With the deployment of troops in Lebanon and Grenada, a spotlight has been thrown on the War Powers Resolution of 1973.

Passed over the veto of President Nixon in the wake of Watergate’s “Saturday Night Massacre,” the resolution was designed by Congress to put a leash on the president and to restrict his authority to deploy troops in a long, undeclared presidential war.

While protesting the legality of the resolution, all presidents have complied with its requirements that within 48 hours of a troop commitment, the president must issue a detailed report. The resolution also requires that all U.S. troops must be withdrawn from hostilities within 60 days unless Congress specifically authorizes a longer term of activity.

The presidents have made a point of saying their compliance was voluntary, not mandatory. If it came to a dispute, would the resolution be held constitutional or would its enforcement be blocked? Herewith are the opposing views of two noted constitutional experts.

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The War Powers Resolution

.... Of doubtful constitutionality

By John Norton Moore

“IT DESERVES to be remarked, that as the participation of the Senate in the making of treaties, and the power of the legislature to declare war, are exceptions out of the general ‘executive power’ vested in the president, they are to be construed strictly, and ought to be extended no further than is essential to their execution.”

So wrote Alexander Hamilton in 1793 in the famous Pacificus-Helvidius debate with James Madison, illustrating that the role of Congress and the president in the conduct of foreign policy has been debated throughout American history.

Until the loss of presidential authority associated with the Vietnam War and the Watergate crisis, that struggle had been broadly won by the presidency. Indeed, in President Truman’s commitment of a quarter of a million American troops in Korea without congressional authorizing legislation—or serious congressional concern about the absence of authorization—that struggle may have been too broadly won.

Vietnam and Watergate, however, changed all that, and perhaps too broadly in the opposite direction. In place of congressional opinion and scholarship supportive of presidential power, concerns were expressed about an “imperial presidency,” and Congress embarked on a decade of the most activist micro-management of foreign policy in American history.

A centerpiece of this new congressional activism is the War Powers Resolution, passed in 1973 at what was probably the low point of presidential power in this century. Subsequently, no American president has accepted the restrictive vision of presidential authority embodied in this

.... is constitutional and enforceable

By Frederick S. Tipson

The Constitution was written by people who believed that Congress should have the central role in decisions to go to war, so long as the president retained—in James Madison’s words—“the power to repel sudden attacks.” (See Taylor Reveley’s valuable War Powers of the President and the Congress (1981).) Beyond this vague conception, the authors of the Constitution gave little guidance regarding the difficulties this division of authority would pose. The problem of the past 200 years has been to adapt this principle to the circumstances and responsibilities of a global actor whose military capacity and constancy frequently are requisites to world peace and security.

The War Powers Resolution of 1973 was the first attempt to address the problem in legislation. Its critics resolve nothing by repeating the truism—which the resolution itself contains—that the Constitution cannot be amended by mere statute. Indeed, similar truisms are equally applicable regarding amendment by military necessity, congressional acquiescence or strained interpretations of language and history. The resolution’s authors proceeded in accordance with the “necessary and proper” clause of the Constitution to codify a procedure based on the recognition of the president’s emergency authority to defend the territory, armed forces, citizenry and other vital interests of the United States.

Two key provisions

Is it constitutional? Critics focus on two key provisions. On the legislative veto issue, they cite the Supreme Court’s Chadha decision of last summer, 103 S.Ct. 2764, as final
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resolution. It represents, quite simply, a congressional view of the war powers.

**Significant problems**

There are three significant problems with the War Powers Resolution. First, it embodies a mythology—inherent in its passage—that the Vietnam War was a "presidential war" and that the resolution would have prevented that war. But unlike the earlier setting in Korea, in 1964 Congress passed the Southeast Asia Resolution by a vote of 504-2 legally empowering the president to use armed forces to defend Vietnam. Sen. Sam Ervin, perhaps the Senate’s pre-eminent constitutional authority, described this resolution as “a declaration of war in a constitutional sense.” And, among the other congressional measures continuing this authorization, in 1966, with more than 200,000 U.S. troops in Vietnam, the Senate voted 92-5 to table an amendment to repeal the Southeast Asia Resolution. Paradoxically, this congressional authorization for the war would have met squarely the requirements of the War Powers Resolution said to be passed to prevent future similar involvements.

