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DRONE STRIKES AND THE WAR POWERS RESOLUTION

*Brock Laney*¹

Tariq Khan lived in North Waziristan, which, along with its southern counterpart, suffers the majority of US drone strikes in Pakistan.² A British investigator asked Tariq if he had ever seen a drone, expecting to hear a report of sighting one or two drones per week.³ Instead, Tariq reported that he “saw 10 or 15 every day,” with drones keeping him awake at night and causing him to worry constantly about his family’s safety.⁴ Tariq died shortly after this interview alongside his 12-year-old cousin. Both were killed by a US drone.⁵

1 Brock Laney graduates with a BA in International Relations in April 2013 and will begin law school in fall 2013. He offers special thanks to Kimberly Laney, Jasmine Albers, Matthew Beck, Rebecca Bradshaw, Jordan Call, Kris Tina Carlston, Andres Gonzalez, Jordan Harvey, Daniel LeFevre, Morgan Lyons, Randall Raban, Brian Reed, and Brooke Smith for their helpful feedback and careful editing.

2 NAUREEN SHAH, COLUMBIA LAW SCHOOL HUMAN RIGHTS CLINIC & CENTER FOR CIVILIANS IN CONFLICT, THE CIVILIAN IMPACT OF DRONES: UNEXAMINED COSTS, UNANSWERED QUESTIONS 19 (2012), available at <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/The%20Civilian%20Impact%20of%20Drones.pdf> (last visited Feb. 25, 2013).

3 Nick Schiffrin, *Was Teen Killed by CIA Drone a Militant -- or Innocent Victim?*, ABC NEWS, <http://abcnews.go.com/Blotter/tariq-khan-killed-cia-drone/story?id=15258659> (last visited Feb. 25, 2013).

4 *Id.*

5 *Id.*

Proponents have called drones a last-resort weapon against terrorists,⁶ while critics respond by pointing out a number of harmful consequences that potentially outweigh the strikes' benefits.⁷ Drones undoubtedly have negative side effects on populations surrounding their targets; civilian deaths, psychological trauma, economic disruption, social deterioration, and disrupted religious practices characterize regions with high concentrations of drone strikes.⁸ These consequences do not necessarily mean that drones should no longer have a place in the US arsenal. Instead, these consequences suggest that careful, decentralized decision making should characterize discussions regarding their use.

Currently, decision making regarding the deployment of drones is concentrated in the hands of an alarmingly small number of individuals⁹ and is thereby somewhat removed from democratic processes. The evolution of drones into unique and powerful instruments of defense has occurred without the accompanying legislative in-

6 Adam Baron, *Family, Neighbors of Yemeni Killed by Drone Wonder Why he Wasn't Taken Alive*, McClatchy, (Nov. 28, 2012), <http://www.mcclatchydc.com/2012/11/28/175794/family-neighbors-of-yemeni-killed.html>; Daniel Byman, *Do Targeted Killings Work?*, Brookings, available at <http://www.brookings.edu/research/opinions/2009/07/14-targeted-killings-byman> (last visited Nov. 29, 2012).

7 See, e.g., Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all>; Robert Mackey, *Drone Strikes are Legal, US Official Says*, N.Y. TIMES LEDE BLOG (Mar. 29, 2010, 12:27 PM), <http://thelede.blogs.nytimes.com/2010/03/29/drone-strikes-are-legal-u-s-official-says/#>; Scott Shane, *C.I.A Is Disputed on Civilian Toll in Drone Strikes* N.Y. TIMES, Aug. 11, 2011, <http://www.nytimes.com/2011/08/12/world/asia/12drones.html?pagewanted=all>.

8 See INTERNATIONAL HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC AT STANFORD LAW SCHOOL & GLOBAL JUSTICE CLINIC AT NYU SCHOOL OF LAW, LIVING UNDER DRONES: DEATH, INJURY, AND TRAUMA TO CIVILIANS FROM US DRONE PRACTICES IN PAKISTAN 73-102 (2012), available at <http://livingunderdrones.org/wp-content/uploads/2012/10/Stanford-NYU-LIVING-UNDER-DRONES.pdf>.

