

# Droning on: The War Powers Resolution and the Numbing Effect of Technology-Driven Warfare

Judah A. Druck

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## NOTE

### DRONING ON: THE WAR POWERS RESOLUTION AND THE NUMBING EFFECT OF TECHNOLOGY-DRIVEN WARFARE

*Judah A. Druck*†

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#### INTRODUCTION

On March 19, 2011, American forces began attacking various targets controlled by Muammar el-Qaddafi as part of NATO’s support for the Libyan antigovernment resistance.<sup>1</sup> Promising that no ground

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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, available at <http://www.nytimes.com/2011/03/20/world/africa/20libya.html?pagewanted=all.html>.

troops would be used during these operations,<sup>2</sup> President Barack Obama ordered strikes on Qaddafi forces using Tomahawk missiles and bombings from warplanes.<sup>3</sup> This order would later include the use of unmanned Predator drones, signaling a shift toward a supporting role for NATO.<sup>4</sup> Fighting lasted for months, ultimately culminating in the ousting of Qaddafi by rebel forces.<sup>5</sup>

Despite the limited nature of the U.S. intervention, questions concerning the legality of the President's actions quickly arose.<sup>6</sup> Under the 1973 War Powers Resolution (WPR),<sup>7</sup> which was enacted in the wake of protests during the Vietnam War, the President is required to cease any use of military forces in "hostilities" within sixty days of the conflict's beginning unless he receives congressional authorization to the contrary.<sup>8</sup> Having acted without any support from Congress in the first sixty days, the President had seemingly presented a clear example of a WPR violation. Yet President Obama and State Department legal adviser Harold Koh rejected this view by arguing that the use of force in Libya had not involved the type of "hostilities" covered by the WPR.<sup>9</sup> Emphasizing the absence of U.S. casualties and lack of exposure to "exchanges of fire with hostile forces," the President stood firmly behind his decision to intervene in Libya without consulting Congress.<sup>10</sup>

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

<sup>3</sup> Elisabeth Bumiller & Kareem Fahim, *U.S.-Led Assaults Hit Tripoli Again; Objective Is Near*, N.Y. TIMES, Mar. 22, 2011, at A1, available at <http://www.nytimes.com/2011/03/22/world/africa/22libya.html?pagewanted=all.html>.

<sup>4</sup> Julian E. Barnes & Charles Levinson, *U.S. Drones Hit Targets in Libya*, WALL ST. J., Apr. 25, 2011, at A9, available at <http://online.wsj.com/article/SB10001424052748704489604576282703009692640.html>; Charlie Savage & Thom Shanker, *Scores of U.S. Strikes in Libya Followed Handoff to NATO*, N.Y. TIMES, June 21, 2011, at A8, available at <http://www.nytimes.com/2011/06/21/world/africa/21powers.html>.

<sup>5</sup> Kareem Fahim et al., *Qaddafi, Seized by Foes, Meets a Violent End*, N.Y. TIMES, Oct. 21, 2011, at A1, available at <http://www.nytimes.com/2011/10/21/world/africa/qaddafi-is-killed-as-libyan-forces-take-surt.html?pagewanted=all.html>.

<sup>6</sup> See Charlie Savage, *Libya Effort Is Called Violation of War Act*, N.Y. TIMES, May 26, 2011, at A8, available at <http://www.nytimes.com/2011/05/26/world/middleeast/26powers.html>.

<sup>7</sup> War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (2006)).

<sup>8</sup> See 50 U.S.C. §§ 1543(a)(1), 1544(b).

<sup>9</sup> See *Libya and War Powers: Hearing on S. J. Res. 20 Before the S. Comm. on Foreign Relations*, 112th Cong. 5-7 (2011) [hereinafter *Libya and War Powers Hearing*] (statement of Harold Hongju Koh, Legal Adviser, U.S. Dep't of State), available at [http://foreign.senate.gov/imo/media/doc/Koh\\_Testimony.pdf](http://foreign.senate.gov/imo/media/doc/Koh_Testimony.pdf); Memorandum and Report from U.S. Dep't of State and U.S. Dep't of Defense to John A. Boehner, Speaker of the House of Representatives 25 (June 15, 2011), available at [http://www.nytimes.com/interactive/2011/06/16/us/politics/20110616\\_POWERS\\_DOC.html?ref=politics.html](http://www.nytimes.com/interactive/2011/06/16/us/politics/20110616_POWERS_DOC.html?ref=politics.html).

<sup>10</sup> See *Libya and War Powers Hearing*, *supra* note 9, at 8.

Legislators, pundits, and academics alike broadly criticized this legal analysis.<sup>11</sup> Yet aside from these particularized complaints, the President ultimately faced no discernible repercussions (judicial, legislative, or social challenges) for his actions.<sup>12</sup> From a historical perspective, the absence of substantial backlash is unsurprising: since its inception, the WPR has generally failed to prevent presidents from using military action in an arguably illegal manner.<sup>13</sup> In those situations, courts,<sup>14</sup> legislators,<sup>15</sup> and social movements<sup>16</sup> have failed to challenge this sort of presidential action, setting the stage for President Obama's similar neglect of the WPR.

But perhaps we can examine the apathetic treatment of President Obama's actions in Libya in a different light, one that focuses on the changing nature and conception of warfare itself. Contrary to larger-scale conflicts like the Vietnam War, where public (and political) outrage set the stage for Congress's assertion of war-making power through the WPR,<sup>17</sup> the recent U.S. intervention did not involve a draft, nor a change in domestic industry (requiring, for example, civil-

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<sup>11</sup> See, e.g., Bruce Ackerman & Oona Hathaway, *Libya's Looming Deadline*, WASH. POST, May 18, 2011, at A17, available at [http://www.washingtonpost.com/opinions/death-of-the-war-powers-act/2011/05/17/AF3Jh35G\\_story.html](http://www.washingtonpost.com/opinions/death-of-the-war-powers-act/2011/05/17/AF3Jh35G_story.html) (“[H]istory will say that the War Powers Act was condemned to a quiet death by a president who had solemnly pledged, on the campaign trail, to put an end to indiscriminate warmaking.”); Jack Goldsmith, *Problems with the Obama Administration's War Powers Resolution Theory*, LAWFARE BLOG (June 16, 2011, 8:38 AM), <http://www.lawfareblog.com/2011/06/problems-with-the-obama-administration%E2%80%99s-war-powers-resolution-theory-2/> (“I do not find the [Obama] Administration's arguments persuasive.”); William Saletan, *Koh Is My God Pilot*, SLATE (June 30, 2011, 7:54 AM), <http://www.slate.com/id/2298116/> (arguing that the Obama Administration is “trying to have it both ways” by implying that there are instances where the WPR applies to drone strikes, but not in the Libyan campaign).

<sup>12</sup> Although Representative Dennis Kucinich attempted to bring a claim against President Obama, the suit was subsequently dismissed for lack of standing. See Kucinich v. Obama, 821 F. Supp. 2d 110, 125 (D.D.C. 2011).

<sup>13</sup> See Michael C. Dorf, *Is the Military Action in Libya Constitutional?*, DORF ON LAW (Mar. 22, 2011, 12:16 AM), <http://www.dorfonlaw.org/2011/03/is-military-action-in-libya.html> (“By my tally, four of the five Presidents to have served in the last 30 years have gone to war illegally.”).

<sup>14</sup> See, e.g., *Crockett v. Reagan*, 720 F.2d 1355, 1356–57 (D.C. Cir. 1983) (deferring to the expertise of Congress in dismissing a congressional WPR claim); *Lowry v. Reagan*, 676 F. Supp. 333, 341 (D.D.C. 1987) (invoking the political question doctrine in dismissing a congressional WPR claim).

<sup>15</sup> See JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 49 (1993) (listing “congressional irresolution” as a factor in concluding that “the War Powers Resolution has not worked”).

<sup>16</sup> For example, despite the constitutional questions surrounding the 1983 U.S. invasion of Grenada, see *Conyers v. Reagan*, 765 F.2d 1124, 1126 (D.C. Cir. 1985) (constitutional challenge filed by eleven members of Congress), the President nevertheless enjoyed “broad popular support for his decision,” see Ed Magnuson et al., *Getting Back to Normal*, TIME, Nov. 21, 1983, at 18.

<sup>17</sup> See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 102 (1972) (“Unhappiness about Vietnam led Congress to seek remedies for what some thought to be the constitutional problems it reflected.”).

ians to ration food), and, perhaps most importantly, did not result in any American casualties.<sup>18</sup> Consequently, most analyses of the Libyan campaign focused on its monetary costs and other economic harms to American taxpayers.<sup>19</sup> This type of input seems too nebulous to cause any major controversy, especially when contrasted with the concurrent costs associated with the wars in Iraq and Afghanistan.<sup>20</sup> In a sense, less is at stake when drones, not human lives, are on the front lines, limiting the potential motivation of a legislator, judge, or antiwar activist to check presidential action.<sup>21</sup> As a result, the level of nonexecutive involvement in foreign military affairs has decreased.

The implications are unsettling: by ameliorating many of the concerns often associated with large-scale wars, technology-driven warfare has effectively removed the public's social and political limitations that previously discouraged a President from using potentially illegal military force. As President Obama's conduct illustrates, removing these barriers has opened the door to an unfettered use of unilateral executive action in the face of domestic law.<sup>22</sup> Consequently, as war becomes more and more attenuated from the American psyche, a President's power to use unilateral force without repercussions will likely continue to grow.

Should the public care that the WPR no longer seems to present a barrier to presidential action? Or, put another way, if the WPR stands for the proposition that the President should not use force unilaterally,<sup>23</sup> does that purpose remain relevant given the increased use of technology in modern warfare? This Note answers that question in

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<sup>18</sup> See Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 16, 2011, at A16, available at <http://www.nytimes.com/2011/06/16/us/politics/16powers.html?pagewanted=all.html> (noting that, contrary to other conflicts, the U.S. strikes in Libya did not involve troops on the ground or American casualties).

<sup>19</sup> See, e.g., Christopher Drew, *Initial Costs of Libyan Intervention on Low End of Analysts' Estimates*, N.Y. TIMES BLOG (Mar. 25, 2011, 4:53 PM), <http://atwar.blogs.nytimes.com/2011/03/25/initial-costs-of-libyan-intervention-on-low-end-of-analysts-estimates/?ref=libya>; Devin Dwyer, *US Military Intervention in Libya Cost At Least \$896 Million*, ABC NEWS BLOG (Aug. 22, 2011, 6:43 PM), <http://abcnews.go.com/blogs/politics/2011/08/us-military-intervention-in-libya-cost-at-least-896-million/>.