Second, the resolution is at least in part unconstitutional. The essence of the resolution is an effort by Congress to define the war powers of Congress and the president. But nothing could be clearer, as enunciated by the Supreme Court in *Myers v. United States*, 272 U.S. 52 at 128 (1926), than that the constitutional scheme of separation of powers cannot be altered by one branch or indeed by anything short of constitutional amendment.

Congress has exclusive authority to declare war, but it has erred in the War Powers Resolution in implicitly denying presidential authority to use the armed forces abroad in settings short of “war.” It was recognized by the Supreme Court in the *Slaughterhouse Cases*, 83 U.S. 36, 79 (1873), and *In re Neagle*, 135 U.S. 1, 63-64 (1889), that the president has the authority to use the armed forces to protect Americans abroad, and presidential authority to use the armed forces abroad in settings short of “war” is almost certainly considerably broader. Indeed, presidents have used the armed forces abroad in well more than 100 instances short of war without congressional authorization.

Another constitutional problem for the resolution is presented by the recent Supreme Court decision in *I.N.S. v. Chadha*, 103 S. Ct. 2764 (1983). That decision, striking down the legislative veto, invalidates the legislative veto in Section 5(c) of the resolution. More important, however, under *Chadha* if Congress cannot force a troop withdrawal by a majority vote of both houses, how can it force such a withdrawal by complete inaction for 60 days, as Section 5(b), the heart of the resolution, would require?

Third, the resolution fuses a potential constitutional confrontation between Congress and the president, quite possibly to go off at a time of foreign policy crisis when the nation can least afford it. In this and other ways, the resolution paradoxically may reduce deterrence and increase the risk of war or American casualties.

**A serious dilemma**

For the presidency, a War Powers Resolution believed to be unconstitutional can force a serious dilemma at a time of national emergency. The president must either assent to an assertion of congressional power inconsistent with his duty to uphold the Constitution or challenge the resolution and risk severe harm to the foreign policy interests of the nation in the resulting battle with Congress.

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vindication of a long-standing presidential objection to Section 5(c) of the resolution. But if *Chadha* did strike down 5(c), it is certainly not clear from the circumstances or reasoning of that decision or from its mute progeny two weeks later (*Process Gas Consumers Group v. Consumers Energy Council*, 103 S.Ct. 3556.) The main reason is the one the Court itself gave in two decisions issued in 1981: *Haig v. Agee*, 453 U.S. 280, and *Dames & Moore v. Regan*, 453 U.S. 654. In both decisions the Court made clear that the relationship between presidential and congressional authority is different in foreign and domestic affairs. In particular, the *Dames & Moore* decision rested on an extraordinary finding of implied congressional delegation of authority to the president through its silence and “acquiescence” precisely because of the special circumstances inherent in the foreign affairs realm.

There are excellent reasons for recognizing different standards for the delegation of authority to the president in foreign and domestic affairs, as repeatedly emphasized by the Court since its landmark decision in *United States v. Curtiss-Wright Co.*, 299 U.S. 304 (1936). But if the president is presumed to derive different, and at times plenary, authority in foreign affairs from the fact of congressional inaction, it should also follow that the Congress can effectively remove such an implication by registering its disapproval—or lack of support—by majority vote—that is, concurrent resolution. Even if Congress could not completely confine the president’s actions in any given case, it should certainly be able to counter any suggestion that he is acting with the “implied consent” of the legislative branch and thereby the full authority of the United States government.

If this difference applies to foreign affairs generally, it is especially true in the war powers area, where Congress is generally presumed to be unable to delegate at all. At a minimum, the Court should distinguish the “statutory” use of the legislative veto from what might be called its “constitutional” use in areas of shared authority like war powers. It would be highly unwise for the Court to deny to the political branches the best available mechanism to exercise their joint responsibilities.

