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THE CONSULTATION CLAUSE OF THE 1973 WAR POWERS RESOLUTION

Laurence D. Pierce*

INTRODUCTION

In 1973, Congress enacted the War Powers Resolution.¹ The purpose of the Resolution was “to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances”² Section 3 of the War Powers Resolution, the consultation clause, provides:

The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after each such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.³

Prior consultation pursuant to section 3 is the first of three major components of the War Powers Resolution. Section 4 requires that within forty-eight hours after armed forces are introduced, the President must report in writing to the Speaker of the House of Representatives and to the President pro tempore of the Senate. The report must set forth the constitutional and legislative authority under which the introduction took place, and the estimated scope and duration of the hostilities.⁴ Submission of the section 4 report triggers the Resolution's third component. Within sixty days of the report the President shall terminate the use of armed forces unless Congress specifically authorizes a longer military involvement by declaration of war or

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¹ Pub. L. No. 93-148, 87 Stat. 555 (1973). Like a bill, a joint resolution has the force of law if approved by both Houses of Congress and the President. Today there is little practical difference between the two, and they are often used interchangeably. This legislation was “entitled a resolution instead of an act in deference to the original House version which was designed to ‘elaborate’ on the war powers rather than give an ‘itemized definition’ of them.” King & Levens, *Curbing the Dog of War: The War Powers Resolution*, 18 Harv. Int'l L. J. 55, 76, n.94 (1977).

² War Powers Resolution, Pub. L. No. 93-148, § 2(a), 87 Stat. 555 (1973).

³ *Id.* § 3.

⁴ *Id.* § 4(a).

otherwise.⁵ This sixty-day period may be extended an additional thirty days if the President certifies to the Congress that an "unavoidable military necessity"⁶ requires the continued use of armed forces. The final paragraph of section 5 reserves for Congress the right to terminate the use of Armed Forces any time before or after expiration of the sixty-day period by passing a concurrent resolution.⁷

The President has submitted war-powers reports pursuant to section 4 on five occasions. The first three of these reports came during April and May of 1975 following President Ford's use of troops to evacuate United States nationals and refugees from Southeast Asia.⁸ The fourth war-powers report was filed May 15, 1975 after President Ford ordered military forces to retake the S.S. Mayaguez which had been seized by Cambodian naval boats in international waters.⁹ Most recently, on April 26, 1980, President Carter submitted a war-powers report after using armed forces in an attempt to rescue American hostages held captive in Iran.

Part I of this comment examines the legislative evolution of the consultation clause to ascertain the intent of those congressional members who drafted and ratified the War Powers Resolution. Part II distinguishes war-powers consultation and "briefing." Part III examines the potential for realizing this congressional intent, given the limitations inherent in congressionally mandated consultation together with the particular limitations imposed by the language of this provision. Parts IV and V respectively examine the gap between the congressional intent and practical effect of the War Powers Resolution, and the specific changes that could be made to ensure greater compliance with the consultation clause. The conclusion is that the imprecision of section 3 permits the President to make most deploy-

⁵ *Id.* § 5(b).

⁶ *Id.*

⁷ *Id.* § 5c. A concurrent resolution may be passed by a simple majority vote of both the House and Senate. Because it becomes law without the President's signature, the concurrent resolution has also been called a "congressional veto." The constitutionality of this provision of the War Powers Resolution has been challenged as a violation of the "presentation clause" of article I, section 7 "which envisions only one way to make laws: by an affirmative vote of a majority of Congress followed by the assent of the President, or by two-thirds of each chamber overriding his veto." T. Frank & E. Weisband, *Foreign Policy By Congress* 76 (1979).

⁸ On April 4, 1975 naval vessels, helicopters and marines were sent to assist in the evacuation of refugees and United States nationals from Danang and other seaports in South Vietnam. On April 12, 1975, President Ford ordered military forces to proceed with the evacuation of United States nationals from Phnom Penh. On April 30, 1975, the President sent marines to evacuate United States nationals and South Vietnamese from the United States Embassy in Saigon.

⁹ For a further discussion of the first four incidents to trigger provisions of the War Powers Resolution, see P. Holt, *The War Powers Resolution, The Role of Congress in U.S. Armed Intervention*, American Enterprise Institute for Public Policy Research, Washington, D.C. 1-2 (1978).

ments of United States Armed Forces without observing the prior consultation requirement.