<sup>20</sup> See *Home and Away: Casualties*, CNN.COM, <http://www.cnn.com/SPECIALS/war.casualties/index.html> (keeping track of U.S. and coalition casualties abroad, which currently total over seven thousand killed in action).

<sup>21</sup> See P.W. SINGER, *WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE TWENTY-FIRST CENTURY* 319–20 (2009) (“Unmanned systems represent the ultimate break between the public and its military.”).

<sup>22</sup> See Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1418 (1989) (“It is hard to discern any progress from the post-war era of drastic abuses that Congress wanted to end.”).

<sup>23</sup> See ELY, *supra* note 15, at 47 (“What is at stake—and was so understood by the framers—is the judgment that no single individual should be able to take the nation into war and thereby risk the lives of all of us, especially our young people.”).

the affirmative by illustrating the issues created by a toothless WPR in the face of modern advances in military technology and tactics. While the limited nature of technology-driven warfare might ostensibly remove the traditional costs associated with war, many of the concerns held by those who drafted the WPR nevertheless remain.

Part I provides a brief history of the WPR, including its creation and subsequent treatment by presidents, courts, and legislators. Specifically, this Part reviews a number of military actions that arguably violated the WPR but were largely ignored by the judiciary and Congress.

Part II examines the ways in which an increased level of citizen attentiveness and mobilization has previously carried significant political weight during wartime, only to wane through the advent of technology-driven warfare and the modern trend toward a limited, “no troops on the ground” style of warfare. This Part further examines the effects of such a shift: namely, that technology-driven warfare removes many of the more obvious costs of war seen in larger-scale conflicts, which in turn has limited the will of politicians and activists to mobilize in order to check potentially illegal presidential action.

Part III explains why a President unrestrained by the WPR, even in the era of technology-driven warfare, creates significant risks that will become prominent as warfare becomes increasingly removed from mainstream consciousness.

## I

### HISTORY OF THE WAR POWERS RESOLUTION

By 1972, the United States had been engaged in Vietnam for over a decade, with over fifty thousand American casualties to show for it.<sup>24</sup> Public support for the war had dwindled,<sup>25</sup> and mounting pressure pushed Congress to reassert its power to declare war.<sup>26</sup> The result was

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<sup>24</sup> See *Statistical Information About Casualties of the Vietnam War, CACCF Record Counts by Year of Death or Declaration of Death (as of 12/98)*, NAT'L ARCHIVES, <http://www.archives.gov/research/military/vietnam-war/casualty-statistics.html#year> (last visited Sept. 24, 2012).

<sup>25</sup> See William L. Lurch & Peter W. Sperlich, *American Public Opinion and the War in Vietnam*, 32 W. POL. Q. 21, 27–28 tbl.2 (1979) (noting that, based on numerous poll results, support for a withdrawal from Vietnam rose from thirteen percent in 1964 to a high of seventy-three percent in 1972).

<sup>26</sup> See ROBERT D. CLARK ET AL., *THE WAR POWERS RESOLUTION: BALANCE OF WAR POWERS IN THE EIGHTIES* 5 (1985) (“[T]he Resolution was enacted near the end of the Vietnam War by a Congress that reemphasized its constitutional right to decide when the United States would become involved in a war or . . . [when] the use of armed force might lead to war.”); Cassandra L. Wilkinson, Comment, *Constitutional Law: The Province and Duty of the Judicial Department: Why the Court Cannot Continue to Use Justiciability to Avoid Dealing with the Tension Between Congress and the President Regarding the War Powers*, 56 OKLA. L. REV. 697, 703 (2003) (“The [WPR] came as a direct response to the executive branch’s abuse of the war powers that led to the Vietnam War.”). Congress was also responding to a perceived encroachment on its constitutional power “[t]o declare War.” U.S. CONST. art. I, § 8, cl. 11;

the WPR,<sup>27</sup> a compromise of sorts whereby the President is granted the power to fend off “momentary threats” but must consult with Congress before taking any further action.<sup>28</sup> Under the terms of the WPR, the President is required “in every possible instance” to consult with Congress before introducing American forces into “hostilities,”<sup>29</sup> and must provide a written report within forty-eight hours of said hostilities.<sup>30</sup> Section 1544 (the “heart of the War Powers Resolution”)<sup>31</sup> requires the President to cease all military operations unless Congress has said otherwise sixty days after the initial report (with an option of a thirty-day extension).<sup>32</sup> Heralded as fulfilling “the intent of the framers,”<sup>33</sup> the WPR garnered enough support to survive a subsequent veto by President Richard Nixon.<sup>34</sup>

Despite these optimistic beginnings, however, the WPR’s subsequent treatment in all three branches of government has illustrated its shortcomings.<sup>35</sup> Though much of the WPR’s ineffectiveness might arise out of issues concerning the structure and language of the WPR itself,<sup>36</sup> those applying the law have exploited these defects, rendering the law “practically useless.”<sup>37</sup> A brief review of the wartime experience under the WPR demonstrates how these inadequacies limited the WPR’s actual effectiveness.

#### A. The President Under the WPR

President Nixon’s initial veto would ultimately serve as an omen for the WPR’s treatment by the executive branch, as subsequent presi-

see Louis Fisher & David Gray Adler, *The War Powers Resolution: Time to Say Goodbye*, 113 POL. SCI. Q. 1, 7 (1998) (noting that the Framers were determined to “preclude unilateral presidential authority to initiate military actions”); Wilkinson, *supra*, at 704 (“The Resolution is also based on the intent of the framers of the Constitution, who indicated in their comments that they felt that the power to wage war was much too great to leave to the President alone.”).

<sup>27</sup> War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (2006)).

<sup>28</sup> Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 449 (2011).

<sup>29</sup> 50 U.S.C. § 1542.

<sup>30</sup> *Id.* § 1543(a)(3).

<sup>31</sup> See CLARK ET AL., *supra* note 26, at 6.

<sup>32</sup> 50 U.S.C. § 1544(b).

<sup>33</sup> *Id.* § 1541(a).

<sup>34</sup> See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 130 (1995).

<sup>35</sup> See ELY, *supra* note 15, at 49 (“[T]hanks to a combination of presidential defiance, congressional irresolution, and judicial abstention, the War Powers Resolution has not worked.”).

<sup>36</sup> See, e.g., Fisher & Adler, *supra* note 26, at 1 (“[The WPR] was ill conceived and badly compromised from the start, replete with tortured ambiguity and self-contradiction.”).

<sup>37</sup> See Patrick D. Robbins, *The War Powers Resolution After Fifteen Years: A Reassessment*, 38 AM. U. L. REV. 141, 142 (1988).

dents have generally failed to comply with the terms of the WPR.<sup>38</sup> This trend began as early as 1974, when President Nixon failed to file a WPR report after deploying troops to evacuate American civilians from Cyprus,<sup>39</sup> and continued into the Ford administration, when the President engaged in operations to rescue the captured U.S. merchant ship *Mayaguez* but only informed Congress *after* the operation was completed.<sup>40</sup> Not to be outdone, the Reagan administration simply refused to comply with the WPR when it sent military “advisers” to El Salvador, introducing WPR violations into a nonrescue context.<sup>41</sup> In each case, the President either avoided all responsibilities under the WPR or complied with them after the fact, when their relevance had all but disappeared.

While these situations might be classified as small-scale operations, the WPR has fared no better in situations involving troops entering real combat zones. For example, when President Ronald Reagan deployed eight hundred troops to Lebanon in 1982, an operation that involved direct exchange of fire between U.S. Marines and Lebanese militiamen, he did so without reporting to Congress.<sup>42</sup> Later, President Reagan’s 1983 U.S. invasion of Grenada, which involved one thousand nine hundred U.S. soldiers (in addition to approximately three hundred troops from the Organization of Eastern Caribbean States), arguably violated the WPR because no “consultation” within the WPR’s meaning appeared to have taken place.<sup>43</sup> Finally, and perhaps most dramatically, President Bill Clinton’s deployment of over twenty thousand troops to Haiti in 1994 (and subsequent threat to invade) was not accompanied by any congressional approval, thereby

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<sup>38</sup> See FISHER, *supra* note 34, at 192 (“Presidents have generally done what they wanted to do, notwithstanding the War Powers Resolution.”); Jonathan T. Menitove, *Once More unto the Breach: American War Power and a Second Legislative Attempt to Ensure Congressional Input*, 43 U. MICH. J.L. REFORM 773, 796 (2010) (“Perhaps the most significant problem facing the War Powers Resolution is presidential disregard.”); Ronald D. Rotunda, *The War Powers Act in Perspective*, 2 MICH. L. & POL’Y REV. 1, 1 (1997) (“[I]n the decades that have passed, both liberals and conservatives, whether Republican or Democrat, have all attacked the law.”).

<sup>39</sup> See ROBERT F. TURNER, *THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE* 47–48 (1983).

<sup>40</sup> See FISHER, *supra* note 34, at 136–37. The Carter Administration, for its own part, did no better. See CLARK ET AL., *supra* note 26, at 24–25 (detailing President Jimmy Carter’s failure to present a WPR report to Congress before engaging in rescue operations during the Iranian hostage crisis).

<sup>41</sup> See TURNER, *supra* note 39, at 73–74 (internal quotation marks omitted).

<sup>42</sup> See FISHER, *supra* note 34, at 140; Robbins, *supra* note 37, at 164.

<sup>43</sup> See Robbins, *supra* note 37, at 165–66 (internal quotation marks omitted). I say “arguably” because while no such consultation took place, President Reagan withdrew all combat troops before the sixty-day period had ended, thereby avoiding any WPR confrontation. See FISHER, *supra* note 34, at 142. At the very least, the congressional suit that followed, see *infra* note 58, implies that there were *some* constitutional questions arising from Grenada.



illustrating “the clearest example of the executive acting in direct conflict with Congress’ views and . . . the mandate of the [WPR].”<sup>44</sup> Numerous other military conflicts illustrate similar presidential disregard for the WPR.<sup>45</sup>

Notably, in each of these situations, the serving President did not simply ignore the WPR, despite his general belief that it was unconstitutional.<sup>46</sup> Rather, the presidents circumvented the WPR’s application by proffering suspect rationales to avoid compliance. One of the more common methods of achieving this end involves denying the existence of the WPR’s “hostilities”-triggering requirement.<sup>47</sup> In those situations, presidents have emphasized the limited nature of the military action, either by focusing on whether there was an actual exchange of fire between the United States and hostile forces,<sup>48</sup> whether the United States introduced ground troops into the hostile area,<sup>49</sup> or, as seen during the recent actions in Libya, whether the United States had suffered any casualties.<sup>50</sup> Despite the often negative treatment of these justifications,<sup>51</sup> presidents have nevertheless faced few repercussions from employing them. Given this background, it should be no surprise that President Obama was able to circumvent the WPR in a similar manner without any major political scars to show for it.

