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# Restoring Constitutional Balance: Accommodating the Evolution of War

Julia L. Chen

*Boston College Law School*, [julia.chen.2@bc.edu](mailto:julia.chen.2@bc.edu)

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# RESTORING CONSTITUTIONAL BALANCE: ACCOMMODATING THE EVOLUTION OF WAR

**Abstract:** When drafting the Constitution, the Framers implemented a structural system of checks and balances to guard against the executive tyranny they had experienced under British rule. During the Vietnam War many in Congress perceived the executive branch as over-reaching, and in response they passed the War Powers Resolution of 1973, which was an attempt to place a procedural check on executive power. This Note examines changes in the technology and actors involved in modern warfare against the scope of the Resolution. The 2011 conflict in Libya is presented as a specific example to demonstrate that modern warfare has evolved outside the scope of the Resolution. Based on the assumption that war powers should be balanced between the executive and legislative branches, this Note argues for new war powers legislation that is more broad and flexible in scope to accommodate the evolution of warfare.

## INTRODUCTION

On March 19, 2011, American forces began a campaign of air strikes against the Qaddafi regime in Libya using warplanes and missiles.<sup>1</sup> On March 21, the President of the United States sent written notification to the leaders of Congress that “U.S. military forces . . . began a series of strikes against air defense systems and military airfields for the purposes of preparing a no-fly zone.”<sup>2</sup> On March 30, it was reported that the Central Intelligence Agency (CIA) had operatives working on the ground in Libya to gather intelligence for military airstrikes and to assess the rebel Libyan fighters.<sup>3</sup> The U.S. military was using spy planes and unmanned aerial vehicles (UAVs) to identify potential Libyan mili-

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<sup>1</sup> David D. Kirkpatrick et al., *Allies Open Air Assault on Qaddafi's Forces*, N.Y. TIMES, Mar. 20, 2011, at A1.

<sup>2</sup> Letter from President Barack Obama to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Mar. 21, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>.

<sup>3</sup> Mark Mazzetti & Eric Schmitt, *C.I.A. Spies Aiding Airstrikes and Assessing Qaddafi's Foes*, N.Y. TIMES, Mar. 31, 2011, at A1.

tary and government targets.<sup>4</sup> By May 12, UAVs were the only American weapons being used to fire on ground targets in Libya.<sup>5</sup> Nonetheless, other American aircraft were supporting allied attack missions.<sup>6</sup>

The President took this action without consulting Congress through the process prescribed by the War Powers Resolution of 1973 (“Resolution”).<sup>7</sup> The Resolution, which was passed in response to the Vietnam War, was a congressional attempt to check executive power and restore a balance of powers in the decision to enter a war.<sup>8</sup> Nonetheless, in response to congressional outcry against the President’s unilateral action, the administration claimed that the War Powers Resolution was not applicable to the Libyan campaign.<sup>9</sup> The Office of Legal Counsel, a unit of the U.S. Department of Justice tasked with providing legal advice to the President, reasoned that the existence of “war” is satisfied “only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a significant period.”<sup>10</sup> Thus, the military operations in Libya did not meet the administration’s definition of “war.”<sup>11</sup> According to the administration’s reasoning, the President may unilaterally take the nation to war using limited military means.<sup>12</sup> What the Obama administration characterized as a unique situation in Libya, however, is becoming more common due to advances in technology and the changing face of warfare.<sup>13</sup> The use of UAVs and cyber-warfare could inflict serious damage on another country, with, from the American perspective,

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<sup>4</sup> *Id.* The UAVs were also capable of tracking the movements of Libyan troops, targeting the troops, or passing their surveillance information along to warplanes, which would then target the troops. *Id.*

<sup>5</sup> Charlie Savage & Thom Shanker, *At Deadline, U.S. Seeks to Continue War in Libya*, N.Y. TIMES, May 13, 2011, at A10.

<sup>6</sup> *Id.* Support of allied attack missions involved providing refueling for allied planes, intelligence gathering, and radiating electronic signals to interfere with Libya’s weapon systems. *See id.*

<sup>7</sup> *See Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 4 (2011) [hereinafter *Libya and War Powers Hearing*] (statement of Sen. Richard Lugar, Ranking Member, S. Comm. on Foreign Relations).

<sup>8</sup> *See War Powers Resolution*, 50 U.S.C. § 1541 (2006); *Libya and War Powers Hearing*, *supra* note 7, at 4.

<sup>9</sup> *Libya and War Powers Hearing*, *supra* note 7, at 5; Louis Fisher, Opinion, *Parsing the War Power*, NAT’L L.J., July 4, 2011, at 50.

<sup>10</sup> Memorandum from Caroline D. Crass, Principal Deputy Ass’t Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Eric Holder, Att’y Gen., Re: Authority to Use Military Force in Libya 8 (Apr. 1, 2011), <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>.

<sup>11</sup> *See id.* at 12–13.

<sup>12</sup> Jonathan Schell, *Let’s Call a War a War*, L.A. TIMES, June 21, 2011, at A13.

<sup>13</sup> *See Unmanned Aerial Warfare: Flight of the Drones*, ECONOMIST, Oct. 8, 2011, at 31.

limited means, no troop deployments, and possibly no involvement of military personnel.<sup>14</sup> According to the Obama administration, there are no “hostilities” under the terms of the Resolution so long as U.S. military casualties are minimal or nonexistent.<sup>15</sup>

With this backdrop, this Note asserts that warfare has evolved outside the bounds of the War Powers Resolution.<sup>16</sup> It avers that the Resolution was an attempt by Congress to reassert its power over the decision to enter a conflict.<sup>17</sup> Nonetheless, the scope of the Resolution is limited to the deployment of military personnel.<sup>18</sup> The modern realities of war, which feature increased use of civilian operators and long-range attacks, are not subject to the current Resolution.<sup>19</sup> Thus, assuming that Congress should have the power to weigh in on these matters, new war powers legislation is needed to encompass the realities of modern warfare.<sup>20</sup>

Part I evaluates the history of war powers in America, specifically the debates over the U.S. Constitution, the War Powers Resolution of 1973, and the proposed War Powers Consultation Act of 2009.<sup>21</sup> This history reflects the intent of the Framers and the rationale for balancing war powers between two branches of government.<sup>22</sup> Part I also demonstrates the periodic struggle over war powers between the legislative and executive branches.<sup>23</sup> Finally, the Part discusses the judicial branch’s view on executive power, despite its refusal to weigh in on the war powers matter specifically.<sup>24</sup>

Part II appraises the status of modern warfare.<sup>25</sup> It first presents the increasing role of civilians and CIA operatives in modern warfare.<sup>26</sup> Part II next describes some of the modern technology that is changing the paradigm of war.<sup>27</sup> Finally, it presents the 2011 conflict in Libya as a

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<sup>14</sup> David Cortright, *License to Kill*, CATO UNBOUND (Jan. 9, 2012), <http://www.cato-unbound.org/2012/01/09/david-cortright/license-to-kill/>.

<sup>15</sup> Schell, *supra* note 12.

<sup>16</sup> See *infra* notes 176–272 and accompanying text.

<sup>17</sup> See *infra* notes 80–110 and accompanying text.

<sup>18</sup> See *infra* notes 80–110 and accompanying text.

<sup>19</sup> See *infra* notes 183–272 and accompanying text.

<sup>20</sup> See *infra* notes 273–391 and accompanying text.

<sup>21</sup> See *infra* notes 40–120 and accompanying text.

<sup>22</sup> See *infra* notes 40–79 and accompanying text.

<sup>23</sup> See *infra* notes 80–136 and accompanying text.

<sup>24</sup> See *infra* notes 137–168 and accompanying text.

<sup>25</sup> See *infra* notes 176–272 and accompanying text.

<sup>26</sup> See *infra* notes 183–207 and accompanying text.

<sup>27</sup> See *infra* notes 208–246 and accompanying text.

specific example of modern warfare and the Obama administration's justification for unilateral executive action.<sup>28</sup>

Finally, Part III proposes fixing the current imbalance of war powers with new war powers legislation.<sup>29</sup> It presents arguments that the military is just one element of modern warfare, and thus regulation of war powers needs to be broader than the War Powers Resolution of 1973, which only regulates action by military personnel.<sup>30</sup> Part III then argues for new framework legislation to replace the War Powers Resolution.<sup>31</sup> This legislation would require meaningful dialogue between the President and Congress before crossing the threshold of war.<sup>32</sup> In so doing, this Note supports more political accountability for the legislative branch and more transparency by the executive branch.<sup>33</sup>

## I. THE EVOLUTION OF WAR POWERS IN AMERICA

This Part focuses on the history of war powers in the United States, and captures the current state of war-making power in America.<sup>34</sup> Section A explores the Framers' debate over war powers when the U.S. Constitution was drafted.<sup>35</sup> Section B analyzes congressional efforts to assert influence through legislation.<sup>36</sup> Section C outlines the congressional oversight of intelligence activities.<sup>37</sup> It provides a statutory basis for communications between the branches on covert activities.<sup>38</sup> Finally, Section D discusses the judicial branch's decision that war powers are a nonjusticiable political question.<sup>39</sup>

### A. *War Powers at the Time of the Framers*

The constitutional distribution of power to deploy armed forces has been debated for centuries.<sup>40</sup> The British precedent available to the

<sup>28</sup> See *infra* notes 247–269 and accompanying text.

<sup>29</sup> See *infra* notes 273–391 and accompanying text.

<sup>30</sup> See *infra* notes 283–333 and accompanying text.

<sup>31</sup> See *infra* notes 334–391 and accompanying text. Framework legislation establishes a structure for congressional rulemaking. Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717, 729–30 (2005).

<sup>32</sup> See *infra* notes 334–391 and accompanying text.

<sup>33</sup> See *infra* notes 334–391 and accompanying text.

<sup>34</sup> See *infra* notes 40–175 and accompanying text.

<sup>35</sup> See *infra* notes 40–79 and accompanying text.

<sup>36</sup> See *infra* notes 80–120 and accompanying text.

<sup>37</sup> See *infra* notes 121–136 and accompanying text.

<sup>38</sup> See *infra* notes 121–136 and accompanying text.

<sup>39</sup> See *infra* notes 137–168 and accompanying text.

<sup>40</sup> See BRIEN HALLETT, *THE LOST ART OF DECLARING WAR* 61–62 (1998).

Framers at the time of the Constitutional Convention of 1787 advocated strong centralized executive power.<sup>41</sup> This model was unacceptable to Americans following the Revolutionary War.<sup>42</sup> After declaring independence from Great Britain, the legislature, in the form of the Continental Congress, assumed all executive powers, and retained them through the time of the Articles of Confederation.<sup>43</sup> The Framers reallocated those powers between the legislative and the executive branches of government.<sup>44</sup> Powers were allocated through a system of checks and balances to protect against the abuse of power by any one branch of government.<sup>45</sup>

The debate over war powers thus centers on the tension between executive power and congressional power.<sup>46</sup> Proponents of broad presidential power assert that the executive's power derives from the Commander-in-Chief Clause of the Constitution.<sup>47</sup> The Framers experienced the ineffectiveness of command by committee during the Revolutionary War.<sup>48</sup> As Samuel Chase of Maryland wrote, "the Congress are not a fit Body to act as a Council of War. They are too large, too slow and their Resolutions can never be kept secret."<sup>49</sup> Accordingly, the delegates determined that the legislature could not direct war.<sup>50</sup> The Constitution thus made the President the Commander in Chief.<sup>51</sup>

<sup>41</sup> Louis Fisher, *Historical Survey of the War Power and the Use of Force*, in *THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES* 11, 11–12 (Gary M. Stern & Morton H. Halperin eds., 1994) [hereinafter *THE POWER TO GO TO WAR*]. John Locke proposed delegating "the power of war and peace . . . and all the transactions, with all persons and communities without the commonwealth" to the executive. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 165 (Ian Shapiro ed., Yale Univ. Press 2003) (1690). William Blackstone, in his *Commentaries*, wrote that the King should have absolute power over foreign affairs. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*230, \*245.

<sup>42</sup> Fisher, *supra* note 41, at 12.

<sup>43</sup> *Id.* The Articles of Confederation gave Congress all power for directing war, peace, and the operation of military forces. W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH?* 56 (1981).

<sup>44</sup> Fisher, *supra* note 41, at 12.

<sup>45</sup> THE CONSTITUTION PROJECT, *DECIDING TO USE FORCE ABROAD: WAR POWERS IN A SYSTEM OF CHECKS AND BALANCES* 1 (2005), available at <http://www.constitutionproject.org/pdf/28.pdf>.

<sup>46</sup> MILLER CTR. OF PUB. AFFAIRS, NATIONAL WAR POWERS COMMISSION REPORT 12 (2008) [hereinafter NATIONAL WAR POWERS COMMISSION REPORT], available at <http://web1.millercenter.org/reports/warpowers/report.pdf>.

<sup>47</sup> *Id.* at 13; see U.S. CONST. art. II, § 2, cl. 2.

<sup>48</sup> REVELEY, *supra* note 43, at 64–65.

<sup>49</sup> Letter from Samuel Chase to Richard Henry Lee (May 17, 1776), in 4 LETTERS OF DELEGATES TO CONGRESS, MAY 16–AUGUST 15, 1776, at 21–22 (Paul H. Smith ed., 1979).