9 See Becker & Shane, *supra* note 7.

frastructure to adequately regulate their usage. With minor modifications to existing legislation, Congress can create an environment wherein drones receive scrutiny from a wider audience. Specifically, the War Powers Resolution (WPR), which outlines congressional and presidential war powers and responsibilities, can be amended to provide an institutionalized check on the President's power to deploy drones.

My argument proceeds by (1) briefly addressing background information on drone strikes, (2) discussing the WPR in response to critiques of its constitutionality, (3) defending the inclusion of drones in the resolution by comparing drones with conventional weapons and conflict law, and (4) outlining a specific plan for adjusting the resolution to account for drone strikes which includes expanding the definition therein to explicitly include drones. Despite criticisms claiming the contrary, the WPR protects rights and rules outlined by the Constitution. Additionally, presidential compliance with the resolution since its enactment implies an inherent legitimacy. Congressional efforts to revise the WPR to account for drones will provide a valuable check on presidential power.

I. BACKGROUND

Drones, unmanned aircraft often sent on pinpoint bombing and reconnaissance missions, have been used with increasing frequency over the past few years.¹⁰ Drone strikes are especially used in areas that are difficult to reach and where political restrictions make conventional warfare unfeasible. On Pakistan's side of the Pakistan-Afghanistan border, for example, terrorists and militants have operated with relative ease from mountain caves and hideouts,

10 Karen DeYoung, *U.S. Increases Yemen Drone Strikes*, WASH. POST, Sept. 16, 2011, http://articles.washingtonpost.com/2011-09-16/world/35272722_1_drone-strikes-aqap-qaeda; Alice K. Ross et al., *The Reaper Presidency: Obama's 300th Drone Strike in Pakistan*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Dec. 3, 2012), <http://www.thebureauinvestigates.com/2012/12/03/the-reaper-presidency-obamas-300th-drone-strike-in-pakistan/>.

cluding US forces stationed in Afghanistan.¹¹ With drones, the US can achieve the dual objective of reaching remote and difficult areas while avoiding American casualties.

Defenders of drone strikes argue that drones number among the United States' last few viable options for combating terrorists and militants.¹² Even proponents of drone strikes, however, recognize the array of flaws associated with their use.¹³ To begin, finding and monitoring suspected terrorists requires highly accurate intelligence¹⁴ and isolating potential targets to avoid civilian casualties has proven nearly impossible.¹⁵ One scholar pointed out that "the Taliban don't go to a military base to build bombs or do training, [so] there are families and neighbors around,"¹⁶ which results in inadvertent civilian deaths from drone strikes.¹⁷ Next, the strikes are "poor second[s] to arrest"¹⁸ because US intelligence personnel cannot collect information from victims.¹⁹

Illustrating another drawback, drone strikes in Pakistan have exacerbated already tense US-Pakistan relations. Although this has not resulted in formal military repercussions, Pakistani officials have condemned drone activity in Pakistan because it violates their

11 See Lyse Doucet, *Mullen Focuses on Afghanistan-Pakistan Border Havens*, BBC NEWS (July 31, 2011, 7:55 PM), <http://www.bbc.co.uk/news/world-south-asia-14361024>.

12 Byman, *supra* note 6.

13 See, e.g., Byman, *supra* note 6.

14 See Byman, *supra* note 6.

15 See, e.g., Becker & Shane, *supra* note 7.

16 Shane, *supra* note 7.

17 See INTERNATIONAL HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC AT STANFORD LAW SCHOOL & GLOBAL JUSTICE CLINIC AT NYU SCHOOL OF LAW, *supra* note 8; Shane, *supra* note 7; Alice K. Ross, *Counting the Bodies in the Pakistani Drone Campaign*, THE BUREAU OF INVESTIGATIVE JOURNALISM (Oct. 15, 2012), <http://www.thebureauinvestigates.com/2012/10/15/counting-the-bodies-in-the-pakistani-drone-campaign>.

18 Byman, *supra* note 6.

19 Byman, *supra* note 6.

sovereignty and harms their citizens.²⁰ Similarly, the strikes can decrease US soft power abroad by disrupting diplomatic relations in the Middle East and provoking victims to join terrorist groups in the place of lost family members or friends.²¹ In response to a 2012 drone strike, for example, a member of the Yemeni Defense Ministry said that he “would not be surprised if a hundred tribesmen joined the lines of al-Qaeda as a result of the latest drone mistake.”²²

These problems and the disputed efficacy of drone strikes²³ make drones very costly and controversial weapons. The high costs and dubious benefits create a set of decisions that democratic instincts suggest should not fall to only a few government officials. In response to these concerns, some have called for a greater degree of transparency along with the introduction of accountability to Congress for drone activity.²⁴ This transparency and accountability acts as an important step towards making the usage of drone strikes subject to public scrutiny.