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<sup>44</sup> Michael Mandel, Note, *A License to Kill: America’s Balance of War Powers and the Flaws of the War Powers Resolution*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 785, 804–05 (2009).

<sup>45</sup> See, e.g., FISHER, *supra* note 34, at 142–43 (discussing President Reagan’s WPR violations in the 1986 airstrikes in Libya); Lori Fisler Damrosch, *The Clinton Administration and War Powers*, 63 LAW & CONTEMP. PROBS. 125, 135–38 (2000) (detailing the WPR questions associated with President Clinton’s actions in Bosnia and Kosovo).

<sup>46</sup> See J. Richard Broughton, *What Is It Good for? War Power, Judicial Review, and Constitutional Deliberation*, 54 OKLA. L. REV. 685, 689 (2001) (“Since its enactment, no President has explicitly approved of the War Powers Resolution and all have disputed its constitutionality in light of the Commander in Chief Clause.”).

<sup>47</sup> See Robbins, *supra* note 37, at 161–62. Of course, presidents have offered a plethora of arguments to avoid the WPR’s reach. See, e.g., FISHER, *supra* note 34, at 144 (discussing the Reagan administration’s WPR argument that the 1987 U.S. naval engagement with Iran in the Persian Gulf was an act of self-defense); John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1381 (1988) (noting that a President can circumvent (and presidents have circumvented) the WPR by “fail[ing] to specify that what [the President] is filing is a [WPR] ‘hostilities’ report, thus avoiding the 60-day clock”); Fisher & Adler, *supra* note 26, at 11–12 (describing the Clinton administration’s WPR theory surrounding the threatened invasion of Haiti, which included the belief that the WPR inherently authorizes unilateral presidential action).

<sup>48</sup> See Robbins, *supra* note 37, at 162–63 (discussing President Reagan during the conflict in El Salvador).

<sup>49</sup> See Damrosch, *supra* note 45, at 137–38 (discussing President Clinton during the conflict in Kosovo).

<sup>50</sup> See *supra* note 10 and accompanying text.

<sup>51</sup> See *supra* note 11 and accompanying text. Often, this backlash takes the form of a congressional lawsuit. See *infra* Part I.C.

## B. The Judiciary Under the WPR

By now, the general pattern concerning presidential treatment of the WPR should be clear: when faced with a situation in which the WPR should, by its own terms, come into play, presidents circumvent its application by proffering questionable legal analyses. Yet, as was frequently the case following the aforementioned presidential actions, those looking to the courts for support were disappointed to learn that the judiciary would be of little help. Indeed, congressional and private litigants have similarly been unsuccessful in their efforts to check potentially illegal presidential action.<sup>52</sup>

The suits arising out of possible WPR violations are well-documented<sup>53</sup> and therefore only require a brief review. Generally, when faced with a question concerning the legality of presidential military action, courts have punted the issue using a number of procedural tools to avoid ruling on the merits. For example, when twenty-nine representatives filed suit after President Reagan's possible WPR violation in El Salvador, the U.S. District Court for the District of Columbia dismissed the suit on political question grounds.<sup>54</sup> Similar suits were dismissed for issues involving standing,<sup>55</sup> mootness,<sup>56</sup> ripeness,<sup>57</sup> or nonjusticiability because Congress could better handle fact-finding.<sup>58</sup> Despite the varying grounds for dismissing WPR suits, a general theme has emerged: absent action taken by Congress itself, the judiciary cannot be counted on to step in to check the President.

To be sure, the judiciary's unwillingness to review cases arising from WPR disputes arguably carries some merit. Two examples illus-

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<sup>52</sup> See Fisher & Adler, *supra* note 26, at 12.

<sup>53</sup> See, e.g., *id.* at 12–14 (detailing the congressional suits filed following various presidential military actions); FISHER, *supra* note 34, at 197–98 (same); Broughton, *supra* note 46, at 704–07 (same).

<sup>54</sup> See *Crockett v. Reagan*, 558 F. Supp. 893, 902–03 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983) (congressional suit challenging President Reagan's actions in El Salvador); see also *Lowry v. Reagan*, 676 F. Supp. 333, 341 (D.D.C. 1987) (dismissing a similar suit filed following President Reagan's actions in the Persian Gulf by using the political question doctrine).

<sup>55</sup> See *Campbell v. Clinton*, 52 F. Supp. 2d 34, 45 (D.D.C. 1999) (congressional suit challenging President Clinton's use of force in Yugoslavia).

<sup>56</sup> See *Conyers v. Reagan*, 765 F.2d 1124, 1129 (D.C. Cir. 1985) (congressional suit challenging President Reagan's invasion of Grenada); see also *Whitney v. Obama*, 845 F. Supp. 2d 136, 139–40 (D.D.C. 2012) (suit challenging President Obama's actions in Libya).

<sup>57</sup> See *Dellums v. Bush*, 752 F. Supp. 1141, 1152 (D.D.C. 1990) (congressional suit challenging President George H. W. Bush's initial actions in Iraq). The court further noted that the ripeness issue could possibly be remedied, but only if Congress first confronted an uncooperative President. See *id.* The result, however, was a framework whereby a President can commit troops to combat unless and until Congress tries to stop him, rather than placing the onus on the President. See ELY, *supra* note 15, at 57–58.

<sup>58</sup> See FISHER, *supra* note 34, at 198 n.40 (citing *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 600 (D.D.C. 1983), *aff'd*, 770 F.2d 202, 210 (D.C. Cir. 1985)).

trate this point. First, although a serviceperson ordered into combat might have standing to sue, congressional standing is less clear.<sup>59</sup> Indeed, debates rage throughout war powers literature concerning whether congressional suits should even be heard on their merits.<sup>60</sup> And though some courts have held that a member of Congress can have standing when a President acts unilaterally, holding that such unauthorized actions amount to "disenfranchisement,"<sup>61</sup> subsequent decisions and commentators have thrown the entire realm of legislative standing into doubt.<sup>62</sup> Though the merits of this debate are beyond the scope of this Note, it is sufficient to emphasize that a member of Congress arguably suffers an injury when a President violates the WPR because the presidential action prevents the congressperson from being able to vote (namely, on whether to authorize hostilities),<sup>63</sup> thereby amounting to disenfranchisement by "preclu[ding] . . . a specific vote . . . by a presidential violation of law . . ." <sup>64</sup> As such, under the right circumstances, perhaps the standing doctrine should not be as problematic as history seems to indicate when a congressperson attempting to have a say on military action brings a WPR suit.

Secondly, and perhaps more importantly, it is arguably unclear what, if any, remedy is available to potential litigants. Unlike a private lawsuit, where a court can impose a simple fine or jail sentence, suits against the executive branch carry a myriad of practical issues. For example, if the remedy is an injunction, issues concerning enforcement arise: Who enforces it and how?<sup>65</sup> Or, if a court makes a declaratory judgment stating that the President has acted illegally, it might invite open defiance, thereby creating unprecedented strife among branches. Yet, a number of possible remedies are indeed available. For one, courts could simply start the WPR clock, requiring a Presi-

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<sup>59</sup> See Ely, *supra* note 47, at 1412 (noting that soldiers sent into war "clearly" have standing to sue, but also arguing that such suits would either never occur or be untimely).

<sup>60</sup> Compare Carlin Meyer, *Imbalance of Powers: Can Congressional Lawsuits Serve as Counterweight?*, 54 U. PITT. L. REV. 63, 119-20 (1992) (arguing that "courts should entertain congressional claimants whenever they challenge executive conduct that deprives them of a constitutionally mandated role"), with Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J.L. & PUB. POL'Y 209, 282 (2001) (arguing that courts should "reject legislator standing outright").

<sup>61</sup> *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979) (en banc), *vacated on other grounds*, 444 U.S. 996 (1979).

<sup>62</sup> See *Raines v. Byrd*, 521 U.S. 811, 829-30 (1997); Arend & Lotrionte, *supra* note 60, at 273 ("*Raines* refused to endorse the notion that federal legislators could have standing in some circumstances; but, conversely, *Raines* did not explicitly reject the notion of legislator standing.").

<sup>63</sup> See ELY, *supra* note 15, at 57; Jonathan Wagner, Note, *The Justiciability of Congressional-Plaintiff Suits*, 82 COLUM. L. REV. 526, 552 (1982).

<sup>64</sup> ELY, *supra* note 15, at 57.

<sup>65</sup> See Ely, *supra* note 47, at 1420 n.118.

dent to either seek congressional approval or cease all actions within the time remaining (depending on whether the court starts the clock from the beginning or applies it retroactively).<sup>66</sup> In doing so, a court would trigger the WPR in the same way that Congress would have had it acted alone. On a similar note, a court could declare the relevant military conflict illegal under the WPR, thereby inviting Congress to begin impeachment proceedings.<sup>67</sup> Although both cases require some level of congressional involvement, a court could at least begin the process of providing a suitable remedy. Thus, the more questionable issues of standing and remedies should not (under the right circumstances) prevent a WPR suit from moving forward.

What about the pragmatic issues associated with involving the judiciary in foreign affairs? After all, we might not *want* our judiciary entering the world of realpolitik by forcing a President's hand; doing so would require a large political (and administrative) undertaking that might take us beyond the bounds of the judiciary's institutional role. And as previously mentioned, courts do not, and perhaps *should* not, want to be in the business of telling the President when or how to act, especially when such conflict might result in presidential defiance. This position might make sense in a system where we could rely on congressional action to prevent unilateral action. But given the dysfunction that overwhelms the legislative branch whenever a President violates the WPR,<sup>68</sup> the entire premise of a system emphasizing no unilateral military action is inverted when the onus is placed squarely on Congress. If Congress could not go to the courts in order to prevent further presidential WPR violations, it would be required to turn to its legislative powers. But doing so would require the approval of at least a majority of Congress, though two-thirds would seem more reasonable given the likelihood of a presidential veto. Requiring such an overwhelming level of congressional support and unity to act is irrational and unreasonable, especially after considering the ways in which most Congresses have failed to act on prior occasions.<sup>69</sup> Given this high burden placed on any Congress, even one with majority control, the judiciary must play some role when a President violates the WPR. Though the pragmatic issues around judicial intervention require some recognition, they are, in some respect, the lesser of two evils.

