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Future War and the War Powers Resolution

Eric Talbot Jensen

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FUTURE WAR AND THE WAR POWERS RESOLUTION

Eric Talbot Jensen∗

ABSTRACT

Since its passage in 1973 over the veto of then-President Nixon, the War Powers Resolution (WPR) has been laden with controversy. Labeled as everything from ineffective to unconstitutional, the WPR has generally failed in its design to require notification and consultation to Congress by the President. Despite numerous proposals to amend the WPR, it continues to languish in the twilight of Executive war powers, and its future is bleak.

With emerging technologies such as drones, cyber tools, nanotechnology, and genomics, the ineffectiveness of the WPR will prove even more profound. The WPR’s reliance on “armed forces” and “hostilities” as triggers for the reporting and consulting requirements of the statute will prove completely inadequate to regulate the use of these advanced technologies. Rather, as the President analyzes the applicability of the WPR to military operations using these advancing technologies, he will determine that the WPR is not triggered and he has no reporting requirements. Recent conflicts (or potential conflicts) in Libya, Syria and Iraq highlight this inevitability.

For the WPR to achieve the aim it was originally intended to accomplish, Congress will need to amend the statute to cover emerging technologies that do not require “boots on the ground” to be effective and which would not constitute “hostilities.” This article proposes expanding the coverage of the WPR from actions by armed forces to actions by armed forces personnel, supplies or capabilities. The article also proposes expanding the coverage of the statute to hostilities and violations of the sovereignty of other nations by the armed forces.

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INTRODUCTION

As United States President Barack Obama contemplated taking military action against Syria in the wake of alleged chemical attacks, he stated that he had authority to do so without Congressional approval. However, after deciding to consult Congress, he was told that the wording of any resolution that would receive Congressional approval would have to be narrowly tailored, limiting the use of armed forces both in time and type. In fact, Senator John McCain threatened that if President Obama were to put “boots on the ground” in Syria, he would face impeachment. These preconditions for Congressional approval invoke the traditional tension between Congress’s constitutional power to “declare war” on one hand and the Executive’s foreign affairs power and the President’s role as Commander in Chief on the other.

The debate is not new. Books, judicial opinions, commission reports, law reviews, and newspapers regularly discuss this tension between Congress...
and the President on the use of military force. The debate has been characterized by what seems to be an ever-increasing adventurism by the President and an ever-decreasing willingness to exert power by the Congress.\[11\] Perhaps the last show of real strength in the debate from Congress came in the immediate aftermath of the Vietnam War.\[12\] With the President in crisis,\[13\] Congress passed a joint resolution that became known as the War Powers Resolution (WPR).\[14\] It was intended to re-exert Congress’s power over war making and force the President to provide notification and seek approval for the use of the military.\[15\] After passage, President Nixon immediately vetoed the Resolution, claiming it was clearly an unconstitutional infringement on his role as the Executive.\[16\]

Congress responded by overriding President Nixon’s veto on November 7, 1973.\[17\] Almost immediately, the War Powers Resolution became a source of great controversy: In addition to President Nixon and his successors,\[18\] scholars\[19\] have claimed the WPR is an unconstitutional infringement on Commander-in-Chief powers. These constitutional issues can be broadly characterized in two major categories: the allocation of war powers between the President and Congress; and, the requirement for the President to withdraw

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11 Geoffrey S. Corn, Triggering Congressional War Powers Notification: A Proposal to Reconcile Constitutional Practice with Operational Reality, 14 LEWIS & CLARK L. REV. 687, 690 (2010). “Presidents will invariably interpret the failure of Congress to affirmatively oppose such initiatives as a license to continue operations.” Id.; John Yoo, Like It or Not, Constitution Allows Obama to Strike Syria Without Congressional Approval, FOX NEWS, Aug. 30, 2013, http://www.foxnews.com/opinion/2013/08/30/constitution-allows-obama-to-strike-syria-without-congressional-approval/ (summarizing the historical tension between Congress’ power to declare war and the President’s role as Commander in Chief).


13 Newton, supra note 9, at 179–80 (explaining that President Nixon was in the throes of the Watergate scandal at this time).


15 Id. at § 1541.


17 119 Cong. Rec. 36, 198, 221–22 (1973) (Senate); id. at 36, 221–22 (House).


forces either after sixty days of inaction by Congress approving the deployment or after a concurrent resolution by Congress.\textsuperscript{20}

One of the topics that has received insufficient attention in the continuing discourse, and the topic of this article, is the potential impact and applicability of the WPR to future armed conflicts.\textsuperscript{21} The world stands on the threshold of incredible advances in weapons technology that are of such a qualitative nature the borders of the current laws governing the use of force will be pushed.\textsuperscript{22} The use of cyber tools to accomplish military operations, the development and weaponization of nanotechnology, the linkage of virology to individual or group DNA, the automation of weapons systems, and the development of robotics all represent likely aspects of future armed conflicts whose effects on the WPR have not yet been considered.

The WPR is not sufficiently clear with respect to its application to future weapon systems. The triggering language of “in any case in which United States Armed Forces are introduced—(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances; [or] (2) into the territory, airspace or waters of a foreign nation,” was written in an era where the means and methods of armed conflict were centered on humans interacting on a geographically limited battlefield.\textsuperscript{23} Though this will continue to be true in the future for most armed conflicts, technologically advanced nations such as the United States are developing and will continue to develop new weapons that will not require human interaction in combat to be effective.\textsuperscript{24} The current language of the WPR is ineffective to ensure Congressional participation in the President’s use of these weapons. If Congress intends the WPR to act as a restraint on presidential use of force in the future, the WPR needs to be amended to clarify that “boots on the ground” and hostilities are not the only required trigger to invoke the WPR’s provisions.

\textsuperscript{21} Newton, supra note 9, at 181.
\textsuperscript{23} See 50 U.S.C. § 1543.
\textsuperscript{24} Because this Article will deal specifically with U.S. domestic legislation known as the War Powers Resolution, the paper will focus on emerging technologies and weapons within the context of the United States.
Part I of this paper will highlight some of the advancing technologies and resulting current and future weapons systems that the United States has and will have in its arsenal. Part II will briefly discuss the passage of the War Powers Resolution and the demonstrated intent of Congress. Part II will then address the triggering language of the WPR, including its original understanding, and its subsequent evolution. Part III will demonstrate the inadequacy of the current language of the WPR to effectively apply to future weapon systems. Part IV will analyze various proposed amendments to the WPR, show how they also do not account for future technologies, and then propose a simple amendment to the WPR that will accomplish this important objective.

I. FUTURE ARMED CONFLICT

It would be nearly impossible to accurately guess what weapons technologies will be developed in the future, or even in the next few decades. However, what does seem clear is that weapons technology is advancing at a rapid rate and that this trend will continue. Many of these advancing technologies will be so qualitatively different from current means and methods of warfare that they will undercut the fundamental understanding of the WPR and Congress’s intent to regulate the use of military force by the President.

The following section will briefly describe some of the known areas of advancing technology in weapons. The focus will be on discussing weapons that will likely raise important questions as to the applicability and effectiveness of the WPR as those weapons are put into use. The means of

warfare will be addressed first, followed by a shorter section on methods of warfare.

A. Means of Warfare

The means of warfare, or armed conflict as it is more generally described in modern usage, refers to the implements used to conduct the conflict. More broadly, they can be thought of as the weapons of warfare, such as rifles, artillery shells, or bombs. As the products of advancing research, future weapons will be more lethal, more accurate, more survivable, and less expensive. Most importantly for this article, they will also be less human. In other words, as these emerging weapons do their harm, they will create greater distance, both in time and space, between the weapon’s deleterious effects and the human that creates, authorizes, initiates, or uses them. The following examples demonstrate the point and provide instructive illustrations as to why the WPR is becoming less and less effective as a means of ensuring Congressional input on the use of military force, as will be discussed in Part III.

1. Drones

Drones are a quickly developing technology whose use has been widely documented. Both armed and unarmed drones are being used in combat zones, along borders, and across the world. Within the U.S. drones are being used by local law enforcement and the U.S. Federal Aviation

26 See Blake & Imburgia, supra note 25, at 168–69.
27 Id. at 170.
Administration has been tasked with determining how to regulate the use of domestic airspace for drones.\textsuperscript{31}

As the technology continues to develop, drones’ lethality and capability will dramatically increase, while their size and detectability will dramatically decrease.\textsuperscript{32} In combination with other advancing technologies discussed below, the United States will soon be able to deploy miniature (microscopic) drones in large quantities from great distances and which have significant lethal and non-lethal effects. Their potential for affecting future warfare has caused P.W. Singer to describe drones as a “game changer” on the level with the atomic bomb.\textsuperscript{33}

Important for this article, drones can be remotely guided\textsuperscript{34} or even preprogrammed.\textsuperscript{35} No human need be anywhere close to the drone as it takes its lethal or non-lethal action. Rather, large numbers of drones can be engaged in significant actions at great distances and at delayed times from the pilots who both fly the drones and direct the action.\textsuperscript{36} This resulting lack of risk to U.S. military personnel has already been the topic of much discussion, especially among ethicists who worry that the “low-cost” of war will make it too easy of an option.\textsuperscript{37} These same characteristics will also cause concerns


\textsuperscript{33} US Expert Discusses Robotics in War, AUSTL. BROAD. CORP. (Feb. 29, 2012), http://www.abc.net.au/lateline/content/2012/s3442876.htm.


\textsuperscript{35} Mike Hanlan, Little Bird—Helicopter Without a Pilot, GIZMAG (July 12, 2006), http://www.gizmag.com/go/5863/.


\textsuperscript{37} See, e.g., id. (“Some critics have worried that UAV operators—controlling drones from half a world away—could become detached and less caring about killing, given the distance, and this may lead to more unjustified strikes and collateral damage.”).
with respect to the intended purposes of the WPR, as will be discussed in Part III.

2. Cyber

Cyber tools are already demonstrating their effectiveness. Recent cyber incidents include facilitating the theft of millions of dollars from automated teller machines, state-sponsored theft of corporate trade secrets, and the disruption of government communication systems during a military attack. The infamous STUXNET malware “infected about 100,000 computers worldwide, including more than 60,000 in Iran, more than 10,000 in Indonesia and more than 5,000 in India” in the process of destroying almost 1,000 centrifuges in an Iranian nuclear facility. The recent Flame malware was designed to gather immense amounts of secretive government data and “exceeds all other known cyber menaces to date” according to Kapersky Lab and CrySys Lab which discovered the malware.

Similar to drones, cyber operations have also been written about extensively, including the recently published Tallinn Manual on the law of armed conflict.