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- 20 John Chalmers & Michael Georgy, *Pakistan Says U.S. Not Listening: Drone Strikes Must Stop*, REUTERS (Apr. 26, 2012), <http://www.reuters.com/article/2012/04/26/us-pakistan-minister-drones-idUSBRE83P0AM20120426>.
- 21 See, e.g., Paul Harris, *Drone Attacks Create Terrorist Safe Havens, Warns Former CIA Official*, THE GUARDIAN (June 5, 2012, 3:56 PM), <http://www.guardian.co.uk/world/2012/jun/05/al-qaida-drone-attacks-too-broad>.
- 22 Hakim Almasmari, *Suspected U.S. Drone Strike Kills Civilians in Yemen, Officials Say*, CNN (Sept. 3, 2012, 8:30 PM), <http://www.cnn.com/2012/09/03/world/meast/yemen-drone-strike>.
- 23 Becker & Shane, *supra* note 7.
- 24 See, e.g., INTERNATIONAL HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC AT STANFORD LAW SCHOOL & GLOBAL JUSTICE CLINIC AT NYU SCHOOL OF LAW, *supra* note 8; NAUREEN SHAH, COLUMBIA LAW SCHOOL HUMAN RIGHTS CLINIC & CENTER FOR CIVILIANS IN CONFLICT, *supra* note 2; Karen McVeigh, *Obama to be Challenged Over Human Cost of CIA Drone Strikes*, THE GUARDIAN (Apr. 26, 2012, 1:22 PM), <http://www.guardian.co.uk/world/2012/apr/26/obama-drone-strikes-human-cost>.

The growing frequency of US drone strikes and the high probability of drone usage proliferating²⁵ to other countries indicate a general movement towards unmanned military assets as war-making tools. US legislators can anticipate future problems associated with this shift by modifying existing legislation to account for drone strikes now, thereby ensuring that future drone strikes occur under transparent and democratic conditions. Through simple changes to the WPR, Congress can take an important step towards controlling the use of a complicated new resource.

II. THE WAR POWERS RESOLUTION

Congress passed the WPR in an attempt to provide explicit legislative rules based on perceptions of the Framers' intent when they separated the powers to declare and direct war.²⁶ The law was passed after the Vietnam War to curtail the President's somewhat unilateral war-making capabilities and make the executive branch more accountable to Congress when unilateral action is necessary. The resolution states that war can be initiated only if one of three conditions is fulfilled: "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."²⁷ If the president deploys armed forces without a declaration of war, the resolution requires the President to brief Congress on the conflict and justify the use of force within 48 hours.²⁸ If Congress does not ratify the war with an official declaration within 60 days, the President then has 30 days to withdraw US armed forces from the conflict.²⁹ Although a straightforward law on its surface, critics have taken issue with some of its details and implications.

25 See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-536, NONPROLIFERATION (2012).

26 War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1973).

27 *Id.* § 1541(c).

28 *Id.* § 1543(a).

29 *Id.* § 1544(b).

Critics, including many US Presidents,³⁰ have questioned the constitutionality of the WPR since it became law in 1973. Despite this, all Presidents have either acted in accordance with the requirements of the WPR or have defended their lack of compliance by arguing that conflicts in which they have engaged do not apply to the resolution's requirements.³¹ To provide a recent example, President Obama provided a report to Congress "consistent with the War Powers Resolution"³² after sending troops to Uganda to fight the Lord's Resistance Army.³³ When Mr. Obama did not send a report to Congress on US military activities in Libya, Harold Koh, the legal advisor to the State Department, justified this silence by asserting that US operations in Libya did not constitute war.³⁴ Further, Koh explicitly stated that the administration did not believe the resolution to be unconstitutional.³⁵ These facts notwithstanding, I address constitutional discrepancies for the sake of strengthening the argument in favor of the WPR.