But beyond the technical barriers courts impose (and the practical reasons behind them), their consistent refusal to reach the merits in WPR cases is more fundamentally problematic given the ways in

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<sup>66</sup> See *id.* at 1416–17.

<sup>67</sup> See *id.* at 1411 n.91 (arguing in support of judicial intervention).

<sup>68</sup> See *infra* Part I.A.3.

<sup>69</sup> See *infra* Part I.A.3.

which early U.S. courts handled cases involving unilateral presidential action.<sup>70</sup> One case in particular illustrates the conflict between the historical and contemporary judicial handling of military cases. *Little v. Barreme*<sup>71</sup> involved the U.S. seizure of a Danish ship sailing from a French port pursuant to direct orders from President John Adams that ran contrary to congressional authorization.<sup>72</sup> In concluding that the captain of the U.S. vessel could be held personally liable for damages,<sup>73</sup> Chief Justice John Marshall (on behalf of a unanimous court) held that the President could not circumvent congressional authority, thereby creating a framework wherein "congressional policy announced in a statute necessarily prevails over inconsistent presidential orders and military actions."<sup>74</sup> Perhaps most notably, Chief Justice Marshall never even considered the political question doctrine or any other judicial avoidance tool in reaching this conclusion.<sup>75</sup> Thus, *Little* seemingly stands for the proposition that the prevention of unilateral presidential action is not merely an issue of public policy, but rather part of the structure of the courts' constitutional power. Consequently, per *Little*, judicial intervention into military affairs should not be problematic.

But we have clearly shifted toward a new judicial framework that does not assert the type of judicial authority Chief Justice Marshall contemplated. The result is that all members of Congress who attempt to challenge presidential military action fail, casting into doubt the future of WPR suits.

### C. Congress Under the WPR

Of course, despite these various suits, Congress has received much of the blame for the WPR's treatment and failures. For example, Congress has been criticized for doing little to enforce the WPR in using other Article I tools, such as the "power of the purse,"<sup>76</sup> or by closing the loopholes frequently used by presidents to avoid the WPR

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<sup>70</sup> See Lori Fislser Damrosch, *Agora: The 1994 U.S. Action in Haiti: The Constitutional Responsibility of Congress for Military Engagements*, 89 AM. J. INT'L L. 58, 66 (1995) ("[A]s . . . judicial decision . . . confirm[s], the congressional prerogative applies not only to cases of 'war' in the traditional sense, but also to cases of initiation of combat short of war.").

<sup>71</sup> 6 U.S. (2 Cranch) 170 (1804).

<sup>72</sup> See *id.* at 170; FISHER, *supra* note 34, at 18-19.

<sup>73</sup> See *Little*, 6 U.S. (2 Cranch) at 179.

<sup>74</sup> FISHER, *supra* note 34, at 19; see also Broughton, *supra* note 46, at 695 ("Significantly, . . . *Little* recognized Congress's ability to limit presidential, commander in chief authority."); Lobel, *supra* note 22, at 1394 ("Courts could sanction executive officials who violated the law irrespective of the necessity for the actions.").

<sup>75</sup> See ELY, *supra* note 15, at 54-55.

<sup>76</sup> See Robbins, *supra* note 37, at 180 ("[L]egislators failed in earlier attempts to use Congress' appropriations power to curb presidential war-making."); see also Sanchez-Espinoza v. Reagan, 770 F.2d 202, 210-11 (D.C. Cir. 1985) (Ginsburg, J., concurring) (sug-

in the first place.<sup>77</sup> Furthermore, in those situations where Congress *has* decided to act, it has done so in such a disjointed manner as to render any possible check on the President useless. For example, during President Reagan's invasion of Grenada, Congress failed to reach an agreement to declare the WPR's sixty-day clock operative,<sup>78</sup> and later faced similar "deadlock" in deciding how best to respond to President Reagan's actions in the Persian Gulf, eventually settling for a bill that reflected congressional "ambivalence."<sup>79</sup> Thus, between the lack of a "backbone" to check rogue presidential action and general ineptitude when it actually decides to act,<sup>80</sup> Congress has demonstrated its inability to remedy WPR violations.

Worse yet, much of Congress's interest in the WPR is politically motivated, leading to inconsistent review of presidential military decisions filled with post-hoc rationalizations. Given the political risk associated with wartime decisions,<sup>81</sup> Congress lacks any incentive to act unless and until it can gauge public reaction—a process that often occurs after the fact.<sup>82</sup> As a result, missions deemed successful by the public will rarely provoke "serious congressional concern" about presidential compliance with the WPR, while failures will draw scrutiny.<sup>83</sup> For example, in the case of the *Mayaguez*, "liberals in the Congress generally praised [President Gerald Ford's] performance" despite the constitutional questions surrounding the conflict, simply because the

gesting that Congress use the "formidable weapons at its disposal" before turning to courts for WPR enforcement help).

<sup>77</sup> See ELY, *supra* note 15; see also CLARK ET AL., *supra* note 26, at 40 (noting that, despite the constitutional questions surrounding the WPR, "Congress refuses to amend or alter any provisions of the War Powers Resolution"); Ely, *supra* note 47, at 1412–13 (arguing that Congress could remedy many of the standing issues brought up by courts by amending the WPR to grant statutory standing).

<sup>78</sup> See Robbins, *supra* note 37, at 166.

<sup>79</sup> See *id.* at 170; see also TURNER, *supra* note 39, at 56–59 (arguing that Congress "continued to 'fiddle' with authorization legislation while Indochina 'burned'").

<sup>80</sup> See John Hart Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877, 925 (1990).

<sup>81</sup> See ELY, *supra* note 15, at 52 ("Decisions on war and peace are tough, and more to the point they're politically risky.").

<sup>82</sup> This "wait and see" approach is even more problematic given the fact that one of the purposes behind the WPR was to avoid that type of congressional inaction. See ELY, *supra* note 15, at 48 (arguing that the WPR was a response to Congress realizing that "it had been laying back, neither disapproving presidential military ventures nor forthrightly approving them, instead letting the president use troops wherever and whenever he wanted and waiting to see how the war in question played politically").

<sup>83</sup> See, e.g., CLARK ET AL., *supra* note 26, at 41 (arguing that "congressional support or criticism of presidential use of force reflects the success or failure of the mission, and the public's reaction, rather than how much Congress is involved in the decisionmaking"); TURNER, *supra* note 39, at 123 ("More often than not, congressional attitudes toward specific situations appeared more attuned to public opinion polls than to the requirements of the law or the Constitution.").

public deemed it a success.<sup>84</sup> Thus, even if Congress was effective at checking potentially unconstitutional presidential action, it would only act when politically safe to do so. This result should be unsurprising: making a wartime decision provides little advantage for politicians, especially if the resulting action succeeds.<sup>85</sup> Consequently, Congress itself has taken a role in the continued disregard for WPR enforcement.

The current WPR framework is broken: presidents avoid it, courts will not rule on it, and Congress will not enforce it. This cycle has culminated in President Obama's recent use of force in Libya, which created little, if any, controversy,<sup>86</sup> and it provides a clear pass to future presidents, judges, and congresspersons looking to continue the system of passivity and deferment.

## II

### THE EVOLUTION OF TECHNOLOGY-DRIVEN WARFARE AS A PRESIDENTIAL CHECK

#### A. Public and Political Scrutiny in the Face of "Traditional" Costs of War

The executive branch has not always had such a large degree of autonomy during wartime, especially during conflicts featuring what might be called the "traditional" costs of war (i.e., those wars involving a draft, staggering military casualties, domestic sacrifices such as rationing, and other similar costs).<sup>87</sup> In those situations, public attentiveness and scrutiny established a powerful check on presidential action, requiring politicians to tread a careful line when constructing policy. The larger-scale wars fought by the United States illustrate this trend.

First, it is worth setting the stage for the role of public scrutiny in the twentieth century by examining what might be the first instance of large-scale war in America: the Civil War, which saw over three million

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<sup>84</sup> TURNER, *supra* note 39, at 121.

<sup>85</sup> See ELY, *supra* note 15, at 52. *But see* Robert E. Paradise, Book Note, *The Least Interested Branch*, 107 HARV. L. REV. 2117, 2122 (1994) (arguing that "Ely's pessimism regarding the possibility of congressionally initiated reform may not be justified").

<sup>86</sup> See *supra* note 12 and accompanying text.

<sup>87</sup> This list is by no means inclusive of all traditional harms associated with war. For example, the potential withdrawal of civil liberties during war is well-documented. *See, e.g.*, Harold D. Lasswell, *The Garrison State*, 46 AM. J. SOC. 455, 457-60 (1941) (expressing the fear that a military state combined with modern technology would pose a threat to a democratic society). But modern rights-restrictive measures and the implied dignitary costs that follow rarely take the blatant form that more traditional costs of war, such as human casualties, take. Compare, for example, the PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), which one could view as an encroachment on the right to privacy, with the Sedition Act, Pub. L. No. 65-150, 40 Stat. 553 (1918), which led to blatant arrests and the outright removal of freedom-of-speech rights.

soldiers serve in combat and resulted in hundreds of thousands of casualties.<sup>88</sup> With nearly ten percent of the country involved in direct combat (and the rest providing financial support)<sup>89</sup> and nearly all industry focused on the war effort, the country was literally engrossed in war for over four years. As a result, President Abraham Lincoln faced substantial social and political dissent by those seeking to avoid those costs of war.<sup>90</sup> The most significant (and violent) backlash occurred in response to the 1863 Conscription Act, which required eligible men to enter a lottery for military duty or pay a sum to avoid service (if selected).<sup>91</sup> Starting on July 13, mere days after the Union victory in Gettysburg, rioting broke out in New York City as the draft selection began, lasting for three days and resulting in more than a hundred casualties.<sup>92</sup> This social backlash presents one of the more explicit examples of the populace demanding a change in wartime policy from the President.

The result was that the administration faced significant opposition from Democrats (or “Copperheads,” an “opprobrious epithet” used by Republicans) who opposed Lincoln’s war policies.<sup>93</sup> Calling Lincoln a “dictator” and attempting to restore the Union as it was in 1860, the Democrats constituted a substantial check on presidential action, forcing the administration to tread carefully while implementing policy.<sup>94</sup> Therefore, as social backlash against wartime policy became more pervasive, a strong system of political accountability formed, whereby the public and politicians alike closely scrutinized Union victories and defeats. General William Sherman’s timely march on Atlanta, for example, would ultimately relieve President Lincoln of the many pressures faced in an election year.<sup>95</sup> In this respect, the heavy costs of war introduced an increased level of citizen

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<sup>88</sup> See ANNE LELAND & MARIJANA OBOROCEANU, CONG. RESEARCH SERV., RL32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 2–4 (2010), available at <http://www.fas.org/sgp/crs/natsec/RL32492.pdf>. In comparison, the War of 1812 involved a little over two thousand deaths, while the Revolutionary War, though perhaps more ideologically important for the United States, similarly resulted in limited casualties. See *id.* at 2.