I. THE LEGISLATIVE HISTORY

During the late 1960s, as the United States military involvement in Southeast Asia escalated, there was a growing sense shared by Congress and the public, that the President, through the use of the undeclared war,¹⁰ had illegally assumed complete war making power. Under articles I and II of the Constitution the war making authority was to have been, at least to some extent, a shared executive-legislative responsibility.¹¹ Accordingly, on June 25, 1969, the Senate passed the National Commitments Resolution,¹² a non-binding simple resolution,¹³ which asked the President to reconsider the use of United States troops in Vietnam without express congressional authorization. This was the first in a series of legislation aimed at recapturing some of Congress' lost war making power.¹⁴ On November 16, 1970, the House passed H.R.J. Res. 1355,¹⁵ a war-powers measure requiring the President to consult with Congress "whenever feasible" before introducing United States Armed Forces into hostilities. No action was taken by the Senate on this resolution, and it died at the end of the 91st Congress. In August of 1971, the House passed H.R.J. Res. 1,¹⁶ a

¹⁰ As early as 1800 Presidents began using their authority as Commander-in-Chief under article II, section 2 to involve the Country in undeclared wars. This unilateral exercise of war making power resulted in the gradual diminution in practical importance of Congress' authority under article I, section 8 to declare war. See T. Frank & E. Weisband, *supra* note 7, at 63.

¹¹ The constitutional allocation of war making authority to Congress under article I, section 8, and to the President under article II, section 2 has generated substantial debate and will not be reexamined here. These issues have been exhaustively, though inconclusively, treated in the following: King & Levens, *supra* note 1, at 56; Frank, *After the Fall: The New Procedural Framework for Congressional Control Over the War Power*, 71 Am. J. Int'l L. 605 (1977); Sofaer, *The Presidency, War, and Foreign Affairs: Practice Under the Framers*, 40 L. & Contemp. Prob. 12 (1976); Kelley, *The Constitutional Implications of the Mayaguez Incident*, 3 Hastings L.Q. 301 (1976); Beston, *Separation of Powers in the Domain of Foreign Affairs: The Original Intent of the Constitution Historically Examined*, 5 Seton Hall L. Rev. 529 (1974); L. Henkin, *Foreign Affairs and the Constitution* (1972).

¹² S. Res. 85, S. Rep. No. 129, 91st Cong., 1st Sess. (1969).

¹³ A simple resolution deals with matters entirely within the prerogatives of either the House or the Senate. It requires neither passage by the other body nor approval by the President, and does not have the force of law.

¹⁴ For a thorough discussion of the predecessor legislation see T. Frank & E. Weisband, *supra* note 7 at 67. Spong, *The War Powers Resolution Revisited: Historic Accomplishment or Surrender*, 16 Wm. & Mary L. Rev. 823, 824 (1975); Jenkins, *The War Powers Resolution: Statutory Limitation on the Commander-In-Chief*, 11 Harv. J. Legis. 181, 185 (1974); Spong, *Can Balance be Restored in the Constitutional War Powers of the President and the Congress?*, 6 U. Rich. L. Rev. 1 (1971).

¹⁵ H.R.J. Res. 1355, 91st Cong., 2nd Sess. (1970).

¹⁶ H.R.J. Res. 1, 92d Cong., 1st Sess. (1971).

similar joint resolution, but without the phrase "whenever feasible." After the Senate passed S. 2956,¹⁷ on April 17, 1972, the House again passed H.R.J. Res. 1, as a substitute for the Senate bill. Conferees were appointed, but no agreement was reached, and the legislation died at the end of the 92d Congress.

The allocation of war making authority was raised again in the 93d Congress. On July 23, 1973, the Senate passed S. 440.¹⁸ This bill, introduced by Senator Javits together with fifty-two co-sponsors, was identical to S. 2956 which had been introduced the previous session. S. 440 did not include an explicit consultation requirement. The report, issued by the Senate Committee on Foreign Relations to accompany S. 440, however, did speak of "renewing close consultation"¹⁹ between the executive and legislative branches. The committee believed that executive-congressional consultations would inevitably result from the President's obligation under the bill to make Congress a partner in shaping foreign policy.²⁰

Meanwhile on July 19, 1973, the House had passed its version of the War Powers Resolution, H.R.J. Res. 542, section 2 of which provided:

The President in every possible instance shall consult with the leadership and appropriate committees of the Congress before committing United States Armed Forces to hostilities or to situations where hostilities may be imminent and after every such commitment shall consult regularly with such Members and committees until such United States Armed Forces are no longer engaged in hostilities or have been removed from areas where hostilities may be imminent.²¹

The report accompanying H.R.J. Res. 542 prepared by the Committee on Foreign Affairs explicitly distinguished "consulting" from simply "informing" the Congress, by explaining that:

consultation in this provision means that a decision is pending on a problem and that members of Congress are being asked by the President for their advice and opinions and, in appropriate circumstances, their approval of action contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available.²²

¹⁷ S. 2956, 92d Cong., 2nd Sess. (1972).