<sup>50</sup> THE CONSTITUTION PROJECT, *supra* note 45, at 1.

<sup>51</sup> U.S. CONST. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States . . .").

According to proponents of congressional war power, however, the Framers feared an ambitious executive and therefore empowered the legislature to authorize all war, with limited time-critical exceptions.<sup>52</sup> During the drafting of the Constitution, Charles Pinckney of South Carolina supported a “vigorous Executive,” but was apprehensive of extending the powers of war and peace to the executive.<sup>53</sup> He felt that such a substantial grant of power would render the executive an “elective” monarchy.<sup>54</sup> James Wilson of Pennsylvania expressed that not all of the powers given to the British sovereign rightfully belonged to the executive, and that some of those, particularly war and peace, should instead be allocated to the legislature.<sup>55</sup> Thus, when it was proposed that Congress have the power “to make war,”<sup>56</sup> James Madison of Virginia and Elbridge Gerry of Massachusetts moved to change the wording, to give the legislature the power to “declare” war.<sup>57</sup> This would leave the executive with the power to move quickly to “repel sudden attacks.”<sup>58</sup> Roger Sherman of Connecticut thought “[t]he Executive shd. be able to repel and not to commence war.”<sup>59</sup> George Mason preferred “clogging rather than facilitating war.”<sup>60</sup> Accordingly, he favored “declare” war over “make” war.<sup>61</sup> The motion to replace “make war” with “declare war” was passed.<sup>62</sup>

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<sup>52</sup> NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, app. IV at 4, 6.

<sup>53</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 62 (June 1), 64–65 (Madison’s notes) (Max Farrand ed., 1966) [hereinafter RECORDS]. Each citation of Farrand’s *Records* includes the page number for the start of the relevant day, the page number for the relevant material, and a parenthetical indication of the source. See Alex Glashausser, *The Extension Clause and the Supreme Court’s Jurisdictional Independence*, 53 B.C. L. REV. 1225, 1230 (2012) (adopting this approach).

<sup>54</sup> 1 RECORDS, *supra* note 53, at 62 (June 1), 65 (Madison’s notes).

<sup>55</sup> *Id.* at 65–66. At the Pennsylvania Ratifying Convention, Wilson endorsed the system of checks and balances, saying that it “is calculated to guard against” a rush to war. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: PENNSYLVANIA 583 (Merrill Jensen ed., 1976). But a system of checks and balances means that war-powers decisions “will not be in the power of a single man, or a single body of men, to involve us in such distress, for the important power of declaring war is vested in the legislature at large.” *Id.*

<sup>56</sup> 2 RECORDS, *supra* note 53, at 312 (Aug. 17), 318 (Madison’s notes).

<sup>57</sup> *Id.* The change of wording from “make war” to “declare war” provides the evidence that proponents of broad executive power use as constitutional justification for unilateral executive defensive actions. See, e.g., REVELEY, *supra* note 43, at 66; JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 99–100 (2005).

<sup>58</sup> See 2 RECORDS, *supra* note 53, at 312 (Aug. 17), 318 (Madison’s notes).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 319.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

In the same clause as the power to declare war, the Framers granted Congress the power to “grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”<sup>63</sup> Thus, the Framers associated letters of marque and reprisal—a limited military action—with the power of going to war.<sup>64</sup> The issuance of a letter of marque and reprisal was an act akin to a limited war.<sup>65</sup> As then-Secretary of State Thomas Jefferson said in 1793, regarding the grant of a letter of marque and reprisal, “when reprisal follows, it is considered as an act of war, and never yet failed to produce it in the case of a nation able to make war.”<sup>66</sup> Thus, Congress was given the power to “declare war” and to initiate limited acts of war.<sup>67</sup>

When it comes to the balance of war powers between the executive and the legislature, however, the words of the Constitution are imprecise.<sup>68</sup> The final draft of the Constitution gave numerous explicit grants of war-related power to Congress and limited imprecise grants of power to the President.<sup>69</sup> The Framers believed that executives have a natural tendency toward war.<sup>70</sup> Thus, they created a system mandating a collec-

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<sup>63</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>64</sup> Louis Fisher, *Point/Counterpoint: Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1649 (2000). Letters of marque and reprisal gave private ship owners license to arm and equip themselves for war, and to capture enemy ships and cargo. Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683, 1714 (2009). The Continental Congress issued letters of marque and reprisal to private ships during the Revolutionary War for the purpose of capturing “British vessels and cargoes.” 4 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 253 (Worthington Chauncey Ford ed., 1906).

<sup>65</sup> Fisher, *supra* note 64, at 1649.

<sup>66</sup> Thomas Jefferson, *Opinion on the Restoration of Prizes (May 16, 1793)*, in 26 THE PAPERS OF THOMAS JEFFERSON 50, 51 (John Catanzariti et al. eds., 1995). The power to “make Rules concerning Captures on Land and Water” gave Congress the power to decide what property was in a position to be captured by the government and private citizens. Wuerth, *supra* note 64, at 1683.

<sup>67</sup> Fisher, *supra* note 64, at 1649.

<sup>68</sup> See REVELEY, *supra* note 43, at 70.

<sup>69</sup> ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 2–3 (1976). Congress has the powers to declare war, to grant letters of marque and reprisal, and to make rules concerning captures on land and water; to raise and support armies; to provide and maintain a Navy; to make rules for the regulation of the land and naval forces; and to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions. U.S. CONST. art. I, § 8. The President is the Commander in Chief of the Army and Navy of the United States, and has the power by and with the advice and consent of the Senate to make treaties. U.S. CONST. art. II, § 2.

<sup>70</sup> Letter from Louis Fisher, Scholar in Residence, The Constitution Project, to Senator John Cornyn, Senate Comm. on the Judiciary 3 (Sept. 29, 2011), [http://constitutionproject.org/pdf/louis\\_fisher\\_war\\_powers\\_memo\\_to\\_senate.pdf](http://constitutionproject.org/pdf/louis_fisher_war_powers_memo_to_senate.pdf). As John Jay wrote, “absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as, a thirst for military glory, revenge for personal affronts;



tive decision to enter a war.<sup>71</sup> As James Madison argued, dividing power between the various branches of government ensures that the branches control each other, thus securing the rights of the people.<sup>72</sup> The Framers sought to create a structural relationship between the branches of government that would ensure political consensus prior to entering a conflict.<sup>73</sup> Furthermore, requiring the President to persuade Congress would provide an opportunity for the executive to explain the necessity of the war to the nation, which would ultimately bear the consequences of the decision.<sup>74</sup>

For the first few decades following ratification of the Constitution, the use of war powers was consistent with the Framers' expectations, and Congress made the decisions to go to war or deploy troops.<sup>75</sup> Yet as early as 1807, then-President Jefferson demonstrated the President's right to act first and then seek out congressional authorization.<sup>76</sup> In 1848, then-Congressman Abraham Lincoln voted to censure President James Polk for "unnecessarily and unconstitutionally" beginning a war with Mexico.<sup>77</sup> During the Civil War, however, then-President Lincoln deployed military forces without first obtaining authorization from Congress.<sup>78</sup> Since ratification of the Constitution the balance has shifted toward the executive branch, but it was not until perceived expansion of executive power during the Vietnam War that Congress drafted framework legislation implementing a procedural check to this expanding executive power.<sup>79</sup>

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ambition or private compacts to aggrandize or support their particular families, or partizans." THE FEDERALIST NO. 4, at 19 (John Jay) (Jacob Ernest Cooke ed., 1961).

<sup>71</sup> THE CONSTITUTION PROJECT, *supra* note 45, at 10.

<sup>72</sup> THE FEDERALIST NO. 51, *supra* note 70, at 351 (James Madison).

<sup>73</sup> *See id.*

<sup>74</sup> *See* THE CONSTITUTION PROJECT, *supra* note 45, at 10.

<sup>75</sup> Fisher, *supra* note 41, at 14.

<sup>76</sup> *Id.* at 17. While Congress was in recess, President Jefferson ordered military action in response to British naval hostilities. *Id.* As President Jefferson observed: "To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means." Letter from Thomas Jefferson to John B. Colvin (Sep. 20, 1810), in 3 THE PAPERS OF THOMAS JEFFERSON RETIREMENT SERIES 99 (Susan Holbrook Perdue & Robert F. Haggard et al. eds., 2006).

<sup>77</sup> Fisher, *supra* note 41, at 18. In 1846, President Polk ordered the military to occupy disputed territory along the border with Mexico. *Id.* This action provoked a war, and Polk notified Congress a few weeks later that "war exists." *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> REVELEY, *supra* note 43, at 135, 226; *see infra* notes 80–110 and accompanying text.

### B. *Attempts to Reassert Congressional Power*

In response to unilateral actions and mistrust of the executive, Congress has passed framework legislation attempting to balance presidential decisions.<sup>80</sup> The War Powers Resolution of 1973 was passed in direct response to the Vietnam War and governs situations where armed forces are introduced into hostilities.<sup>81</sup> In 2008, the National War Powers Commission proposed new legislation, the War Powers Consultation Act of 2009, to resolve perceived problems with the current law.<sup>82</sup> Both of these were attempts to balance congressional power with perceived overreaching by the executive branch.<sup>83</sup>

#### 1. The War Powers Resolution of 1973

In August 1964, North Vietnamese boats fired on U.S. Navy warships in the Gulf of Tonkin, in international waters.<sup>84</sup> The President responded by ordering retaliatory air strikes on North Vietnam.<sup>85</sup> He then asked congressional leaders for a resolution to demonstrate Congress's support of the military action in what was then known as Indochina.<sup>86</sup> Both the House and the Senate moved quickly to pass the Gulf of Tonkin Resolution, with only two dissenters between them.<sup>87</sup>

Within a year of passing the Resolution, U.S. forces were bombing North Vietnamese targets on nonretaliatory grounds, and ground combat troops were introduced into South Vietnam.<sup>88</sup> At first, the President emphasized the safety of American citizens in his meeting with congress-

<sup>80</sup> See H. COMM. ON FOREIGN AFFAIRS, 97TH CONG., THE WAR POWERS RESOLUTION, A SPECIAL STUDY OF THE COMMITTEE ON FOREIGN AFFAIRS 69 (Comm. Print 1982).

<sup>81</sup> *Libya and War Powers Hearing*, *supra* note 7, at 2.

<sup>82</sup> NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 6.

<sup>83</sup> *Id.*

<sup>84</sup> H. COMM. ON FOREIGN AFFAIRS, *supra* note 80, at 1.

<sup>85</sup> *Id.* at 2.

<sup>86</sup> *Id.* President Lyndon Johnson believed that "President Truman's one great mistake in going to the defense of South Korea in 1950 ha[d] been his failure to ask Congress for an expression of its backing." *Id.*

<sup>87</sup> *Id.* at 4–5. The Gulf of Tonkin Resolution read in part: "the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." Joint Resolution of Aug. 10, 1964, Pub. L. No. 88-408, 78 Stat. 384. Senators Ernest Gruening of Alaska and Wayne Morse of Oregon voted against the Resolution. 110 CONG. REC. 18,471 (1964). Senator Morse argued that "we have made a great mistake by subverting and circumventing the Constitution of the United States . . . [W]e are in effect giving the President . . . warmaking powers in the absence of a declaration of war. I believe that to be a historic mistake." *Id.* at 18,470.

<sup>88</sup> H. COMM. ON FOREIGN AFFAIRS, *supra* note 80, at 7.

sional leadership to urge the passage of the Gulf of Tonkin Resolution.<sup>89</sup> Then, in a speech to the nation the President justified increased troop levels with the threat of Communist expansion in Vietnam.<sup>90</sup> Members of Congress did not find this assessment credible and began to doubt the President's explanations.<sup>91</sup>

In response, the Senate Foreign Relations Committee held hearings on the war.<sup>92</sup> While being questioned by Senator J. William Fulbright, Under Secretary of State Nicholas Katzenbach asserted that declarations of war as outlined in the Constitution were "outmoded," and that the Gulf of Tonkin Resolution was the "functional equivalent of a declaration of war."<sup>93</sup> Members of Congress were outraged at this assertion of executive power, and many began to regret their hasty approval of the Resolution.<sup>94</sup> Public dissatisfaction with the conflict increased, and the Resolution was repealed in 1971.<sup>95</sup> Over the next few years the conduct of the war in Vietnam created a growing gap in trust between the legislative and executive branches.<sup>96</sup> Congress thus turned to the larger question of allocation of war powers between the executive and legislative branches of government.<sup>97</sup>

In 1973, Congress attempted to settle the ongoing war powers struggle and reassert the system of checks and balances implemented

<sup>89</sup> *Id.* at 8.

<sup>90</sup> *Id.* at 9.

<sup>91</sup> *Id.* While the troop buildup in Vietnam was occurring, the Johnson administration also sent more than 21,500 troops to the Dominican Republic, citing a need to protect American lives from Communist control of revolutionary forces. *Id.* at 7–8. Congressional leaders were called to the White House for a briefing after military action was already underway, and the President did not ask for their endorsement of his decision. *Id.* at 8. The action in the Dominican Republic against the backdrop of operations in Vietnam contributed to Congress's distrust of the administration. *Id.* at 7–8.

