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105TH CONGRESS, 2d Session | HOUSE OF REPRESENTATIVES | REPORT 105–442

DIRECTING THE PRESIDENT PURSUANT TO SECTION 5(c) OF THE WAR POWERS RESOLUTION TO REMOVE UNITED STATES ARMED FORCES FROM THE REPUBLIC OF BOSNIA AND HERZEGOVINA

MARCH 13, 1998.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GILMAN, from the Committee on International Relations, submitted the following

ADVERSE REPORT

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H. Con. Res. 227]

The Committee on International Relations, to whom was referred the concurrent resolution (H. Con. Res. 227) directing the President pursuant to section 5(c) of the War Powers Resolution to remove United States Armed Forces from the Republic of Bosnia and Herzegovina, having considered the same, report unfavorably thereon and recommend that the concurrent resolution not be agreed to.

BACKGROUND AND PURPOSE

On February 20, 1998, the North Atlantic Council—the decision-making body of the North Atlantic Treaty Organization (NATO)—decided to keep the existing Stabilization Force (SFOR) in Bosnia after its current mandate expires on June 30, 1998. SFOR will be maintained at approximately its current level of 34,000 troops, and the U.S. contingent will number 6,900—a slight reduction from the present level of 8,000 troops. The mandate for this extended SFOR mission will be to continue to support implementation of the Dayton Peace Agreement (DPA).

On March 4, 1998, pursuant to section 1203 of the National Defense Authorization Act for Fiscal Year 1998 (Public Law 105–85) and section 8132 of the National Defense Appropriations Act for Fiscal Year 1998 (Public Law 105–56) President Clinton submitted to Congress a report (House Document 105–223) which concluded

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that the United States has major national interests in peace in Bosnia. The President also asserts in his report that we have a broad interest in ensuring the viability of the NATO alliance and of a democratic, undivided, and peaceful Europe. The President further states that U.S. leadership is essential to sustaining progress in implementing the DPA and that without U.S. participation in the international military force in Bosnia, the effort to bring peace to Bosnia might falter. In his report, the President declines to set an end-date for the deployment, instead stating that withdrawal of U.S. forces will be based on establishing conditions under which Dayton implementation can continue without the support of a large NATO-led military force.

H. Con. Res. 227, introduced by Congressman Campbell on February 26, 1998, is a concurrent resolution that directs the President, pursuant to section 5(c) of the War Powers Resolution (Public Law 93–148, 50 U.S.C. 1541–1548), to remove United States Armed Forces from Bosnia by June 30, 1998, unless the President requests and Congress authorizes a later date.

Section 5(c) of the War Powers Resolution provides that:

> . . . at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

Section 7 of the War Powers Resolution provides expedited procedures to govern the consideration of concurrent resolutions introduced pursuant to section 5(c).

Concurrent resolutions are resolutions passed by both houses of Congress but not sent to the President for signature into law. When the War Powers Resolution was enacted in 1973, it was widely believed that Congress could require the President to act in response to the passage of concurrent resolutions. In 1983, however, the Supreme Court ruled in *INS* v. *Chadha* that provisions of law purporting to require the President to act in response to the passage of concurrent resolutions are unconstitutional because they deny the President his right to veto legislation to which he objects. It is generally accepted that section 5(c) of the War Powers Resolution was among the concurrent resolution provisions rendered ineffective by the *Chadha* decision.

The fact that a concurrent resolution passed pursuant to section 5(c) cannot legally require the President to withdraw United States Armed Forces from a foreign country does not mean that section 5(c)—and the associated expedited procedures of section 7—effectively have been repealed. Rather, the import of the *Chadha* decision is that any concurrent resolution passed pursuant to section 5(c) would not be binding.

In addition, because the *Chadha* decision does not address congressional procedures, the expedited procedures of section 7 remain available with respect to concurrent resolutions introduced under section 5(c). Under section 7, the Committee is required to report the resolution within 15 calendar days, or by Friday, March 13, 1998. The resolution "shall become the pending business of the

House in question . . . and shall be voted on within three calendar days thereafter, ..." or by Monday, March 16, 1998. These dates can be modified only by action of the House (either by unanimous consent or pursuant to a rule reported by the Committee on Rules).