¹⁸ S. 440, 93d Cong., 1st Sess. (1973).

¹⁹ S. Rep. No. 220, 93d Cong., 1st Sess. 24-25 (1973).

²⁰ *Id.*

²¹ H.R.J. Res. 542, 93d Cong., 1st Sess. § 2 (1973).

²² H.R. Rep. No. 287, 93d Cong., 1st Sess. 6-7 (1973).

A conference on H.R.J. Res. 542 was requested by the House July 31, 1973, and a report filed October 4, 1973.²³ The final war-powers measure as it emerged from conference embodied elements of both S. 440 and H.R.J. Res. 542. As a whole, however, the final text more closely resembled the original House version.

That part of the joint explanatory statement of the conference committee, dealing with the consultation clause,²⁴ shed little light on the intended meaning of the consultation requirement. The intent of the joint conferees, however, can be gleaned from congressional debate prior to the vote on the measure.

On October 10, 1973, Senator Javits, the individual credited with principal authorship of the War Powers Resolution, explained to his Senate colleagues:

Section 3, the provisions establishing a statutory requirement of advance consultation as well as continuing consultation with the Congress, is to be read as maximal rather than minimal. The consultation requirement is not discretionary for the President; he is obliged by law to consult before the introduction of forces into hostilities and to continue consultations so long as the troops are engaged.²⁵

During the same debate Senator Stennis stated:

The legislation includes provisions urging consultation between the President and the Congress before U.S. Forces are introduced into hostilities, or situations where hostilities appear imminent. This is a particularly important provision because it emphasizes that it is only as a result of both of these branches of the Federal Government working together and accepting their responsibilities that the nation should be committed to war.²⁶

On the House side, Representative O'Neill said, "[The War Powers Resolution] neither takes away nor increases the President's constitutional authority to deal with overseas crises. It simply provides that when the President acts, he must consult with the Congress and seek its concurrence before committing our country to war. That is the basic fact of this legislation."²⁷ Also with respect to the consultation clause, Representative Cleveland said, "[The] war-powers legislation should foster a greater amount of consultation between the Executive

²³ H.R. Rep. No. 547, 93d Cong., 1st Sess. (1973).

²⁴ *Id.* at 8.

²⁵ 119 Cong. Rec. 33550 (1973).

²⁶ 119 Cong. Rec. 33560 (1973).

²⁷ 119 Cong. Rec. 36212 (1973).

and Congress well in advance of the emergence of crises in which this resolution would have effect."²⁸

While the consultation clause of the original House bill was left substantially intact by the conferees, "committing" and "committed," which appear in the earlier version, were changed to "introducing" and "introduction."²⁹ This change suggests less congressional involvement in the decision making process, implicitly mandating consultation only before the actual physical movement of troops into hostilities. While the House version required consultation before committing forces to situations where hostilities "may be imminent," the conferees instead adopted language requiring consultation only where an imminent involvement in hostilities "is clearly indicated."³⁰ This change apparently limits the range of situations where the President is bound to consult. The requirement that the President consult with "Congress" instead of with the "leadership and appropriate committees,"³¹ as required under the House version, makes that clause less specific as to who the President should consult. Despite these changes, the intent that the President engage in some form of meaningful, non-discretionary consultation before deploying armed forces remains clear and in accord with the original House and Senate versions.

The conference report was adopted by the Senate on October 10, 1973, and by the House on October 12. On October 25, President Nixon vetoed the War Powers Resolution calling it unconstitutional and a danger to foreign policy.³² On November 7, at a time of widespread anti-war sentiment,³³ the House, by a four-vote margin, overrode the President's veto of H.R.J. Res. 542.³⁴ Following similar

²⁸ 119 Cong. Rec. 33872 (1973).

²⁹ Section 2 of H.R.J. Res. 542 required that "[t]he President . . . shall consult . . . before committing United States Armed Forces . . . and after every such *commitment* shall consult regularly . . ." (Emphasis added.) See note 21 *supra* and accompanying text. Under section 3 of the War Powers Resolution "[t]he President shall consult . . . before *introducing* United States Armed Forces . . . and after each such *introduction* shall consult regularly . . ." (Emphasis added.) See note 3 *supra* and accompanying text.

