare was practically nonexistent.¹⁴⁹ Congress could redefine the hostilities standard not as potential for U.S. casualties, but as potential for indirect U.S. casualties or casualties in general, regardless of state allegiance. Congress could also add a provision that states that cyber-warfare is the equivalent of hostilities. These proposed changes would limit the Executive Branch's unilateral discretion to wage a costly cyber-war with another country without triggering the sixty-day clock because the Hostilities Provision would be easier to implicate in a context that resembles traditional war. The Executive Branch would have to consult with Congress, thus satisfying the WPR's original intent.¹⁵⁰

These solutions are problematic for a variety of reasons. First, unlike the Predator drone context, broadening the scope of the Hostilities Provision will not make it easier for the Provision to be implicated. Pinpointing when a Predator drone has been destroyed is easy¹⁵¹ and involves few, if any, difficult inquiries concerning whether it was a casualty under the proposed changes to the Hostilities Provision asserted above; however, in the cyber-warfare context, such a determination is much harder to make because the indirect effects of cyber-warfare cause most of the substantial damage.¹⁵² This is problematic because indirect threats are much more difficult to quantify—there are many variables relating to the strength of the correlation between the cyber-attack and potential indirect casualties.¹⁵³ Since the Judicial Branch would probably not tackle this issue,¹⁵⁴ Congress would be forced to determine a standard for hostilities, which would likely cause more ambiguity because of partisanship and the changing makeup of Congress.¹⁵⁵

Another problem is that redefining the Hostilities Provision as it pertains to casualties in general will not stop the Executive Branch from conducting cyber-warfare. Not all forms of cyber-

¹⁴⁹ See Lewis, *supra* note 134, at 66.

¹⁵⁰ See Firmage, *supra* note 10, at 249.

¹⁵¹ See *Unclear Whether Iran Shot Down Drone, a U.S. Official Says*, *supra* note 101.

¹⁵² Kesan & Hayes, *supra* note 130, at 445.

¹⁵³ See *id.*

¹⁵⁴ See Firmage, *supra* note 10, at 265.

¹⁵⁵ See *id.*

warfare result in casualties,¹⁵⁶ yet under this new framework, the WPR will not cover these actions. For example, the Stuxnet virus did not involve any casualties,¹⁵⁷ but if it were more advanced and permanently crippled the Iranian nuclear facilities, its use could equate to an act of war that Iran would retaliate against; however, it would still not invoke the Hostilities Provision. This hypothetical situation of a conflict escalating without congressional input is a major issue the WPR was designed to prevent.¹⁵⁸ Also, even if the Hostilities Provision is invoked under the new framework, it will not necessarily prevent unilateral Executive Branch action. The sixty-day provision for executive notice and legislative response “is unrealistic for war on a digital battlefield.”¹⁵⁹ Cyber-warfare is normally not conducted continually for months on end like traditional warfare. One digital virus is often all that is necessary to achieve the strategic goals of cyber-warfare.¹⁶⁰ As such, the Executive Branch can substantially cripple another country by using cyber-warfare without any input from Congress and not run afoul of WPR obligations because the conflict will be over within days.

Another major problem is that involving Congress in the deliberation process for cyber-warfare is potentially dangerous. Although the WPR is designed to support congressional consultation,¹⁶¹ this objective might not be optimal in the cyber-warfare context. The strategy of when to use cyber-warfare is also different from most other warfare tactics.¹⁶² Cyber-warfare is only similar to nuclear warfare because both would “come without a clear warning,” there is “no reliable defense[] against” them, and the collateral damage would be catastrophic.¹⁶³ Unlike other military tactics, such as drone warfare, where the temporal period for when to strike is much longer and retaliatory strikes are successful, preemption is the best function and defense for cyber-warfare.¹⁶⁴ Striking first is crucial because effective retaliation can be very difficult if a state has been crippled by cyber-warfare.¹⁶⁵ This poses serious problems for the WPR.

¹⁵⁶ See Lewis, *supra* note 134.

¹⁵⁷ *Id.*

¹⁵⁸ See GRIMMETT, *supra* note 24.

¹⁵⁹ Dycus, *supra* note 144, at 162.

¹⁶⁰ See, e.g., Lewis, *supra* note 134.

¹⁶¹ See 50 U.S.C. § 1541(a) (2006).

¹⁶² See Dycus, *supra* note 144, at 163–64.

¹⁶³ *Id.* at 163.

¹⁶⁴ Gjelten, *supra* note 124.

¹⁶⁵ See *id.*

Unlike the drone warfare context, where discussing the strike location is not necessarily detrimental to the military strategy, in the cyber-warfare context, discussing the issue in Congress will alert the enemy (due to the transparent legislative process) and potentially compromise the preemptive strike. It could even endanger American citizens because the enemy would want to preemptively strike the United States as a defensive measure, assuming the enemy has the capabilities.