Although section 1(c) of H. Con. Res. 227 contains a declaration of policy stating that the requirement to withdraw U.S. Armed Forces from Bosnia does not necessarily reflect any disagreement with the purposes or accomplishments of such Armed Forces, the Committee strongly believes that the linkage between the effect of the resolution and present U.S. policy in Bosnia was inescapable. Moreover, the policy implications of the measure would be easily comprehended by observers in Europe—especially in Bosnia itself—and elsewhere, whereas the legal issues may not.

U.S. troops in Bosnia have been the heart of a NATO force under U.S. command that has successfully put a stop to a conflict in the center of Europe that killed hundreds of thousands and led to more than two million refugees. In the past few months the glimmerings of success in regenerating a stable civil society in all of Bosnia have manifested themselves, as demonstrated by the replacement through free and fair elections of extremists with moderate political forces. Moreover, the U.S. has expended in excess of 7 billion dollars to implement the Dayton Peace Agreement in Bosnia. The Committee believes that withdrawal now would place that considerable investment at risk, with no guarantee that the U.S. would not be called upon in the future to again introduce forces if the conflict reignites. A unilateral withdrawal by U.S. troops in Bosnia would also undermine the necessary unity and credibility of the NATO alliance.

The Committee was generally sympathetic to the intent of the sponsor of the resolution to reassert the war-making authority vested in the Congress by the Constitution of the United States. The current circumstances in Bosnia, however, present a poor test case. The Committee believes that the Congress essentially acquiesced in the Bosnia deployment when it agreed to the Conference report on the National Defense Appropriations Act for Fiscal Year 1998 that adopted a Senate-authored sense of Congress provision that funds should be terminated as of July 1, 1998, but allowed the President to waive this provision, with the full knowledge that he would utilize this waiver. Last year's vote on the Conference report for Defense Appropriations was not just a simple appropriation of funds, it was an affirmative action of the Congress to grant the Executive branch latitude in continuing the Bosnia deployment.

It would be contradictory, having acquiesced in the troops remaining in Bosnia through the waiver provision, to now adopt a resolution calling for the withdrawal of the very forces the Congress last year gave the President latitude to deploy. Such an action would undermine the credibility of United States leadership. Such credibility is crucial to the ability of the United States to gain a wide variety of foreign policy objectives, no matter who is President and what party controls the Congress.

COMMITTEE ACTION

H. Con. Res. 227 was introduced by Rep. Campbell on February 26, 1998. The Full Committee marked up the bill in open session,

pursuant to notice, on March 10, 1998, and March 11, 1998. On March 11, 1998, with a quorum being present, the Committee by a rollcall vote of 22 yeas to 16 nays ordered the bill adversely reported to the House.

On November 7, 1997, the Full Committee held a hearing on the U.S. role in Bosnia. Ambassador Robert Gelbard, Special Representative of the President and the Secretary of State for Implementation of the Dayton Peace Accords was the witness. Issues surrounding Bosnia and the U.S. role there have been raised at numerous other Committee hearings since U.S. Armed Forces were deployed there, including hearings at which the Secretary of State and the Secretary of Defense have testified.

ROLLCALL VOTES ON AMENDMENTS

In compliance with clause (2)(l)(2)(B) of rule XI of the Rules of the House of Representatives, the record of committee rollcall votes on final passage or amendments during the committee's consideration of H. Con. Res. 227 is set out below:

Votes during markup of H. Con. Res. 227—March 11

Vote #1 (11:08 a.m.)—Campbell amendment to change the date that U.S. Armed Forces must be removed from the region from June 30, 1998 to "not later than 60 days after the date on which a final judgment is entered by a court of competent jurisdiction determining the constitutional validity of this concurrent resolution, unless a declaration of war or specific authorization for such use of United States Armed Forces has been enacted."