³⁰ Section 2 of H.R.J. Res. 542 required that "[t]he President . . . shall consult . . . before committing United States Armed Forces . . . where *hostilities may be imminent* . . ." (Emphasis added.) See note 21 *supra* and accompanying text. Under section 3 of the War Powers Resolution "[t]he President . . . shall consult before introducing United States Armed Forces . . . where imminent involvement in hostilities *is clearly indicated* by the circumstances . . ." (Emphasis added.) See note 3 *supra* and accompanying text.

³¹ See notes 3 and 21 *supra* and accompanying text.

³² H.R. Doc. No. 171, 93d Cong., 1st Sess. (1973). For a discussion of the constitutionality of the War Powers Resolution, see material cited note 11 *supra*.

³³ The existing public disapproval of our involvement in Vietnam had been further heightened by the secret bombings of Cambodia during May of 1970.

³⁴ 119 Cong. Rec. 36221 (1973).

action in the Senate,³⁵ the measure became Public Law Number 93-148.³⁶

II. WAR-POWERS CONSULTATION AND "BRIEFING" DISTINGUISHED

Under article II, section 2 of the Constitution, the President is the Commander-in-Chief of the Army and Navy. On the basis of that authority, the President assumes exclusive control over the instruments of military action; the President alone is empowered to mobilize United States troops.³⁷ To assist in the exercise of this military power, the President receives from intelligence sources the most detailed and sensitive information concerning the international situations which might lead to the use of military force. By comparison, Congress, cast in the role of the war-powers consultant, is generally less informed. With the power to act, and superior intelligence information, the President lacks incentive to engage in prior, meaningful consultation. As a result, war-powers consultation has often been reduced to "briefing." The distinction is significant; "consultation" is a formal deliberation involving a balanced exchange of opinion. "Briefing," on the other hand, is merely a one-sided notification, which in terms of the exercise of the war powers, means disclosure of intelligence information to which the President alone is privy.

Without the power to deploy troops, and in most instances without the intelligence information necessary to make fully informed decisions of a military nature, Congress' capacity for involvement in war-powers decision making is limited. Nevertheless, war-powers consultation need not be reduced to "briefing." Despite the lack of power and information, meaningful consultation is possible. Even where the President is simply informing members of Congress of contemplated military action, if the discussions occur before the initiation of the military action, at least those members would have an opportunity to communicate approving or dissenting views to the President. Even without equal intelligence information, congressional members can provide non-expert opinion representing actual or anticipated constituent sentiment.

³⁵ 119 Cong. Rec. 36198 (1973).

³⁶ War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).

³⁷ As Commander-in-Chief the President has exclusive power to act. Whether the President has the "authority" under the War Powers Resolution to match the exclusive power is arguable. Section 2(c) of the War Powers Resolution seems to authorize the exercise of the President's power as Commander-in-Chief only pursuant to, "(1)[a] declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." For a discussion of whether section 2(c) should be considered a statement of policy or a statutory limitation on the President's use of force, see Spong, *The War Powers Resolution Revisited: Historic Accomplishment or Surrender*, *supra* note 14, at 837; Jenkins, *supra* note 14, at 188.

III. ENFORCING WAR-POWERS CONSULTATION

The War Powers Resolution is silent as to explicit sanctions against a President who fails to comply with the consultation requirements of section 3. Although not a direct sanction, where the President wishes to continue the use of armed forces beyond the limits prescribed by the resolution, congressional authorization is required.³⁸ Seemingly, Congress had hoped that the possibility of withholding this authorization, together with the political pressure brought to bear on a President acting in clear violation of an explicit provision of law, would be sufficient to ensure compliance. To date, in situations where military action has not been preceded by consultation as required by the Resolution, disregard for section 3 has not aroused enough public opposition to create a climate which would encourage Congress to oppose the President's actions.

The ways of compelling the President to engage in the consultation required by the War Powers Resolution are at best ineffective. For example, Congress might impose economic sanctions, but as Senator Javits observed, such sanctions are "clumsy, blunt and obsolescent."³⁹ Furthermore, a suit brought to challenge the constitutionality of all or part of the War Powers Resolution may be barred by the political question doctrine.⁴⁰ Congress has held oversight hearings in an effort to assess and improve compliance with the consultation provisions of the Resolution,⁴¹ but these hearings have been investigative in nature rather than punitive, and of limited enforcement value.