(i) *The Precedent-Violation Argument*

The first objection to the constitutionality of the resolution came in the form of a veto from President Nixon, who stated that,

One of its provisions would automatically cut off certain authorities after sixty days unless the Congress extended

30 RICHARD GRIMMETT, CONG. RESEARCH SERV., RL32267, THE WAR POWERS RESOLUTION: AFTER THIRTY YEARS (2004).

31 *See id.*

32 Letter from Barack Obama, U.S. President, to the Speaker of the House of Representatives & the President Pro Tempore of the Senate (Oct. 14, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/10/14/letter-president-speaker-house-representatives-and-president-pro-tempore>.

33 *Id.*

34 Charlie Savage & Mark Landler, *White House Defends Continuing Role in Libya Operation*, N.Y. TIMES, June 15, 2011, <http://www.nytimes.com/2011/06/16/us/politics/16powers.html?pagewanted=all>.

35 *Id.*

them. Another would allow the Congress to eliminate certain authorities merely by the passage of a concurrent resolution—an action which does not normally have the force of law, since it denies the President his constitutional role in approving legislation.³⁶

No constitutional provision explicitly supports Nixon's first objection. Rather, he relies on historical precedent, asserting that the resolution would limit powers that the executive branch had been exercising properly for years.³⁷ In a vein similar to Nixon's, some have argued that the resolution tampers with an already effective separation of powers, with one scholar arguing that neither branch has the authority to define the limits of another's power.³⁸

Historical precedent notwithstanding, Congress justified the resolution's provisions by tying them to specific powers outlined in the Constitution. The legislation cites the Constitution, which "specifically provide[s] that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof."³⁹ In the same section, Congress is given the power "to make Rules for the Government and Regulation of the land and naval Forces" as well as the responsibility to "provide for calling forth the Militia."⁴⁰ The WPR violates neither constitutional statement, but is instead supported by both. The resolution is an example of Congress filling the legislative role outlined in the first statement and creates rules that clearly fall under the category outlined in the second.

36 Richard Nixon, Veto of the War Powers Resolution (Oct. 24, 1973), in PUBLIC PAPERS OF THE PRESIDENTS 311 (Gerhard Peters & John T. Woolley eds., 2013).

37 *Id.*

38 Robert F. Turner, *The War Powers Resolution: Unconstitutional, Unnecessary, and Unhelpful*, 17 LOY. L.A. L. REV. 683 (1984).

39 War Powers Resolution § 1541(b); *see also* U.S. CONST. art. I, § 8.

40 U.S. CONST. art. I, § 8.

The President may exercise the right to deploy troops when national emergencies require it.⁴¹ Without accountability to Congress, however, the President could hypothetically wage war unilaterally and indefinitely. It is not difficult to imagine, for example, the President engaging in a long-term armed conflict without congressional approval, defending the conflict with an appeal to national defense. As an example, Truman introduced American troops into the Korean War without congressional approval, relying instead on inferences drawn from a UN Security Council Resolution.⁴² Although major fighting in Korea lasted only three years, American soldiers remain in South Korea today in the unsteady aftermath of a war that has not technically ended.⁴³ Thus, a lack of carefully enforced institutionalized oversights can potentially lend itself to lengthy campaigns waged without congressional sanction.

Critics might contend that long, undeclared campaigns are necessary for national defense. While this is likely true in many cases, the Constitution only allows for non-congressionally sanctioned military action when the US is “actually invaded, or in such imminent Danger as will not admit of delay.”⁴⁴ Allowing Congress to check the President’s long-term war powers protects the constitutional provision that the Legislature has the responsibility and right to declare war and leaves the essential short-term war powers untouched.

(ii) *The Legislative Veto*

Nixon’s second constitutional objection concerns the presence in the resolution of a legislative veto.⁴⁵ The WPR contains a provision

41 War Powers Resolution § 1541(c).

42 Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT’L LAW 21, 21 (1995).

43 Charles Armstrong, *The Korean War Never Ended*, CNN OPINION, (May 26, 2010, 10:19 AM), <http://www.cnn.com/2010/OPINION/05/24/armstrong.north.korea/index.html> (an armistice was signed, but never a peace treaty).