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43 Holger Stark, Stuxnet Virus Opens New Era of Cyber War, SPIEGEL ONLINE (Aug. 8, 2011, 3:04 PM), http://www.spiegel.de/international/world/mossad-s-miracle-weapon-stuxnet-virus-opens-new-era-of-cyber-war-a-778912.html. Admittedly, STUXNET was governed by the jus ad bellum, but similar malware will undoubtedly be used during armed conflict in the future. For an analysis of STUXNET under the jus in belli, see Jeremy Richmond, Evolving Battlefields: Does STUXNET Demonstrate a Need for Modifications to the Law of Armed Conflict?, 35 FORDHAM INT’L L.J. 842 (2012).
International Law Applicable to Cyber Warfare (Tallinn Manual) which provides rules and commentary on the application of the law of armed conflict (LOAC) to cyber operations. Many nations are embracing the capabilities that cyber tools provide because of their bloodless nature and the increased set of targets to which such tools provide access.

In addition to nations, cyber tools are increasingly available to non-state actors. Individual hackers have been known to develop sophisticated malware and cause great damage. Large markets have now developed around the production and sale of cyber tools, making them available to the highest bidder at very reasonable prices. One of the unique characteristics of cyber tools is their propensity to be reengineered or “copycatted.” As reported by David Hoffman,

Langner [who first discovered the STUXNET malware] warns that such malware can proliferate in unexpected ways: “Stuxnet’s attack code, available on the Internet, provides an excellent blueprint and jump-start for developing a new generation of cyber warfare weapons.” He added, “Unlike bombs, missiles, and guns, cyber weapons can be copied. The proliferation of cyber weapons cannot be controlled. Stuxnet-inspired weapons and weapon technology will soon be in the hands of rogue nation states, terrorists, organized crime, and legions of leisure hackers.”

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50 Blake & Imburgia, supra note 25, at 181–83.
Because of the proliferation of cyber tools across all levels of society, the United States will continue to need to develop and use cyber capabilities to conduct both defensive protective measures, but also offensive cyber actions. In fact, the Air Force recently announced that it has classified six specific cyber tools as “weapons” and Congress recently provided authorization for the United States Department of Defense (“DoD”) to conduct “offensive operations in cyberspace.” Additionally, U.S. Cyber Command, General Keith Alexander, announced in March 2013 that the Pentagon will have 13 offensive cyber teams by fall 2015.

In addition, the Guardian newspaper recently reported that President Obama “ordered his senior national security and intelligence officials to draw up a list of potential overseas targets for U.S. cyber-attacks,” and the Washington Post reported that “U.S. intelligence services carried out 231 offensive spy-operations in 2011.”

Cyber weapons are, and will continue to be, a part of the United States’ military arsenal. As will be seen in Part III, the distance in both time and space by which these cyber tools can be effectively used demonstrates the ineffectiveness of the WPR in future armed conflicts.

3. Robots and Autonomous Weapons

The use of robotics and autonomous systems by the United States military has not progressed as far or as fast as that of drones and cyber operations, but their use is clearly increasing. As noted by Singer,

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61 See also Chen, supra note 38, at 1790–92.
When the U.S. military went into Iraq in 2003, it had only a handful of robotic planes, commonly called “drones” but more accurately known as “unmanned aerial systems.” Today, we have more than 7,000 of these systems in the air, ranging from 48-foot-long Predators to micro-aerial vehicles that a single soldier can carry in a backpack. The invasion force used zero “unmanned ground vehicles,” but now we have more than 12,000, such as the lawnmower-size Packbot and Talon, which help find and defuse deadly roadside bombs.62

Thomas Adams, a retired Army Colonel, argues that “[f]uture Robotic weapons ‘will be too fast, too small, too numerous and will create an environment too complex for humans to direct,’” and “[i]nnovations with robots ‘are rapidly taking us to a place where we may not want to go, but probably are unable to avoid.””63

The development and use of autonomous systems, including robots, unarmed and armed unmanned aerial and underwater vehicles,64 auto-response systems such as armed unmanned sentry stations,65 and a host of other similar weapon systems is clearly increasing.66 In addition to the United States, “there are 43 other nations that are also building, buying and using military robotics today.”67 In 2005, a published military report “suggested autonomous robots on the battlefield will be the norm within 20 years,”68 and a recent DoD report titled Unmanned Systems Integrated Roadmap FY2011-2036, stated that it “envisions unmanned systems seamlessly operating with manned systems

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63 Robots on Battlefield: Robotic Weapons Might be the Way of the Future, But They Raise Ethical Questions About the Nature of Warfare, TOWNSVILLE BULL. (Sept. 18, 2009).


66 John Markoff, U.S. aims for robots to earn their stripes on the battlefield, INT’L HERALD TRIBUNE (Nov. 27, 2010).


while gradually reducing the degree of human control and decision making required for the unmanned portion of the force structure.\(^{69}\)

Current controversy has erupted around autonomous systems when the DoD issued \textit{Autonomy in Weapon Systems,}\(^{70}\) a directive that applies to the “design, development, acquisition, testing, fielding, and employment of autonomous and semi-autonomous weapon systems, including guided munitions that can independently select and discriminate targets.”\(^{71}\) The Directive deals specifically with the autonomous nature of future systems and states that “It is DoD policy that . . . [a]utonomous and semi-autonomous weapon systems shall be designed to allow commanders and operators to exercise appropriate levels of human judgment over the use of force.”\(^{72}\) Immediately following the issuance of the DoD Directive, Human Rights Watch published a report\(^{73}\) calling for a multilateral treaty that would “prohibit the development, production, and use of fully autonomous weapons.”\(^{74}\) This report has, in turn, been assailed by law of war experts who attack the underlying legal and practical assumptions it contains.\(^{75}\)

At this point, it is unclear how the issues surrounding robots and autonomous weapon systems will all resolve, but it seems very unlikely that the military will abandon such a useful tool. In fact, it seems much more likely that research, development, and employment of robots and autonomous systems, including autonomous weapon systems, will continue to increase and become an even larger portion of the military arsenal. The employment of these non-human weapons has significant potential impact on the effectiveness of the WPR, as will be discussed below.


\(^{71}\) DEPARTMENT OF DEFENSE, DIRECTIVE No. 3000.09 § 2(a)(2), The Directive does not apply to “autonomous and semi-autonomous cyberspace systems for cyberspace operations; unarmed, unmanned platforms; unguided munitions; munitions manually guided by the operator (e.g. laser- or wire-guided munitions); mines; or unexploded explosive ordnance.” \(\text{Id.} \) § 2(b).

\(^{72}\) \text{Id.} § 4(a).

\(^{73}\) HUMAN RIGHTS WATCH, LOSING HUMANITY: THE CASE AGAINST KILLER ROBOTS (2012), available at \(\text{http://www.hrw.org/sites/default/files/reports/arms1112ForUpload_0_0.pdf}\).

\(^{74}\) \text{Id.} at 5.

4. Nanotechnology

According to a U.S. government website, “[n]anotechnology is the understanding and control of matter at the nanoscale, at dimensions between approximately 1 and 100 nanometers, where unique phenomena enable novel applications.” In the United States, the National Science and Technology Council oversees nanotechnology development with the goal to “expedite[] the discovery, development and deployment of nanoscale science, engineering, and technology to serve the public good through a program of coordinated research and development aligned with the missions of the participating agencies.” China and Russia are also “openly investing significant amounts of money in nanotechnology.”

The U.S. DoD was quick to recognize the potential benefits of nanotechnology. In 2006, Forbes reported:

The Department of Defense has spent over $1.2 billion on nanotechnology research through the National Nanotech Initiative since 2001. The DOD believed in nano long before the term was mainstream. According to Lux Research, the DOD has given grants totaling $195 million to 809 nanotech-based companies starting as early as 1988. Over the past ten years, the number of nanotech grants has increased tenfold.

Potential applications of nanotechnology to military purposes are numerous. Blake and Imburgia, both military lawyers, have written:

Scientists believe nanotechnology can be used to develop controlled and discriminate biological and nerve agents; invisible, intelligence gathering devices that can be used for covert activities almost anywhere in the world; and artificial viruses that can enter into the human body without the individual’s knowledge. So called “nanoweapons” have the potential to create more intense laser technologies as well as self-guiding bullets that can direct themselves to a target based on artificial intelligence. Some experts also believe nanotechnology possesses the potential to attack buildings as a

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78 Blake & Imburgia, supra note 25, at 180.
“swarm of nanoscale robots programmed only to disrupt the electrical and chemical systems in a building,” thus avoiding the collateral damage a kinetic strike on that same building would cause.80

Foreseeable weapons advances from nanotechnology include improving the strength and longevity of machinery,81 advances in stealth technology,82 allowing the creation of more powerful and efficient bombs,83 and the miniaturization of nuclear weapons.84 Perhaps most importantly for this article, nanotechnology will likely eventually allow for the creation of microscopic nanobots that can not only act as sensors to gather information, but also serve as delivery systems for lethal toxins or genomic alterers into human bodies.85

Nanotechnology will make weapons smaller, more mobile, and more potent. It will provide easier, quicker, and more accurate means of collecting information. It will allow greater range, effect, and lethality. And it will do all of this at great distances from any human influence and with kinetic effects that cover the full spectrum of possibilities. The WPR currently does not seem to encompass the military application of such technology.

5. Virology and Genomics

These two areas of advancing technologies are early in their development. Insofar as they overlap with biological weapons, such use by nations has already been internationally prohibited.86 However, their increased accessibility to the general public has raised grave concerns amongst

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80 Blake & Imburgia, supra note 25, at 180 (citations omitted).
successive United States administrations; to the extent that natural or synthetic viruses and similar naturally occurring organisms do not fall within the proscriptions of international law, they provide potentially potent weapons or weapons platforms, especially in combination with advances in genomics.\(^{87}\) Additionally, such international regulation only applies to States,\(^{88}\) and any impact on non-state actors depends on domestic implementation of the Treaty provisions and effective enforcement, normally through criminal actions that only take effect after the crime has occurred.\(^{89}\)

Genomics is the “study of genes and their function.”\(^{90}\) The rapid advances in genomics\(^ {91}\) have not only provided numerous benefits for modern medicine and science in general, but have also provided the opportunity for significant weapons advancements. “A couple of decades ago, it took three years to learn how to clone and sequence a gene, and you earned a PhD in the process. Now, thanks to ready-made kits you can do the same in less than three days . . . the cost of sequencing DNA has plummeted, from about $100,000 for reading a million letters, or base pairs, of DNA code in 2001, to around 10 cents


\(^{88}\) See generally, Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction Apr. 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062.

\(^{89}\) See, e.g., S.C. Res. 1540, paras. 2-3, U.N. Doc. S/RES/1540 (Apr. 28, 2004) (calling on member States to develop domestic procedures to enforce treaty provisions relating to non-state actors’ use of nuclear, chemical or biological weapons).


The ability to tailor a weapon to the exact DNA of your intended target would allow for precision targeting in a way not formerly possible.

For example, Andrew Hessels, Marc Goodman, and Steven Kotler, writing recently in the Atlantic, proposed a hypothetical where a virus that was genetically coded to the President of the United States was created and transmitted through unwitting individuals with lethal effect on only the President. Advances in genomics, particularly linked to similar advances in virology and nanotechnology, move this hypothetical from the world of science fiction to the realm of potential weapons.