³⁸ See note 5 *supra* and accompanying text.

³⁹ 119 Cong. Rec. 1395 (1973). *But see*, Glennon, Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions, 60 Minn. L. Rev. 1 (1975) (Congress can effectively limit presidential war making power by means of its exclusive power over the purse). For an analysis of other possible means of enforcing the consultation clause see Zultz, *Recapture of the S.S. Mayaguez: Failure of the Consultation Clause of the War Powers Resolution*, 8 Int'l. L. & Pol. 457, 472 (1976).

⁴⁰ As yet, no such challenge has been made to the constitutionality of the War Powers Resolution. While the United States Supreme Court has explicitly rejected the notion that any issue involving foreign affairs would be immune from judicial review, *Baker v. Carr*, 369 U.S. 186, 211 (1962), most courts held that suits challenging the legality of the Vietnam conflict to be nonjusticiable. See *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) *cert. denied*, 416 U.S. 936 (1974); *DeCosta v. Laird*, 471 F.2d 1146 (2d Cir. 1973); *Luflig v. McNamara*, 373 F.2d 664 (D.C. Cir. 1967) *cert. denied*, 387 U.S. 945 (1967); *Allee v. Laird*, 347 F. Supp. 689 (E.D.Pa. 1972), *aff'd* 411 U.S. 911 (1973); *Gravel v. Laird*, 347 F. Supp. 7 (D.D.C. 1972). *But see* *Massachusetts v. Laird*, 451 F.2d. 26 (1st Cir. 1971); *Berk v. Laird*, 429 F.2d 302 (2d Cir. 1970). For a detailed discussion of judicial review of executive war-making see Firmage, *The War Powers and the Political Question Doctrine*, 49 Colo. L. Rev. 65 (1977).

⁴¹ See *Congressional Oversight of War Powers Compliance: Zaire Airlift: Hearings before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 95th Cong., 2d Sess. (1978); *War Powers Resolution: Hearings Before Comm.*

There is a basic two-part problem with enforcing any war-powers consultation. First, Congress will probably not be aware of any non-compliance until there has been a violation. Accordingly, enforcement can only exist in the form of a reprimand after-the-fact.⁴² Second, because any critical *post hoc* response might be considered unpatriotic, there will be a tendency on the part of Congress and the public to support the President's decision to use military force even where the action patently violates the consultation requirements of the War Powers Resolution.⁴³

President Ford's use of military force to recapture the S.S. Mayaguez illustrates these enforcement problems.⁴⁴ According to the chronology of events prepared by the Department of State,⁴⁵ on May 12, 1975, at 5:02 a.m.,⁴⁶ the United States Embassy in Jakarta informed Washington and the President that the Mayaguez had been seized. At 7:30 a.m. a reconnaissance aircraft was sent by the Pentagon to find the ship. At 1:50 p.m. the White House conducted a press briefing and issued a statement concerning the incident, and the next morning, May 13, at 6:54 a.m. another press briefing was held regarding the ship's location. That afternoon, for the first time, the congressional leadership was contacted by telephone and advised that the President had directed military actions to prevent the Mayaguez and its crew from being transferred to the Cambodian mainland. Less than half an hour later, at 7:04 p.m., the first shots were fired by United States Air Force planes at Cambodian patrol boats. The next day, May 14, between 4:45 p.m. and 5:10 p.m., orders were issued by the President to begin military operations to recover the Mayaguez and its crew. Between 6:40 p.m. and 7:40 p.m. the President met with congressional leaders to inform them of action he had taken to recover the ship. At 9:33 p.m. the Mayaguez was recaptured and by 11:07 p.m. the crew was aboard the U.S.S. Wilson. On May 15, in

on Foreign Relations, 95th Cong. (1977) (hereinafter cited as *War Powers Resolution: Hearings*); *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings before the Subcomm. on International Security and Scientific Affairs of the House Comm. on International Relations*, 94th Cong., 1st Sess. (1975) (hereinafter cited as *War Powers: A Test of Compliance*).

⁴² For a discussion of what has been called the *fait accompli* problem see King & Levens, *supra* note 1, at 88; Jenkins, *supra* note 14, at 201.

⁴³ See Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 Harv. L. Rev. 1771, 1796 (1968).