Although redefining the Hostilities Provision to incorporate cyber-warfare is not the best solution, there are other potential avenues that could involve Congress in the decision-making process and therefore satisfy the original intent of the WPR. First, Congress could develop strategic guidelines for cyber-warfare similar to the way it has for nuclear warfare. Congress has held some hearings on the rules for cyber-warfare, such as the March 2012 hearing with Keith Alexander (the head of the U.S. Cyber Command), but these hearings have not updated the current ground rules for cyber-warfare.¹⁶⁶ This is problematic because the rules were written in 2005 and are inadequate for current cyber-warfare technologies.¹⁶⁷ As a result, Congress should take initiative and help implement an updated procedural framework. Congress could work more closely with the Executive Branch and the military to develop a flexible policy that reflects the distinctive technology and strategy of cyber-warfare.¹⁶⁸ Congress could also require that the Executive Branch report all instances of cyber-warfare so that Congress can ensure that the Executive Branch is not abusing its discretion.¹⁶⁹ This policy would set out the procedures for how and under what circumstances the United States could conduct cyber-warfare.¹⁷⁰ Congress could also develop a policy that defines the types of countermeasures that are "legally and strategically appropriate for different types of cyber-attacks."¹⁷¹ These proposed solutions might not adequately satisfy all the goals of the WPR, but given the practicalities of cyber-warfare, a pre-defined cyber-warfare

¹⁶⁶ Lolita C. Baldor, *Pentagon Grappling with Cyberwarfare Rules*, NAVYTIMES (Jul. 25, 2012), <http://www.navytimes.com/news/2012/07/ap-military-pentagon-grappling-cyberwarfare-rules-072512/>.

¹⁶⁷ *Id.*

¹⁶⁸ Dycus, *supra* note 144, at 164.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Hathaway et al., *supra* note 131, at 879.

policy still provides Congress with the best method to incorporate itself in the decision-making process.

Although Congress should adopt a policy that sets out the procedure for cyber-warfare, it is important that this policy remain limited.¹⁷² At this point, there are still many uncertainties regarding the future of cyber-warfare, and it could even be argued that the lack of hard-line limitations “may be positive” because “laying down clear legal markers before having a developed understanding of these capabilities may problematically limit their effective use.”¹⁷³ It is also important to not create “red lines that proscribe the use of [cyber-warfare] capabilities [because it] will create reluctance and trepidation among strategists and will lead to disadvantages in combat situations.”¹⁷⁴

Another potential solution is to involve congressional intelligence committees in the strategy of cyber-warfare.¹⁷⁵ Unlike the drone warfare context, this solution is more suitable to the realities of cyber-warfare. Congress has already adopted a measure that keeps them “fully and currently informed of all covert actions which are . . . engaged in by . . . any department, agency, or entity of the United States [g]overnment.”¹⁷⁶ That provision should be expanded to incorporate cyber-warfare since cyber-warfare has often been considered an intelligence activity.¹⁷⁷ Since intelligence committees are not entirely transparent,¹⁷⁸ this would give Congress a role in cyber-warfare decisions without impeding the military by disclosing U.S. strategy. This role, however, should only include the potential to raise “legal issues with the [E]xecutive [B]ranch, as well as provide policy advice as to the wisdom of employing these capabilities in such circumstances.”¹⁷⁹ Congress should not have any veto power over the actions.¹⁸⁰ Even though the WPR’s goal of having Congress fully involved will not be satisfied,¹⁸¹ given the realities of cyber-war-

¹⁷² See Dycus, *supra* note 144, at 171.

¹⁷³ Eric Lorber, Comment, *Executive Warmaking Authority and Offensive Cyber Operations: Can Existing Legislation Successfully Constrain Presidential Power?*, 15 U. PA. J. CONST. L. 961, 964 (2013).

¹⁷⁴ *Id.* at 1001.

¹⁷⁵ See Dycus, *supra* note 144, at 167.

¹⁷⁶ 50 U.S.C. § 3093(b)(1) (2006).

¹⁷⁷ Dycus, *supra* note 144, at 159.

¹⁷⁸ See *id.* at 160.

¹⁷⁹ Lorber, *supra* note 173, at 1002.

¹⁸⁰ *Id.*

¹⁸¹ See *id.*

fare, this is one of the few practical ways to actively involve Congress in the decision-making process for cyber-warfare.

For the foregone reasons, satisfying the WPR's goals in the cyber-warfare context requires substantially different solutions than in the drone warfare context. Given the practicalities and dangers of cyber-warfare, the Legislative Branch needs to cede some of its power under the WPR and take up new responsibilities because, otherwise, it risks becoming obsolete in the decision-making process or even endangering the country itself. Only by limiting its influence can the Legislative Branch ensure, to the greatest possible extent, that the goals of the WPR are fulfilled.

V. CONCLUSION

The Hostilities Provision is not adequately equipped to deal with the new military strategies of drone warfare and cyber-warfare. As a result, the Executive Branch has substantially more discretion to use military power than the original WPR drafters intended. However, Congress can remedy this problem by implementing a few solutions. In the drone warfare context, Congress needs to either incorporate drones into the definition of hostilities or set a historical precedent that drone strikes will amount to hostilities. These proposed solutions will severely limit the Executive Branch's ability to engage in conflicts where American casualties are not at risk, but the conflict nevertheless has substantial foreign policy implications. With regard to cyber-warfare, the solution is more complicated because the tactic is distinct from other warfare tactics. Incorporating cyber-warfare into the hostilities definition would create more problems than it would solve, and thus, a different approach is needed. To adequately prepare for cyber-warfare, Congress cannot fully rely on the current version of the WPR because its method of involving Congress in the deliberation process is ill-adapted for the cyber-warfare context. Thus, to actively participate in the cyber-warfare decision-making process, Congress must work with the Executive Branch to develop *ex ante* guidelines for how and when to conduct cyber-warfare operations. Congress can also use its Intelligence Committee or another similar committee as a check on the Executive Branch.¹⁸² Full congressional involvement is not productive because of transparency concerns; however, having special committee involvement can alleviate this concern be-

¹⁸² See Dycus, *supra* note 144, at 158.

cause these committees are afforded secrecy privileges.¹⁸³ Although these proposed solutions for both drone warfare and cyber-warfare are not without their problems, they offer the most practical and realistic avenues for Congress to fulfill the WPR's goal of greater congressional involvement in war decisions.

¹⁸³ See *id.* at 167, 169.