As with the prior weapons discussed in this section, viral and genomic weapons have effects at great distances, in both time and space, from their initiator. There is no requirement for the human designer or user to be on the same continent when the lethal effect occurs. Furthermore, the pinpoint accuracy of a genetically coded weapon could limit the scale in such a way as to stay far below the level of armed conflict.

### B. Methods of Warfare

In contrast to means of warfare, the method of warfare is not about the weapon or means of warfare itself, but about how warfare is conducted—the tactics of warfare. For example, the use of camouflage is considered a ruse and is a method of warfare. Advancing technologies will allow for new and innovative methods of warfare that will raise interesting legal issues. One in particular is worth mentioning here—latent attacks.

#### 1. Latent Attacks

Latent attacks are “characterized by the placing or embedding of some weapon in a place or position where it will not be triggered until signaled

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sometime in the future or activated by some future action.” The eventual
attack may be triggered by a remote signal or specific occurrence and may
even be triggered by the victim himself. For example, consider viral genetic
material that is implanted by a nanobot into the intended victim far in advance
of a future attack. The latent but lethal genetic material may only be activated
upon some signal by the attacker or some other event, potentially by an
unknowing third party or the victim himself, such as ingesting some supposed
antidote. Additionally, the triggering event may never occur, but the potential
would always be there.

Latent computer attacks are already well documented. Embedded source
code in the hardware of computer components or software found on computers
would provide an adversary with a powerful future weapon. For example,
consider that the United States sells F-16 aircraft to numerous countries
throughout the world. The United States could certainly implant in the
computer functions of that aircraft some computer code that will not allow the
F-16 to engage aircraft that it identifies as belonging to the U.S. military. In
fact, if the U.S. has this capability, it may be irresponsible to not take such pre-
emptive actions. As the largest producer of weapons worldwide, and one of
the largest exporters, latent attacks should be an important consideration for
the U.S. military industrial complex.

The capability to implant, hide and trigger latent attacks is technologically
dependent. But as the ability to do so continues to develop, it seems clear that
the United States and other technologically capable nations, would likely use
such technology, even against current allies, as a hedge against future changes
in the geopolitical situation. As with the means of warfare discussed above,
this method of attack would take place in time and space at great distances
from the initial human action, taking it outside the current regulation of the
WPR.

96 Jensen, supra note 22, at 309.
97 Id.
98 Steve Stecklow, U.S. Nuclear Lab Removes Chinese Tech Over Security Fears, REUTERS (Jan. 7,
99 Wary of Naked Force, Israel Eyes Cyberwar on Iran, REUTERS, (July 7, 2009), http://www.ynetnews.
com/articles/0,7340,L-3742960,00.html.
100 Stockholm International Peace Research Institute, The SIPRI Top 100 arms-producing and military
armaments/production/Top100.
101 Stockholm International Peace Research Institute, TIV of arms exports from all, 2012-2013, available
In all of these cases, where the human connection is attenuated and the type of action is different from the normal kinetic model, there are significant impacts on the application of the WPR. It is to this topic that the paper now turns.

II. THE WAR POWERS RESOLUTION

The WPR is a federal law intended to inhibit the President’s ability to use military force in a situation of armed conflict without involving Congress. Both its constitutionality and its practicality have been seriously questioned in the past, including a very detailed discussion between the Executive and Legislative branches in connection with United States’ support to military operations in Libya in 2011. The next part will provide a brief historical background. The part will be followed by an introduction to the text of the Resolution, with emphasis on those portions pertinent to the thesis of this article. Issues raised by those specific provisions will then be discussed.

A. History

In the early 1970’s, discontent with the Vietnam War was spreading throughout the citizenry of the United States and the Congress. Congress demonstrated its frustration with the situation by repealing the Gulf of Tonkin Resolution, which was the Congressional grant of authority for the war. With the publication of the Pentagon Papers in June 1971, Congress felt betrayed by successive Presidential administrations that, it appeared, had not been keeping Congress fully informed of the military actions in Indochina.

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102 WPR, sec. 2(a).
In response, Congress passed the Mansfield Amendment109 which “declared to be the policy of the United States to terminate at the earliest possible date all military operations of the United States in Indochina.”110

Despite this Congressional action, military involvement continued, and Congress turned to another source for stopping the war—funding. On May 31, 1973, Congress passed a bill telling the President that “None of the funds herein appropriated under this act or heretofore appropriated under any other act may be expended to support directly or indirectly combat activities in, over or from off the shores of Cambodia or in or over Laos by United States forces.”111 President Nixon vetoed the bill but was forced to the bargaining table.112 After negotiations, Congress passed a Joint Resolution which the President did not veto which stated “Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos, or Cambodia.”113

During this same period, a stream of judicial cases flooded the Courts from citizens,114 members of the military,115 and eventually members of Congress.116 The results of these cases were mixed, and no clear standard was achieved as to the differing roles of Congress and the President in the use of the military. Though President Nixon complied with the Joint Resolution by ceasing bombing on August 14, 1973, Congress was left dissatisfied with their role in the Vietnam War and felt a great need to reign in Presidential power to engage the military in hostilities.117 That chance came in October 1973.118

110 Id.
113 Pub. L. No 93-52, Sec 108. 87 Stat. 130 (July 1, 1073).
117 See Fisher & Adler, supra note 12, at 1, 4, 10.
118 Id. at 1–6.
As early as May 3, 1973, Representative Zablocki introduced a Joint Resolution that would require the President to work more closely with Congress when initiating military actions. The House passed the proposed legislation on July 18 and the Senate on July 20. It was reported to the Joint Conference Committee on October 4, and agreed to by the Senate on October 10 and the House on October 12. The legislation was then sent to the President who vetoed it on October 24.

The President raised several issues in his veto, including the claim that the legislation was clearly unconstitutional because it “would attempt to take away, by mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years.” President Nixon further argued that the legislation “would seriously undermine this Nation’s ability to act decisively and convincingly in times of international crisis.” He also chided the Congress for trying to set up automatic cut-offs of authority without requiring particular action by Congress, arguing that “[i]n [his] view, the proper way for the Congress to make known its will on such foreign policy questions is through a positive action.”

Many of President Nixon’s arguments remain pertinent today in the continuing discussion of the constitutionality, as well as prudence, of the War Powers Resolution. Nevertheless, an emboldened Congress overrode the

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121 Id.
122 Id.
123 Id.
124 Id.
127 Id. at 893.
128 Id.
129 Id. at 894–95.
130 See, e.g., The War Powers Resolution Debate Continues, CONST. DAILY (Sept. 4, 2013), http://blog.constitutioncenter.org/2013/09/the-war-powers-resolution-debate-continues/ (describing both sides of the current debate); Robert F. Turner, Why the War Powers Resolution Isn’t a Key Factor in the Syria Situation, CONST. DAILY (Aug. 30, 2013), http://blog.constitutioncenter.org/2013/08/why-the-war-powers-resolution isnt-a-key-factor-in-the-syria-situation/ (arguing that President Nixon’s arguments against the WPR are still valid today).
President’s veto, and the War Powers Resolution became law on November 7, 1973.

Since the passage of the WPR, every President has questioned the constitutionality of the War Powers Resolution as an “unconstitutional infringement on the President’s authority as Commander-in-Chief.” There is only one instance when the President has mentioned the WPR in sending a notification to Congress and that was after the event had occurred. There have been numerous examples of President’s filing reports “consistent with” their WPR obligations, but generally with at least implicit and often explicit disclaimers as to the applicability of the WPR. As of 2012, “Presidents have submitted 132 reports to Congress as a result of the War Powers Resolution. Of these, President Ford submitted 4, President Carter 1, President Reagan 14, President George H. W. Bush 7, President Clinton 60, President George W. Bush 39, and President Barack Obama 11.”

There have also been a number of instances where armed forces have been deployed into potentially hostile environments, yet the President has not filed any kind of a report with Congress. In at least some of these instances, the President has determined not to file, based on an opinion of the Department of Justice’s Office of Legal Counsel (OLC) which was issued with respect to the deployment of U.S. military forces to Somalia in 1992. According to the OLC, President Clinton did not need to consult with or report to Congress

132 See GRIMMETT, supra note 20, at 6; RICHARD F. GRIMMETT, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 2 (2012); see BAKER ET AL., supra note 8, at 26.

133 See GRIMMETT, supra note 20, at 2; see BAKER ET AL., supra note 8, at 2 (referring to the 1975 seizure of the Mayaguez and the President’s filing “cited section 4(a)(1), which triggers the time limit, . . . [but] in this case the military action was completed and U.S. armed forces had disengaged from the area of conflict when the report was made.”).


135 See GRIMMETT, supra note 20, at 2–3, 81.

136 See GRIMMETT, supra note 132, at 17.

137 See GRIMMETT, supra note 20, at 74.

because “Attorneys General and this Office ‘have concluded that the President
has the power to commit United States troops abroad’ as well as to ‘take
military action, for the purpose of protecting national interests.’”

A brief analysis of the text will demonstrate why the Executive objects to
Congress’s actions in the WPR.

B. Text

The WPR is divided into ten sections. Section 1 simply states the title,
and Section 2 gives the purpose and policy of the legislation, stating
Congress’s purpose is to “fulfill the intent of the framers of the Constitution of
the United States and insure that the collective judgment of both the Congress
and the President will apply to the introduction of United States Armed Forces
into hostilities.” This purpose statement stakes out Congress’s position early,
that the use of the military in armed conflict requires both branches of
government.

Section 3 is titled “Consultation” and states that “[t]he President in every
possible instance shall consult with Congress before introducing United States
Armed Forces into hostilities.” This, of course, is made to address one of
Congress’s major complaints during the Vietnam War.

Section 4, which will be analyzed in detail in the next section, is one of the
most contentious, and the most significant for the purposes of this Article.
The section is titled “Reporting” and establishes reporting requirements for the
President to the Congress under specified circumstances.

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139 Id. The OLC issued a similar opinion in relation to the 2011 military operation in Libya stating that
Congress’s authority under the “declare war” clause of the Constitution only applied to armed conflicts that
were “prolonged and substantial . . . typically involving exposure of U.S. military personnel to significant risk
www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya_0.pdf. See also
Chen, supra note 38, at 1798; Newton, supra note 9, at 186.
141 Id. § 1541(a).
142 Id. § 1542.
143 Id. § 1543.
Section 5 also generates significant controversy, especially by those who think the WPR is unconstitutional.\textsuperscript{145} It requires the President to terminate hostilities and remove forces after sixty days without Congress taking any further action.\textsuperscript{146} This contested language in the WPR is likely moot after the 1997 Supreme Court case of \textit{Raines v. Byrd},\textsuperscript{147} which will be discussed below.

Sections 6 and 7 are mostly procedural. Section 8 is titled “Interpretation” and states that nothing in the resolution “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 circumstances which authority he would not have had in the absence of this joint resolution.”\textsuperscript{148}

Section 9 deals with the separability of provisions within the Resolution,\textsuperscript{149} and Section 10 is administrative.\textsuperscript{150}

\section*{C. Issues}

For the purposes of this paper, Section 4 contains the language at issue with respect to future armed-conflict.\textsuperscript{151} However, Section 5 contains the most onerous requirements on the President and represents the most invasive move into what the President would claim as his exclusive authority as commander-in-chief.\textsuperscript{152} Therefore, a discussion of Section 5 is warranted first.