⁴⁴ This was the fourth international incident to trigger provisions of the War Powers Resolution. See notes 8 and 9 *supra* and accompanying text for a discussion of the first three incidents. For a discussion of the ineffectiveness of the War Powers Resolution during the Mayaguez incident see Kelley, *supra* note 11, at 314.

⁴⁵ *War Powers: A Test of Compliance*, *supra* note 41, at 109-11.

⁴⁶ Hours given in eastern daylight time.

accordance with section 4 of the War Powers Resolution, the President submitted a report to the Speaker of the House and President pro tempore of the Senate stating, "In view of this illegal and dangerous act, I ordered, *as you have been previously advised*, United States military forces to conduct the necessary reconnaissance . . . to secure the return of the vessel and its personnel . . ." ⁴⁷ (Emphasis added.)

While most congressional members publicly approved the President's handling of the incident, they denied the suggestion that they had been "previously advised" let alone consulted as required by the War Powers Resolution. Then Senate Majority Leader Mike Mansfield said, "I was not consulted. I was notified after the fact about what the Administration had already decided to do."⁴⁸ Senator Javits, testifying less than one month later, on June 4, 1975, before the House Subcommittee on International Security and Scientific Affairs stated, "Consultation with the Congress prior to the Mayaguez incident resembled the old discredited practice of informing selected members of Congress a few hours in advance of the implementation of decisions already taken within the executive branch."⁴⁹ During the same hearings, Mr. Monroe Leigh, legal advisor to the Department of State, admitted that United States aircraft had been ordered into combat by the President before he had contacted the congressional leadership, let alone engaged in the required consultations.⁵⁰ Despite this self-admitted violation of the consultation requirement of the War Powers Resolution, President Ford suffered no adverse public reaction. In fact, throughout the country, the response to the President's action was overwhelmingly favorable. Letters, wires, and

⁴⁷ Subcommittee on International Security and Scientific Affairs of the Committee on International Relations, *The War Powers Resolution, Relevant Documents, Correspondence, Reports* 45 (1976).

⁴⁸ N.Y. Times, May 15, 1975, at 18.

⁴⁹ *War Powers: A Test of Compliance*, *supra* note 41, at 61.

⁵⁰ During the oversight hearings held on June 4, 1975, the following discussion occurred:

Mr. Zablocki. Let me restate my question, and now I am going to try to make it very pointed. On page 3 you state that the congressional leadership was informed of the principal military operations prior to the actual commencement of those operations. I presume that was on May 13 between the hours of 5:50 a.m. and 7:20 p.m.?

Mr. Leigh. Well, the first principal military action---

Mr. Zablocki. But an hour later at approximately 8:30 p.m. that same evening, a U.S. aircraft sank a Cambodian vessel seeking to approach the Mayaguez.

Mr. Leigh. That is right, sir.

Mr. Zablocki. Therefore, the orders must have been given to the area by the President to use military force prior to the actual commencement of ---.

Mr. Leigh. Yes, the President told the Members of Congress that in that period he had ordered the U.S. military forces to take action to prevent the seamen and the vessel from being moved to the mainland.

Id. at 81.

phone calls to the White House following the rescue mission ran twelve to one in support of the President.⁵¹ This recent history shows that the risk of political injury to the President, resulting from unilateral military action is not enough to insure compliance with the consultation clause. Thus far, the tendency to support the President's military decisions once they are made has outweighed congressional and public concern with section 3 violations.

Finally, there is a more intrinsic limitation to consultation under section 3 of the War Powers Resolution. Even if the President were to engage in consultation, there is no way for Congress to make its opinion binding. Congress can only compel the President to engage in the formalities of consultation; that is the physical act of calling or meeting with congressional members to discuss situations where military intervention is being considered, before the order is given to deploy troops. While it is possible that the President may be required to listen, it is beyond the scope of war-powers consultation to require that the President act accordingly. The formalities indicated above are the most compliance that Congress might exact from an unwilling President. While this maximum enforceable consultation does not ensure "that the collective judgment of both the Congress and the President"⁵² will apply to war-powers decision making, it can be meaningful if it occurs in advance.

IV. THE GAP BETWEEN CONGRESSIONAL INTENT AND THE PRACTICAL EFFECT OF THE WAR POWERS RESOLUTION

Due to the enforcement problems discussed in Part III, to ensure even the maximum enforceable consultation, section 3 of the War Powers Resolution must be specific as to when and with whom consultation must occur. Section 3 of the Resolution lacks this specificity, and provides the President with two means of circumventing the clear legislative intent that prior, meaningful war-powers consultation take place.