Voting yes: Goodling, Hyde, Ballenger, Rohrabacher, Manzullo, Royce, Kim, Chabot, Sanford, Salmon, Campbell, Graham, and Blunt.

Voting no: Gilman, Bereuter, Smith, King, Houghton, Fox, Hamilton, Gejdenson, Berman, Ackerman, Martinez, Payne, Menendez, Brown, Hastings, Danner, Hilliard, Sherman, Wexler, Clement, Luther, and Davis.

Failed 13–22.

Vote #2 (11:20 a.m.)—Motion to order the bill adversely reported to the House.

Voting yes: Gilman, Bereuter, Smith, King, Houghton, Fox, Hamilton, Gejdenson, Berman, Ackerman, Martinez, Payne, Menendez, Brown, Hastings, Danner, Hilliard, Sherman, Wexler, Clement, Luther, and Davis.

Voting no: Goodling, Hyde, Burton, Gallegly, Ros-Lehtinen, Ballenger, Rohrabacher, Manzullo, Royce, Kim, Chabot, Sanford, Salmon, Campbell, Graham, and Blunt.

Passed 22–16.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

SECTION-BY-SECTION ANALYSIS

The Resolution consists of a single Section: "Removal of United States Armed Forces From the Republic of Bosnia and Herzegovina."

Subsection (a) provides:

(1) The Congress has the sole power to declare war under article I, section 8, of the Constitution;

(2) A state of war has not been declared with respect to Bosnia and Herzegovina;

(3) A specific authorization for the use of U.S. Armed Forces in Bosnia and Herzegovina has not been enacted; and

(4) Within the meaning of section 4(a)(1) of the War Powers Resolution (50 U.S.C. 1543(a)(1)), the situation in Bosnia and Herzegovina constitutes either hostilities or a situation where imminent involvement in hostilities is clearly indicated.

Subsection (b) "Removal of Armed Forces" requires the President, by direction of the Congress, to remove U.S. Armed Forces from Bosnia and Herzegovina by June 30, 1998 unless the President requests and the Congress authorizes a later date, except for a limited number of members of the Armed Forces sufficient only to protect U.S. diplomatic facilities and citizens, and noncombatant personnel to advise the North Atlantic Treaty Organization (NATO) Commander in Bosnia and Herzegovina, and unless and until a declaration of war or specific authorization has been enacted.

Subsection (c) "Declaration of Policy" stipulates that the requirement to remove U.S. Armed Forces from Bosnia and Herzegovina does not necessarily reflect any disagreement with the purposes or accomplishments of such Armed Forces, nor does it constitute any judgement of how the Congress would vote on either a declaration of war or a specific authorization for the use of such armed forces.

APPENDIX

For the interest of Members, the text of the War Powers Resolution is set out below:

[Public Law 93–148, 93d Congress, H.J. Res. 542, November 7, 1973]

JOINT RESOLUTION

Concerning the war powers of Congress and the President.

Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This joint resolution may be cited as the "War Powers Resolution".

PURPOSE AND POLICY

SEC. 2. (a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgement 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, and to the continued use of such forces in hostilities or in such situations.

(b) Under article I, section 8, of the Constitution, it is specifically provided 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.

(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised 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.

CONSULTATION

SEC. 3. 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 every 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.

REPORTING

SEC. 4. (a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional re-

sponsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

CONGRESSIONAL ACTION

SEC. 5. (a) Each report submitted pursuant to section 4(a)(1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

CONGRESSIONAL PRIORITY PROCEDURES FOR JOINT RESOLUTION OR BILL

SEC. 6. (a) Any joint resolution or bill introduced pursuant to section 5(b) at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may

be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 5(b). The joint resolution or bill so reported shall become the pending business of the House in question and shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 5(b). In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

CONGRESSIONAL PRIORITY PROCEDURES FOR CONCURRENT RESOLUTION

SEC. 7. (a) Any concurrent resolution introduced pursuant to section 5(b) at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on Foreign Affairs of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

(b) Any concurrent resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Such a concurrent resolution passed by one House shall be referred to the committee of the other House named in subsection (a) and shall be reported out by such committee together with its recommendations within fifteen calendar days and shall thereupon become the pending business of such House and shall be voted on

within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) In the case of any disagreement between the two Houses of Congress with respect to a concurrent resolution passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such concurrent resolution within six calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement.