<sup>92</sup> *Id.* at 11. Leonard Meeker, a legal advisor to the U.S. Department of State, submitted a memorandum on international law and the constitutional aspects of the conflict in Vietnam. Leonard C. Meeker, *The Legality of United States Participation in the Defense of Vietnam*, 54 DEP'T ST. BULL. 474, 489 (1966). He concluded that the President had "full authority" as Commander in Chief to commit U.S. forces to Vietnam and that the Congress had ratified the action by appropriating funds for the mission. *Id.* at 489; cf. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 197 (1996) (arguing that the Framers relied on the traditional understanding that the legislature's appropriations power would "control[] executive actions leading to war").

<sup>93</sup> H. COMM. ON FOREIGN AFFAIRS, *supra* note 80, at 14.

<sup>94</sup> *Id.*

<sup>95</sup> Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055; see ROBERT F. TURNER, *THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE* 8 (1983).

<sup>96</sup> See H. COMM. ON FOREIGN AFFAIRS, *supra* note 80, at 69.

<sup>97</sup> *Id.*

by the Framers.<sup>98</sup> This attempt resulted in the War Powers Resolution of 1973, which was passed over President Richard Nixon's veto.<sup>99</sup> This Resolution required the President to consult with and report to the Congress on decisions to introduce armed forces into hostilities or potential hostilities, unless there has already been a declaration of war.<sup>100</sup>

Although there is no definition section in the War Powers Resolution or explanation of its scope, the legislative history reveals that it applies only to military personnel.<sup>101</sup> During the Senate debates on the Resolution, Senator Thomas Eagleton of Missouri attempted "to make the language of legislation match the realities of war."<sup>102</sup> He claimed that to those involved in war "it is irrelevant whether they are members of the Armed Forces, military advisers, civilian advisers, or hired mercenaries. The consequences are the same—they can kill, and they can be killed."<sup>103</sup> Thus Senator Eagleton proposed that the Resolution encompass all civilian combatants as well as "Armed Forces."<sup>104</sup> Senator Eagleton predicted that if his amendment was not passed, the Resolution itself would encourage broader use of CIA and other civilian personnel in future wars.<sup>105</sup> CIA personnel were already being "used as pilots and combat advisor[s]."<sup>106</sup> Thus, he foretold that not including civilian personnel in the Resolution would encourage the use of civil-

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<sup>98</sup> NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 21. The War Powers Resolution's intended purpose was "to fulfill the intent of the framers of the Constitution . . . 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." War Powers Resolution, 50 U.S.C. § 1541 (2006).

<sup>99</sup> Pub. L. No. 93-148, 87 Stat. 555 (codified as amended at 50 U.S.C. §§ 1541-1548 (2006)); see NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 21.

<sup>100</sup> See 50 U.S.C. § 1542.

<sup>101</sup> See *id.* §§ 1541-1548; 119 CONG. REC. 25,079 (1973).

<sup>102</sup> 119 CONG. REC. 25,079. Senator Eagleton proposed an amendment to the Resolution to include:

Any person employed by, under contract to, or under the direction of any department or agency of the United States Government who is either (a) actively engaged in hostilities in any foreign country; or (b) advising any regular or irregular military forces engaged in hostilities in any foreign country shall be deemed to be a member of the Armed Forces of the United States for the purposes of this Act.

*Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* (arguing that war is not a matter of semantics).

<sup>105</sup> *Id.* at 25,080.

<sup>106</sup> *Id.*

ians, which was not limited by the Resolution, in the place of uniformed personnel, which was so limited.<sup>107</sup>

Senator Eagleton's amendment was left out of the bill and never voted on by the Senate.<sup>108</sup> It was proposed that the Committee on Armed Services, which at the time had jurisdiction over CIA affairs, would instead consider legislation.<sup>109</sup> Thus, the Resolution as passed applies to the introduction of "Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."<sup>110</sup>

## 2. The War Powers Consultation Act of 2009

In 2008, the National War Powers Commission, chaired by former Secretaries of State James Baker and Warren Christopher, released a report that urged the President and Congress to repeal the War Powers Resolution of 1973 and enact new war powers legislation.<sup>111</sup> Citing the gravity and uncertainty of war powers questions, the Commission recommended implementing decisive guidance for the political branches.<sup>112</sup> It found that the keystone to the debate over war powers is the need for meaningful consultation between the political branches prior to committing the United States to a war.<sup>113</sup> The Commission proposed that meaningful debate is essential to "promote the rule of law" and to "send the right message" to the American public, and to the military.<sup>114</sup>

The Commission thus drafted the War Powers Consultation Act of 2009 to "codify the norm of consultation," and frame a process for productive debate between the political branches on the decision to

<sup>107</sup> *Id.*

<sup>108</sup> 119 CONG. REC. 25,081. The amendment was left out of the bill because Senator Edmund Muskie of Maine proposed that changing the bill could jeopardize its support in Congress, and he wanted enough support behind the bill to override President Nixon's anticipated veto. *Id.*

<sup>109</sup> *Id.* A Senate Resolution in 1976 created the Select Committee on Intelligence, which is required to "oversee and make continuing studies of the intelligence activities and programs of the United States Government, and to submit to the Senate appropriate proposals for legislation and report to the Senate concerning such intelligence activities and programs." S. Res. 400, 94th Cong. (1976) (enacted).

<sup>110</sup> War Powers Resolution, 50 U.S.C. § 1541 (2006).

<sup>111</sup> NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 6 (finding the War Powers Resolution of 1973 to be "impractical and ineffective").

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 7. The Commission found that the War Powers Resolution does not have clear consultation requirements. *Id.*

<sup>114</sup> *Id.* The Commission proposed that "it harms the country to have the centerpiece statute in this vital area of American law regularly and openly questioned or ignored." *Id.* at 35.

enter a war.<sup>115</sup> The proposed Act mandates consultation between the President and Congress prior to engaging “armed forces into significant armed conflict.”<sup>116</sup> It explicitly defines “significant armed conflict” as conflicts that are expressly authorized by Congress, or combat operations “by U.S. armed forces” expected to last at least a week.<sup>117</sup> Thus, unlike the War Powers Resolution, the scope of the proposed Act is clear.<sup>118</sup> The Act explicitly excludes “covert operations.”<sup>119</sup> Although the proposed Act puts forward recommendations designed to fix the ambiguity in the balance of war powers between the political branches, it has not been enacted.<sup>120</sup>

### C. Attaining Congressional Oversight of Covert Actions

Although the War Powers Resolution is limited to involvement of military personnel, a restriction that the proposed War Powers Consultation Act did not seek to change,<sup>121</sup> Congress later obtained statutory oversight of both military and civilian intelligence activities.<sup>122</sup> Soon after the Resolution passed, congressional investigations into CIA activities led to the formation of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence.<sup>123</sup> These committees have jurisdiction over legislation involving the CIA, and shared authorization for appropriations involving the entire intelligence community, including military and civilian agencies.<sup>124</sup> Both the House and the Senate intelligence committees are required to contain members from their respective appropriations, armed services, foreign rela-

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<sup>115</sup> *Id.* at 8.

<sup>116</sup> *Id.* at 46.

<sup>117</sup> NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 45.

<sup>118</sup> *See id.*

<sup>119</sup> *Id.*

<sup>120</sup> James A. Baker III & Lee H. Hamilton, Op-Ed., *Breaking the War Powers Stalemate*, WASH. POST, June 10, 2011, at A17. The Commission briefed President Obama and testified before the House Foreign Affairs Committee and the Senate Foreign Relations Committee about their proposed legislation. *National War Powers Commission*, MILLER CENTER, <http://millercenter.org/policy/commissions/warpowers> (last visited Nov. 13, 2012).

<sup>121</sup> NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 45 (specifically excluding covert operations).

<sup>122</sup> *See* War Powers Resolution, 50 U.S.C. § 1541 (2006); Daniel B. Silver, *Intelligence and Counterintelligence*, in NATIONAL SECURITY LAW 935, 945 (John Norton Moore & Robert F. Turner eds., 2d ed. 2005).

<sup>123</sup> *See* S. Res. 400, 94th Cong. (1976) (enacted); Rules of the House of Representatives, Rule XLVIII (1977); Silver, *supra* note 122, at 948–49.

<sup>124</sup> Silver, *supra* note 122, at 949.

tions, and judiciary standing committees.<sup>125</sup> This cross-over ensures that information does not slip between the cracks of different committees.<sup>126</sup>

The Intelligence Oversight Act of 1991 solidified congressional oversight of the intelligence community.<sup>127</sup> The Act requires the executive branch to notify the congressional intelligence committees of any covert action.<sup>128</sup> Notification is not a condition required to initiate these actions.<sup>129</sup> Nonetheless, the Act requires the President to make findings in writing immediately or in cases of an emergency within forty-eight hours that “such an action is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States.”<sup>130</sup> Moreover, the findings must specify the department or agency that will carry out the action and whether any nongovernmental actors will be involved.<sup>131</sup>

At the time the Act passed, there was debate between the executive, who was reticent about informing Congress of every covert action, and the legislature, which wanted more oversight.<sup>132</sup> Compromising with the President, Congress acknowledged that there would be cases requiring expediency by the executive.<sup>133</sup> Congress accepted President George H.W. Bush’s promise to “inform Congress of any covert action within a few days in almost all instances.”<sup>134</sup> Subsequently, in 2001, President George W. Bush attempted to restrict the sharing of information with the congressional intelligence committees.<sup>135</sup> Due to strong congressional objections, he was unsuccessful.<sup>136</sup>

<sup>125</sup> S. Res. 400, 94th Cong. (1976) (enacted); Rules of the House of Representatives, Rule XLVIII (1977); *Congressional Oversight*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/offices-of-cia/congressional-affairs/congressional-oversight.html> (last visited Nov. 13, 2012).

<sup>126</sup> See S. Res. 400, 94th Cong. (1976) (enacted); Rules of the House of Representatives, Rule XLVIII (1977).

<sup>127</sup> Intelligence Authorization Act, Fiscal Year 1991 (Intelligence Oversight Act of 1991), Pub. L. No. 102-88, 105 Stat. 429 (codified as amended at 50 U.S.C. § 413 (2006 & Supp. IV 2010)).

<sup>128</sup> 50 U.S.C. § 413b(b).

<sup>129</sup> *Id.* § 413b(c).

<sup>130</sup> *Id.* § 413b(a).

<sup>131</sup> *Id.* § 413b(a).

<sup>132</sup> Silver, *supra* note 122, at 952–53. President George H.W. Bush had vetoed another bill that had required the President to notify Congress prior to covert activities, with no emergency exception. *Id.* at 952.

<sup>133</sup> See Intelligence Oversight Act of 1991, 50 U.S.C. § 413b(c)(3) (2006 & Supp. IV 2010) (mandating that if the President does not submit written findings within the required time-frame, the “President shall fully inform the congressional intelligence committees in a timely fashion and shall provide a statement of the reasons for not giving prior notice”).

<sup>134</sup> Silver, *supra* note 122, at 953.

<sup>135</sup> *Id.* at 954.

<sup>136</sup> *Id.*

#### D. *The Federal Courts: Choosing Not to Weigh In*

A judicial opinion could provide concrete, albeit fact-dependent, guidance on the proper distribution of war powers.<sup>137</sup> In 1803, in *Marbury v. Madison*, the U.S. Supreme Court established judicial review, which is the Court's prerogative of interpreting the constitutionality of executive and legislative acts.<sup>138</sup> Accordingly, at various times, members of Congress have filed lawsuits to compel the President to follow the terms of the War Powers Resolution, but cases have been routinely dismissed without clarification of the war powers question.<sup>139</sup> In most cases courts declined to rule based on the political question doctrine.<sup>140</sup>

The subject matter that the Supreme Court considers to be a political question has evolved over time.<sup>141</sup> In 1962, in *Baker v. Carr*, the Supreme Court articulated its criteria for the political question doctrine.<sup>142</sup> The Court noted that the doctrine is "one of 'political ques-

<sup>137</sup> See REVELEY, *supra* note 43, at 206.

<sup>138</sup> See 5 U.S. (1 Cranch) 137, 177 (1803). As Chief Justice John Marshall wrote, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each." *Id.*

<sup>139</sup> See NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, app. V at 7–8.

<sup>140</sup> See *Holtzman v. Schlesinger*, 484 F.2d 1307, 1312 n.3 (2d Cir. 1973). The political question doctrine is the judiciary's refusal to rule on matters that raise inherently political questions. *Marbury*, 5 U.S. (1 Cranch) at 170. As *Marbury* held, "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Id.*

<sup>141</sup> Martin Redish, *Judicial Review and the Political Question*, 79 Nw. U. L. REV. 1031, 1031 (1985). Chief Justice Marshall's description of the political question in *Marbury* was narrowly limited to matters where the President was clearly granted unilateral discretion by the Constitution. See 5 U.S. (1 Cranch) at 170. By 1924, it was noted that the political question referred to

all those matters of which the court, at a given time, will be of the opinion that it is impolitic or inexpedient to take jurisdiction. Sometimes this idea of inexpediency will result from the fear of the vastness of the consequences that a decision on the merits might entail. Sometimes it will result from the feeling that the court is incompetent to deal with the particular type of question involved. Sometimes it will be induced by the feeling that the matter is "too high" for the courts. But always there will be a weighing of considerations in the scale of political wisdom.