<sup>89</sup> See 1 JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES: FROM CHRISTOPHER COLUMBUS TO THE ROBBER BARONS (1492–1900), at 208 (2002) (noting that the Treasury Department imposed tax increases in order to bankroll the Union war effort).

<sup>90</sup> See *infra* notes 91–92 and accompanying text.

<sup>91</sup> See IVER BERNSTEIN, THE NEW YORK CITY DRAFT RIOTS: THEIR SIGNIFICANCE FOR AMERICAN SOCIETY AND POLITICS IN THE AGE OF THE CIVIL WAR 7–9 (1990).

<sup>92</sup> Estimates on the exact figure vary. See *id.* at 288–89 n.8.

<sup>93</sup> See Richard O. Curry, *Copperheadism and Continuity: The Anatomy of a Stereotype*, 57 J. NEGRO HIST. 29, 30 (1972) (internal quotation marks omitted).

<sup>94</sup> See *id.*

<sup>95</sup> See JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 774–76 (1988); see also *id.* at 582–83 (noting that Union military success “blunted, temporarily, the mounting copperhead offensive against the administration’s war policy”).



involvement that required the administration to shape its policy in response to constant public scrutiny.

The U.S. involvement in World War I provided an equally clear example of citizen mobilization having a meaningful impact on American foreign policy in a scenario involving the traditional costs of war, thereby setting the stage for similar incidents throughout the twentieth century.<sup>96</sup> Prior to the U.S. intervention in World War I, Europe had already witnessed the deaths of hundreds of thousands of soldiers, seen an increased use of chemical warfare, and found itself seemingly stuck in a perpetual stalemate with little hope of achieving lasting peace.<sup>97</sup> Thus, for most Americans, there was obviously much at stake in deciding whether to intervene, leading many to call for America's continued isolationism. Figures such as Eugene V. Debs played prominent roles in rallying the antiwar cause and, in some extreme cases, protestors even took to domestic terrorism in order to express their opposition to intervention.<sup>98</sup> Between assisting its allies abroad and avoiding major mobilization and harm to its soldiers, the U.S. public strongly favored the latter.

This public outcry had a clear influence on the decision to enter World War I. For example, President Woodrow Wilson's reelection campaign in 1916 included the slogan "[h]e kept us out of war,"<sup>99</sup> and it was only after the United States began suffering civilian casualties at the hands of German submarines that the country saw a sufficient shift in public sentiment.<sup>100</sup> While U.S. casualties eventually totaled over one hundred thousand,<sup>101</sup> public pressure successfully kept the country out of foreign affairs for over two years—nearly half of the

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<sup>96</sup> See Keith Neilson, *Total War: Total History*, 51 MIL. AFF. 17, 19 (1987) ("[T]he conflict of 1914-1918 was a total war that involved the belligerents in all phases of their national existence and faced military decision makers with new and complex problems.").

<sup>97</sup> For example, a single attack during the Battle of the Somme resulted in twenty thousand British deaths without making any significant gain. See *The Great War and the Shaping of the 20th Century, The Battle of the Somme*, PBS.COM, [http://www.pbs.org/greatwar/maps/maps\\_somme.html](http://www.pbs.org/greatwar/maps/maps_somme.html) (last visited Sept. 24, 2012).

<sup>98</sup> See, e.g., JOSEPH T. McCANN, *TERRORISM ON AMERICAN SOIL: A CONCISE HISTORY OF PLOTS AND PERPETRATORS FROM THE FAMOUS TO THE FORGOTTEN* 46-49 (2006) (detailing the "San Francisco Preparedness Day Bombing," where a suitcase bomb killed ten people at a rally supporting increased defense spending and general military preparedness).

<sup>99</sup> JOHN MILTON COOPER, JR., *WOODROW WILSON: A BIOGRAPHY* 342 (2009).

<sup>100</sup> See Office of the Historian, U.S. Dep't of State, *Milestones: 1914-1920: American Entry into World War I, 1917*, HISTORY.STATE.GOV, <http://history.state.gov/milestones/1914-1920/WWI> (last visited Sept. 24, 2012) ("Germany's resumption of submarine attacks on passenger and merchant ships in 1917 was the primary motivation behind Wilson's decision to lead the United States into World War I."). Even then, however, President Wilson faced strong opposition. See John Whiteclay Chambers II, *Decision for the Draft*, OAH MAG. HIST., Oct. 2002, at 26, 28 (noting that the President's military policy faced "considerable opposition" and that "it took a month for Wilson to force conscription through a bitterly divided Congress").

<sup>101</sup> LELAND & OBOROCEANU, *supra* note 88, at 2.

war. Thus, as the United States experienced its first major conflict in the twentieth century, the role of public sentiment against war suggested that it could have a meaningful impact on foreign policy in subsequent military engagements.

But the true power of public attentiveness would not become apparent until the Vietnam War. The growth and prominence of the Vietnam War antiwar movement is well-documented.<sup>102</sup> As American involvement in Vietnam increased throughout the 1960s, a growing level of discontent for the war emerged throughout the country,<sup>103</sup> from protests on campuses to the steps of the Capitol, culminating in a movement that eventually played a major role in the U.S. pullout. For example, key political players, including President Lyndon Johnson, Henry Kissinger, and Robert McNamara, felt constrained by the growing movement and were therefore forced to shift their policy in response.<sup>104</sup> Similarly, toward the latter part of his term, President Johnson was forced to act “within the constraints set by public opinion and protest until it was impossible for his administration to advance escalation any further.”<sup>105</sup> This public backlash culminated in the complete pullout from Vietnam,<sup>106</sup> as well as the passage of the WPR.<sup>107</sup>

Finally, one can view the nearly decade-long conflict in Iraq as a unique example of public attentiveness playing a meaningful role in military policy. For some, the Iraq War stood in stark contrast to Vietnam and the other large-scale wars.<sup>108</sup> Indeed, the war did not involve a draft, nor did the total casualty figures come even close to those

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102 See, e.g., CHARLES DEBENEDETTI & CHARLES CHATFIELD, *AN AMERICAN ORDEAL: THE ANTIWAR MOVEMENT OF THE VIETNAM ERA* (1990) (detailing the Vietnam antiwar movement); ADAM GARFINKLE, *TELLTALE HEARTS: THE ORIGINS AND IMPACT OF THE VIETNAM ANTIWAR MOVEMENT* (1995) (same).

103 See *supra* note 25 and accompanying text.

104 See RICHARD SOBEL, *THE IMPACT OF PUBLIC OPINION ON U.S. FOREIGN POLICY SINCE VIETNAM: CONSTRAINING THE COLOSSUS* 97 (2001) (“The decision-makers’ own words reveal that public opinion constrained Vietnam policy across the war.”).

105 *Id.* at 67. Unsurprisingly, when these movements died down, the President was able to act free of any constraints. See *id.* at 236 (“The decline of the antiwar movement permitted the escalatory bombings in 1972 that led to an armistice in 1973.”).

106 See *id.* at 98 (“By 1973, public opposition had essentially forced the United States to withdraw from Vietnam.”).

107 See HENKIN, *supra* note 17.

108 See, e.g., COLIN MCINNES, *SPECTATOR-SPORT WAR: THE WEST AND CONTEMPORARY CONFLICT* 27 (2002) (“What . . . distinguishes the Afghan, Iraqi, and Kosovo operations and other operations undertaken by Western powers during the post-Cold War era is their limited and local nature.”); SINGER, *supra* note 21, at 317–18 (comparing the Vietnam War and World War II to the wars in Iraq and Afghanistan, where “most American families no longer have to think about whether their husband, wife, son, or daughter would be at risk if the military is sent to war”).

associated with the aforementioned conflicts.<sup>109</sup> Perhaps as a result, the public outrage that emerged before our intervention in Iraq slowly faded in prominence, ostensibly illustrating the ways in which contemporary warfare has dulled the effect of public scrutiny.<sup>110</sup> Given these characteristics, we might see the Iraq War as a more limited type of war, perhaps more intrusive than the skirmish in Libya but falling short of the traditional sacrifices associated with Vietnam.

Although featuring distinct characteristics not seen in earlier conflicts, we can still classify the Iraq War as one of the few modern wars involving traditional harms. For instance, although the military casualties suffered in Iraq themselves might seem low compared to World War I, the public no longer seems able to tolerate a large number of casualties, making the thousands of troops lost in Iraq sufficient to trigger citizen mobilization.<sup>111</sup> Furthermore, although the impact of public outrage in response to the Iraq War might seem inconsequential, we can explain the decreased level of social involvement as simply a shift in the way people protest. While the Vietnam War involved, perhaps even required, protest in the form of physical visibility, the advent of the Internet and other means of citizen engagement have changed the way movements mobilize.<sup>112</sup> Thus, given the different ways in which the public can now engage in the political process, we can view the Iraq War as having involved a significant level of citizen mobilization, culminating in a meaningful impact on the decision to withdraw.<sup>113</sup> As such, although seemingly incomparable to the earlier wars in the nineteenth and twentieth centuries, the Iraq War can in-

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<sup>109</sup> Compare *supra* note 20 (reporting more than seven thousand casualties in the Iraq and Afghanistan conflicts), with *supra* note 97 (reporting more than twenty thousand casualties in a single attack during World War II).

<sup>110</sup> Compare *Anti-War Demonstrators Rally Around the World*, CNN.COM (Jan. 18, 2003), [http://articles.cnn.com/2003-01-18/us/sproject.iq.us.protests\\_1\\_rally-inspection-team-iraq?\\_s=PM:US](http://articles.cnn.com/2003-01-18/us/sproject.iq.us.protests_1_rally-inspection-team-iraq?_s=PM:US) (describing one of the major preinvasion protests, which included “[a]t least tens of thousands of people”), with *Limited Protests Target IRS, City’s “Pillars of War,”* WASH. TIMES, Mar. 19, 2008, <http://www.washingtontimes.com/news/2008/mar/19/limited-protests-target-irs-citys-pillars-of-war/> (describing the protest marking the fifth anniversary of the Iraq War as drawing “only a fraction of the tens of thousands that typically come to the nation’s capital to protest wars”).