INTERPRETATION OF JOINT RESOLUTION

SEC. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

(b) Nothing in this joint resolution shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to the date of enactment of this joint resolution and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

(c) For purposes of this joint resolution, the term "introduction of United States Armed Forces" includes the assignment of member of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Nothing in this joint resolution—

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provision of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement

in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

SEPARABILITY CLAUSE

SEC. 9. If any provision of this joint resolution or the application thereof to any person or circumstance is held invalid, the remainder of the joint resolution and the application of such provision to any other person or circumstance shall not be affected thereby.

EFFECTIVE DATE

SEC. 10. This joint resolution shall take effect on the date of its enactment.

CARL ALBERT,
Speaker of the House of Representatives.
JAMES O. EASTLAND,
President of the Senate pro tempore.

IN THE HOUSE OF REPRESENTATIVES, U.S.,
November 7, 1973.

The House of Representatives having proceeded to reconsider the resolution (H.J. Res. 542) entitled "Joint resolution concerning the war powers of Congress and the President", returned by the President of the United States with his objections, to the House of Representatives, in which it originated, it was

Resolved, That the said resolution pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

W. PAT JENNINGS,
Clerk.

I certify that this Joint Resolution originated in the House of Representatives.

W. PAT JENNINGS,
Clerk.

IN THE SENATE OF THE UNITED STATES,
November 7, 1973.

The Senate having proceeded to reconsider the joint resolution (H.J. Res. 542) entitled "Joint resolution concerning the war powers of Congress and the President", returned by the President of the United States with his objections to the House of Representatives, in which it originate, it was

Resolved, That the said joint resolution pass, two-thirds of the Senators present having voted in the affirmative.

Attest:

FRANCIS R. VALEO,
Secretary.

ADDITIONAL VIEWS

We oppose House Concurrent Resolution 227 for both reasons of policy and law.

The author of this concurrent resolution, Mr. Campbell, says he has two goals: To have a vote in Congress to determine whether our troops should be in Bosnia, and to find out whether, and to what extent, the War Powers resolution is constitutional. In addition, Mr. Campbell makes clear that he opposes U.S. troops in Bosnia: "I do not hide my position on the policy. I do not think they should be there."

We believe this resolution to direct the withdrawal of U.S. forces from Bosnia has highly negative consequences for U.S. policy and peace in Bosnia. We do not believe this resolution provides the legal clarity on the constitutionality of the War Powers Resolution that its author seeks.

I. POLICY

This resolution harms U.S. policy in several ways.

First, this resolution is not just a sense of the Congress. It *directs* the President to remove U.S. forces from Bosnia.

Many questions have been raised about the constitutionality of a concurrent resolution directing presidential action under section 59(c) of the War Powers resolution, but the author of H. Con. Res. 227 believes such a resolution is constitutional. For this reason, he wants to move this resolution out of Congress and into the Courts. If his argument were to prevail in the Courts, this resolution would be binding on the President, and require the withdrawal of U.S. forces from Bosnia.

Second, passage of this resolution would send a strong political signal and undermine the President's ability to keep U.S. troops in Bosnia.

U.S. participation in the NATO Stabilization Force (SFOR) is vital to the continuation of peace and stability in Bosnia. The United States is the acknowledged leader of the peacekeeping effort, and the backbone of the NATO force in Bosnia. If U.S. troops leave Bosnia, our allies will leave. There will be no NATO force in Bosnia without the United States.

Third, this resolution hurts the peace process in Bosnia and risks the resumption of war.

This resolution sends exactly the wrong signal at exactly the wrong time both to our allies and the parties in Bosnia opposed to peace, who are only waiting for us to leave.