Maurice Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 344–45 (1924) (indicating that the doctrine was no longer limited to matters of unilateral presidential discretion).

<sup>142</sup> 369 U.S. 186, 217 (1962). The Court concluded that unless the facts of a case fit into one of the outlined categories, it should not be dismissed as a nonjusticiable political question. *Id.*



tions,' not one of 'political cases.'"<sup>143</sup> Further, the Court indicated that courts cannot use the doctrine to "reject a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."<sup>144</sup>

Despite this narrow reading of the political question doctrine, suggesting that some war powers questions might be justiciable, courts have continually declined to clarify the ambiguous nature of the division of war powers between the legislative and executive branches.<sup>145</sup> For example, in 1983, in *Crockett v. Reagan*, the U.S. Court of Appeals for the District of Columbia Circuit held that the constitutionality of President Ronald Reagan's deployment of troops to El Salvador was a nonjusticiable political question.<sup>146</sup> Twenty-nine members of Congress brought the suit against the President; they claimed that the President violated the War Powers Resolution because American military personnel deployed to El Salvador were placed, without congressional approval, in situations "where imminent involvement in hostilities" was inevitable.<sup>147</sup> The D.C. Circuit affirmed the lower court's ruling that the case was nonjusticiable in its "current posture" due to the extensive fact-finding that would be required for the court to "determine whether U.S. forces have been introduced into hostilities or imminent hostilities."<sup>148</sup> The district court had concluded that this type of "investigation and determination" was appropriate for Congress, not the judiciary, and the D.C. Circuit agreed.<sup>149</sup>

Similarly, in 2003, in *Doe v. Bush*, the U.S. Court of Appeals for the First Circuit held that the plaintiff's request for a preliminary injunction to prevent the President from initiating a war in Iraq, was nonjusti-

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> See, e.g., *Doe v. Bush*, 323 F.3d 133, 144 (1st Cir. 2003); *Holtzman*, 484 F.2d at 1312 n.3 (noting that numerous suits challenging American involvement in the Vietnam Conflict had been dismissed from federal courts based on the political question doctrine); NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, app. V at 7.

<sup>146</sup> 720 F.2d 1355, 1356-57 (D.C. Cir. 1983).

<sup>147</sup> *Id.* at 1356.

<sup>148</sup> *Id.* at 1357; *Crockett v. Reagan*, 558 F. Supp. 893, 898 (D.D.C. 1982). The district court reasoned that to properly adjudicate the case they would have to investigate "the nature and extent of the United States' presence in El Salvador and whether a report under the [War Powers Resolution] is mandated because our forces have been subject to hostile fire or are taking part in the war effort." *Crockett*, 558 F. Supp. at 898.

<sup>149</sup> *Crockett*, 558 F. Supp. at 898; see *Crockett*, 720 F.2d at 1357. The district court also found that in accordance with *Baker*, "[t]he question here belongs to the category characterized by a lack of judicially discoverable and manageable standards for resolution." *Crockett*, 558 F. Supp. at 898.

cialable and therefore dismissed it.<sup>150</sup> The court declined to use the political question doctrine because it concluded the contours of the doctrine were poorly defined.<sup>151</sup> Nonetheless, it held that the circumstances as presented did “not warrant judicial intervention,” and observed that “the appropriate recourse for those who oppose war with Iraq lies with the political branches.”<sup>152</sup> And more recently, in 2011, in *Kucinich v. Obama*, the U.S. District Court for the District of Columbia declined to rule on the merits of a complaint alleging that the President acted in violation of the War Powers Resolution.<sup>153</sup> The court found that the plaintiffs lacked standing either as taxpayers or as members of Congress.<sup>154</sup> The case was dismissed based on standing, and the court did not examine the issue of whether or not the plaintiffs’ claims were a nonjusticiable political question.<sup>155</sup>

Although courts have not made decisive rulings on the division of war powers between the political branches, they have provided guidance on the scope of executive power generally.<sup>156</sup> In 1952, in *Youngstown Sheet and Tube Co. v. Sawyer*, the Supreme Court held that an executive order to seize steel mills to prevent a wartime strike was unconstitutional.<sup>157</sup> Justice Robert Jackson’s concurring opinion outlined three zones of presidential power.<sup>158</sup> Courts often reference this opinion to analyze the constitutionality of executive actions.<sup>159</sup> Justice Jackson’s first

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<sup>150</sup> 323 F.3d at 144.

<sup>151</sup> *Id.* at 139–40. The court explained, “[t]he political question doctrine—that courts should not intervene in questions that are the province of the legislative and executive branches—is a famously murky one.” *Id.* at 140.

<sup>152</sup> *Id.* at 144. The court’s holding was based on the ripeness doctrine, that there was a lack of a “fully developed dispute between the [political branches].” *Id.* at 137. The court explained that “Congress has been deeply involved in significant debate, activity, and authorization connected to our relations with Iraq for over a decade, under three different presidents of both major political parties, and during periods when each party has controlled Congress.” *Id.* at 144.

<sup>153</sup> No. 11-1096(RBW), 2011 WL 5005303, at \*12 (D.D.C. Oct. 20, 2011). The plaintiffs were ten members of Congress, who sought an order from the court, “declaring that the military operations in Libya constitute a war for the purposes of Article I of the United States Constitution and are therefore unconstitutional absent a declaration of war from Congress; . . . [and] providing injunctive relief suspending all U.S. military operations in Libya.” *Id.* at \*2.

<sup>154</sup> *Id.* at \*12.

<sup>155</sup> *Id.* at \*11 n.9.

<sup>156</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952); ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 344, 381 (4th ed. 2011).

<sup>157</sup> *Youngstown*, 343 U.S. at 588–89.

<sup>158</sup> *Id.* at 635–38 (Jackson, J., concurring).

<sup>159</sup> See, e.g., *Medellin v. Texas*, 552 U.S. 491, 494 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004); CHERMERINSKY, *supra* note 156, at 347.

zone exists when “the President acts pursuant to an express or implied authorization of Congress.”<sup>160</sup> In this zone, presidential authority is at its zenith, because it encompasses the executive power as well as congressional power.<sup>161</sup> Actions taken in the first zone are presumed to be lawful.<sup>162</sup> Justice Jackson’s second zone includes actions the President takes with neither approval nor disapproval by Congress.<sup>163</sup> In this zone, the President relies solely on the executive power, and there is a “zone of twilight” in which the allocation of constitutional powers is uncertain.<sup>164</sup> According to Justice Jackson, the general constitutionality of actions in this second zone is unclear.<sup>165</sup> The third zone includes actions taken by the President that are “incompatible with the . . . will of Congress.”<sup>166</sup> In this zone, presidential “power is at its lowest ebb,” and the constitutionality of presidential actions is most suspect.<sup>167</sup> In *Youngstown*, Justice Jackson concluded that the President was acting in the third zone, where constitutionality is most doubtful, because Congress had explicitly taken actions contrary to the presidential action.<sup>168</sup>

In summary, the Court has addressed the broader subject of executive power, but it has been unwilling to rule on the specific war powers question.<sup>169</sup> Instead, it defers that question to the political branches.<sup>170</sup> War powers were allocated to the legislative and executive branches by the Framers, who implemented structural checks and balances to avoid tyranny.<sup>171</sup> The War Powers Resolution was an attempt by Congress to deal with the war powers question, reasserting its power over war, by forcing the President to seek congressional approval.<sup>172</sup> Applying Justice Jackson’s reasoning in *Youngstown*, congressional approval of presidential decisions to go to war would strengthen the constitutionality of the executive decision.<sup>173</sup> Modern warfare, however, is growing outside the

<sup>160</sup> *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

<sup>161</sup> *Id.* at 635–37.

<sup>162</sup> *Id.* at 637.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *See id.*

<sup>166</sup> *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

<sup>167</sup> *Id.* at 637–38.

<sup>168</sup> *Id.* at 640, 655.

<sup>169</sup> *See* CHEMERINSKY, *supra* note 156, at 347, 381; *supra* notes 137–168 and accompanying text.

<sup>170</sup> CHEMERINSKY, *supra* note 156, at 374; *see supra* notes 137–168 and accompanying text.

<sup>171</sup> *See supra* notes 40–79 and accompanying text.

<sup>172</sup> *See supra* notes 80–120 and accompanying text.

<sup>173</sup> *See supra* notes 156–168 and accompanying text.

strictures of the War Powers Resolution.<sup>174</sup> Specifically, modern warfare technologies and methods allow the President to act without the approval of Congress, thereby asserting more war-making power.<sup>175</sup>

## II. MODERN WARFARE CARVES OUT INCREASING EXECUTIVE POWER

The ambiguity in congressional and presidential war powers augments the tension between the President's desire to enter foreign wars and Congress's inherent reticence as direct representatives of the people.<sup>176</sup> This ambiguity creates a risk that presidential power will increase if unchecked.<sup>177</sup> Furthermore, modern technological and warfare developments increase the potential for aggrandizing the executive power.<sup>178</sup>

Section A of this Part explains that modern wars are fought by government civilians and contractors as much as, and sometimes more than, they are fought by military personnel.<sup>179</sup> Section B then describes how improvements in military technology are changing the modes by which countries wage war.<sup>180</sup> Section C presents the 2011 action in Libya as an example, provides an analysis of the executive's claims that the action in Libya was outside the scope of the War Powers Resolution, and demonstrates that the Resolution is an insufficient check on executive power in the context of modern conflicts.<sup>181</sup> This Part suggests that against the backdrop of the outmoded statute and judicial refusal to settle the war powers dispute, the legislative branch is ceding war-making power to the President.<sup>182</sup>

### A. *The Cast of Characters Is Changing: The "Who" of Modern Warfare*

Civilians have always been involved in military operations, but the level of involvement today is unprecedented.<sup>183</sup> By some accounts, civil-

<sup>174</sup> See *Libya and War Powers Hearing*, *supra* note 7, at 19–20.

<sup>175</sup> *Id.* at 24.

<sup>176</sup> NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 12.

<sup>177</sup> *Id.*

<sup>178</sup> Fisher, *supra* note 9, at 50.

<sup>179</sup> See *infra* notes 183–207 and accompanying text.

<sup>180</sup> See *infra* notes 208–246 and accompanying text.

<sup>181</sup> See *infra* notes 247–269 and accompanying text.

<sup>182</sup> See *infra* notes 183–272 and accompanying text.

<sup>183</sup> See James Surowiecki, *Army, Inc.*, NEW YORKER, Jan. 12, 2004, at 27 (“To be sure, civilian involvement in military operations is nothing new—the French Army took taxicabs to the front in 1914—and private contractors have historically played a greater role in the United States than in Europe. But the scale and scope of what we’re seeing today is unprecedented.”).

ians hold half of all defense-related jobs.<sup>184</sup> Many of these civilians serve in logistics- and support-related roles, such as cleaning offices, doing the laundry, and maintaining roads for the military.<sup>185</sup> Still others have much more direct involvement, such as in combat missions, protecting dignitaries, and possibly targeting terrorists in impenetrable areas of the world.<sup>186</sup>

Civilian operatives of the CIA's clandestine service deployed to hostile environments now perform roles once reserved for military personnel.<sup>187</sup> This change in CIA operations stemmed from the events of September 11, 2001 and the resulting Global War on Terror.<sup>188</sup> The CIA's intelligence directorate deploys more personnel overseas than ever before, and forms strong relationships with foreign military personnel and intelligence agencies to deepen their knowledge of terrorist activities.<sup>189</sup> Moreover, the CIA operates unmanned aerial vehicles (UAVs) out of remote bases in Pakistan and Afghanistan, conducting missile and bomb strikes on targets.<sup>190</sup> The CIA's overseas intelligence network contributes significantly to military operations, such as the raid into Pakistan that killed Osama Bin Laden in May 2011.<sup>191</sup> Furthermore, many CIA personnel die in overseas deployments such as the seven that died in an ambush on their remote post in Afghanistan in December 2009.<sup>192</sup>

Nonetheless, the CIA does not act alone; they, like the military, increasingly bring contractors to the fight.<sup>193</sup> In June 2009, the CIA director revealed to Congress that in 2004, the CIA had hired outside contractors to locate and assassinate terrorist leaders.<sup>194</sup> Outside con-

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<sup>184</sup> Scott M. Sullivan, *Private Force/Public Goods*, 42 CONN. L. REV. 853, 859 (2010).

<sup>185</sup> Surowiecki, *supra* note 183.

<sup>186</sup> Adam Ciralsky, *Tycoon, Contractor, Soldier, Spy*, VANITY FAIR, Jan. 2010, at 74.

<sup>187</sup> *Id.*

<sup>188</sup> CENT. INTELLIGENCE AGENCY, 9.11 MARKING THE TENTH ANNIVERSARY 6 (2011), available at <https://www.cia.gov/library/publications/additional-publications/9-11-tenth-anniversary/9-11-Brochure.pdf>.

<sup>189</sup> *Id.*

<sup>190</sup> James Risen & Mark Mazzetti, *C.I.A. Said to Use Outsiders to Put Bombs on Drones*, N.Y. TIMES, Aug. 21, 2009, at A1.