**The 60-day limit**

Similarly, the 60-day limitation on the president’s emergency authority in Section 5(b) is attacked because it seems...
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In addition to the potential damage to deterrence by this threat of crisis confrontation, the 60-day withdrawal provision of Section 5(b) may in some settings reduce deterrence and increase American casualties. Knowing a precise timetable for withdrawal could certainly enable an enemy to increase American casualties. Similarly, knowing of the possibility of an automatic 60-day cut-off could encourage an enemy to fight on in an effort to achieve a political victory.

Foreign policy consequences from congressional actions are not imaginary horribles. The 1975 Soviet air lift to Angola was resumed within days after congressional action prohibiting any U. S. involvement. And the North Vietnamese regular army invasion of South Vietnam—after the conclusion of a solemn agreement ending the war—took place only after congressional action forbidding future direct U. S. involvement.

A recent study by Robert F. Turner of the experience under the resolution, *The War Powers Resolution: Its Implementation in Theory and Practice* (1983), suggests that in some cases the resolution may reduce deterrence and enhance the risk of war. It should be remembered in evaluating the War Powers Resolution that Congress has considerable checks not dependent on the resolution, including the ability to terminate major hostilities abroad by normal legislative process.

Given these questions about the War Powers Resolution, what might be done to end the confrontation, recognizing that members of Congress are required, as is the president, to pursue honestly the appropriate meaning of separation of powers and that what is needed is not a "victory" for either branch but rather agreement on practices and procedures that will enhance democratic consensus and effectiveness in foreign policy? Generally, cases arising under the War Powers Resolution, as in other sensitive areas of foreign policy, are likely to be treated by the courts as presenting nonjusticiable political questions and thus not subject to judicial review.

There is, however, another alternative fair to both branches and, I believe, more likely to produce results leading to a broader consensus and a more lasting balance. This is the creation of a joint congressional-executive commission to study implementation of separation of powers in foreign policy. This commission could make recommendations on all the alternatives, including enhanced reliance on informal guidelines and procedures as well as reviewing the War Powers Resolution.

To be balanced, this commission should have half its members selected by Congress and half by the president. Rather than seeking to force congressional views of the appropriate balance, this commission would reflect the views of both branches in what has been a continuing debate. It also would serve a broader national goal in examining the limits of appropriate congressional micro-management of foreign policy. The war powers controversy is but one piece of this broader mosaic that may be one of the most important and enduring issues in American foreign policy.

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To give constitutional significance to congressional inaction: the president's authority to act in emergencies simply runs out in 60 days if Congress does nothing. That consequence, of course, underlies the entire theory of emergency authority.

In practice, however, this situation is not likely to arise. Because of the "priority procedures" mandated by the resolution for both authorizing legislation and concurrent resolution vetoes, as well as the high visibility of such issues in the Congress, the 60-day provision is more of a deadline for congressional decision than for presidential authority. In most cases, Congress can be expected to act affirmatively, either to authorize the operation in question or to direct its termination. If it should ever come down to a situation in which the time simply runs out, Congress would probably not be well advised to rely on its inaction to enforce its views—at least as far as judicial resolution is concerned. In other words, the constitutionality of Section 5(b) may depend on the circumstances in which it comes into play—if ever.

But even if the resolution is constitutional, is it enforceable? In the case of a clear confrontation between the president and the Congress, the Supreme Court would probably agree to resolve the matter. But if the Court were unwilling to do so—and under some circumstances it probably should not—Congress would have little choice but to enforce its position through the funding process. In my view, funding restrictions should be the last resort, rather than the preferred method, for ensuring congressional control. They are too clumsy and indirect to assure a meaningful and constructive influence on policy.

The preferable situation, however, is one in which such confrontation is avoided through congressional-executive agreement on a workable, constitutional procedure. The continued pursuit of such agreement is the highest responsibility of both branches.

(Frederick S. Tipson is on leave as chief counsel to the Senate Foreign Relations Committee. He is a visiting senior fellow at both the Georgetown Center for Strategic and International Studies and the Center for Law and National Security at the University of Virginia. The views expressed are entirely personal.)
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