<sup>111</sup> See Thom Shanker et al., *In Baghdad, Panetta Leads Uneasy Moment of Closure to a Long Conflict*, N.Y. TIMES, Dec. 16, 2011, at A19, available at <http://www.nytimes.com/2011/12/16/world/middleeast/panetta-in-baghdad-for-iraq-military-handover-ceremony.html?scp=2&sq=iraq&st=cse> (noting that over four thousand military deaths in Iraq “helped turn sentiment at home against the war”).

<sup>112</sup> For example, numerous websites currently serve as platforms for antiwar movements. See, e.g., STOP THE WAR COALITION, <http://stopwar.org.uk/> (last visited Sept. 2, 2012) (protesting the Iraq War); MOVEON.ORG, <http://front.moveon.org/> (last visited Sept. 2, 2012).

<sup>113</sup> See Shanker et al., *supra* note 111 (noting that the antiwar sentiment surrounding Iraq “contribut[ed] to a crash in the popularity of President George W. Bush during his second term and to the election of Barack Obama, who opposed the invasion in 2003”).

deed be viewed as one involving traditional harms, complete with significant domestic harms and resulting social and political changes.

There are obvious similarities between the causes and effects of the public scrutiny associated with the larger wars discussed above. In each situation, the United States was faced with some, or even all, of the traditional costs associated with war: a draft, an increasingly large military industry, logistical sacrifices (such as rationing and other noncombat expenses), and significant military casualties.<sup>114</sup> Americans looking to keep the United States out of foreign affairs obviously had a great deal on the line, which provided sufficient incentive to scrutinize military policy. In the face of these potentially colossal harms, the public was willing to assert a significant voice, which in turn increased the willingness of politicians to challenge and subsequently shift presidential policy. As a result, public scrutiny and activism placed a President under constant scrutiny in one war, delayed U.S. intervention in another, and even helped end two wars entirely. Thus, we may extract a general principle from these events: when faced with the prospect of a war requiring heavy domestic sacrifices, and absent an incredibly compelling reason to engage in such a war (as seen in World War II, for example),<sup>115</sup> the public is properly incentivized to emerge and exert social (and, consequently, political) pressure in order to engage and shift foreign policy. However, as we will see, the converse is true as well.

#### B. The Introduction of Technology-Driven Warfare and Shifting Wartime Doctrines

The recent actions in Libya illustrate the culmination of a shift toward a new era of warfare, one that upsets the system of social and political checks on presidential military action. Contrary to the series of larger conflicts fought in the twentieth century, this new era has ushered in a system of war devoid of some of the fundamental aspects of war, including the traditional costs discussed above. Specifically, through the advent of military technology, especially in the area of robotics, modern-day hostilities no longer require domestic sacrifices, thereby concealing the burden of war from mainstream consciousness.<sup>116</sup> By using fewer troops and introducing drones and other

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<sup>114</sup> See *supra* note 87 and accompanying text (discussing “traditional” costs of war).

<sup>115</sup> See David Greenberg, *Advise and Dissent*, SLATE (Mar. 26, 2003, 3:32 PM), [http://www.slate.com/articles/news\\_and\\_politics/history\\_lesson/2003/03/advise\\_and\\_dissent.html](http://www.slate.com/articles/news_and_politics/history_lesson/2003/03/advise_and_dissent.html) (“[T]he only major war that lacked an organized bloc of dissenters was World War II . . .”).

<sup>116</sup> See SINGER, *supra* note 21, at 322 (“[R]obotics offer the public and their leaders the lure of riskless warfare. All the potential gains of war would come without the costs, and even be mildly entertaining.”).

forms of mechanized warfare into hostile areas more frequently,<sup>117</sup> an increased number of recent conflicts have managed to avoid many domestic casualties, economic damages, and drafts.<sup>118</sup> In a way, less is on the line when drones, rather than people, take fire from enemy combatants, and this reality displaces many hindrances and considerations when deciding whether to use drones in the first place.<sup>119</sup>

This move toward a limited form of warfare has been termed the “Obama Doctrine,” which “emphasizes air power and surgical strikes, rather than boots on the ground.”<sup>120</sup> Under this military framework, as indicated by the recent use of drones in the Middle East, the traditional harms associated with war might become increasingly obsolete as technology replaces the need for soldiers. Indeed, given the increased level of firepower attached to drones, we can imagine a situation where large-scale military engagements are fought without any American soldiers being put in harm’s way, without Americans having to ration their food purchases, and without teenagers worrying about being drafted.<sup>121</sup> For example, “[w]ith no oxygen- and sleep-needing human on board, Predators and other [unmanned aerial vehicles] can watch over a potential target for 24 hours or more—then attack when opportunity knocks.”<sup>122</sup> Thus, if the recent actions in Libya are any indication of what the future will look like, we can predict a major shift in the way the United States carries out wars.<sup>123</sup>

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<sup>117</sup> See Tony Rock, Note, *Yesterday’s Laws, Tomorrow’s Technology: The Laws of War and Unmanned Warfare*, 24 N.Y. INT’L L. REV. 39, 40 (2011) (arguing that the use of drones has become “an integral weapon in the war on terror”).

<sup>118</sup> See SINGER, *supra* note 21, at 319 (noting that robotics have created a system of warfare “[w]ith no draft, . . . no tax or war bonds, and now the knowledge that the Americans at risk are mainly just American machines”); Lori Montgomery, *The Cost of War, Unnoticed*, WASH. POST, May 8, 2007, at D1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/07/AR2007050701582.html> (noting that taxpayers have felt few ill financial effects of the wars in Iraq and Afghanistan, despite the wars’ high costs).

<sup>119</sup> For example, Singer notes that, in a country that employs mechanized warfare, “[a] leader needn’t carry out any kind of consensus building that is normally needed before a war, and doesn’t even need to unite the country behind the effort.” SINGER, *supra* note 21, at 319–20.

<sup>120</sup> See Michael C. Dorf, *The “Obama Doctrine”: The Wisdom and Lawfulness of the President’s Take-No-Prisoners Approach*, JUSTIA.COM (Oct. 24, 2011), <http://verdict.justia.com/2011/10/24/the-obama-doctrine>.

<sup>121</sup> Illustrating that this scenario is not as farfetched as it might seem, the Navy recently tested a semiautonomous drone, capable of striking targets without any direct human control. See W.J. Hennigan, *New Drone Has No Pilot Anywhere, So Who’s Accountable?*, L.A. TIMES, Jan. 26, 2012, <http://www.latimes.com/business/la-fi-auto-drone-20120126,0,740306.story?article>.

<sup>122</sup> Jim Krane, *Pilotless Warriors Soar to Success*, CBS NEWS.COM (Feb. 11, 2009, 8:43 PM), <http://www.cbsnews.com/stories/2003/04/25/tech/main551126.shtml>.

<sup>123</sup> Though this Note has focused solely on the technological side of contemporary warfare, it is worth mentioning that there has been increased use of private security forces to carry out military actions abroad, as the use of mercenaries plays on the same themes discussed here: private forces are easy to mobilize, they avoid the political costs of doing so, and create the issue of dulling public interest and awareness. See Deborah Avant, *War*,

### C. The Effects of Technology-Driven Warfare on Politics and Social Movements

The practical effects of this move toward a technology-driven, and therefore limited, proxy style of warfare are mixed. On the one hand, the removal of American soldiers from harm's way is a clear benefit,<sup>124</sup> as is the reduced harm to the American public in general. For that, we should be thankful. But there is another effect that is less easy to identify: public apathy. By increasing the use of robotics and decreasing the probability of harm to American soldiers, modern warfare has "affect[ed] the way the public views and perceives war" by turning it into "the equivalent of sports fans watching war, rather than citizens sharing in its importance."<sup>125</sup> As a result, the American public has slowly fallen victim to the numbing effect of technology-driven warfare; when the risks of harm to American soldiers abroad and civilians at home are diminished, so too is the public's level of interest in foreign military policy.<sup>126</sup>

In the political sphere, this effect snowballs into both an uncaring public not able (or willing) to effectively mobilize in order to challenge presidential action and enforce the WPR, and a Congress whose own willingness to check presidential military action is heavily tied to public opinion.<sup>127</sup> Recall, for example, the case of the *Mayaguez*, where potentially unconstitutional action went unchecked because the mission was perceived to be a success.<sup>128</sup> Yet we can imagine that *most* missions involving drone strikes will be "successful" in the eyes of

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*Recruitment Systems, and Democracy, in IN WAR'S WAKE: INTERNATIONAL CONFLICT AND THE FATE OF LIBERAL DEMOCRACY* 235, 245–50 (Elizabeth Kier & Ronald R. Krebs eds., 2010). The difference is that the level of attenuation is not as significant when using private contractors; as Avant notes, Americans tend to ignore the distinction between private and recruited soldiers in reacting to their deaths. *See id.* at 249–50. That same equivalence can hardly be found when reacting to the death of a soldier versus the death of a drone; thus, the focus here is on the more extreme form of separation between public concerns and battlefield realities.

<sup>124</sup> *See* Elisabeth Bumiller & Thom Shanker, *War Evolves with Drones, Some Tiny as Bugs*, N.Y. TIMES, June 20, 2011, at A1, available at [http://www.nytimes.com/2011/06/20/world/20drones.html?\\_r=2&ref=unmannedaerialvehicles](http://www.nytimes.com/2011/06/20/world/20drones.html?_r=2&ref=unmannedaerialvehicles) ("[N]o one disputes that drones save American lives.").

<sup>125</sup> SINGER, *supra* note 21, at 318; *see also* McINNES, *supra* note 108, at 136–37 (noting that technology "plays to American fantasies," which "misses the brutal reality of war: that war is unpredictable; . . . that mistakes are made; that no matter the technology, if the strategy is not right then the war will fail; and that in war, people die").

<sup>126</sup> *See* Stephen L. Carter, *The Iraq War, the Next War, and the Future of the Fat Man*, 64 STAN. L. REV. ONLINE 46, 49 (2012), <http://www.stanfordlawreview.org/online/iraq-war-next-war> ("The policy of using remote attacks to eliminate our enemies is one to which the public pays less and less attention."); Mandel, *supra* note 44, at 806 ("[M]ilitary deployments involving tens or hundreds of thousands of American soldiers that could cost thousands of American lives will, of course, receive greater attention and scrutiny from the American public.").

<sup>127</sup> *See supra* Part I.A.3.