\subsection*{1. Section 5}

As stated above, Section 5 of the WPR requires the President, in the absence of action by Congress, to withdraw any “United States Armed Forces” within sixty calendar days.\textsuperscript{153} President Nixon and subsequent Presidents have


\textsuperscript{149} \textit{Id.} § 1548.

\textsuperscript{150} \textit{Id.} § 1541(c).

\textsuperscript{151} \textit{Id.} § 1544.

\textsuperscript{152} See \textit{id.} § 1545.

\textsuperscript{153} \textit{Id.} § 1544(b) states:

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
argued that Congress cannot, by inaction, bind the President to take action with
respect to the use of armed forces. The President’s arguments seem to have
received Supreme Court approval in Raines v. Byrd, a Supreme Court case
concerning the Line Item Veto Act.

In Raines v. Byrd, the members of Congress claimed that passage of the
line item veto “causes a type of institutional injury (the diminution of
legislative power), which necessarily damages all Members of Congress and
both Houses of Congress equally.” The Supreme Court responded that this
equated to a “loss of political power, not loss of any private right,” and
decided that “individual Members of Congress do not have sufficient ‘personal
stake’ in this dispute and have not alleged a sufficiently concrete injury to have
established Article III standing.”

This decision became important with respect to the WPR in 1999 when
Representative Tom Campbell and other members of Congress filed a
complaint for declaratory relief to stop President Clinton’s action with respect
to the use of force in Kosovo. Campbell sought

a declaration from the judicial branch that the President, the head of
the executive branch, has violated the War Powers Clause of the
Constitution and the War Powers Resolution by conducting air strikes
in the Federal Republic of Yugoslavia without congressional
authorization.

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. Such sixty-
day period shall be extended for not more than an additional thirty days if the President
determines and certifies to the Congress in writing that unavoidable military necessity respecting
the safety of United States Armed Forces requires the continued use of such armed forces in the
course of bringing about a prompt removal of such forces.

See Rademaker, supra note 145.
Raines, 521 U.S. at 821.
Id. at 830.
Id. at 39–40.
The District Court, relying on *Raines v. Byrd*, held that the courts will apply Raines and Coleman rigorously and will find standing only in the clearest cases of vote nullification and genuine impasse between the political branches. Under the circumstances presented in this case, the Court cannot conclude that plaintiffs have standing to bring this action, and the case therefore will be dismissed.

Similarly, on appeal, the D.C. Circuit Court again relied on *Raines v. Byrd*, stating that “[t]he question whether congressmen have standing in federal court to challenge the lawfulness of actions of the executive was answered, at least in part, in the Supreme Court’s recent decision in *Raines v. Byrd*.” The Court went on to affirm the District Court’s holding and deny the appeal.

As Professor Geoff Corn has argued, the decision in Raines “confirms a consistent course followed by the judiciary when asked to adjudicate the legality of presidential decisions to engage the United States Armed Forces in hostilities: focus on whether such a challenge presents a truly ripe issue.” Corn goes on to argue that “[a] challenge will only be cognizable if Congress manifests express opposition to such action. Thus, the legality of war making is not based on a theory of unilateral presidential war power, but on a theory of cooperative policy making by the two branches of government who share this awesome authority.”

These decisions fit nicely into Justice Jackson’s framework in his now-famous concurrence in the *Youngstown Sheet & Tube Co. v. Sawyer*. In a situation such as that contemplated by Section 5 where the Congress has taken no action, the President can “only rely on his own independent powers.” Further, “congressional inertia, indifference or quiescence may sometimes, at
least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”

In other words, the “practice of the President relying on the implied support of Congress, Congress allowing the President to take war-making initiatives and manifesting its consent through less than express authorization, and courts declining to intervene so long as such support was evident” appears to take any bite out of Section 5. As long as Congress does not take action, the President is unlikely to have a Court intervene for non-compliance with the withdrawal requirements of the WPR.

2. Section 4

Because Section 5 of the WPR is now assumed by most constitutional scholars to be unconstitutional, the real power in the WPR is left to Section 4. This section lays out the triggers for the application of the Resolution. The section states:

SEC. 4. (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;

the president shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

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170 Id.
(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.  

This section sets up two threshold queries when determining whether the WPR has been triggered: whether there is an introduction of armed forces; and whether that introduction is into current or imminent “hostilities,” enters the geographic space of another state while equipped for combat, or substantially enlarges current deployments. These two queries will be discussed next.

a. Armed Forces

Because the involvement of the armed forces is a trigger for the WPR, it is important to determine what “armed forces” means in U.S. domestic law in order to analyze the application of the statute to potential future armed conflicts and the ability of the WPR in its present form to effectively accomplish the will of Congress with respect to their view of separation of powers and the use of force.

Within the WPR itself, there is a provision that provides examples of what Congress was targeting with the WPR. In 50 U.S.C. § 1547(c), the statute states:

For purposes of this chapter, the term “introduction of United States Armed Forces” includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.  

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173 Id.
174 Id. § 1547(c).
In defining the term “armed forces” for the purposes of the WPR, the statute refers to “members of such armed forces,” seemingly making clear that the assumption in the drafting was the involvement of actual personnel. As a result, in Congressional usage, the use of the term armed forces has often been substituted with by reference to putting “boots on the ground,” meaning members of the armed forces being placed in the area of operations and at risk from operations.

This usage is supported by the discussion of the WPR within Congress. For example, while arguing in support of the Bill, Representative Annunzio stated:

We must create a situation, in law, where Americans can know that their sons will be sent into hostilities which are clearly understood and clearly accepted, and that unless that action has the approval of Congress, it should not continue until it becomes, like the Vietnam war, the longest war ever fought in our history, for a purpose still not clearly understood, and against an enemy still not clearly defined. This reference to “sons” shows that the chief concern at the time was the sending actual troops into harm’s way, not just military materials.

Representative Matsunaga who also supported the passage of the WPR, stated: “First, it specifies that the President should consult in every possible instance with congressional leaders before committing American troops to hostilities.” The use of the word “troops” instead of “Armed Forces” seems to be a clear indication that he was concerned about actual people in combat and not just military materials.

These sentiments are also reflected by Representative Reid who argued that “[T]his bill does provide a new mechanism whereby Congress and, indeed, any Member of Congress can bring to a vote a preferential motion to end hostilities where U.S. troops have been committed.” As with Representative Matsunaga, the use of the word troops here indicates that the placing of actual

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175 The term “armed forces” is defined in 10 U.S.C. § 101a(4): “The term ‘armed forces’ means the Army, Navy, Air Force, Marine Corps, and Coast Guard.” While this is an important narrowing of the term, it is not extremely helpful for the purposes of this analysis as it does not make a differentiation between personnel and equipment. Many future technologies will not involve personnel in the same way current technologies do, but be much more separated by time and distance.

176 119 Cong. Rec. H6231, H6281 (daily ed. July 18, 1973) (statement of Rep. Annunzio). Mr. Annunzio, also emphasized Congress’ important role in determining if “this Nation should involve itself in major hostilities, committing large numbers of troops and large quantities of our national treasure.” Id. at H6280.

177 Id.

178 Id. at H6278.
military members on the ground, or “boots on the ground,” was the prevailing thought.

Members of the Senate were equally clear on this issue. Senator Griffin, speaking of an amendment he proposed, stated, “[f]inally, provision is made in the amendment so that any cessation of funding of operations would not imperil the safety of the Armed Forces.”179 This appears to be a reference focused on military personnel as opposed to materiel.

Additionally in a conversation on the record between Senator Johnston and Senator Javits, Senator Johnston voiced some concern about whether the language of the bill, which he said “speaks of introducing our troops in hostilities,” would actually cover the actions in Vietnam, where “our troops were originally sent there to guard an Air Force base.”180 Senator Javits replied that there was imminent danger of hostilities when the troops were sent to guard the Air Force Base and then the following exchange took place:

Senator Johnston: “Then the term ‘introducing hostilities’ means introducing troops into the country if hostilities are taking place?”

Senator Javits: “That is exactly right.”

Senator Johnston: “And where they are not employed initially for hostilities?”

Senator Javits: “That is precisely right.”181

The focus on sending “troops” into hostilities in the conversation regardless of the status of the “hostilities” highlights that the Senators involved believed that “troops” were the real concern meant to be covered by the statute, rather than material or non-personnel items.

Two more examples are useful. Senator Tunney who spoke in support of the bill stated, “This is not to deny that many situations might require an American military presence. It is to stress that the methods selected by recent American Presidents for introducing and maintaining American troops in hostilities indicate that defects exist in the process by which war-making decisions are made.”182 Similarly, Senator Huddleston who was a co-sponsor of the WPR, in arguing the constitutional basis for the statute, said

180 Id. at 14208.
181 Id. at 14209.
182 Id. at 14215.
The basis for legislative power in the committing of troops to hostilities abroad rests in article I, section 8 of the Constitution which authorizes Congress to provide for the common defense, to declare war, to raise and support—for up to 2 years at a time—the Army and Navy, to make rules to regulate and govern the military forces . . .”183

These references to “troops” is a clear indication that the focus of the WPR was actual soldiers, sailors, airmen, and marines—not their equipment, military materiel, or other property. “Armed forces” was meant to mean people from the very beginning.184

Recent operations have confirmed the continuing reliance by the Executive on “boots on the ground” as the trigger for WPR constraints. In response to a question directly about the application of the WPR to the 2011 military operations in Libya, President Obama stated,

I spoke to the American people about what we would do. I said there would be no troops on the ground . . . We have done exactly what I said we would do. We have not put any boots on the ground . . . But do I think that our actions in any way violate the War Powers Resolution? The answer is ‘no.’ So I don’t even have to get to the constitutional question.”185

In response to President Obama’s reading of the WPR, Minority Leader of the House of Representative, Nancy Pelosi agreed. “The limited nature of this

183 Id. at S14216 (statement of Sen. Huddleston).

184 Two potential arguments against this interpretation are the following: First, Congress indicated in other documents, such as a 1966 treaty with the Republic of Korea, that it could distinguish between “United States Armed Forces” and “members of the United States Armed Forces.” Facilities and Areas and the Status of United States Armed Forces in Korea, U.S.-S. Kor., July 9, 1966, 17 U.S.T. 1677 (defining “members of the United States armed forces” as an independent phrase than United States armed forces itself for purposes of the treaty). Indeed, the WPR itself includes the assignment of “members of such armed forces” to command and accompany the military forces of other countries within the Act’s definition of the phrase “introduction of United States Armed Forces.” War Powers Resolution, 50 U.S.C. § 1547(c) (2012). Thus, if Congress wanted the President to be restricted by the WPR only when actual members of the United States Armed Forces were introduced into another country, it could, and should, have said so. Second, Congress’ intent in enacting the WPR was not merely to prevent the President from unilaterally placing members of the United States Armed Forces into harm’s way. This is evident from the fact that the WPR does not require written reports from the President for some deployments that are not aimed at starting hostilities. See id. §1543(a)(2). Consequently, the full text of the WPR appears to be aimed at forbidding the President from circumventing Congress’ constitutional right to declare war. This aim would certainly be consistent with a broader interpretation of the phrase “introduction of United States Armed Forces” than one that requires boots on the ground. Despite these potential arguments, the weight of evidence seems to clearly indicate that Congress was intending to protect actual military personnel when it passed the WPR.