44 U.S. CONST. art. I, § X.

45 GRIMMETT, *supra* note 30.

allowing Congress to require the President, by joint resolution, to remove American forces from combat if the designated time limit expires.⁴⁶ According to Nixon, this provision constitutes a legislative veto, which, because it circumvents presentment to the Executive, acts as a *de facto* override of the President's power to veto an act of Congress.⁴⁷ Questions concerning the legislative veto arose in *Immigration and Naturalization Service v. Chadha*, the results of which have fueled criticisms of the WPR similar in nature to Nixon's.

Jagdish Chadha, a Kenyan slated for deportation from the US, submitted a deportation appeal to the Immigration and Naturalization Services (INS) and an immigration judge found that Chadha qualified for a suspension of his deportation.⁴⁸ Chadha's request granted, the INS submitted his name, along with 339 others, to Congress for approval.⁴⁹ The House of Representatives, exercising their perceived legal right to apply a legislative veto, overruled the judge's decision, prompting an appeals process that escalated to the Supreme Court.⁵⁰ The Court ultimately ruled against the House, finding the legislative veto unconstitutional,⁵¹ pointing out additionally that the House violated the principle of bicameralism.⁵² This decision has provided support for critics of the WPR who condemn the legislative veto provision found therein.⁵³

The Court's ruling in *Chadha* does not, however, necessarily outlaw legislative vetoes generally, nor does it guarantee the unconstitutionality of their usage under the WPR for two reasons. First, dissenting opinions indicate the importance of the legislative veto in preserving Congress's constitutional powers. Supreme Court Jus-

46 War Powers Resolution § 1541(c).

47 See Nixon, *supra* note 36.

48 *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 923, 924 (1983) (Rehnquist, J. & White, J., dissenting).

49 *Chadha*, 462 U.S. at 924.

50 See *id.*

51 *Chadha*, 462 U.S. at 959.

52 See *id.* at 949.

53 GRIMMETT, *supra* note 30.

tice Powell, who agreed with the ruling “only in the judgment,”⁵⁴ argued that “the breadth of this holding gives one pause. Congress has included the veto in literally hundreds of statutes, dating back to the 1930’s. Congress clearly views this procedure as essential to controlling the delegation of power to administrative agencies.”⁵⁵ Similarly, Justice White argued in a dissenting opinion that without the legislative veto, Congress would be forced to “refrain from delegating necessary authority . . . or, in the alternative, to abdicate its law-making function to the Executive Branch and independent agencies.”⁵⁶ These opinions indicate that including legislative vetoes in some statutes and resolutions strengthens the system of checks and balances instead of violating them.

Second, the legislative action condemned in *Chadha* is not perfectly comparable to the one in the WPR. The court found additional fault with the House’s unilateral action because it violated the principle of bicameralism.⁵⁷ The additional violation of bicameralism makes the ruling in *Chadha* distinct from other forms of legislative vetoes, thus potentially exempting the WPR from the implications of this case. These distinctions have led some scholars to conclude that *Chadha* does not condemn the WPR.⁵⁸

Despite key differences between the legislative veto in *Chadha* and the one in the WPR, some argue that *Chadha* does ultimately confirm the unconstitutionality of the legislative veto in the resolution.⁵⁹ Accepting this consensus, however, still does not destroy the

54 *Chadha*, 462 U.S. at 959 (Powell, J., concurring).

55 *Id.* at 959, 960.

56 *Id.* at 968 (White, J., dissenting).

57 *Id.* at 949 (majority opinion).

58 *See, e.g.*, G. Sidney Buchanan, *In Defense of the War Powers Resolution: Chadha Does Not Apply*, 22 HOUS. L. REV. 1155 (1985); Mark L. Krotoski, *Essential Elements of Reform of the War Powers Resolution*, 29 SANTA CLARA L. REV. 607 (1989); Clement J. Zablocki, *War Powers Resolution: Its Past Record and Future Promise*, 17 LOY. L.A. L. REV. 579 (1984).