<sup>128</sup> *See supra* note 84 and accompanying text.

the public: even if a strike misses a target, the only “loss” one needs to worry about is the cost of a wasted missile, and the ease of deploying another drone would likely provide a quick remedy. Given the political risks associated with making critical statements about military action, especially if that action results in success,<sup>129</sup> we can expect even less congressional WPR enforcement as more military engagements are supported (or, at the very least, ignored) by the public. In this respect, the political reaction to the *Mayaguez* seems to provide an example of the rule, rather than the exception, in gauging political reactions within a technology-driven warfare regime.

Thus, when the public becomes more apathetic about foreign affairs as a result of the limited harms associated with technology-driven warfare, and Congress’s incentive to act consequently diminishes, the President is freed from any possible WPR constraints we might expect him to face, regardless of any potential legal issues.<sup>130</sup> Perhaps unsurprisingly, nearly all of the constitutionally problematic conflicts carried out by presidents involved smaller-scale military actions, rarely totaling more than a few thousand troops in direct contact with hostile forces.<sup>131</sup> Conversely, conflicts that *have* included larger forces, which likely provided sufficient incentive for public scrutiny, have generally complied with domestic law.<sup>132</sup>

The result is that as wars become more limited,<sup>133</sup> unilateral presidential action will likely become even more unchecked as the triggers for WPR enforcement fade away. In contrast with the social and political backlash witnessed during the Civil War, World War I, the Vietnam War, and the Iraq War, contemporary military actions provide insufficient incentive to prevent something as innocuous and limited as a drone strike. Simply put, technology-driven warfare is not conducive to the formation of a substantial check on presidential action.<sup>134</sup>

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<sup>129</sup> See *supra* note 81 and accompanying text.

<sup>130</sup> See SOBEL, *supra* note 104, at 15 (“Popular presidents tend to engage in the use of force short of war because higher popularity levels ‘free’ them from the domestic constraints that would otherwise inhibit resort of force.”).

<sup>131</sup> See *supra* notes 38–44 and accompanying text.

<sup>132</sup> See Mandel, *supra* note 44, at 805 (noting that in “[h]igher-[i]ntensity” conflicts, such as the Gulf War and the recent wars in Afghanistan and Iraq, presidents have had little trouble obtaining explicit congressional authorization to use military force).

<sup>133</sup> See Ackerman & Hathaway, *supra* note 28, at 449 (“[M]odern war is limited war.”).

<sup>134</sup> Admittedly, this Note has assumed thus far that civil participation during (or in the days preceding) military action is necessarily a positive development, and will later argue that such control can help prevent future conflict and the costs that follow. See *infra* Part III.A. However, the ability to sway decision makers during war does not necessarily create such benefits and can even help exacerbate many of the worst symptoms of war. Consider, for example, the days following Pearl Harbor, where public sentiment pushed both the military and politicians toward Japanese internment. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 296 (2004). In that situation, and given the benefit of hindsight, an apathetic populace might have actually *helped* America avoid a cost of war (namely, rights-restrictive measures).

## III

THE WAR POWERS RESOLUTION IN THE ERA OF  
TECHNOLOGY-DRIVEN WARFARE

## A. Why an Unconstrained Executive Matters Today

If public scrutiny acts as a check on presidential action by pressuring Congress into enforcing domestic law (namely, the WPR), then that check has weakened given the increased use of technology-driven warfare abroad.<sup>135</sup> As a result, fewer checks on presidential military actions exist, implying that we will see more instances of unilateral presidential initiatives. But if the new era of warfare removes the very issues associated with traditional warfare, should we be concerned about the American public's increasing numbness to it all? The answer is undoubtedly yes.

First, from a practical standpoint, the psychology surrounding mechanized warfare makes it easier for the United States to enter hostilities initially.<sup>136</sup> Without having to worry about any of the traditional costs of war (such as a draft, rationing, casualties, etc.), the triggers that have historically made the public wary of war are now gone. When machines, rather than human beings, are on the front lines, the public (and, as a result, politicians and courts) will not act to stop the continued use of drones. In other words, people will simply stop caring about our increased actions abroad, regardless of their validity, constitutionality, or foreign harm.

But again one must wonder: should we care? After all, even if we increase the number of military conflicts abroad, the repercussions hardly seem worth worrying about. For example, worrying that WPR violations will cause significant harm to the United States seems somewhat misplaced given the limited nature of technology-driven warfare. Granted, this style of warfare might make it easier to enter hostilities, but the risk of subsequent harm (at least to the United States) is low enough to mitigate any real danger. Furthermore, even if the effects of warfare might become increasingly dulled, any use of force that *would* eventually require traditional, Vietnam-esque types of harms as the result of technology-driven warfare would in a sense "wake up the populace" in order to check potentially unconstitutional action.<sup>137</sup>

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But while the months following Pearl Harbor are illuminating in terms of how a populace's fear can take hold of an entire government, the scope of this Note entails examining the role popular opinion plays in entering a military conflict, not responding to that conflict once it has already ramped up.

<sup>135</sup> See *supra* notes 125–26 and accompanying text.

<sup>136</sup> See *supra* note 119 and accompanying text; see also Bumiller & Shanker, *supra* note 124 ("[D]rones can turn war into a videogame . . . and, with no Americans directly at risk, more easily draw the United States into conflicts.").

<sup>137</sup> For example, if a country responded in a manner that would require the United States to begin using ground troops (say, by retaliating with drones of their own), the



Thus, if our level of involvement requires machines and only machines, why worry about a restrained level of public scrutiny?

The answer is that a very real risk of harm exists nonetheless. War by its very nature is unpredictable.<sup>138</sup> Indeed, one of the major grievances concerning the war in Vietnam was that we ended up in a war we did not sign up for in the first place.<sup>139</sup> The problem is not the initial action itself but the *escalation*. Therefore, while drone strikes might not facially involve any large commitment, the true threat is the looming possibility of escalation.<sup>140</sup> That threat exists in the context of drones, whether because of the risk of enemy retaliation or because of a general fear that an initial strike would snowball into a situation that *would* require troops on the ground.<sup>141</sup> In both cases, an apparently harmless initial action could eventually unravel into a situation involving harms associated with traditional warfare.<sup>142</sup> Worse yet, even if that blowback was sufficient to incentivize the populace and Congress to mobilize, the resulting involvement would only occur after the fact.<sup>143</sup> If we want restraints on presidential action, they should be in place *before* the United States is thrown into a war, and this would require public awareness about the use of drones.<sup>144</sup> As such, whether it is unforeseen issues arising out of the drones themselves<sup>145</sup> or unforeseen consequences stemming from what was ostensibly a minor military undertaking, there is reason to worry about a

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subsequent escalation would likely provide a clear signal to the public that it is time to act. In that respect, technology-driven warfare could actually result in *more* WPR scrutiny once adversaries respond.

<sup>138</sup> See SINGER, *supra* note 21, at 323 (“It’s in [war’s] very nature to be complex, messy, and unpredictable.”).

<sup>139</sup> See SOBEL, *supra* note 104, at 53–55 (discussing the U.S. escalation in Vietnam, beginning with strategic bombings but eventually growing to tens of thousands of ground troops, and the discontent that grew as a result).

<sup>140</sup> See SINGER, *supra* note 21, at 322 (“It was the lure of an easy preemptive action that got the United States into such trouble in Iraq in the first place.”).

<sup>141</sup> See MCINNES, *supra* note 108, at 139 (noting that the shift toward a style of warfare emphasizing technological superiority might result in a backlash that would give America’s enemies an incentive to resort to the type of warfare that the West wants to avoid (e.g., wars requiring ground troops)).

<sup>142</sup> The recent news story concerning the loss of a U.S. drone in Iran provides a particularly gripping example of this risk, as tensions between the two countries have risen as the result of an ostensibly innocuous robotic surveillance mission. See Scott Shane & David E. Sanger, *Crash of Stealth C.I.A. Drone in Iran Reveals Secret U.S. Surveillance Effort*, N.Y. TIMES, Dec. 8, 2011, at A6, available at [http://www.nytimes.com/2011/12/08/world/middleeast/drone-crash-in-iran-reveals-secret-us-surveillance-bid.html?\\_r=1](http://www.nytimes.com/2011/12/08/world/middleeast/drone-crash-in-iran-reveals-secret-us-surveillance-bid.html?_r=1).

<sup>143</sup> Recall the success of antiwar movements before World War I, which managed to keep Americans out of the war for over two years, likely saving hundreds of thousands of lives. See *supra* notes 99–101 and accompanying text.

<sup>144</sup> See ELY, *supra* note 15, at 45 (“The nation shouldn’t be permitted to ‘slide into’ war: An unambiguous in-or-out vote should be required at the outset.”).

<sup>145</sup> See, e.g., Bumiller & Shanker, *supra* note 124 (reporting that a malfunctioning drone entered restricted airspace in Washington, D.C., nearly causing fighter jets to be scrambled).

populace who is unable to exert any influence on military actions, even as we shift toward a more limited form of warfare.<sup>146</sup>

Another issue associated with a toothless WPR in the era of technology-drive warfare involves humanitarian concerns. If one takes the more abstract position that the public should not allow actions that will kill human beings to go unchecked, regardless of their legality or underlying rationale, then that position faces serious pressure in the era of technology-driven warfare. As the human aspect of warfare becomes more attenuated, the potential humanitarian costs associated with war will fade out of the collective consciousness, making it easier for the United States to act in potentially problematic ways without any substantial backlash. Rather than take note of whom we target abroad, for example, the numbing effect of technology-driven warfare forces the public to place “enormous trust in our leaders” despite the fact that good faith reliance on intelligence reports does not necessarily guarantee their accuracy.<sup>147</sup> Accordingly, as the level of public scrutiny decreases, so too will our ability to limit unwarranted humanitarian damage abroad.<sup>148</sup> At the very least, some dialogue should occur before any fatal action is taken; yet, in the technology-driven warfare regime, that conversation never occurs.<sup>149</sup>

Of course, this Note has argued that the issues associated with technology-driven warfare (an increased level of military involvement abroad, potential for escalation, humanitarian difficulties, etc.) though very real, are less prominent than the harms associated with traditional warfare. But perhaps this premise is incorrect; that is, perhaps technology-driven warfare *does* present sufficient harm to trigger social and political scrutiny. For example, pecuniary harms are very real contemporary concerns, and they seem to play an increased role in determining a country’s standing.<sup>150</sup> In this respect, given the fi-

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<sup>146</sup> Consider environmental policy, which faces a similar hurdle: U.S. policies that have small or zero immediate costs, but that might create larger issues in the long run, may not spur social or political protest until it is too late. See John M. Broder, *Environmentalists Cooling on Obama*, N.Y. TIMES, Feb. 18, 2010, at A18, available at <http://www.nytimes.com/2010/02/18/science/earth/18enviros.html> (noting that “action on environmental issues has slowed” and that “[e]nvironmental advocates largely remained silent” in 2009).