<sup>191</sup> President Barack Obama, Remarks to the Intelligence Community at CIA Headquarters (May 20, 2011), <http://www.whitehouse.gov/the-press-office/2011/05/20/remarks-president-cia-director-leon-panetta-and-dni-director-james-clapp>.

<sup>192</sup> Richard A. Oppel Jr. et al., *Attacker in Afghanistan Was a Double Agent*, N.Y. TIMES, Jan. 5, 2010, at A1; Press Release, President Obama and CIA Director Panetta Speak at CIA Memorial Service (Feb. 5, 2010), <https://www.cia.gov/news-information/press-releases-statements/press-release-2010/president-and-cia-director-speak-at-memorial-service.html>.

<sup>193</sup> Risen & Mazzetti, *supra* note 190.

<sup>194</sup> Mark Mazzetti, *Outsiders Hired as C.I.A. Planned to Kill Jihadists*, N.Y. TIMES, Aug. 20, 2009, at A1.

tractors had previously been hired to interrogate terrorists, but not for lethal means.<sup>195</sup> Contractors are trained to load Hellfire missiles and laser-guided bombs on UAVs, and serve alongside the CIA and military personnel at UAV bases.<sup>196</sup> Still, this revelation that contractors helped with planning, training, surveillance, and possibly even targeting terrorists for capture or assassination was the first evidence that the CIA's covert programs were directly using contractors for lethal means.<sup>197</sup> The CIA director ended the program after determining that it was unsuccessful.<sup>198</sup> Yet the classified program had operated for seven years and spent millions of dollars, without notification to the congressional committees charged with oversight of the intelligence community.<sup>199</sup>

There are several reasons for the increase in civilians at war, including cost concerns, institutional memory, and expertise.<sup>200</sup> The maintenance of military and civilian government personnel is very expensive, providing incentive to outsource jobs to contractors that will cost the government less money.<sup>201</sup> Furthermore, the complexity of modern weaponry frequently necessitates bringing civilian contractors along for maintenance and sometimes even operation of equipment.<sup>202</sup> Additionally, many weapons, such as UAVs, can be operated remotely, and there is seemingly no need to have a military pilot in that job when a contractor could do it just as well.<sup>203</sup> Sometimes contractors have even better capabilities to accomplish a mission than the government personnel that hire them.<sup>204</sup> Civilian contractors do not have the frequent personnel transfers that military personnel encounter; thus the contractors can spend more time training with complex equipment, becoming the unit's institutional memory.<sup>205</sup> Finally, it may be easier politically to send the CIA and other civilians into a conflict than to de-

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<sup>195</sup> *Id.*

<sup>196</sup> Risen & Mazzetti, *supra* note 190.

<sup>197</sup> Mazzetti, *supra* note 194.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> P.W. SINGER, WIRED FOR WAR 370–72 (2009).

<sup>201</sup> *See id.* at 179–80.

<sup>202</sup> Charles Garraway, *The Changing Character of the Participants in War: Civilianization of Warfighting and the Concept of "Direct Participation in Hostilities,"* in INTERNATIONAL LAW STUDIES: INTERNATIONAL LAW AND THE CHANGING CHARACTER OF WAR 177, 178–79 (Raul A. Pedrozo & Daria P. Wollschlaeger eds., 2011) [hereinafter INTERNATIONAL LAW STUDIES].

<sup>203</sup> *See id.*; *see also* SINGER, *supra* note 200, at 371 ("For many, there appears to be nothing inherently military about the ability to punch a keyboard and move a joystick around.")

<sup>204</sup> *See* Ciralsky, *supra* note 186. The CIA hired the Blackwater security firm (renamed Xe) to develop means of penetrating countries where the CIA has trouble working, because local governments will not cooperate with the Agency. *Id.*

<sup>205</sup> SINGER, *supra* note 200, at 371.

ploy the military, because the executive is not required to justify publicly the requirement to Congress.<sup>206</sup> Thus, civilians have emerged as a significant component of modern warfare.<sup>207</sup>

### B. *Modern Warfare Methods Change the Character of War*

Senator Thomas Eagleton's prediction that activities outside the scope of the War Powers Resolution would increase has become a reality.<sup>208</sup> In addition to a change in participants, development of technology is changing the methods of warfare in the modern era.<sup>209</sup> New technology decreases the risk of injury or death for humans that have the assistance of improved intelligence, firepower support, and long-range automated capabilities.<sup>210</sup> Furthermore, technology has the potential to reduce severely the need for humans to operate a foreign war.<sup>211</sup> Thus, war waged remotely, as made possible by these technological advances, is beyond the scope of "war" as contemplated by the War Powers Resolution.<sup>212</sup>

#### 1. Use of Unmanned Aerial Vehicles

The use of UAVs is outside the bounds of what the 1973 drafters of the War Powers Resolution envisioned.<sup>213</sup> Between the years 2000 and 2010, the number of UAVs used to support military operations grew from under fifty to over six thousand, ushering in a new era of warfare.<sup>214</sup> The American government, including the Pentagon and the CIA, has created an extensive support network including several operational bases in the United States and around the world.<sup>215</sup> As of 2012, more military pilots are being trained for and more hours are being flown by American UAVs than conventional aircraft.<sup>216</sup>

UAVs are not just unmanned planes; rather they have enhanced capabilities that make military operations more effective.<sup>217</sup> The

<sup>206</sup> *Id.* at 319–20.

<sup>207</sup> *Id.*

<sup>208</sup> See 119 CONG. REC. 25,080 (1973); SINGER, *supra* note 200, at 319–20.

<sup>209</sup> See SINGER, *supra* note 200, at 129.

<sup>210</sup> See *id.* at 319.

<sup>211</sup> *Id.* at 129.

<sup>212</sup> See *Libya and War Powers Hearing*, *supra* note 7, at 19–20; 119 CONG. REC. 25,080.

<sup>213</sup> See *Libya and War Powers Hearing*, *supra* note 7, at 19–20.

<sup>214</sup> Raul A. Pedrozo, *Use of Unmanned Systems to Combat Terrorism*, in INTERNATIONAL LAW STUDIES, *supra* note 202, at 217; Cortright, *supra* note 14.

<sup>215</sup> Cortright, *supra* note 14.

<sup>216</sup> *Unmanned Aerial Warfare: Flight of the Drones*, *supra* note 13.

<sup>217</sup> See *id.*

Reaper MQ-9 aircraft, for example, can loiter above a target for up to twenty-four hours, microscopically observe activities on the ground from an altitude of up to five miles, transmit real-time video to its controllers on the other side of the world, and fire a missile at the target with meticulous precision.<sup>218</sup> Thus, UAVs bring unprecedented surveillance, intelligence, and strike capabilities to the warfighter.<sup>219</sup> Moreover, the use of UAVs allows the United States to attack military targets and avoid the high civilian death rates that occurred during bygone wars.<sup>220</sup> Thus, one of the biggest advantages UAVs bring is that they take the pilot out of hostile situations.<sup>221</sup> UAVs can fly missions that would be too dangerous for a manned aircraft, such as surveillance or air sampling after a chemical attack.<sup>222</sup> Ultimately UAVs make new combat missions possible and may make war-fighting efforts more effective.<sup>223</sup>

The use of UAVs changes the risks of combat scenarios, because it eliminates the human cost of putting troops on the ground.<sup>224</sup> Whereas historically, politicians have weighed the political cost of putting American forces in hostile situations, UAVs remove this barrier.<sup>225</sup> By minimizing American casualties, UAVs remove the emotional tie between public approval of war and the military.<sup>226</sup> This removes the need for the President to demonstrate to the American public that the human costs of war are worth the overall benefit to the nation.<sup>227</sup> Thus, although UAVs may increase targeting accuracy in combat, enabling the

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<sup>218</sup> *Id.* UAVs come in many shapes and sizes. *Id.* Some have been designed to mimic the size and characteristics of a fly on the wall. *Id.* Still others, such as the large RQ-4A Global Hawk, an all-weather spy plane, can fly nonstop from the United States to Australia, and can conduct surveillance on 53,000 square miles of ground in a day. *Id.*

<sup>219</sup> *See id.*

<sup>220</sup> John Yoo, *Assassination or Targeted Killings After 9/11*, 56 N.Y.L. SCH. L. REV. 57, 78 (2011).

<sup>221</sup> *See Unmanned Aerial Warfare: Flight of the Drones*, *supra* note 13.

<sup>222</sup> *Id.*

<sup>223</sup> *See* Cortright, *supra* note 14.

<sup>224</sup> *See id.*

<sup>225</sup> *See* SINGER, *supra* note 200, at 319–20; Jide Nzelibe, *Are Congressionally Authorized Wars Perverse?*, 59 STAN. L. REV. 907, 917 (2007).

<sup>226</sup> SINGER, *supra* note 200, at 319.

<sup>227</sup> *See id.* (“With no draft, no need for congressional approval (the last formal declaration of war was in 1941), no tax or war bonds, and now the knowledge that the Americans at risk are mainly just American machines, the already lowering bars to war may well hit the ground.”).



United States to prosecute more effective wars, they may also lower political hurdles to entering combat situations.<sup>228</sup>

## 2. Use of Cyber-Warfare

Another type of warfare not anticipated by the drafters of the War Powers Resolution is cyber-warfare.<sup>229</sup> It can be used as a tool to support the nation's interests in many different ways: to collect information on the enemy, to optimize the use of the nation's weaponry, to disrupt the computer network that controls the enemy's weaponry, to directly attack the enemy's national infrastructure, or to impact morale.<sup>230</sup> Cyber-warfare does not leave the footprints of conventional warfare, and thus it can inflict damage on another country anonymously.<sup>231</sup> This anonymity allows an attacker to make an impact without affecting international relations, and potentially without political impact at home.<sup>232</sup> Furthermore, there are no restraints on the personnel that can conduct cyber-attacks.<sup>233</sup> These activities are easily outsourced to private industry, and tasking is easily dispersed to multiple entities, making an attack even more difficult to trace.<sup>234</sup> Moreover, because cyber-warfare is conducted remotely, it does not require troops on the ground, and thus it would not be subject to the War Powers Resolution.<sup>235</sup>

In October 2012, U.S. Secretary of Defense Leon Panetta warned that America, like other nations, is at risk of a "cyber Pearl Harbor: an attack that would cause physical destruction and the loss of life."<sup>236</sup> In

<sup>228</sup> Tony Rock, *Yesterday's Laws, Tomorrow's Technology: The Laws of War and Unmanned Warfare*, N.Y. INT'L L. REV., Summer 2011, at 39, 65–66.

<sup>229</sup> See *Libya and War Powers Hearing*, *supra* note 7, at 19–20. At least one scholar has proposed that a cyber-attack will constitute force depending on several factors that characterize conventional military attacks, such as the severity, immediacy, directness, invasiveness, measurability, and presumptive legitimacy. Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885, 914–15 (1999).

<sup>230</sup> Lukas Milevski, *Stuxnet and Strategy: A Special Operation in Cyberspace?*, JOINT FORCES Q., 4th Quarter 2011, at 64, 65.

<sup>231</sup> Matthew C. Waxman, *Cyber Attacks as "Force" Under UN Charter Article 2(4)*, in INTERNATIONAL LAW STUDIES, *supra* note 202, at 43, 51.

<sup>232</sup> See *id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> See *Libya and War Powers Hearing*, *supra* note 7, at 19–20.

<sup>236</sup> Leon Panetta, U.S. Sec'y of Def., Address to Business Executives for National Security: Defending the Nation from Cyber Attack (Oct. 11, 2012), <http://www.defense.gov//speeches/speech.aspx?speechid=1728>. Secretary Panetta explained that "[a]n aggressor nation or extremist group could use . . . cyber tools to gain control of critical switches.

May 2007, Estonian authorities experienced such an attack when they removed a World War II-era Soviet statue from a park.<sup>237</sup> They did not anticipate that such a cyber-attack would threaten their national security.<sup>238</sup> The distributed denial-of-service attack rapidly increased traffic to websites, depleted available bandwidth, caused websites to crash, and threatened the nation's electronic infrastructure, forcing the Estonian government to defend its population and commerce.<sup>239</sup> As the Estonian technicians attempted to block their connections to international servers, the actions were analogous to a conventional "blockade" of the nation's access points to the rest of the world.<sup>240</sup> This was the first case of a cyber-attack crippling an entire nation, but it may be just the beginning of a new frontier in warfare.<sup>241</sup>

There are indications that the United States is using cyber-warfare in its secret war against the Iranian nuclear weapons program.<sup>242</sup> Sometime in 2009, a software program was introduced into the Iranian computer network.<sup>243</sup> The program, which is now known as Stuxnet, made its way through the computer system and sabotaged its designated tar-

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They could . . . derail passenger trains or . . . derail trains loaded with lethal chemicals. They could contaminate the water supply in major cities or shutdown the power grid across large parts of the country." *Id.*

<sup>237</sup> Mark Landler & John Markoff, *After Computer Siege in Estonia, War Fears Turn to Cyberspace*, N.Y. TIMES, May 29, 2007, at A1.