A U.S. troop withdrawal would put at risk the impressive accomplishments in Bosnia since December 1995: an end to the fighting; the demobilization of armies on all sides; the election of local governments and the formation of multi-ethnic governments; progress in the formation of all-Bosnian institutions; restructuring and re-

training of local police; progress in arresting war criminals; and, for the first time, the emergence of a Bosnian Serb leadership that supports the Dayton peace process.

This resolution gives the confusing and unfortunate message that the United States lacks the resolve to stick with the peace process in Bosnia. Passage of this resolution, just as we are beginning to see progress in Bosnia, would have a devastating impact, and risk a resumption of war.

Finally, the participation of U.S. forces in the peace process in Bosnia has always been about more than just Bosnia. It is also about the future of NATO and stability in Europe. The NATO-led operation in Bosnia is the largest, most complex military mission ever undertaken by NATO. Our allies and the people of Bosnia have looked to us for leadership—and we have supplied it.

This resolution undermines the credibility of U.S. leadership in the NATO alliance, and casts doubt on the ability of the United States to keep its commitments.

II. LAW

The author of H. Con. Res 227 wants to force the courts to examine the constitutionality of the War Powers Resolution, but we doubt that this concurrent resolution will provide the legal clarity he seeks.

No President has accepted the constitutionality of the War Powers Resolution, while many, if not most, Members of Congress have maintained the opposite.

Presidents have avoided a direct confrontation on this issue by reporting and consulting "consistent with" the War Powers Resolution, but not pursuant to it.

Congress has also sidestepped the issue. Congress has been reluctant to take responsibility by voting for an authorization, or to directly challenge deployments of U.S. forces in the absence of such authorization or a declaration of war.

The lack of legal clarity on the War Powers Resolution is frustrating, but we seriously doubt H. Con. Res. 227 would resolve this question. It is our belief that this concurrent resolution, if it were to go to the courts, would be judged on very narrow grounds.

First, after the Supreme Court's *Chadha* decision of 1983, it has been widely accepted that a concurrent resolution that mandates Presidential action—but does not go to the President for his signature or require a two-thirds vote to override a Presidential veto—would violate the Constitution.

Second, we do not believe any Court would rule that circumstances in Bosnia meet the test of "hostilities" under the War Powers Resolution, which would trigger paragraph 5(c) and the ability of Congress to direct a withdrawal of U.S. forces by concurrent resolution.

Courts are always very reluctant to make such a call because it is a political and foreign policy judgment. Bosnia presents a poor test case for such a judgment, so courts would be even less likely to consider it. U.S. forces have been in Bosnia for over two years, pursuant to a peace treaty. There have been no U.S. casualties from hostile action. The Administration has stated on the record that "hostilities" are not present.

We believe that if Congress were to pass a concurrent resolution to remove U.S. troops from Bosnia pursuant to section 5(c) of the War Powers Resolution, a court—if it were to rule at all—would likely base its decision on these narrow grounds, without resolving the larger question of war powers authority.

III. MR. CAMPBELL'S AMENDED RESOLUTION

Mr. Campbell also offered an amendment to his resolution, which failed in Committee. We mention it here because Mr. Campbell received consent to offer his amended resolution on the House floor.

Mr. Campbell's amended resolution would direct the President to remove troops sixty days after a "final judgment by a court determining the constitutional validity of this concurrent resolution."

First, this amended resolution is as harmful on policy grounds as Mr. Campbell's original resolution. It would require that U.S. troops be withdrawn without any further consultation with the Commander-in-Chief, or the commander of U.S. forces on the ground. It would require a withdrawal without due attention to the safety and security of U.S. forces.

Second, this amended resolution is worse than the original resolution on legal grounds.