185 CNS News, Obama Won’t Answer If War Powers Resolution Is Constitutional, YOUTUBE (June 29, 2011), https://www.youtube.com/watch?v=uxWDkPu0lpU.
engagement allows the president to go forward. I’m satisfied that the president
has the authority he needs to go ahead. If we had boots on the ground . . . then
that’s a different story.”

Even more recently, in response to the deployment of 130 troops to Iraq in
the face of advancing ISIS forces, Secretary of Defense Chuck Hagel “stressed
that the latest deployment ‘is not a combat-boots-on-the-ground operation.’”
This continuing reliance on whether there are “boots on the ground” when
classifying a conflict for domestic law purposes reinforces the original
understanding of the WPR as this being a trigger for the application of the
statute. As will be discussed in Part III, the future technologies discussed
above will allow the President to engage in significant uses of military power
with almost no chance of triggering the statute.

b. Hostilities

The first potential way of meeting the second trigger for the WPR is
“hostilities.” By introducing armed forces into hostilities, the full WPR is
effectuated. However, what defines hostilities is not clear, especially in light
of new technologies.

In the 1973 debates over the WPR, the principal sponsor, Senator Jacob K.
Javits, was asked at a House of Representatives hearing whether the term
‘hostilities’ was problematic because of “the susceptibility of it to different
interpretations,” making this “a very fuzzy area.” Senator Javits
acknowledged the vagueness of the term but suggested that it was a necessary
feature of the legislation: “There is no question about that, but that decision
would be for the President to make. No one is trying to denude the President of
authority.”

This approach of looking to the Executive Branch for a definition of
“hostilities” has continued since the WPR’s passage, causing one scholar to

186 Mike Lillis, Pelosi backs Obama on Libya, THE HILL, June 16, 2011, available at
goodenough/not-combat-boots-ground-operation-says-hagel-announcing-130-more.
188 James Nathan, Salvaging the War Powers Resolution, 23 PRESIDENTIAL STUD. Q. 235, 244–46 (1993);
189 Id.
190 Id.
argue that “[f]rom the beginning, it appears that Congress has largely left the determination of ‘hostilities’ to executive practice.” As evidence of this practice, two years after the passage of the WPR, Congress sought clarification from the Executive Branch as to the meaning of the term “hostilities.”

Monroe Leigh, Legal Adviser of the Department of State, and Martin Hoffman, Defense Department General Counsel, answered that the Executive Branch understood the term “to mean a situation in which units of the U.S. Armed Forces are actively engaged in exchanges of fire with opposing units of hostile forces.”

The House Report of the WPR stated that “[t]he word hostilities was substituted for the phrase armed conflict during the subcommittee drafting process because it was considered to be somewhat broader in scope,” but the Executive Branch argues that neither the legislation nor its drafting history provides any more clarity to its meaning. In recent hearings before Congress, Department of State Legal Adviser Harold Koh acknowledged that “hostilities” is an inherently ambiguous legal standard and stated that in his opinion:

[T]he legislative history of the resolution makes clear there was no fixed view on exactly what the term “hostilities” would encompass. Members of Congress understood that the term was vague, but specifically declined to give it more concrete meaning, in part to avoid unduly hampering future Presidents by making the resolution a “one size fits all” straitjacket that would operate mechanically, without regard to particular circumstances.

As further explained by Mr. Koh, recent Administrations have established four factors that help determine on a case-by-case basis whether “hostilities”
exist. These four factors are “whether the mission is limited, whether the risk of escalation is limited, whether the exposure is limited, and whether the choice of military means is narrowly constrained.” It was an analysis of these four factors that allowed President Obama to determine the WPR was not implicated in the 2011 coalition military operations against Libya because the action involved only “intermittent military engagements” which would not require the withdrawal of forces under the WPR. Mr. Koh added that the U.S. military actions in Libya were “well within the scope of the kinds of activity that in the past have not been deemed to be hostilities for purposes of the War Powers Resolution.”

Not all members of Congress agreed with President Obama’s interpretation of the term. Congressman John Boehner argued that the actions in Libya were clearly hostilities.

You know, the White House says there are no hostilities taking place,” said U.S. House Speaker John Boehner, a Republican. “Yet we’ve got drone attacks underway. They’re spending $10 million a day, part of an effort to drop bombs on Gadhafi’s compounds. It just doesn’t pass the straight-face test in my view, that we’re not in the midst of hostilities.

Others took a similar view. Representative Brad Sherman argued that the WPR was “the law of the land” and that “if the president deploys forces, he’s got to seek Congressional authorization or begin pulling out after 60 days. Too many presidents have simply ignored the law . . . [w]hen you’re flying Air Force bombers over enemy territory, you are engaged in combat.”

In addition to members of Congress, some of the most notable War Powers academics also thought the military operations in Libya may qualify under the statute. Professor Robert Chesney argued that when compared with other

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196 Id. at 21.
197 Id.
198 Id. at 14, 16.
199 Id. at 21. See also MARIAH ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY 1-3 (2013); Charlie Savage & Mark Landler, White House Defends Continuing U.S. Role in Libya Operation, N.Y. TIMES, June 16, 2011, at A16 (adding that the “limited nature of this particular mission [in Libya] is not the kind of ‘hostilities’ envisioned by the War Powers Resolution”).
201 Id.
historical actions and Executive and Legislative responses, the operations in Libya could be considered hostilities.\textsuperscript{202}

Despite objections, the President pressed ahead with military operations and, as noted above, continues to do so in more current operations such as in Iraq.\textsuperscript{203} In fact, as one scholar has recently written, “Truman, Ford, Kennedy, Johnson, Nixon, Reagan, George H.W. Bush, Clinton and Obama all claimed the power to initiate hostilities without congressional authorization.”\textsuperscript{204} President Obama’s decision to follow the four factors as defining criteria for the WPR allowed considerable freedom of activity. A similar decision by future presidents will have significant impacts on the future application of the WPR to conflicts involving emerging technologies.

3. Geographic Space

The other possibility from the second part of the WPR trigger is the introduction of armed forces “equipped for combat” into the “territory, airspace or waters of a foreign nation.”\textsuperscript{205}

The House of Representatives Report on the WPR provides some insight into Congress’ intent in using this language. According to the Report, Congress intended the WPR to apply to

the initial commitment of troops in situations in which there is no actual fighting but some risk, however small, of the forces being involved in hostilities. A report would be required any time combat military forces were sent to another nation to alter or preserve the existing political status quo or to make the U.S. presence felt. Thus, for example, the dispatch of Marines to Thailand in 1962 and the quarantine of Cuba in the same year would have required Presidential reports. Reports would not be required for routine port supply calls, emergency aid measures, normal training exercises, and other noncombat military activities.\textsuperscript{206}

\begin{itemize}
\item[204] MARIAN ZEISBERG, \textit{WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY} 7 (2013).
\item[206] Id.
\end{itemize}
This particular aspect of the WPR trigger has not seemed to be decisive in WPR discussions. There have certainly been situations where this language would have seemed to apply—such as Kosovo and Libya—but it has not been dispositive in bringing the Executive Branch to accept the applicability of the WPR and comply with the notification procedures. This language will be even less consequential with respect to future military operations involving advanced technologies because of its tie to the definition of armed forces, as will be discussed below.

4. Substantial Enlargement

The House Report again sheds some light on what Congress intended with this WPR trigger. According to the Report, the word “substantially” was meant to be a “flexible criterion.”\(^{207}\) The Report provides some examples of when this trigger would be met:

A 100-percent increase in numbers of Marine guards at an embassy—say from 5 to 10—clearly would not be an occasion for a report. A thousand additional men sent to Europe under present circumstances does not significantly enlarge the total U.S. troop strength of about 300,000 already there. However, the dispatch of 1,000 men to Guantanamo Bay, Cuba, which now has a complement of 4,000 would mean an increase of 25 percent, which is substantial. Under this circumstance, President Kennedy would have been required to report to Congress in 1962 when he raised the number of U.S. military advisers in Vietnam from 700 to 16,000.\(^{208}\)

As with the language concerning geographic borders, this language has also not been argued in past military operations and is unlikely to have much effect in future operations, again because of its tie to the definition of “armed forces.” A substantial enlargement would require an initial use of armed forces.

III. INEFFECTIVENESS OF THE WPR

Recall the earlier discussion of Congress’s purpose in passing the WPR.\(^{209}\) At the time, Congress felt disenfranchised in their constitutional role in war-making.\(^{210}\) In the wake of the Vietnam War, Congress felt that successive

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207 Id.  
208 Id.  
209 See supra Part II.A.  
 Presidents from both political parties had ignored the Constitutional design of
shared national security powers with respect to using military force.\footnote{211}
Congress passed the WPR to force the President to acknowledge that Congress
also had a role in the use of the military and to add some definition to what that
role was, with an emphasis on consultation.\footnote{212} Given the likely
unconstitutionality of Section Five after Raines v. Byrd and subsequent Court
decisions, the fourth section’s requirements on reporting become the primary
methodology for Congress to ensure consultation.

Considering the discussion in the previous Part that highlighted issues with
the WPR, this Part will now analyze the future weapon systems discussed in
Part I in light of the issues with the WPR to conclude that the WPR will be
ineffective in controlling the use of these advanced technologies by the
President as currently understood and applied.

A. Armed Forces

As discussed above, the term “armed forces” has generally been understood
to mean members of the United States military.\footnote{213} The often-used phrase of
“boots on the ground” would be even more restrictive and not include many
operations, such as typical Navy and Air Force operations where no U.S.
personnel are utilized in a way that they might come into physical contact with
an opposing force. As mentioned above, Senator Boehner didn’t seem to take
the view that the Air Force and Navy were excluded.\footnote{214} Under either
interpretation, the use of advanced technologies calls into question the
effectiveness of the WPR in accomplishing Congress’s goal of forcing the
President to consult before engaging in activities that might lead to hostilities.
Several examples will adequately illustrate this point.