<sup>238</sup> Håly Laasme, *Estonia: Cyber Window into the Future of NATO*, JOINT FORCES Q., 4th Quarter 2011, at 59. The United States could have been drawn into defending Estonia because both countries are bound by Article 5 of the North American Treaty Organization (NATO) charter, which requires allies to assist each other with necessary measures, including the use of force if one of the members is attacked. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243; see Laasme, *supra*, at 59. Article 5 was not invoked in this case, because there was no clear enemy to retaliate against, and there was ambiguity within NATO regarding *how* to retaliate against this sort of attack. Laasme, *supra*, at 59–60. The Estonians claim that an internet address that was used in the attacks belonged to an individual in the Putin administration and therefore blame Russia for the attacks. Landler & Markoff, *supra* note 237.

<sup>239</sup> Laasme, *supra* note 238, at 59; Joshua Davis, *Hackers Take Down the Most Wired Country in Europe*, WIRED, Aug. 21, 2007, [http://www.wired.com/politics/security/magazine/15-09/ff\\_estonia?currentPage=all](http://www.wired.com/politics/security/magazine/15-09/ff_estonia?currentPage=all). The attack shut down internet access for the Estonian Parliament and Estonian banks, which shut down commerce. Landler & Markoff, *supra* note 237. Estonians lost use of the internet, which among other things they use to "vote, file their taxes, and with their cellphones, to shop or pay for parking." *Id.*

<sup>240</sup> Laasme, *supra* note 238, at 59.

<sup>241</sup> *Id.* Similar cyber-attacks preceded the Russian invasion of Georgia in 2008. Mark Clayton, *The New Cyber Arms Race*, CHRISTIAN SCI. MONITOR, Mar. 7, 2011, <http://www.csmonitor.com/USA/Military/2011/0307/The-new-cyber-arms-race>.

<sup>242</sup> *Talk of the Nation: As Tensions Rise, Some See 'Covert War' with Iran*, NAT'L PUB. RADIO (Jan. 17, 2012), <http://www.npr.org/2012/01/17/145349370/as-tensions-rise-some-see-covert-war-with-iran>.

<sup>243</sup> Clayton, *supra* note 241.

get: nuclear centrifuges that are vital to the Iranian weapons program.<sup>244</sup> Then in May 2012, Iran announced that computers used by many of their high-ranking officials were attacked by a data collecting and reporting virus called Flame.<sup>245</sup> It is widely believed that both Stuxnet and Flame were joint operations by the American and Israeli governments, although neither country has claimed responsibility.<sup>246</sup>

### C. *The Conflict in Libya: Illustrating the Limits of the War Powers Resolution*

The 2011 conflict in Libya demonstrates that the use of these modern warfare methods is outside the bounds of the War Powers Resolution of 1973, and thus evades a legislative check on executive power.<sup>247</sup> On March 19, 2011, President Barack Obama ordered American forces to join a NATO operation in Libya, without congressional authorization.<sup>248</sup> On June 14, Speaker of the House John Boehner sent a letter to the President, warning him that he would soon be in violation of the time limits established by the War Powers Resolution, because the President had not received authorization from Congress for the action in Libya.<sup>249</sup> The next day, the White House sent a report to Congress, asserting that the level of American involvement in Libya was less than “hostilities,” and thus fell outside the scope of the Resolution.<sup>250</sup> The report asserted that because the operations did “not involve sustained fighting or active exchanges of fire with hostile forces, nor [did] they involve the presence of U.S. ground troops, U.S. casualties, or a serious threat thereof,” the actions were different from those contemplated by the Resolution.<sup>251</sup> The next day, Speaker Boehner responded that with UAV attacks underway and the military

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<sup>244</sup> *Id.*

<sup>245</sup> Thomas Erdbrink, *Iran Confirms Attack by Virus That Collects Information*, N.Y. TIMES, May 30, 2012, at A4.

<sup>246</sup> Ellen Nakashima et al., *U.S. and Israel Created Flame*, WASH. POST, June 20, 2012, at A1.

<sup>247</sup> See *Libya and War Powers Hearing*, *supra* note 7, at 18–19; *infra* notes 248–272 and accompanying text.

<sup>248</sup> *Id.* at 4.

<sup>249</sup> Letter from Speaker John A. Boehner to the President (June 14, 2011), [http://www.speaker.gov/sites/speaker.house.gov/files/UploadedFiles/Letter\\_to\\_POTUS\\_Libya\\_061411.PDF](http://www.speaker.gov/sites/speaker.house.gov/files/UploadedFiles/Letter_to_POTUS_Libya_061411.PDF).

<sup>250</sup> See Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 16, 2011, at A16.

<sup>251</sup> THE WHITE HOUSE, UNITED STATES ACTIVITIES IN LIBYA 25 (2011), available at [http://www.foreignpolicy.com/files/fp\\_uploaded\\_documents/110615\\_United\\_States\\_Activities\\_in\\_Libya\\_-\\_6\\_15\\_11.pdf](http://www.foreignpolicy.com/files/fp_uploaded_documents/110615_United_States_Activities_in_Libya_-_6_15_11.pdf).

spending ten million dollars a day on the effort, he did not understand how the United States was not engaged in “hostilities.”<sup>252</sup>

On June 28, 2011, Senator John Kerry held a hearing before the Senate Committee on Foreign Relations regarding the War Powers Resolution and America’s use of force in Libya.<sup>253</sup> In his opening statement, Senator Kerry asserted that he supported the administration’s position that action in Libya was outside the scope of the Resolution.<sup>254</sup> He explained that the Resolution was drafted in response to the Vietnam War and was written to provide guidance for “a particular kind of war, to a particular set of events.”<sup>255</sup> Senator Kerry reasoned that after many years of fighting and the loss of almost 60,000 American lives in Vietnam, Congress drafted the law to ensure that the legislative branch would be able to weigh in before American soldiers are sent abroad.<sup>256</sup> At this point, Senator Kerry drew a contrast with the conflict in Libya, which was “a very limited operation” and did not involve American armed forces in “hostilities.”<sup>257</sup>

Senator Richard Lugar, the ranking member of the Committee, expressed dismay that the President acted unilaterally without seeking congressional authorization to initiate military action in Libya.<sup>258</sup> He expressed that even if the President did have the legal authority to initiate a war without congressional approval, that did not mean the action was “wise or helpful to the operation.”<sup>259</sup> He suggested that most people educated on the matter would agree that the President should “seek congressional authorization for war when circumstances allow.”<sup>260</sup>

Harold Koh, a legal advisor to the U.S. Department of State, explained the administration’s legal position on war powers.<sup>261</sup> The American military activity in Libya was limited largely to providing in-

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<sup>252</sup> See Charlie Savage, *2 Top Lawyers Lose Argument on War Power*, N.Y. TIMES, June 18, 2011, at A1.

<sup>253</sup> *Libya and War Powers Hearing*, *supra* note 7, at 1.

<sup>254</sup> *Id.* at 2.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* As Senator Kerry explained, the Ford administration “defined hostilities only as those situations where U.S. troops were exchanging fire with hostile forces. And subsequent administrations, Republican and Democrat alike, built on that interpretation.” *Id.*

<sup>258</sup> *Id.* at 4.

<sup>259</sup> *Libya and War Powers Hearing*, *supra* note 7, at 4.

<sup>260</sup> *Id.* Senator Lugar reiterated the importance of consultation between the executive and legislative branches, stating that “the chances for success in war are enhanced by the unity, clarity of mission and constitutional certainty that such an authorization and debate provide.” *Id.*

<sup>261</sup> *Id.* at 7.

telligence and refueling for NATO allies.<sup>262</sup> The administration's view was that in cases like this when the military engages in a "limited military mission that involves limited exposure for U.S. troops and limited risk of serious escalation and employs limited military means," the "hostilities" are not covered by the Resolution.<sup>263</sup>

Mr. Koh, like Senator Kerry, differentiated the action from those envisioned by the drafters of the War Powers Resolution.<sup>264</sup> Unlike previous administrations, the Obama administration did not challenge the constitutionality of the Resolution.<sup>265</sup> Rather, it argued that the Resolution was drafted to "play a particular role," and that to "play that role effectively in this century" the Resolution would require modification.<sup>266</sup> The Resolution regulates "the introduction of U.S. Armed Forces into hostilities."<sup>267</sup> As Mr. Koh explained, the Resolution does not address the situation of "unmanned uses of weapons that can deliver huge volumes of violence," such as UAVs.<sup>268</sup> Thus the administration claimed that there was a large hole in the Resolution for combat activities employing unmanned weaponry.<sup>269</sup>

Clearly, the use of technologies such as UAVs and cyber-attacks in modern warfare are outside the bounds of the War Powers Resolution as it currently stands.<sup>270</sup> This removes a legislative check on executive power, and when considered in light of historical views on the balance of power, augments executive power.<sup>271</sup> Although some consider modern warfare methods to be a legitimate augmentation of executive power, others believe that the Resolution should be amended to provide a legislative check to this power.<sup>272</sup>

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<sup>262</sup> *Id.* at 10. The U.S. military was also providing about ten percent of the flight missions to engage enemy targets to enforce a no-fly zone and protect civilians. *Id.*

<sup>263</sup> *Id.* at 9.

<sup>264</sup> *Id.* at 8. Mr. Koh explained that the drafters of the Resolution were concerned with Vietnam-like scenarios, not with limited missions like the one in Libya. *Id.*

<sup>265</sup> *Libya and War Powers Hearing, supra* note 7, at 18; see NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 24.

<sup>266</sup> *Libya and War Powers Hearing, supra* note 7, at 18.

<sup>267</sup> *Id.* at 19, 35.

<sup>268</sup> *Id.* This statement was in response to a question from Senator Chris Coons regarding UAVs and cyber-warfare. *Id.* at 34. Mr. Koh recognized that situations such as "cyber conflict" would not be within the scope of the Resolution, acknowledging that "many of the provisions . . . may turn out to be poorly suited for the current situation." *Id.* at 20.

<sup>269</sup> See *id.* at 35.

<sup>270</sup> See *supra* notes 183–269 and accompanying text.

<sup>271</sup> See *supra* notes 40–79 and accompanying text.

<sup>272</sup> See *infra* notes 273–333 and accompanying text.

### III. RESTORING THE NECESSARY BALANCE OF POWER

This Part argues for the restoration of balance between the executive and legislative branches in light of the nature of modern warfare and limitations of the War Powers Resolution.<sup>273</sup> It asserts that the Resolution can no longer accomplish its intended purpose and should be replaced by new war powers framework legislation.<sup>274</sup> As Senator Thomas Eagleton stated in his attempt to broaden the Resolution, “[e]ither we are involved in hostilities or we are not.”<sup>275</sup> Thus, the law should be written to “match the realities of war.”<sup>276</sup>

Section A asserts that the War Powers Resolution is outdated.<sup>277</sup> Modern warfare is happening outside the bounds of the Resolution, and the U.S. Constitution’s system of checks and balances calls for recalibrating the balance.<sup>278</sup> Section B proposes new framework legislation on war powers.<sup>279</sup> It endorses broader legislation to accommodate inevitable changes in future technology.<sup>280</sup> It also recognizes that much of modern warfare is reliant on covert operations.<sup>281</sup> Thus, the legislation should be bifurcated to accommodate open as well as covert warfare.<sup>282</sup>

#### A. *The Balance of War Powers Is Out of Kilter*

Since the framing of the Constitution, the American commitment to separation and balance of powers has been seen as necessary for preventing tyranny.<sup>283</sup> In response to unilateral action by the executive, Congress attempted to reassert its prerogative over war powers in

<sup>273</sup> See *infra* notes 283–391 and accompanying text. This argument assumes that Congress should have a role in war powers. *Id.* Others argue that the executive branch alone is better suited for making foreign policy decisions, because Congress can act only through formal resolutions, legislation, and hearings. See, e.g., James R. Ferguson, *Government Secrecy After the Cold War: The Role of Congress*, 34 B.C. L. REV. 451, 466–67 (1993). Meanwhile the executive can act more swiftly, decisively, and informally. *Id.*

<sup>274</sup> See *infra* notes 283–333 and accompanying text; *supra* note 31 (defining framework legislation).

<sup>275</sup> 119 CONG. REC. 25,079 (1973).

<sup>276</sup> See *id.*; *infra* notes 334–391 and accompanying text.

<sup>277</sup> See *infra* notes 283–333 and accompanying text.

<sup>278</sup> See *infra* notes 283–333 and accompanying text.

<sup>279</sup> See *infra* notes 334–391 and accompanying text.

<sup>280</sup> See *infra* notes 344–358 and accompanying text.

<sup>281</sup> See *infra* notes 359–388 and accompanying text.

<sup>282</sup> See *infra* notes 359–388 and accompanying text.

<sup>283</sup> See Ronald J. Krotoszynski, Jr., *The Shot (Not) Heard 'Round the World: Reconsidering the Perplexing U.S. Preoccupation with the Separation of Legislative and Executive Powers*, 51 B.C. L. REV. 1, 20 (2010).