<sup>147</sup> See Carter, *supra* note 126.

<sup>148</sup> See, e.g., Hakim Almasmari, *Suspected U.S. Drone Strike Kills Civilians in Yemen*, OFFICIALS SAY, CNN.COM (Sept. 3, 2012), [http://www.cnn.com/2012/09/03/world/meast/yemen-drone-strike/?hpt=hp\\_t3](http://www.cnn.com/2012/09/03/world/meast/yemen-drone-strike/?hpt=hp_t3).

<sup>149</sup> The Defense Department does not even keep track of the number of civilians killed by drones. See Justin Elliott, *U.S. Doesn't Count Civilians Killed by Drones*, SALON (Mar. 23, 2011, 5:07 PM), [http://www.salon.com/2011/03/23/pakistan\\_drones\\_civilian\\_casualties/](http://www.salon.com/2011/03/23/pakistan_drones_civilian_casualties/).

<sup>150</sup> See Howard LaFranchi, *How the Iraq War Has Changed America*, CHRISTIAN SCI. MONITOR (Dec. 10, 2011), <http://www.csmonitor.com/USA/Foreign-Policy/2011/1210/How-the-Iraq-war-has-changed-America> (noting the heavy monetary burden the war in Iraq has placed on the United States and its detrimental long-term impact).

nancial costs of drone strikes (and military spending in general),<sup>151</sup> perhaps we need not be worried about an absence of public scrutiny.

Yet given the traditional costs of war, pecuniary harm hardly seems like the type of concern sufficient to create the type of political checks present in the Civil War, World War I, Vietnam, or Iraq. In all four situations, American lives were at stake, entire households faced life-changing effects of war in a very real way, and the entire country saw major social and political transformations. Economic harm is certainly an issue worth considering, especially as the United States takes on more and more debt; yet, whether that sort of harm rises to the level sufficient to trigger mass citizen mobilization remains to be seen.<sup>152</sup> Indeed, if the recent actions in Libya are any indication, financial harm is far too attenuated to create any sort of substantial backlash. Future technology-driven conflicts will likely create a clearer picture of the role of pecuniary damage, but as it stands, this sort of harm fails to “rally the troops” for public attentiveness.

#### B. Why Existing Theories of Presidential Constraint Are No Longer Sufficient

Naturally, some have argued that an unchecked President is not necessarily an issue at all. Specifically, in *The Executive Unbound*, Eric Posner and Adrian Vermeule argue that the lack of presidential constraint is actually a rational development: we *want* a President who can act with alacrity, especially in a world where quick decisions may be necessary (e.g., capturing a terrorist).<sup>153</sup> But rather than worry about this progression, Posner and Vermeule argue that sufficient political restraints remain in place to prevent a president from acting recklessly, making the inability of legal constraints (such as the WPR) to curtail presidential action a moot point.<sup>154</sup> Specifically, a mix of “elections, parties, bureaucracy, and the media” acts as an adequate constraint on presidential action, even absent any legal checks on the

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<sup>151</sup> See *supra* note 19 and accompanying text.

<sup>152</sup> In fact, technology-driven warfare might *decrease* the pecuniary cost of war. See Krane, *supra* note 122 (noting that drones “are expected to cost a third as much as Lockheed Martin’s . . . next-generation manned fighter”).

<sup>153</sup> See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 14–15 (2010) (“[E]xecutive-centered government in the administrative state is inevitable, and [the] law cannot hope to constrain the modern executive.”); see also *id.* at 207–08 (presenting the days following 9/11 and the 2008 financial crisis as two examples of the growing extensiveness of presidential power).

<sup>154</sup> See *id.* at 176 (arguing that “liberal legalists overlook the importance of de facto constraints arising from politics, and thus equate a legally unconstrained executive with one that is unconstrained *tout court*”).

executive.<sup>155</sup> Posner and Vermeule find that presidential credibility and popularity create a deep incentive for presidents to constrain their own power. This restraint does not arise from a sense of upholding the Constitution or fear of political backlash, but from the public itself.<sup>156</sup> Because of these nonlegal constraints, the authors conclude that the fear of an unconstrained President (one that has the potential to go so far as tyranny) is unwarranted.<sup>157</sup>

The problem with such a theory is that the requisite social and political awareness that might have existed in large-scale wars has largely disappeared, allowing the President to act without any fear of diminished credibility or popularity. Specifically, Posner and Vermeule seem to rely on public attentiveness in order to check presidential action but do not seem to consider a situation where public scrutiny fails to materialize. The authors place an important caveat in their argument: “*As long as the public informs itself and maintains a skeptical attitude toward the motivations of government officials, the executive can operate effectively only by proving over and over that it deserves the public’s trust.*”<sup>158</sup> But what happens when such skepticism and scrutiny vanish? The authors premise their argument on a factor that does not exist in a regime that utilizes technology-driven warfare. If credibility is what controls a President, and an apathetic populace does not care enough to shift its political views based on the use of technology-driven warfare abroad, then a President need not worry about public sentiment when deciding whether to use such force. This in turn means that the theory of self-restraint on the part of the President fails to account for contemporary warfare and its social impact, making the problem of public numbing very pertinent.<sup>159</sup>

#### CONCLUSION

On June 21, 2011, the United States lost contact with a Fire Scout helicopter flying over Libya. Military authorities ultimately concluded

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<sup>155</sup> *Id.* at 209; *see also id.* at 113 (“[T]he system of elections, the party system, and American political culture constrain the executive far more than do legal rules created by Congress or the courts.”).

<sup>156</sup> *See id.* at 4 (“[T]he major constraints on the executive, especially in crises, do not arise from law or from the separation-of-powers framework defended by liberal legalists, but from politics and public opinion.”).

<sup>157</sup> *See id.* at 204–05.

<sup>158</sup> *Id.* at 209 (emphasis added); *see also id.* at 208 (relying on an implicit public awareness when arguing that “[d]eclarations of emergency not justified by publicly visible events would be met with skepticism” and that “[a]ctions said to be justified by emergency would not be approved if the justification were not plausible”).

<sup>159</sup> *See* Ronald R. Krebs, *In the Shadow of War: The Effects of Conflict on Liberal Democracy*, 63 INT’L ORG. 177, 201–02 (2009) (noting that Eric Posner and Adrian Vermeule’s executive enthusiasm fails to account for either the potential for presidential abuse or the absence of political and social costs that would follow).

that Qaddafi forces shot the helicopter down, adding to the final cost of America's intervention.<sup>160</sup> Yet there would be no outrage back home: no candlelit vigils, no congressional lawsuits, no protests at the White House gates, no demands for change. Instead, few people would even know of the Fire Scout's plight, and even fewer would care. That is because the Fire Scout helicopter was a drone, a pilotless machine adding only a few digits to the final "cost" of the war, hardly worth anyone's time or effort.

As these situations become more and more common—where postwar assessments look at monetary, rather than human costs—the fear of unilateral presidential action similarly becomes more pertinent. Unlike past larger-scale wars, whose traditional harms provided sufficient incentive for the populace to exert pressure on the President (either directly or via Congress), technology-driven warfare has removed the triggers for checks on presidential action. And though the military actions that have raised WPR issues involved limited, small-scale operations, the volatile and unpredictable nature of warfare itself could eventually put American lives in danger, a risk worth considering given the increased use of drones abroad.

Thus, the same conditions are now in place as when the WPR was enacted, creating a need to revisit the importance of the WPR in light of the numbing effect of technology-driven warfare. Although it might be tempting to simply write off the WPR as a failed experiment in aggressive congressional maneuvering given its inability to prevent unilateral presidential action in the past, the new era of warfare and its effects on the populace has created a newfound sense of urgency, one that requires a strong statutory barrier between the President and military action abroad. Thus, we need stronger WPR enforcement as it becomes easier to enter into "hostilities."

While others focus on the WPR itself,<sup>161</sup> the emphasis of this Note is on the public's role in preventing unilateral presidential action. In this respect, the simplest solution for the numbing effect of contemporary warfare is an increased level of public attentiveness and scrutiny concerning military actions abroad, regardless of the lack of

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<sup>160</sup> See *Libya Conflict: NATO Loses Drone Helicopter*, BBC NEWS (June 21, 2011), <http://www.bbc.co.uk/news/world-africa-13858200>.

<sup>161</sup> Possible solutions have ranged from amending the WPR, see FISHER, *supra* note 34, at 191–94 (suggesting ways to fix the WPR while also arguing that “[t]o repeal it . . . would send the wrong signal”); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 90 (1990) (“The resolution is not well drafted and does not do what the authors sought to do; it needs to be rewritten.”); Ely, *supra* note 47, at 1385 (presenting ways to strengthen the terms of the WPR), to outright repealing it, see TURNER, *supra* note 39, at 131–33 (“Now that its failure has been demonstrated . . . Congress could take a valuable first step in the direction of improved legislative-executive cooperation . . . by repealing the War Powers Resolution.”); Fisher & Adler, *supra* note 26, at 16–18 (discussing the merits of repealing the WPR).

visible costs at home. As we have seen, once the public becomes vigilant about our less-visible foreign actions, we can expect our politicians to become receptive to domestic law. But as this Note points out, the issues surrounding a toothless WPR will continue to grow and amplify as society enters a new age of technology-driven warfare. Thus, there is a pressing need for greater public awareness of the new, and perhaps less obvious, consequences of our actions abroad.<sup>162</sup> Perhaps taking note of these unforeseen costs will improve the public's inquiry into potential illegal action abroad and create real incentives to enforce the WPR.

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<sup>162</sup> E.g., Peter W. Singer, Op-Ed., *Do Drones Undermine Democracy?*, N.Y. TIMES, Jan. 22, 2012, at SR5, available at [http://www.nytimes.com/2012/01/22/opinion/sunday/drones-undermine-democracy.html?\\_r=1&scp=1&sq=do%20drones%20undermine%20democracy&st=cse](http://www.nytimes.com/2012/01/22/opinion/sunday/drones-undermine-democracy.html?_r=1&scp=1&sq=do%20drones%20undermine%20democracy&st=cse).





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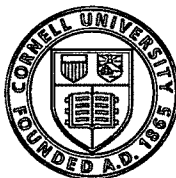
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