1. Drones

The use of drones obviously raises issues with respect to the composition
of “armed forces” within the WPR. Any remotely piloted drone would by
definition be a situation where the operator was not on the ground where the
weapon’s effects were to occur. In the military operations against terrorists, the

\footnote{211} See Edwin B. Firmage, The War Power of Congress and Revision of the War Powers Resolution, 17 J.
\footnote{212} See Druck, supra note 210, at 213–14.
\footnote{213} See supra Part II.C.2.a.
\footnote{214} See supra Part II.C.2.b.
President has claimed authority to use drones based on Congressional action in passing the Authorization to Use Military Force (AUMF) but it is unclear whether the President believes he must have authority to use drones in other situations, even armed drones. There does not appear to be any statement by the Executive Branch that the use of armed drones involves the introduction of armed forces under the WPR. Prior reports that the President has filed “consistent with” the WPR reporting requirements have not included reports on drone usage.

Additionally, the President’s determination that the limited use of Air Force personnel during the military operations in Libya did not trigger his reporting requirements under the WPR make it seem clear that the use of armed drones would certainly not do so either. In Libya, aircrews were actually entering Libyan airspace. The use of armed drones would not only not involve “boots on the ground” but would not even involve “boots in the air.” As long as the introduction of armed forces is equated to “boots on the ground,” the use of armed drones will not meet that trigger.

Alternatively, one could argue that the WPR language is sufficient to include the employment of drones. Drones certainly can mimic troops in many ways. They can enter into foreign nations; they can be flown to those nations in large numbers; and they can add to the number of drones that are already in that nation and that are equipped for combat. Indeed, the use of the word “repair” in the WPR could be understood to imply that the phrase “United States Armed Forces” encompasses materials used by the Armed Forces and not just human members of the Armed Forces. However, the practice of past and current Presidents has been to treat drones as if they were not “armed forces” for WPR reporting purposes.

As technology increases and drones become smaller (eventually microscopic when combined with advances in nanotechnology), and more lethal, with longer loiter capabilities, and are created in great masses, they will present a very capable weapons and reconnaissance platform. Such a capability will be a very effective asset to use in military operations and will undoubtedly be so.

216 Savage & Landler, supra note 199.
217 Libya Hearing, supra note 192, at 24.
For example, assume that an insurgent group rises in a country that is an ally to the United States and threatens to overthrow the government and establish a government that is not friendly to the U.S. The allied government seeks military assistance from the President, who determines that sending a fleet of 100 unmanned armed drones to quickly and decisively engage the insurgent group would be an effective military option. Pilots located in Nevada would fly the drones, and an airport in a neighboring country would launch and maintain them. No U.S. persons would actually be deployed to the allied country where the insurgency is occurring. Under the current pattern of analysis, such action will not trigger the WPR, despite the significant destructive effect the drones would cause.

2. Cyber Operations

Further, consider the use of cyber technologies. These advanced weapons can be initiated far from any battlefield and in a place remote from the intended victim of the action. As already discussed, one of their greatest appeals is their effectiveness without putting those using them in harm’s way. Because of this, the nature of cyber operations have caused at least one cyber scholar to speculate that there should be a “duty to hack” because of the bloodless nature, both to the attacker and the victim, of cyber operations.

The example of the recent STUXNET malware is instructive. STUXNET appears to have been a well planned and highly effective cyber operation which resulted in the physical destruction of almost 1,000 centrifuges used in the nuclear enrichment process. It is alleged to have been the work of the U.S. and Israel. However, no member of the military ever stepped foot in Iran or even flew over Iran in connection with the operation so far as the world knows. In other words, the U.S., assuming the U.S. was involved, was able

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219 See also Blake & Imburgia, supra note 25, at 183.
221 See David E. Sanger, Obama Order Sped Up Wave of Cyberattacks Against Iran, N.Y. TIMES (June 1, 2012), http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.
to accomplish a priority national security goal that would have required significant military assets if done through some other, more kinetic, means.

Presumably, if the President had decided to use kinetic operations, surely the specter of the WPR would have been raised. If an attack by Air Force assets or a mission for some special operations unit, similar to the one that killed Osama Bin Laden, had been used similar effects may have occurred. But, because the entire operation was done through cyber means, it appears that neither the President, nor Congress felt that the WPR was implicated. There were no “boots on the ground,” and the operative United States assets were presumably far from the territory of Iran and likely operating within the territory of the United States or one of its allies.

This apparent perception that the President can conduct a significant military action that would otherwise involve the WPR but does not, because it was accomplished through the use of cyber means, should serve as a warning to Congress. If the President feels comfortable executing STUXNET without consultation, it would be hard to envision a category of cyber actions that would cause the President to think he should notify Congress.

As Arnold points out, Congress has engaged to some degree on the issue of cyber activities by passing the National Defense Authorization Act. The 2012 National Defense Authorization Act contained a provision that authorized cyber activities, subject to the War Powers Resolution. Of course, being “subject to” the WPR does not mean it applies. It simply means that when it applies, the Executive Branch will comply with its requirements. In its Cyberspace Policy Report, the DoD responded to the question by the Senate: “[w]hat constitutes use of force in cyberspace for the purpose of complying

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Congress affirms that the Department of Defense has the capability, and upon direction by the President may conduct offensive operations in cyberspace to defend our Nation, Allies and interests, subject to—

(1) the policy principles and legal regimes that the Department follows for kinetic capabilities, including the law of armed conflict; and

(2) the War Powers Resolution (50 U.S.C. 1541).

227 *See* Arnold, *supra* note 191, at 177.
with the War Powers Act.” The answer demonstrates the elusive nature of categorization of these future weapons.

The requirements of the War Powers Resolution apply to “the introduction of United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.”

Cyber operations might not include the introduction of armed forces personnel into the area of hostilities. Cyber operations may, however, be a component of larger operations that could trigger notification and reporting in accordance with the War Powers Resolution. The Department will continue to assess each of its actions in cyberspace to determine when the requirements of the War Powers Resolution may apply to those actions.

The DoD’s assessment of each of its cyber actions will no doubt occur given the Executive Branch’s understanding of the WPR discussed above. Such an assessment is unlikely to prove much of a constraint on presidential actions, as the threshold for triggering the WPR is so high.

3. Other Emerging Technologies

Other advanced weapon systems, such as those involving nanotechnology and genomics, are similar to those discussed above. In each of these cases, there will certainly be human involvement in the design, creation, and utilization of these weapons, but all of this will take place far from any battlefield and from the area where the effects of the weapon are designed to take place. There will be no “boots on the ground.”

Even in the case of robots and autonomous weapons, it is unclear how the “boots on the ground” standard will apply. To the extent that “boots on the ground” refers to putting American lives at risk, the President would have a clear argument that these should be treated similar to drones, and not be considered as crossing that threshold.

229 Id.
For example, assume the same scenario above where an ally is seeking help from the U.S. against an insurgency. As part of the response, the President wants to install autonomous sentry systems to guard several key government sites from potential attack. Though the use of these systems may lead to significant casualties, there would be no U.S. persons in the allied country—no “boots on the ground.” The Executive Branch is unlikely to deem such action as triggering the reporting and consultation requirements of the WPR.

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Generally then, the current understanding of “armed forces” will not provide limits on the presidential use of power under the WPR with respect to many emerging technologies. Looking to “boots on the ground” as the clarifying paradigm of what the introduction of armed forces means under the statute will not provide Congress with the notification and consultation it desires. In order to continue the validity of the WPR as a notification tool for Presidential actions in future military operations, Congress will need to elucidate a different understanding of the term “armed forces.”

B. Hostilities

The Executive Branch’s measure for “hostilities” also favors action by the President without implicating the WPR with respect to future technologies. As stated by Harold Koh, the four determining factors are “whether the mission is limited, whether the risk of escalation is limited, whether the exposure is limited, and whether the choice of military means is narrowly constrained.” ²³⁰ Importantly, it appears that the determination of how each military operation fits into these four factors is an Executive Branch determination, not one for Congress.²³¹ It is unlikely that future military operations using the advanced technologies discussed above will be considered “hostilities,” as defined by these four factors, in a way that will meaningfully constrain the President with respect to the WPR.

1. Drone Operations

When considered in light of the four hostilities factors, drones become an even more attractive tool for the President when deciding to use lethal military

²³⁰ Libya Hearing, supra note 192, at 21.
force. In the current attack on terrorist targets, every target is considered a unique operation and gets individual approval. It is hard to imagine a more limited mission. Because the current missions in places like Yemen are done with host nation approval, the risk of escalation is minimal, as more than a decade of drone operations has proven. With no “boots on the ground,” exposure of U.S. personnel is obviously limited and drones present a very tailored choice of means of action. In other words, it appears that judging hostilities by the Executive Branch’s four criteria seems tailor-made for a President who favors drone operations.

Indeed, current practice confirms this approach. The President’s on-going use of armed drones against terrorists has never been understood as “hostilities” by the Executive Branch. Congress is often notified in advance or shortly after a drone strike, but the President has never conceded that this information was shared in compliance with the WPR. Again, Executive practice is creating a “gloss” that will be relied on by future Executives.

2. Cyber Operations

Allison Arnold has recently published an excellent analysis of whether “cyber hostilities” would trigger the WPR, concluding that “it is unlikely that the executive branch would deem stand-alone offensive military operations in cyberspace as ‘hostilities’ triggering the War Powers Resolution.” Arnold’s conclusions are exactly right.

Similar to drones, a number of significant and serious cyber operations would fall below the threshold of hostilities as described by the four factors.

234 Charlie Savage and Mark Landler, White House Defends Continuing U.S. Role in Libya Operation, N.Y. TIMES, June 15, 2011 at 2 (“The administration’s theory implies that the president can wage a war with drones and all manner of offshore missiles without having to bother with the War Powers Resolution’s time limits.” (quoting Jack Goldsmith)).
235 See id. at 2.
236 See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (“In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”); Corn, supra note 11, at 690 n.13.
237 Arnold, supra note 191, at 192.
Perhaps the most contested factor would be the risk of escalation. Many cyber experts have written about the potential for escalation in cyber operations. However, the anonymous nature of the Internet and the difficulties of attribution dramatically temper the risk of escalation.

Once again, the example of the recent STUXNET malware is instructive. Assuming that the United States was involved, the President initiated an act which most experts and commentators in the area believe violated the international law prohibition on the use of force and may even have been an armed attack. As mentioned above, a similar attack on such a scale using kinetic means would seem to trigger the WPR. However, Arnold analyzes STUXNET using the four factors and determines that a military operation even of that scale, done solely by cyber means, would not trigger the WPR. Assuming the U.S. was involved in STUXNET, the President seems to agree with Arnold’s analysis since neither President Bush nor President Obama notified Congress of the “cyber hostilities.”

As a practical matter, with respect to the factor of escalation, the anonymity of a cyber attack weighs in favor of such attacks not being hostilities. It was almost two years before computer analysts could attribute the attack to Israel.
and/or the U.S. and then without certainty. Though Iran called for retribution, the passage of time had severely limited Iran’s legal options.

3. Other Emerging Technologies

The President’s application of the four factors for determination of the existence of hostilities is equally unlikely to apply to many potential uses of advanced technologies. For example, the use of robots or autonomous weapons provides little risk to U.S. persons. An anonymous infiltration of nanobots into another nation’s steel manufacturing industry to create flawed material is unlikely to result in an escalation of conflict. Establishing a series of autonomous sentry sites as discussed above is a very narrow and limited response to a call for help from an ally and unlikely to result in risk to the United States. These and other potential uses of emerging technologies will not meet the common understanding of hostilities yet are almost certainly the kinds of Executive actions about which Congress is hoping to be notified.