1973.<sup>284</sup> Although broad issues prompted the statute, the result was a limited doctrine.<sup>285</sup> Its limitations on presidential power are now constrained by its own parameters as the Resolution applies only to military personnel.<sup>286</sup> Thus, over time, warfare outgrew the strictures established by the Resolution, and executive control over war is once again overly powerful.<sup>287</sup>

## 1. The Need for Balance of Powers

The American constitutional democracy's system of checks and balances supports a "joint decision" system.<sup>288</sup> This model of decision making gives the President the unilateral power to make war, without authorization from Congress, only in emergency situations.<sup>289</sup> These scenarios include the need to fend off an attack on the United States, to prevent an imminent attack, and to protect American citizens whose lives are threatened, as opposed to scenarios involving a "sustained use of force."<sup>290</sup> Conversely, any use of armed forces for sustained operations and non-emergencies should require consultation with Congress.<sup>291</sup> This division of powers between the branches of government ensures that the decision to bring the nation into war—a significant decision that the American people pay for with their lives and money—is scrutinized by both political branches.<sup>292</sup>

The negotiations over the powers allocated to the executive and legislative branches during the Constitution's drafting lend support to this view.<sup>293</sup> It was asserted that the legislative branch would proceed

<sup>284</sup> See War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (codified as amended at 50 U.S.C. §§ 1541–1548 (2006)); H. COMM. ON FOREIGN AFFAIRS, *supra* note 80, at 276.

<sup>285</sup> James Nathan, *Salvaging the War Powers Resolution*, 23 PRESIDENTIAL STUD. Q. 235, 238, 244 (1993).

<sup>286</sup> See *Libya and War Powers Hearing*, *supra* note 7, at 19.

<sup>287</sup> See *id.*

<sup>288</sup> Joseph R. Biden, Jr. & John B. Ritch III, Commentary, *The War Power at a Constitutional Impasse: A "Joint Decision" Solution*, 77 GEO. L.J. 367, 371–72 (1988).

<sup>289</sup> *Id.* at 372. One opposing theory is that Congress can use its power over spending to control executive decisions. See, e.g., *id.* at 371; Yoo, *supra* note 92, at 286 (concluding, based on an analysis of legal and historical sources, that the Framers expected Congress's power of the purse to be its "primary check on presidential use of the military"). But, the reality is that "Congress will never fail to provide overall funding for the armed forces, and the President can veto military appropriations bills containing restrictions he finds unacceptable." Biden & Ritch, *supra* note 288, at 371.

<sup>290</sup> Biden & Ritch, *supra* note 288, at 372; see 2 RECORDS, *supra* note 53, at 312 (Aug. 17), 318 (Madison's notes).

<sup>291</sup> Biden & Ritch, *supra* note 288, at 372.

<sup>292</sup> See THE CONSTITUTION PROJECT, *supra* note 45, at 10.

<sup>293</sup> Biden & Ritch, *supra* note 288, at 372.

too slowly to respond to and appropriately repel attacks on the nation.<sup>294</sup> Still, the Framers thought it was necessary to change the wording to give the President the power to act in emergency situations.<sup>295</sup> Thus the meaning of “declare war” was likely understood by the Framers as power over war-making decisions, excluding defensive and emergency situations.<sup>296</sup> Their debate implies that outside of the necessity for the President to repel attacks, the power to “make war” remains with Congress.<sup>297</sup>

Furthermore, when the Framers discussed war powers, they did not envision actions by only the military.<sup>298</sup> Rather, they envisioned control over both public and private actors in war.<sup>299</sup> The congressional power to grant letters of marque and reprisal lends support to this view.<sup>300</sup> This power brought privately owned ships into the service of the nation to capture and kill enemy forces.<sup>301</sup> Letters of marque and reprisal were vital to the nation in the late eighteenth century, because at the time, the United States did not have a sufficient Navy to stand up against the power of the large British Navy.<sup>302</sup> Rather, the United States had to get assistance from civilian vessels.<sup>303</sup> Similarly, modern warfare is better fought with the use of civilian augmenters.<sup>304</sup> The military relies on government civilians and contractors to increase capabilities at war.<sup>305</sup> Thus, just as Congress was given power to grant letters of marque and reprisal, it should have authority over the reality of modern day civilians at war.<sup>306</sup>

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<sup>294</sup> 2 RECORDS, *supra* note 53, at 312 (Aug. 17), 318 (Madison’s notes). Charles Pinckney advocated for the Senate to have the power to commence war, being “more acquainted with foreign affairs, and more capable of proper resolutions” than the House, which was expected to only meet once a year, and “would be too numerous for such deliberations.” *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> See Alfred W. Blumrosen & Steven M. Blumrosen, *Restoring the Congressional Duty to Declare War*, 63 RUTGERS L. REV. 407, 430 (2011).

<sup>297</sup> *See id.*

<sup>298</sup> *See* Wuerth, *supra* note 64, at 1735.

<sup>299</sup> *See id.*

<sup>300</sup> *See* U.S. CONST. art. I, § 8, cl. 11; Wuerth, *supra* note 64, at 1735–36.

<sup>301</sup> Wuerth, *supra* note 64, at 1714.

<sup>302</sup> Theodore M. Cooperstein, *Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering*, 40 J. MAR. L. & COM. 221, 226–27 (2009).

<sup>303</sup> *See id.*

<sup>304</sup> *See* SINGER, *supra* note 200, at 370–72.

<sup>305</sup> *See id.*; *supra* notes 183–207 and accompanying text.

<sup>306</sup> *See* U.S. CONST. art. I, § 8, cl. 11; SINGER, *supra* note 200, at 370–71; Cooperstein, *supra* note 302, at 252.



An appropriate balance of powers is evidenced in modern statutes, such as the Intelligence Oversight Act of 1991.<sup>307</sup> Although the statute acknowledges the importance of covert activities to national security, it works within the framework of the Constitution.<sup>308</sup> The Act requires the executive to keep the congressional oversight committees “fully and currently informed of the intelligence activities.”<sup>309</sup> Thus, it is understood that the President must sanction covert activities for national security, but that the activities are subject to scrutiny by members of Congress.<sup>310</sup> This allows for further review and political debate by representatives of the nation on issues that affect the nation.<sup>311</sup> Lack of adherence to this system could result in the tyranny so feared by the Framers.<sup>312</sup>

## 2. The Experience in Libya Demonstrates That the War Powers Resolution Is Outdated

The use of technology, such as UAVs and cyber-warfare, which fall outside the War Powers Resolution, is on the rise.<sup>313</sup> Thus, although the Obama administration claimed that the conflict in Libya was a unique situation and a narrow carve-out from the Resolution, the evolution of technology and changes in modern warfare demonstrate that Libya is not unique.<sup>314</sup> There is also increasing wartime involvement of government civilians and contractors, which is outside the scope of the Resolution.<sup>315</sup> Thus, the small exception to the War Powers Resolution claimed by the executive branch is a rapidly growing gap that nullifies the Resolution’s attempt to balance war powers.<sup>316</sup>

The characteristics of UAVs and cyber-warfare that make them beneficial to the military also put them squarely within the Obama ad-

<sup>307</sup> See Intelligence Oversight Act of 1991, 50 U.S.C. § 413 (2006 & Supp. IV 2010).

<sup>308</sup> See *id.*

<sup>309</sup> *Id.* § 413(a)(1).

<sup>310</sup> See *id.* § 413b(b).

<sup>311</sup> See Silver, *supra* note 122, at 949.

<sup>312</sup> See NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, app. IV at 6; Gregory F. Treverton, *Constraints on “Covert” Paramilitary Action*, in *THE POWER TO GO TO WAR*, *supra* note 41, at 133, 146.

<sup>313</sup> See *Libya and War Powers Hearing*, *supra* note 7, at 19–20; SINGER, *supra* note 200, at 194.

<sup>314</sup> See *Libya and War Powers Hearing*, *supra* note 7, at 9; Fisher, *supra* note 9, at 50 (suggesting that following the reasoning of the administration, “a nation with superior military force could pulverize another country . . . and there would be neither hostilities nor war”).

<sup>315</sup> See 119 CONG. REC. 25,079 (1973); Sullivan, *supra* note 184, at 859.

<sup>316</sup> Michael Hirsh, *Defining Down War*, NAT’L J. (July 1, 2011), <http://www.nationaljournal.com/how-obama-has-perfected-the-art-of-not-saying-war-20110701> (asserting that “the United States is entering into a new arena with few rules, and the War Powers Resolution is already miles behind, legally, constitutionally, and practically”).

ministration's exception to the War Powers Resolution.<sup>317</sup> UAVs and cyber-warfare allow the United States to fight long-distance wars, without deploying military personnel overseas, and with little risk of endangering American lives.<sup>318</sup> Nonetheless, both UAVs and cyber-attacks could have the same effects as a conventional military attack, and both could result in reprisal by adversaries against America.<sup>319</sup> Thus, just as a nation could pay a heavy price for introducing soldiers into combat, use of remotely operated technology could also be costly.<sup>320</sup> Nonetheless, these technologies enable the President to act against adversaries without having to negotiate the obstacle of congressional consultation.<sup>321</sup>

Furthermore, the War Powers Resolution is limited to U.S. Armed Forces, and does not apply to the CIA or other civilians at war.<sup>322</sup> This gap was acknowledged at the time the Resolution was drafted.<sup>323</sup> The CIA and civilian contractors have since become a larger part of American war fighting.<sup>324</sup> In fact, during the 2011 conflict in Libya, there were reports of CIA personnel on the ground.<sup>325</sup> Yet, since they were not military personnel, the Resolution did not apply.<sup>326</sup>

The War Powers Resolution was an attempt to check unbounded executive war power, but it was clearly written for a 1973-era war.<sup>327</sup> Technological innovation and the changing face of warfare have evolved to put modern military actions outside the scope of the Resolu-

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<sup>317</sup> See *Libya and War Powers Hearing*, *supra* note 7, at 19. As Harold Koh testified on behalf of the administration, "when the statute talks about the introduction of U.S. Armed Forces into hostilities and what you are sending in is an unmanned aerial vehicle high in the sky, it is not clear that that provision was intended to apply to that particular weapon." *Id.*

<sup>318</sup> See Hirsh, *supra* note 316.

<sup>319</sup> See Waxman, *supra* note 231, at 47; see also Sikander Ahmed Shah, *War on Terrorism: Self Defense, Operation Enduring Freedom, and the Legality of U.S. Drone Attacks in Pakistan*, 9 WASH. U. GLOB. STUD. L. REV. 77, 124–25 (2010) (explaining that American UAV attacks in Pakistan cause "resentment and anger," and have been blamed for promoting terrorist recruitment and for motivating recent terrorist attacks in Pakistani cities).

<sup>320</sup> See Waxman, *supra* note 231, at 48. Secretary of State Hillary Clinton announced in a 2010 address: "In an internet-connected world, an attack on one nation's networks can be an attack on all." Hillary Rodham Clinton, U.S. Sec'y of State, Remarks on Internet Freedom (Jan. 21, 2010), <http://www.state.gov/secretary/rm/2010/01/135519.htm>.

<sup>321</sup> See *id.*

<sup>322</sup> 119 CONG. REC. 25,079 (1973); Louis Fisher, *Basic Principles of the War Power*, 5 J. NAT'L SECURITY L. & POL'Y 319, 335 (2012).

<sup>323</sup> 119 CONG. REC. 25,079.

<sup>324</sup> Pedrozo, *supra* note 214, at 251; see *supra* notes 183–207 and accompanying text.

<sup>325</sup> Mazzetti & Schmitt, *supra* note 3.

<sup>326</sup> See War Powers Resolution, 50 U.S.C. § 1541 (2006).

<sup>327</sup> See Baker & Hamilton, *supra* note 120.

tion.<sup>328</sup> The result of this evolution is nearly unbounded war powers for the executive branch.<sup>329</sup> Nonetheless, modern military actions should be subject to the system of checks and balances established in the Constitution.<sup>330</sup> Without this political dialogue, the executive could spend millions of dollars, endanger American lives, and embroil the nation in international disputes more easily.<sup>331</sup> As stated by George Mason, the constitutional check should “clog” rather than facilitate war, and guarantee that decisions are made in the best interests of the nation.<sup>332</sup> To ensure a broader congressional role and achieve the appropriate balance of war powers, a new statutory framework is needed.<sup>333</sup>

### B. *Proposed Amendment to the War Powers Resolution*

Congress should draft framework legislation to formalize its role in the decision to enter a war, thereby restoring the balance of powers contemplated by the Framers.<sup>334</sup> As noted above, when the President makes war powers decisions in the absence of congressional action, the decisions are in Justice Robert Jackson’s “zone of twilight” and are of dubious constitutionality.<sup>335</sup> Passing new legislation mandating that the President consult with Congress—and obtain approval or disapproval—would solidify the constitutionality of war-making decisions.<sup>336</sup> The President’s decision would thus fall within either Justice Jackson’s first or third categories, which would clarify or strengthen the constitutionality of the executive action.<sup>337</sup>

In 2008, the National War Powers Commission proposed new legislation, the War Powers Consultation Act of 2009.<sup>338</sup> This proposed legislation would clarify some of the issues that limit the effectiveness of the

<sup>328</sup> See *supra* notes 183–269 and accompanying text.

<sup>329</sup> NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 24. Furthermore, Congress has never pushed the President to comply with the Resolution, because that might force Congress to make a politically accountable vote on involvement in war. See *id.*

<sup>330</sup> See Fisher, *supra* note 322, at 336–37.

<sup>331</sup> See *id.*

<sup>332</sup> See 2 RECORDS, *supra* note 53, at 312 (Aug. 17), 319 (Madison’s notes).