First, the law requires that the President consult "in every possible instance"⁵³ before introducing armed forces. This language, taken from the original House version, was explained in an accompanying report issued by the Committee on Foreign Affairs. Use of the word "every" was to reflect the committee's belief that prior consultations should exist "in extraordinary and emergency circumstances—even

⁵¹ Newsweek, May 26, 1975 at 16.

⁵² War Powers Resolution, Pub. L. No. 93-148, § 2(a), 87 Stat. 555 (1973).

⁵³ War Powers Resolution, Pub. L. No. 93-148, § 3, 87 Stat. 555 (1973).

when it is not possible to get formal congressional approval in the form of a declaration of war or other specific authorization."⁵⁴ By including the word "possible," Congress gave the President the opportunity to allege that prior consultation was "impossible." During a speech delivered April 11, 1977, at the University of Kentucky, ex-President Ford enumerated seven reasons why it is impossible to involve the Congress in the decision to deploy United States forces.⁵⁵ This list did not include the only reason given by the drafters for including the word "possible" in the law, which was that they could envision situations demanding such an immediate response that there would not be time enough to consult. As a result, because section 3 includes the word "possible," even during incidents such as the Mayaguez, where there were over twenty-four hours available for consultation, the President is able to argue that such consultation is "impossible" and therefore not contemplated by section 3.

The language of section 3 provides the President with a second opportunity for evasion. There is an apparent gap between the reporting requirements of section 4, and section 3 which states that the President shall consult "before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances"⁵⁶ In addition to requiring that the President report in writing to Congress after introducing troops into hostilities and imminent hostilities, section 4 requires that the President report when troops are introduced "into the territory, airspace, or waters of a foreign nation, while equipped for combat" and where they are introduced "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation"⁵⁷ As a result, the scope of the reporting requirement under section 4 is broader than the consultation required under section 3. When asked about the difference between these two sections, Senator Javits stated that as a matter of policy it was intended that the President be required to consult prior to any troop deployment, not only when hostilities or imminent hostilities are involved.⁵⁸

Therefore, the Resolution allows the President to evade the consultation requirement by alleging that no "hostilities" are involved. The attempted rescue, on April 24, 1980, of the American hostages

⁵⁴ H.R. Rep. No. 287, 93d Cong., 1st Sess. 6 (1973).

⁵⁵ *War Powers Resolution: Hearings*, *supra* note 41, at 325.

⁵⁶ War Powers Resolution, Pub. L. No. 93-148 § 3, 87 Stat. 555 (1973).

⁵⁷ *Id.* §§ 4(a)(2), 4(a)(3).

⁵⁸ *War Powers: A Test of Compliance*, *supra* note 41, at 64.

held captive in Iran illustrates the use of this loophole. In the same manner that President Ford bypassed the Congress in using armed forces to recapture the Mayaguez, President Carter ignored the consultation requirements in attempting to rescue the hostages. Shortly before the rescue mission was aborted, President Carter told Senate Majority Leader Robert C. Byrd that a covert action was being rehearsed, he did not mention that the mission was already underway. Speaker of the House Thomas P. O'Neill, Jr. was never contacted by the President in advance of the rescue attempt despite enough time to do so.⁵⁹ Two days after the failed mission, on April 26, 1980, the President submitted a written report to the Speaker of the House and President pro tempore of the Senate pursuant to section 4 wherein he laid the foundation for a defense to possible allegations of noncompliance with the section 3 consultation requirements. In relevant part the report stated:

On April 24, 1980, elements of the United States Armed Forces under my direction commenced the positioning stage of a rescue operation which was designed, if the subsequent stages had been executed, to effect the rescue of the American hostages The subsequent phases of the operation were not executed. Instead, for the reasons described below, all these elements were withdrawn from Iran and *no hostilities occurred*.⁶⁰ (Emphasis added.)

President Carter's interpretation of the term "hostilities" is not consistent with the intent of the authors of the War Powers Resolution. Taken from the original House version, the term was explained in an accompanying report:

"[H]ostilities" was substituted for the phrase "armed conflict" during the subcommittee drafting process because it was considered to be somewhat broader in scope. In addition to a situation in which actual fighting has begun, "hostilities" also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. "Imminent hostilities" denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict.⁶¹

Applying this definition, the attempted rescue in Iran was indeed a situation involving "hostilities," or at least "imminent hostilities," since the mission presented a "clear and present danger of armed conflict." Had the rescue proceeded as planned, United States Armed

⁵⁹ Lanouette, *War Powers Irresolution*, 12 Nat'l J. 740 (1980).