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Emerging technologies, including those discussed above, will open a wide array of new military options to the President. And the uses of these technologies are under regulated by the current WPR. Because the President’s obligation to notify Congress under the WPR is tied to the onset of hostilities, and the employment of these future technologies will not equate to hostilities in most instances, the use of drones, cyber and other emerging technologies will not trigger the Executive’s obligation to provide notice to Congress. If this does not meet the intent of Congress in the desire for notification and consultation, it must do something to pull these types of Executive action under the current WPR.

IV. AMENDING THE WPR

Given the clear inadequacies of the WPR, the recognition of the need for revision has been widespread, beginning with the statute’s original sponsors.

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244 Ellen Nakashima & Joby Warrick, Stuxnet was Work of U.S. and Israeli Experts, Officials Say, WASH. POST (June 2, 2012), http://www.washingtonpost.com/world/national-security/stuxnet-was-work-of-us-and-israeli-experts-officials-say/2012/06/01/gJQAhEy6U_story.html#.

245 Nicole Perlroth & Quentin Hardy, Bank Hacking Was the Work of Iranians, Official Say, N.Y. TIMES (Jan. 8, 2013), http://www.nytimes.com/2013/01/09/technology/online-banking-attacks-were-work-of-iran-us-officials-say.html?_r=0.

246 BAKER ET AL., supra note 8, at 21.
Time has only deepened that conviction. The sections below look at previously proposed solutions and then advance a new solution to the WPR that will allow it to cover the use of advanced technologies discussed in this article.

A. Previously Proposed Solutions

There have been several suggestions of ways to amend the WPR to make it more effective in current operations. Various legislative proposals, Commission Reports and scholarly articles have all recognized the problems with the existing WPR and proposed solutions to problems. These potential solutions will be discussed below. However, despite the merit of many of these proposals, none of them would effectively accomplish Congress’s intent of ensuring notification and consultation with respect to the use of emerging technologies in future armed conflicts.

1. Legislative Proposals

Since the passage of the WPR, there has been a consistent call to repeal the legislation and “rely on traditional political pressures and the regular system of checks and balances, including impeachment” to control Executive actions. On June 7, 1995, the House of Representatives actually voted on a bill to repeal the WPR which failed by a vote of 217 to 201. The bill looked like it would pass until forty-four Republicans switched sides and voted against the measure in order to not strengthen the then-democratic President, Bill Clinton.

There have also been a number of legislative attempts to amend the WPR, in light of its acknowledged shortcomings. One of the most significant was a


247 See GRIMMETT, supra note 20, at 44–48 (outlining and discussing proposed amendments to the WPR since its inception).

248 For example, in 1988, the Senate Foreign Relations Subcommittee on War Powers held extensive hearings after President Reagan’s decision to reflag Kuwaiti tankers in the Persian Gulf. During those hearings, many national security experts and former government employees urged the subcommittee to seek repeal of the WPR. See The War Power After 200 Years: Congress and the President at a Constitutional Impasse, Hearings Before the Special Subcommittee on War Powers of the Senate Committee on Foreign Relations, 100th Congress (1989); Biden & Ritch, supra note 103, at 370.

249 Fisher & Adler, supra note 12, at 1 (arguing that “outright repeal would be less risky than continuing along the present path.”).

250 See GRIMMETT, supra note 20, at 2; Fisher & Adler, supra note 249, at 15.

251 Fisher & Adler, supra note 12, at 16.
Use of Force Act proposed by Senator Biden in a 1989 law review article. The proposed Act listed a number of circumstances where the President could use force without further authorization from Congress. The proposal would then define the “use of force” as “the introduction of United States Armed Forces into hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances.” The Act would have also established a consultative group, mandating meetings between certain Members of Congress and various Executive Branch officials, including the President, where discussion would occur but consent would not be required.

Another attempt at amendment was the War Powers Resolution Amendment of 1988, known as the Byrd-Warner amendments, but also supported by Senators Nunn and Mitchell. In explaining his reasoning behind the Bill, Senator Byrd stated that the intent of the amendments was to “change[] the presumption of the current War Powers Resolution, which is that U.S. Armed Forces must withdraw from situations of hostilities or imminent hostilities within 60 days unless Congress specifically authorizes their continued presence.” No Congressional action was taken on this proposal.

None of these legislative proposals have passed, nor would they have effectively dealt with emerging technologies. Further, there are no legislative proposals that would have solved the “armed forces” or “hostilities” problem in a way that would have covered future developments in armed conflict.
2. War Powers Consultation Act of 2009

Recognizing the ineffective history of the WPR, the University of Virginia’s Miller Center of Public Affairs invited a number of former government experts on national security, including two former Secretaries of State who served as co-chairs, to “identify a practical solution to help future Executive and Legislative Branch leaders deal with the issue [of war powers].” The National War Powers Commission Report that was produced by the invitees proposed legislation which the Report calls the War Powers Consultation Act of 2009 (WPCA) and urges Congress to pass the Act and the President to sign it. The Act tries to meet the most important needs of both the President and the Congress.

The proposed WPCA does a number of things meant to correct existing flaws in the WPR. The WPCA would create a “Joint Congressional Consultation Committee” consisting of some of the key members of Congress with whom the President would be “encouraged to consult regularly with.” It requires the President to consult the Committee only with respect to “deployment of United States armed forces into significant armed conflict” which is defined as “(i) any conflict expressly authorized by Congress or (ii) any combat operation by U.S. armed forces lasting more than a

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260 THE MILLER CENTER, http://millercenter.org (a nonpartisan institute that seeks to expand understanding of the presidency, policy, and political history, providing critical insights for the nation’s governance challenges).

261 BAKER ET AL., supra note 8.

262 Id. at 10.

263 Id. at 9. The Report states:

We recognize the Act we propose may not be one that satisfies all Presidents or all Congresses in every circumstance. On the President’s side of the ledger, however, the statute generally should be attractive because it involves Congress only in “significant armed conflict,” no minor engagements. Moreover, it reverses the presumption that inaction by Congress means that Congress has disapproved of a military campaign and that the President is acting lawlessly if he proceeds with the conflict. On the congressional side of the ledger, the Act gives the Legislative Branch more by way of meaningful consultation and information. It also provides Congress a clear and simple mechanism by which to approve or disapprove a military campaign, and does so in a way that seeks to avoid the constitutional infirmities that plague the War Powers Resolution of 1973. Altogether, the Act works to gives [sic] Congress a seat at the table; it gives the President the benefit of Congress’s counsel; and it provides a mechanism for the President and the public to know Congress’s views before or as a military campaign begins.

264 Id. at 9–10.

265 Id. at 36.

266 Id. at 37.
week or expected by the President to last more than a week.”

The proposed WPCS also reverses the highly contested portion of the WPR which requires the President to remove troops based on Congressional inaction and instead requires Congress to take action by formally approving or disapproving of the President’s decision to deploy troops.

Despite the quality of the participants in the Commission and the vast experience in Government service upon which they relied, Congress has not chosen to adopt the Report’s recommendations and pass the WPCA. However, Senators McCain and Kaine introduced the WPCA as a bill on the Senate floor on January 16, 2014. At the time of writing, it seems very unlikely that the Bill will pass, but this is at least a signal of the quality of the WPCA recommendations.

However, though scholars have also found that the WPCA would represent many improvements to the WPR, it would not avoid the most contentious of WPR issues, the triggering mechanism. As Prof. Corn writes, using the term “significant armed conflict” as the trigger does not solve the problem because it “creates the same inherent risk for one critical reason: it is not tethered to a military operational criterion.”

Similarly, the proposed WPCA would also be as ineffective as the WPR in regulating future armed conflicts. Its continuing reliance on the term “armed forces” leaves one of the major issues with respect to future technologies unsolved. Further, removing the term “hostilities” and substituting for it the term “significant armed conflict” is equally unhelpful. Not only does the definition of “significant armed conflict” include the term “armed forces,” but “like the failed concept of ‘hostilities[] or . . . situations where imminent involvement in hostilities is clearly indicated by the circumstances,’ the concept of ‘armed conflict’ will almost inevitably be susceptible to interpretive debate.”

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267 Id. at 10.

268 Id. at 47–48.


270 Corn, supra note 11, at 713–14 (2010).

271 Id. at 693–94.
Though the WPCA may have made an improvement on the current debates concerning the WPR, it would not provide a solution to future armed conflicts.\(^{272}\)

3. Rules of Engagement (ROE)

Perhaps the most useful of these proposals is the recommendation by Professor Corn to tie the WPR\(^{273}\) requirement to notify Congress to the Executive Branch’s determination that mission-specific supplemental measures to the Standing Rules of Engagement\(^{274}\) are needed. Corn recognizes the importance of the “trigger” in making the WPR more effective\(^{275}\) and argues that “[l]inking such notification to the authorization of ‘mission specific’ Rules of Engagement . . . will substantially contribute to the efficacy of the historically validated war-making balance between the President and Congress.”\(^{276}\)

As Corn explains, when the President takes actions with military forces, other than traditional defense of the United States,\(^{277}\) he normally authorizes the use of force to accomplish specific missions.\(^{278}\) In other words, when the President sends military personnel to attack an enemy, he provides them with ROE that authorize them to use force outside of self-defense to accomplish a mission.\(^{279}\) Such measures may include declaring certain individuals or members of organized groups as “declared hostile forces” who can be attacked on sight.\(^{280}\)

\(^{272}\) Chen, supra note 38, at 1801.

\(^{273}\) Corn, supra note 11, at 695. Professor Corn actually makes his recommendations in light of the WPCA discussed above. However, his recommendations would be just as effective if amended to the WPR and since the WPCA does not seem likely to be passed by Congress, this article will treat Corn’s recommendations as if they were made concerning the WPR.

\(^{274}\) The Standing Rules of Engagement is a document promulgated and maintained by the Chairman of the Joint Chiefs of Staff that "establish fundamental policies and procedures governing the actions to be taken by US commanders and their forces during all military operations and contingencies and routine Military Department functions." Chairman of the Joint Chiefs of Staff, Instruction 3121.01B, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES A-1 (June 13, 2005).

\(^{275}\) Corn, supra note 11, at 694–95.

\(^{276}\) Id. at 695.

\(^{277}\) Id. at 715.

\(^{278}\) Id. at 719–23.


\(^{280}\) Chairman of the Joint Chiefs of Staff, Instruction 3121.01B, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES A-2 to A-3 (June 13, 2005).
Corn then postulates that the invocation of mission-specific ROE provide a “more effective consultation trigger” for WPR activation because they “reveal the constitutional demarcation line between responsive uses of military force and proactive uses of such force—a line that has profound constitutional significance. Authorizing employment of the armed forces under such proactive use of force authority implicates the constitutional role of Congress in war-making decisions.” According to Corn, Congress’s ambivalent reactions to Presidential uses of force are the reason a more recognizable trigger is necessary.