59 *See, e.g.*, Krotoski, *supra* note 53.

validity of the WPR. The resolution's Separability Clause⁶⁰ indicates that all other sections remain legally intact should any other section fail to survive constitutional scrutiny.⁶¹ Although the removal of the legislative veto capability would limit the ability of the legislature to enforce the resolution, there are other tools Congress could implement to check presidential action.⁶²

In conclusion, criticisms of the WPR ultimately fail because (1) the resolution protects powers explicitly granted by the Constitution,⁶³ (2) the legislative veto helps Congress protect constitutionally granted war powers,⁶⁴ and (3) even given a conclusively unconstitutional legislative veto, the Separability Clause protects all other clauses in the resolution.⁶⁵ Finally, regardless of criticisms of the WPR, US Presidents have provided reports to Congress consistent with the requirements of the legislation since its enactment, providing evidence of its legitimacy.⁶⁶

III. DRONE STRIKES AND THE WAR POWERS RESOLUTION

Observed individually, single drone strikes might more closely resemble assassinations than warfare. A more comprehensive view of US drone operations in Pakistan, Yemen, or Somalia, however, reveals several characteristics that place drone strikes campaigns more securely within the category of conventional warfare. Just as Yorktown and Bunker Hill fall under the broader category of the American Revolutionary War, individual drone strikes are often constituent parts of larger campaigns with identifiable goals. Pro-

60 War Powers Resolution § 1548.

61 See Zablocki, *supra* note 58, at 590.

62 See, e.g., Krotoski, *supra* note 58, 690 (alternatives to a joint resolution include, for example, overruling a presidential veto with a two-thirds majority or cutting off funds to the military).

63 See War Powers Resolution § 1541.

64 *Id.*

65 See *id.* § 1548.

66 GRIMMETT, *supra* note 30.

longed drone strike campaigns resemble war in levels of casualties, spillover effects into civilian populations, and consistency of attacks. Additionally, the Obama administration has justified drone activity by appealing to international conflict law, calling drone attacks part of a war on a specific belligerent.⁶⁷ Thus, in this section I discuss similarities between drone strikes campaigns and war to justify the inclusion of drones under the authority of Congress. After establishing this, I discuss specific changes to the WPR that can provide an institutionalized accounting for drone activity.

(i) War-Like Characteristics of Drone Strikes Campaigns

First, drone strikes cause civilian and militant casualties in numbers that resemble trends typical of conventional warfare. Drone strikes' clandestine nature makes estimates of deaths from attacks difficult to calculate, but careful studies of drone activity in Pakistan, Yemen, and Somalia since 2002 estimate casualties between 3,900⁶⁸ and 4,700.⁶⁹ To provide a comparison, the US suffered roughly 4,485 casualties from 2003-2012 in Iraq.⁷⁰ Although US officials have praised drones as capable of conducting surgical strikes with little or no collateral damage,⁷¹ third parties estimate hundreds of civilian

67 Ari Shapiro, *U.S. Drone Strikes are Justified, Legal Adviser Says*, NPR (March 26, 2010, 2:45 AM), <http://www.npr.org/templates/story/story.php?storyId=125206000>.

68 THE BUREAU OF INVESTIGATIVE JOURNALISM, *Casualty Estimates*, <http://www.thebureauinvestigates.com/category/projects/drone-data/> (last visited Feb. 27, 2013).

69 *US Senator Says Drones Death Toll is 4700*, THE TELEGRAPH, Feb. 21, 2013, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/9884667/US-senator-says-drones-death-toll-is-4700.html>.

70 *Casualties in Iraq*, THE WALL STREET JOURNAL, <http://online.wsj.com/public/resources/documents/IRAQ-CASUALTY-COUNT.html> (last visited Feb. 27, 2013); *Operation Iraqi Freedom*, ICASUALTIES.ORG, <http://icasualties.org/> (last visited Feb. 27, 2013).

71 Ken Dilanian, *U.S. Counter-Terrorism Strategy to Rely on Surgical Strikes, Unmanned Drones*, L.A. TIMES, June 29, 2011, <http://articles.latimes.com/2011/jun/29/news/la-pn-al-qaeda-strategy-20110629>.

casualties.⁷² Drone strikes also cause significant injuries and property damage.⁷³ Finally, the nearly constant presence of drones over many villages in North and South Waziristan causes psychological and stress-related health problems that affect large proportions of civilian populations.⁷⁴

Next, drone activity resembles war in its targeting of a specific belligerent over an extended period of time. Drone strikes occur on a monthly basis, with an average of roughly 32 deaths per month.⁷⁵ Further, most drone strikes have targeted militants, the majority of which were associated with the Taliban and al-Qaeda.⁷⁶ Attorney General Holder argued that the US faces a “stateless enemy,”⁷⁷ but it is a specific enemy nonetheless. These facts, along with the regional focus of anti-militant drone strikes, bear similarity to conventional warfare wherein belligerents remain fixed and identifiable throughout the duration of a conflict.