⁶⁰ 126 Cong. Rec. H2991 (daily ed. April 28, 1980).

⁶¹ H.R. Rep. No. 287, 93d Cong. 1st Sess. 7(1973).

Forces would almost certainly have been engaged in fighting. Despite persuasive evidence to the contrary, President Carter maintained that these were not "hostilities," and that no prior consultation was required. This demonstrates how an apparent drafting error,⁶² limiting consultation to situations involving "hostilities," enables the President to avoid section 3 consultation.

V. AMENDING THE WAR POWERS RESOLUTION

The international incidents which have triggered the consultation requirements of the War Powers Resolution demonstrate that section 3 lacks the requisite specificity to insure even the maximum enforceable consultation, let alone the more comprehensive consultation intended by those members of Congress who drafted and enacted the law. To insure the maximum enforceable consultation, section 3 must be amended. The following modifications would clarify the legislative intent, and facilitate enforcement of the consultation requirement. First, section 3 should apply to each of the three situations where a written report is required under section 4. That is, not only to situations involving "hostilities" or "imminent hostilities," but also situations where the armed forces are introduced into the territory, airspace or waters of a foreign nation, or in numbers which substantially enlarge the United States Armed Forces equipped for combat in a foreign nation. Second, the definition of "hostilities" included in the report to accompany H.R.J. Res. 542⁶³ should be incorporated into the text of the statute. It should be clearly indicated that there can be "hostilities" even if no shots have been fired, and that "imminent hostilities" include even the threat that foreign troops might fire on United States forces. Third, by deleting the word "possible," the President should be required to consult in "every" instance before introducing armed forces. If there are situations which Congress considers so exigent that prior consultation would be deleterious, these should be specifically enumerated. Otherwise, the President should be required to consult before deploying armed forces.

The principal author of the War Powers resolution, Senator Javits, has urged that section 3 be amended to require that the President consult with the congressional committees having legislative jurisdiction, rather than the leadership which is not a unit for such decisions.⁶⁴ In 1977 the Carter administration endorsed a consultation methodology whereby the congressional leadership would desig-

⁶² *War Powers: A Test of Compliance*, *supra* note 41, at 85.

⁶³ See note 61 *supra* and accompanying text.

⁶⁴ *War Powers: A Test of Compliance*, *supra* note 41, at 62.

nate a single member of Congress to be the initial point of contact when a crisis develops.⁶⁵ These two proposed modifications should be integrated to require that the President consult with the chairman of the committee having legislative jurisdiction. This fourth change would facilitate consultation by designating an initial point of contact, and would allow the President to get the view of that legislative committee charged with making recommendations on that subject to the Congress.

VI. CONCLUSION

Due to the lack of specificity in section 3 of the 1973 War Powers Resolution, either Congress or the President could have taken the initiative and determined the nature and extent of war-powers consultation. Thus far, the President, rather than Congress, has prescribed what little consultation there has been. Largely because of Congress' unwillingness to assert its right to be consulted, that requirement has been rendered a nullity. This is reminiscent of the congressional inaction that created the imbalance of war making power, between Congress and the President, which the Resolution was enacted to correct. Then, as now, the President controlled the sphere of military intervention. Where the Constitution was ambiguous as to the allocation of war making authority, the President, by way of his power as Commander-in-Chief, took the initiative, thereby diminishing the practical importance of Congress' authority to declare war. Congress' right to war-powers consultation has been diminished by a similar lack of initiative.

As Representative John F. Seiberling told the House Subcommittee on International Security and Scientific Affairs during oversight hearings on the War Powers Resolution, "the mere passage of a law does not automatically change ingrained patterns of behavior."⁶⁶ Circumventing the consultation provisions of section 3 has become for the President a self-perpetuating habit, and for Congress a self-fulfilling expectation. Congress should begin to reverse the pattern of executive avoidance by removing any doubt as to the nature of the consultation requirement. Amending section 3 is the only way to inject meaning into the consultation clause, and to insure that the collective judgment of both the Congress and the President will apply to the use of United States Armed Forces.

⁶⁵ *War Powers Resolution: Hearings*, *supra* note 41, at 200 (letter submitted by Douglas J. Bennet, Jr., Assistant Secretary for Congressional Relations).

⁶⁶ *War Powers: A Test of Compliance*, *supra* note 41, at 42.