It is precisely because of [congressional ambivalence] that a meaningful and operationally pragmatic notification trigger is so important. Because any initiation of hostilities beyond the limited scope of responsive/defensive actions will require authorization of supplemental ROE measures, a coextensive congressional notification requirement triggered by ROE approval will provide Congress the opportunity to exercise its constitutional role.

Under Corn’s proposal, anytime the President deployed military personnel and gave them mission-specific ROE, the notification and consultation provisions of the WPR would be triggered. It is unlikely that President’s would avoid providing the military with the appropriate ROE simply to avoid the WPR because the risks to military personnel would be too great.

As useful as Professor Corn’s suggestion might be if applied to today’s WPR, it would not sufficiently resolve the problems of emerging technologies. In many instances, those who use cyber tools will be governed by ROE; however, there will certainly be times when they are not. A similar situation likely exists for drones. Because of the special approval process used for armed drone attacks, a formal mission-specific ROE may not be promulgated to govern the use of force, particularly if it is an attempt at an individual target. The use of nanotechnology and drones pose the same problems with respect to ROE. Certainly offensive uses of these weapons will be so highly controlled, at least initially, that reliance on a supplemental mission-specific ROE measure will not be sufficient to accomplish the notification and consultation requirements.

281 Corn, supra note 11, at 694.
282 Id. at 724.
283 Id. at 728.
Perhaps most importantly, the pressure for the President to issue mission accomplishment ROE in order to preserve the lives of military personnel will not exist with non-human weapons such as drones, cyber tools, autonomous weapons, etc. This will allow the President to manipulate the use of ROE in order to prevent the requirement to go to Congress. In other words, in a situation where the President would issue mission-specific ROE such as sending a SEAL team into Pakistan to capture or kill Osama bin Laden, the issuance of mission-specific ROE would be completely unnecessary if the same mission were going to be accomplished by an armed unmanned drone or by a lethal nanobot carrying a genomic identifier.

4. All Offensive Strikes

Along with Allison Arnold, Julia Chen is among the first to recognize the inadequacies of the WPR in confronting modern technologies. Chen argues that the WPR “can no longer accomplish its intended purpose and should be replaced by new war powers framework legislation.” She proposes that the WPR, or WPCA, be amended to cover “all offensive strikes.”

Chen’s proposal is intended to include all personnel who might be engaged in offensive military operations, not just military personnel, as originally proposed by Senator Thomas Eagleton. She argues that the Constitution’s grant of Congressional power over letters of marque and reprisal indicate that Congress should use the War Powers framework to control civilian agencies, such as the CIA, that might also involve themselves in armed conflict.

However, as Chen rightly acknowledges, other statutory authorities regulate the CIA and other intelligence activities conducted by U.S. citizens. Additionally, civilian agencies, and even civilians who accompany military forces, have no authority to participate in offensive military actions under the Laws of Armed Conflict (LOAC). When they do so, they lose their

\[284\] Arnold, supra note 191, at 176–77.
\[285\] Chen, supra note 38, at 1795.
\[286\] Id. at 1802.
\[287\] Id. at 1785–88.
\[289\] Chen, supra note 38, at 1797.
\[290\] Chen concedes that intelligence activities are currently governed by statutes such as the Intelligence Oversight Act of 1991, 50 U.S.C. § 413 (as amended).
\[291\] See generally CORN, ET AL., supra note 95, at 131–57 (explaining the status of civilians under the LOAC).
protections and may be prosecuted for their war-like acts. When Congress authorizes the President to exercise the nation’s war powers, it is not intending to authorize civilian participation in hostilities. This is amply illustrated by the fact that in the current fight against terrorist organizations around the world, the AUMF does not relieve the President of making Presidential findings under 50 U.S.C. Sec. 413b(a).

Additionally, using the term “offensive” would apply nicely to most existing technologies but will not fit as well with future technologies. For example, in the case of a latent attack discussed above, the triggering mechanism may be the victim’s own actions, such as targeting a certain weapon or platform. Further, many future cyber activities may be created and used as defensive capabilities but have an autonomous strike-back capability that would be defensive in nature but still have impacts against foreign systems. Autonomous weapons systems would have the same characteristics.

Because of these issues, though Chen’s proposal would also accomplish the much-needed extension of the WPR over some emerging technologies, it is underinclusive of certain technologies and too expansive in creating a situation where the President would be overregulated in his exercise of Executive authority.

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Despite the numerous attempts to modify the WPR, it does not appear that any of the existing suggestions are sufficient to ensure the notification and consultation that Congress is seeking from the President, particularly with respect to emerging technologies. The next section will propose an amendment to the WPR that will solve this problem.

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292 International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3; CORN, ET AL., supra note 95, at 168–70.
293 CORN, ET AL., supra note 95, at 468.
294 The drafters of the WPCA recognized this distinction and specifically excluded “covert actions” from its coverage. BAKER, ET AL., supra note 8, at 36.
296 See infra Part I.B.1.
B. A Proposal for Future Armed Conflicts

As mentioned throughout this article, the primary weakness of the WPR with respect to future armed conflicts is the inability of the triggering mechanisms to adequately regulate emerging technologies. The limited application to only “armed forces” and the current understanding of “hostilities” is unable to capture the kinds of military actions the President will likely take in the future, leaving Congress without a mechanism to force notification and consultation. Each of these terms must be expanded to accomplish the WPR’s stated goal of assisting Congress in playing its constitutional role in war making.

1. Supplies or Capabilities

The inadequacy of the term “armed forces” has been discussed at length. It is clear that many of the emerging technologies will not involve “boots on the ground” or even in the airspace. These technologies will be planned, created, and initiated by humans, but humans will be distant in both time and space from their lethal effects. In order to cover these types of future military operations, the WPR needs to clarify its applicability to these “humanless” means and methods of warfare.

The solution to this dilemma is to add language that includes “capabilities” to the coverage of the WPR. In other words, the language from Section 4(a) would be amended from its current form of “In the absence of a declaration of war, in any case in which United States Armed Forces personnel are introduced—” to read “In the absence of a declaration of war, in any case in which United States Armed Forces personnel, supplies or capabilities are introduced or effectuated—.”

By adding the proposed language, the statute would be clear as to what elements of the armed forces were governed by the statute. While the current statute is only understood to govern personnel, adding “supplies” and

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298 See generally infra Part III.A.

299 See generally infra Part I.A.

300 War Powers Resolution § 4(a), 50 U.S.C. §§ 1541-1548 (1973). The added language would also be used in the other areas of the WPR where section 4(a)’s language is reproduced.

301 Id.
“capabilities” would extend the statute to cover the emerging technologies discussed in this paper.

The statute would also need to include the following definitions in order to provide clarity:

**Armed Forces Personnel** - For purposes of this chapter, the term “Armed Forces Personnel” means personnel who are members of or belong to the armed forces as defined in 10 U.S.C. Sec. 101(a)(4).

**Armed Forces Supplies** - For purposes of this chapter, the term “Armed Forces Supplies” has the same meaning as 10 U.S.C. Sec. 101(a)(14). It does not include goods and services transferred under Title 22 of the United States Code.

**Armed Forces Capabilities** - For purposes of this chapter, the term “Armed Forces Capabilities” means any service, process, function, or action that is used, directed, initiated, established, or created by the armed forces (as defined in 10 U.S.C. Sec. 101(a)(4)) that produces or results in an effect or condition designed to accomplish a military objective.

Adding the word “effectuate” to the statute would cover some weapons systems like cyber tools, that might be introduced at one point, but sit dormant until needed in the future. At the future time, when the tool was effectuated and its effects initiated, the President would need to notify Congress.

The amendment of this language triggering the application of the WPR will vastly increase the coverage of the notification responsibility of the President, particularly with respect to emerging technologies.

2. **Violation of Sovereignty**

The second trigger, that of “hostilities,” would also need to be adapted for future technologies. The Executive Branch’s definition of hostilities has become too narrow over time and the capabilities of emerging technologies...
will largely fall outside that definition. The scope of the second trigger needs to have a geographic element as well as a descriptive element. Some actions that will never be significant enough to reach the level of “hostilities,” may still violently offend another nation and lead to armed conflict.

In order to minimize the problems from maximizing the coverage, the current phrase in Section 4(a) of the WPR that states “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances” should be amended to read “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, or that violate the sovereignty of a foreign nation.”

The addition of the violation of sovereignty will increase the scope of the WPR to include those areas not currently covered by hostilities. Using cyber tools similar to STUXNET, which do not risk much escalation or present much exposure to U.S. forces, will still be covered if they were used or designed to have effects in the sovereign territory of another nation. A similar analysis would apply to the use of nanotechnology or genomics, bringing these future technologies under the coverage of the WPR.

Using the word “violate” removes consensual activities that do not equate to hostilities. Tying the statute to a violation of sovereignty goes to the heart of what the WPR was meant to accomplish by ensuring the President notifies and consults with Congress before taking actions that might lead to war. In many cases, violations of sovereignty can be considered a “use of force” or escalate into a “use of force” under the United Nations Charter paradigm. This is particularly true of violations of sovereignty by the military.

302 War Powers Resolution § 4(a)(1).
304 U.N. Charter art. 2, para. 4.
305 The current regime for regulating force by states is found in the United Nations Charter. A complete analysis of this regime is beyond the scope of this paper. Suffice it here to say that Article 2.4 of the Charter states the basic obligation of states: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” Id. There is a vast array of literature on this subject. See Albrecht Randelzhofer, Article 2(4), in 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 114–36 (Bruno Simma et al. eds., 3d ed. 2012); Applicable to the topic of this article, several commentators have written about the application of the “use of force” paradigm specifically to cyber operations. See generally THE TALLINN MANUAL, supra note 48, at 42–53; Matthew C. Waxman, Cyber-Attacks and the Use of Force: Back
The statute would not preclude all violations of a state’s sovereignty, and the President would still have considerable room to effect foreign relations with other Executive assets. But the use of the military to violate the sovereignty of another state would trigger the WPR requirements.

**CONCLUSION**

Congress initially passed the WPR because it felt that it was unable, under the practice at the time, to meaningfully engage with the Executive on war-making issues. The recent events in Libya, Syria, and Iraq reinforce the fact that the WPR has not solved this Constitutional issue. Reliance on the triggers of “armed forces” and “hostilities” have not resulted in the notification and consultation Congress was seeking with respect to war-making.

These WPR triggers will be even less effective as emerging technologies develop and are used in future armed conflicts. Cyber tools, unmanned and autonomous weapons and weapons systems, nanotechnology, genomics and a host of other future developments provide effective tools for the President to use as Commander-in-Chief of the armed forces and fall outside the current WPR. The President will be able to utilize these and other future capabilities without triggering the WPR requirements.

Amending the WPR to include supplies and capabilities and to cover actions that violate the sovereignty of a foreign nation will increase the coverage of the WPR and effectuate the intention of Congress to regain their Constitutional role in war-making.