<sup>333</sup> See NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 8.

<sup>334</sup> See *id.* at 26.

<sup>335</sup> See *supra* notes 156–175 and accompanying text.

<sup>336</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

<sup>337</sup> See *id.*

<sup>338</sup> NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 8. The National War Powers Commission proposed “a pragmatic approach” to legislation with a “focus on ensuring that Congress has an opportunity to consult meaningfully with the President about significant armed conflicts and that Congress expresses its views.” *Id.* at 6.

War Powers Resolution of 1973, and would require Congress to act affirmatively in response to presidential war powers decisions.<sup>339</sup> Although this proposal was a step in the right direction, the proposal requires further modification to encompass the full reality of modern warfare.<sup>340</sup> The modifications proposed below will ensure that the new law has sufficient breadth to encompass all conflicts regardless of the actors.<sup>341</sup> Furthermore, the modifications incorporate a bifurcated process to accommodate the realities of fighting modern wars, which rely on covert actions.<sup>342</sup> These proposed reforms bring the balance of power between the executive and legislative branches more closely in line with the Framers' intent and more thoroughly accommodate the realities of modern warfare.<sup>343</sup>

### 1. Revise the Scope of War Powers Legislation

The scope of *actors* that fall within the War Powers Consultation proposal should be broadened.<sup>344</sup> The proposal currently is limited to "combat operation[s] by U.S. armed forces."<sup>345</sup> The legislation should be more expansive, and closer to the reality of modern war fighting, which is conducted by many actors in addition to the military.<sup>346</sup> This change could be accomplished by omitting the words "armed forces."<sup>347</sup> Therefore, the scope of the legislation should be modified to encompass "any combat operation by the United States."<sup>348</sup> This change to the proposed legislation would encompass military, government civilians, contractors, UAVs, and other technological innovations that act on behalf of the nation.<sup>349</sup>

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<sup>339</sup> See *id.* at 44–48.

<sup>340</sup> See 119 CONG. REC. 25,079 (1973); NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 44–48; SINGER, *supra* note 200, at 370–72.

<sup>341</sup> See 119 CONG. REC. 25,079; NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 45.

<sup>342</sup> NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 44–48; Gary M. Stern & Morton H. Halperin, "Covert" Paramilitary Action and War Powers, in *THE POWER TO GO TO WAR*, *supra* note 41, at 149, 149.

<sup>343</sup> See 119 CONG. REC. 25,079; SINGER, *supra* note 200, at 370–72; *infra* notes 345–391 and accompanying text.

<sup>344</sup> See 119 CONG. REC. 25,079; SINGER, *supra* note 200, at 370–72.

<sup>345</sup> NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 45.

<sup>346</sup> See 119 CONG. REC. 25,079 (1973); SINGER, *supra* note 200, at 370–72.

<sup>347</sup> See NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 45.

<sup>348</sup> See *id.*

<sup>349</sup> See *Libya and War Powers Hearing*, *supra* note 7, at 19–20; NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 45.

The scope of *conflicts* that fall within the War Powers Consultation proposal should also be broadened.<sup>350</sup> The proposed legislation currently applies to “any conflict expressly authorized by Congress, or . . . combat operations lasting more than a week or expected by the President to last more than a week.”<sup>351</sup> On the one hand, this proposal would encompass the 2011 action in Libya.<sup>352</sup> On the other hand, it would not encompass short-duration, high-impact strikes, such as the cyber-attack launched against Estonia in 2007.<sup>353</sup> Although an action may be of short duration, it may have long-term effects, and it may have sufficient force to profoundly affect the United States in the form of money, personnel, or foreign relations.<sup>354</sup> Thus, language should be added to the proposed legislation to make it applicable to *all offensive* strikes.<sup>355</sup> This expansion would add scenarios that are likely to instigate reprisal against America.<sup>356</sup> Therefore, this modification would force the President to explain to Congress why a fight is worth starting and why it is in the national interest.<sup>357</sup> Furthermore, this change would still allow the executive to act unilaterally to defend the country against attacks, and would ensure the balance between the political branches intended by the Framers.<sup>358</sup>

## 2. Bifurcation of the Oversight Process

To check effectively the President’s war power, Congress should divide the process of congressional oversight so it is tailored to address both open and covert warfare.<sup>359</sup> The War Powers Consultation proposal specifically exempts “covert operations” from its scope.<sup>360</sup> Nonetheless, “covert operations” are a significant element of modern warfare.<sup>361</sup> Covert actions should therefore not be exempt from legislation

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<sup>350</sup> See 119 CONG. REC. 25,079.

<sup>351</sup> See NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 45.

<sup>352</sup> Baker & Hamilton, *supra* note 120.

<sup>353</sup> See NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 45; Landler & Markoff, *supra* note 237.

<sup>354</sup> See Waxman, *supra* note 231, at 47. For example, a single preemptive American strike on an Iranian nuclear enrichment site could rapidly escalate to entangle the United States in a long-term war. See *id.*

<sup>355</sup> See NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 45.

<sup>356</sup> See Waxman, *supra* note 231, at 48.

<sup>357</sup> See THE CONSTITUTION PROJECT, *supra* note 45, at 10.

<sup>358</sup> See *id.*

<sup>359</sup> See Intelligence Oversight Act of 1991, 50 U.S.C. § 413 (2006 & Supp. IV 2010); NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 45–46.

<sup>360</sup> See NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 45.

<sup>361</sup> See Waxman, *supra* note 231, at 51.

that governs war powers, because the Constitution envisions a role for both the Congress and the President in the decision to enter a war.<sup>362</sup>

The Commission's proposed legislation calls for creation of a Joint Congressional Consultation Committee.<sup>363</sup> This Committee would be composed of the minority leaders of the House and Senate, the majority leader of the Senate, the Speaker of the House, and the chairs and ranking members of the Senate and House committees on foreign affairs, armed services, intelligence, and appropriations.<sup>364</sup> Thus, the Committee closely mirrors the requirements of the existing congressional oversight committees on intelligence.<sup>365</sup> The proposed legislation should be amended so that *all* intended acts of war by the executive, including open *and* covert actions, are initially referred to this Committee.<sup>366</sup>

For non-covert operations, the War Powers Consultation proposal outlines a process for congressional oversight.<sup>367</sup> The President is required to have meaningful consultation with the Committee, rather than just notification.<sup>368</sup> This consultation must occur prior to the conflict, or in emergent circumstances, within three calendar days after operations begin.<sup>369</sup> The proposal also requires that Congress act to approve or disapprove of the action.<sup>370</sup> If Congress has not acted on its own accord, the Committee is required to "introduce an identical concurrent resolution in the Senate and House."<sup>371</sup> This process would result in meaningful consultation between the President and Congress, and would mandate that Congress act to check the President's power when appropriate.<sup>372</sup>

This proposed legislation should be modified so that in situations that require *covert* operations, the process would be modeled on the

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<sup>362</sup> See Stern & Halperin, *supra* note 342, at 149 (reporting that presidents use covert actions to avoid congressional involvement).

<sup>363</sup> See NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 45–46.

<sup>364</sup> *Id.*

<sup>365</sup> See S. Res. 400, 94th Cong. (1976) (enacted); Rules of the House of Representatives, Rule XLVIII (1977).

<sup>366</sup> See NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 45–46; *cf.* Intelligence Oversight Act of 1991, 50 U.S.C. § 413 (2006 & Supp. IV 2010) (prescribing a similar procedure for congressional oversight of intelligence activities).

<sup>367</sup> NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 46–48.

<sup>368</sup> *Id.* at 46.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* at 47.

<sup>371</sup> *Id.*

<sup>372</sup> See *id.*

Intelligence Oversight Act of 1991.<sup>373</sup> In these situations, the Joint Congressional Consultation Committee would assume an analogous role to the existing Senate and House intelligence committees.<sup>374</sup> Thus, the members of the Committee could engage in fully informed consultation with the President, rather than being limited to the discussion of only non-covert actions.<sup>375</sup> Following the model of the Intelligence Oversight Act of 1991, the process for covert operations should require the President to make a finding in writing within forty-eight hours of making the decision to conduct the action.<sup>376</sup> In addition, the action could commence prior to notification, but notification must follow soon afterward.<sup>377</sup> Furthermore, in a written finding the President should specify “each department, agency, or entity of the United States Government authorized to fund or otherwise participate in any significant way in such action.”<sup>378</sup> The finding must also identify any third parties that are not employed by the government that are to be involved with the action.<sup>379</sup> This statement will give members of Congress the full picture of what forces are involved in the activity.<sup>380</sup>

Upon receipt of this finding from the President, the Committee must have an affirmative requirement to balance the power of the executive.<sup>381</sup> It should first be required to make a finding as to whether the action truly requires secrecy or should be discussed with the full Congress.<sup>382</sup> If the Committee finds that the action is of a nature that requires secrecy, it should remain in the Committee for debate.<sup>383</sup> Conversely, if the Committee finds that there is no need for secrecy, it should consult accordingly with the executive and, if appropriate, treat the information as an open conflict.<sup>384</sup>

Once the Committee makes a finding that the conflict is covert and should be kept secret, it must be further debated within the Com-

<sup>373</sup> See Intelligence Oversight Act of 1991, 50 U.S.C. § 413 (2006 & Supp. IV 2010).

<sup>374</sup> See *id.*; NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 45–46.

<sup>375</sup> See NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 45–46; *cf.* 50 U.S.C. § 413 (providing for an analogous procedure).

<sup>376</sup> See 50 U.S.C. § 413b(a)(1).

<sup>377</sup> See *id.* § 413b(c).

<sup>378</sup> See *id.* § 413b(a)(3).

<sup>379</sup> See *id.* 50 U.S.C. § 413b(a)(4) (2006 & Supp. IV 2010).

<sup>380</sup> See *id.* § 413b.

<sup>381</sup> See *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

<sup>382</sup> *Cf.* 50 U.S.C. § 413 (requiring a similar deliberation). Although confining confidential information to small groups of leadership is imperative for maintaining secrets, Congress must guard against abuse. Silver, *supra* note 122, at 949.

<sup>383</sup> *Cf.* 50 U.S.C. § 413 (prescribing this requirement).

<sup>384</sup> See *id.*; NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 45–48.

mittee.<sup>385</sup> Furthermore, the executive should be required to keep the Committee apprised of the conflict and provide periodic written updates.<sup>386</sup> This exchange would give Congress the opportunity to check the power of the President, and prevent the tyranny that the Framers so feared.<sup>387</sup> Additionally, it would enable Congress to balance the power of the executive and make informed decisions on defense appropriations.<sup>388</sup>

These recommended modifications to the proposed War Powers Consultation Act of 2009 would make it match the realities of modern warfare.<sup>389</sup> Expanding its scope to include all of the actors that contribute to modern warfare, and all of the actions with the effects of warfare, would strike the appropriate balance of war powers between the executive and legislative branches.<sup>390</sup> This balance is necessary to ensure not only that the executive can adequately defend the nation, but also that both the executive and legislative branches are accountable to the people who pay the price of governmental decisions.<sup>391</sup>

## CONCLUSION

The Constitution's system of checks and balances gave both the President and Congress powers over war. The War Powers Resolution of 1973 was an attempt by Congress to reassert its constitutional prerogative and implement a formal structure for the division of power with the President. Forty years later, modern warfare has evolved sufficiently to render the War Powers Resolution ineffective. Thus, Congress should replace the War Powers Resolution with a new, more pragmatic

<sup>385</sup> See NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 46; *cf.* 50 U.S.C. § 413 (2006 & Supp. IV 2010) (detailing a similar model).

<sup>386</sup> See NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 47 (mandating consultation at least every two months for the duration of a conflict).

<sup>387</sup> See 2 RECORDS, *supra* note 53, at 312 (Aug. 17), 318–19 (Madison's notes).

<sup>388</sup> See Andru E. Wall, *Demystifying the Title 10-Title 50 Debate: Distinguishing Military Operations, Intelligence Activities & Covert Action*, 3 HARV. NAT'L SECURITY J. 85, 107–08 (2011) (arguing for alignment of congressional oversight and funding with regard to military and intelligence activities).

<sup>389</sup> See 119 CONG. REC. 25,079 (1973); NATIONAL WAR POWERS COMMISSION REPORT, *supra* note 46, at 45–48; SINGER, *supra* note 200, at 370–72.

<sup>390</sup> See 119 CONG. REC. 25,079.

<sup>391</sup> See Peter M. Shane, *The Obama Administration and the Prospects for a Democratic Presidency in a Post-9/11 World*, 56 N.Y.L. SCH. L. REV. 27, 54–55 (2011) (recommending a system “based on rule of law, checks and balances, and genuine public accountability” that would “capture[] the ideals of presidential accountability to law as embodied in our Constitution or as enacted by Congress through our democratic legislative process and of day-to-day presidential accountability to attend to the interests of all of the American people”).



statute aligned with the realities of modern warfare. The new statute should incorporate elements of the proposed War Powers Consultation Act of 2009 and the existing Intelligence Oversight Act of 1991. Moreover, its scope should be expansive, to encompass all actors and all actions of modern warfare. Such an approach will ensure real checks and balances and political accountability in the realm of war powers.

JULIA L. CHEN