Finally, the Obama administration consistently justifies drone activity by citing international law as it relates to war, referring to individual drone strikes as part of a war on al-Qaeda and the Taliban.⁷⁸ Harold Koh, for example, defended drones by referencing the

72 See, e.g., INTERNATIONAL HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC AT STANFORD LAW SCHOOL & GLOBAL JUSTICE CLINIC AT NYU SCHOOL OF LAW, *supra* note 8; THE BUREAU OF INVESTIGATIVE JOURNALISM, *supra* note 68.

73 See INTERNATIONAL HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC AT STANFORD LAW SCHOOL & GLOBAL JUSTICE CLINIC AT NYU SCHOOL OF LAW, *supra* note 8.

74 See INTERNATIONAL HUMAN RIGHTS AND CONFLICT RESOLUTION CLINIC AT STANFORD LAW SCHOOL & GLOBAL JUSTICE CLINIC AT NYU SCHOOL OF LAW, *supra* note 8, at 80-88.

75 See THE BUREAU OF INVESTIGATIVE JOURNALISM, *supra* note 68.

76 See *The Year of the Drone: Key Observations*, THE NEW AMERICA FOUNDATION, <http://counterterrorism.newamerica.net/drones/observations> (last visited Feb. 27, 2013).

77 Att’y Gen. Eric Holder, Address at Northwestern University School of Law (Mar. 5, 2012).

78 Shapiro, *supra* note 67.

right of the US to self-defense, which is sanctioned by international law.⁷⁹ Koh stated that “the U.S. is in armed conflict with al-Qaeda as well as the Taliban and associated forces in response to the horrific acts of 9/11.”⁸⁰ The administration’s explicit and repeated branding of drone activity in the Middle East as war provides strong evidence that drone campaigns deserve attention under the WPR alongside conventional warfare.

Admittedly, drone campaigns are not identical to other forms of war. Pakistan, for example, has not reacted to US military activity in its country with physical retributive action. In drone warfare, however, countries are not the targets, which explains in great measure Pakistan’s lack of military retaliation. Classifying drone campaigns as war does not require complete uniformity of attributes with other implements of traditional warfare because the nature of war is context dependent. Drones, deployed in the name of national defense, should not be subject to a separate list of constraints than are other instruments of war deployed for similar reasons.⁸¹

(ii) Accounting for Drones in the War Powers Resolution

The inclusion of drone strikes in the WPR would duly anticipate an increasing trend towards fighting through unmanned vehicles.⁸² This global trend has indicated that “technologies that remove humans from the battlefield are becoming the new normal in war.”⁸³ The costs to the US in terms of personnel casualties and political

79 Shapiro, *supra* note 67.

80 Shapiro, *supra* note 67.

81 Huma Imtiaz, *Drones Have Taken Us Into Undeclared War in Pakistan: US Congressman*, THE EXPRESS TRIBUNE (May 31, 2012), <http://tribune.com.pk/story/386903/congressmen-ask-obama-for-target-criteria-legal-justification-of-drone-strikes/>.

82 See, e.g., DRONE WARS UK, *Mapping Drone Proliferation: UAVs in 76 Countries*, GLOBAL RESEARCH (Sept. 18, 2012), <http://www.globalresearch.ca/mapping-drone-proliferation-uavs-in-76-countries/5305191>.

83 Peter W. Singer, Op-Ed., *Do Drones Undermine Democracy?*, N.Y. TIMES, Jan. 21, 2012, <http://www.nytimes.com/2012/01/22/opinion/sunday/do-drones-undermine-democracy.html?pagewanted=all>.

capital remain so low relative to other types of conflict that drone usage will likely persist or increase in frequency. The changing nature of international conflict suggests that drones and other unmanned military assets will probably become important aspects of war. Properly classifying drones and implementing a congressional check on their usage at a time when they are emerging as conventional weapons is therefore very important.

Accounting for drones through the WPR would require only small modifications to the legislation. The resolution refers to “armed forces” as the asset of interest that Congress seeks to regulate.⁸⁴ To induct drones into the WPR, legislators can expand the definition of armed forces therein to explicitly include drones and other unmanned military assets. Specifically, the resolution should define “armed forces” as any US military asset, manned or unmanned, deployed in the interest of national security with specific military target(s). Similar to the current version of the resolution, the updated law should require any President that deploys these military assets to abide by the restrictions and protocols outlined therein.

An effective definition of drone strikes as part of the armed forces must necessarily address conditional factors since drones are not used exclusively for long-term campaigns. Drones are sometimes used for assassinations and other objectives, and although guidelines for controlling their use in these other areas are too broad to be discussed here, modifications to the resolution should account for those distinct circumstances. To avoid unnecessary and possibly detrimental consequences of reporting covert operations to Congress, the updated resolution should include a clause that limits the type of drone activity the President must report to Congress. To distinguish between long-term campaigns and single attacks, the law should specify that two attacks targeting the same group or occurring in the same country within one month of each other constitute the beginning of a campaign. Once this condition is met, proceeding with the campaign would require presidential action as outlined in the WPR.

Although seemingly arbitrary, two drone strikes in one month is likely an effective indicator that a series of attacks is becoming a

campaign, and Congress should have the power to exert its constitutional authority when such a benchmark is reached. Reports indicate that there have been, on average, 2.84 drone attacks per month in Pakistan since 2004.⁸⁵ Attacks in Yemen exhibit similar patterns, although the consistency of those attacks has not risen to Pakistan's levels until recently.⁸⁶ Using these current trends as a baseline helps determine the appropriate attack frequency for determining the starting point of a campaign. Because unsuccessful assassination attempts may necessitate a second attack in a relatively short period of time, the success of an attack should be considered in the definition of which attacks count towards defining a series of attacks as a campaign. Only attacks that successfully eliminate the intended target should be counted towards the limit. This will allow for repeated attempts if an assassination or other single operation endeavor fails after an initial attempt.

Some might argue that including drone strikes in the WPR raises the cost of using drones to an unacceptably high level because their use would require formal sanction. Congressional approval, however, does not necessarily constitute an official declaration of war. Presidents have reported a number of conflicts to Congress consistent with the WPR that have proceeded without an official declaration from Congress.⁸⁷ Additionally, the Obama administration explicitly classifies the conflict with al-Qaeda and the Taliban as "armed conflict"⁸⁸ and gaining explicit approval from Congress would not change the costs of moving forward with the conflict. Finally, obtaining congressional approval would potentially create

85 See Justin Elliott, Cora Currier & Lena Groeger, *How Obama Drone Death Claims Stack Up*, PROPUBLICA (June 18, 2012), <http://www.propublica.org/special/how-obama-drone-death-claims-stack-up>.

86 Peter Bergen & Jennifer Rowland, *Obama Ramps Up Covert War in Yemen*, CNN OPINION (June 12, 2012), <http://www.cnn.com/2012/06/11/opinion/bergen-yemen-drone-war/index.html>.

87 See GRIMMETT, *supra* note 30.

88 Harold Hongju Koh, Legal Adviser, U.S. Dept. of State, Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010).

greater domestic legitimacy for a campaign, thereby strengthening the President's political position instead of weakening it. These considerations indicate that Congress can justifiably and easily address the lack of institutional oversight for drone warfare through modifying the WPR.

IV. CONCLUSION

Although critics have disputed the constitutionality of the WPR, the major functional pieces of the law are specifically backed by the Constitution. Further, US Presidents have provided reports to Congress in compliance with the legislation, suggesting some level of implied legitimacy for the resolution. Revising the WPR to include drones and other non-conventional weapons will provide an essential check on presidential power as these forms of conflict become more common in the future.

The current drone strikes campaign has proven very costly and the cost-benefit analysis should not be limited to the President, White House aides, and a handful of correspondents at the CIA. The negative consequences of drone strikes suggest that a greater number of decision makers should become involved in the discussion of whether or not to move forward with these costly campaigns of dubious merit.

The nature of conflict is constantly evolving. Legislation must also evolve through a combination of pragmatism and foresight in the interest of protecting democratic processes and human rights.