This amended resolution would hand over U.S. foreign policy to the courts. It would be up to the courts to make a judgment, at a time of their own choosing, as to whether U.S. forces could remain in Bosnia. That judgment could come in a matter of days or weeks, or it could stretch out over a period of years because of the appeals process. Up until the time of a final judgment by the courts, a sword of Damocles would hang over the U.S. troop presence in Bosnia. This period of uncertainty—potentially very long—would have a devastating impact on U.S. policy in Bosnia, and a devastating impact on the peace process in Bosnia. For the foreign policy of the United States to be held up on a critical issue until a court's "final judgment" places the nation's national security interests in a totally unacceptable bind.

Furthermore, we believe this amended resolution is even less likely than the original resolution to get a judicial review on the merits of war powers authority. As long as the courts do not issue a judgment under this resolution, the President is not violating a Congressional mandate. There is no justiciable controversy. This amended resolution would require the courts to act in order to make the case ripe for court consideration, but courts have been reluctant to get involved in foreign policy disputes between the executive and legislative branches. We believe the courts, put squarely in the middle, would be highly unlikely to rule.

IV. CONCLUSION

We believe this resolution, both in its original form and as amended for floor consideration, will harm U.S. policy in Bosnia—risking all the achievements of the past two years, risking all the efforts of U.S. troops and our $7 billion investment, and risking the resumption of war.

We believe this resolution, in neither its original form nor as amended for floor consideration, will achieve the author's purpose in clarifying the constitutionality of the War Powers Resolution.

LEE H. HAMILTON.
GARY L. ACKERMAN.
ENI F.H. FALEOMAVAEGA.
ALCEE L. HASTINGS.
BOB CLEMENT.
SAM GEJDENSON.
ROBERT WEXLER.
JIM DAVIS.
BILL LUTHER.
MATTHEW G. MARTINEZ.

DISSENTING VIEW ON THE UNFAVORABLE RECOMMENDATION OF THE HOUSE INTERNATIONAL RELATIONS COMMITTEE ON H. CON. RES. 227

INTRODUCTION

H. Con. Res. 227 was introduced on February 26, 1998. Because it is a concurrent resolution brought under section 7 of the War Powers Resolution of 1973, it must be heard in the International Relations Committee within 15 calendar days of introduction, and within 3 calendar days thereafter on the House floor, unless a different schedule is agreed to by the yeas and nays. No rule is required for the concurrent resolution to be heard on the House floor, and the matter must be voted on there whether or not the International Relations Committee concurs with the concurrent resolution.

The purpose of H. Con. Res. 227 is to compel a vote in Congress on whether U.S. armed forces should be in Bosnia. The concurrent resolution itself is neutral as to whether those armed forces should be so employed. The concurrent resolution is emphatically not neutral on the point that it is for Congress to make this decision, however.

A secondary purpose of H. Con. Res. 227 is to create a test case on the constitutionality of the War Powers Resolution, and on the division of responsibility between the President and the Congress regarding the use of American forces overseas—a test case that will survive the obstacles that have heretofore been found by courts in choosing not to rule on this issue.

A. HOSTILITIES EXIST IN BOSNIA

The War Powers Resolution, section 5(b), requires the President to withdraw U.S. armed forces sixty days after they have been introduced,

> into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances

unless Congress has granted approval. (This 60-day period can be extended for an additional 30 days if the President certifies that "unavoidable military necessity" requires it.)

1. The word "hostilities"

The House Committee Report on the War Powers Resolution when it was passed in 1973 stated:

> The word hostilities 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 fighting actually

> 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.

H.R. Rep. No. 287, 93rd Cong., 1st Sess. 7 (1973). (A "clear potential" for armed conflict, therefore, appears to satisfy the definition.)

Whereas H. Con. Res. 227 is based on an act of Congress, and not on the Constitution directly, early Supreme Court precedent supports the conclusion that the insertion of U.S. forces into even small conflicts required the approval of Congress. The famous action against the Barbary Pirates during the presidency of Thomas Jefferson, for example, was authorized by Congress; so also were U.S. actions during the Napoleonic wars.[1]

2. Hostilities since December 1995

On February 29, 1996, two months after the introduction of U.S. armed forces into Bosnia, Chairman Benjamin Gilman of the House International Relations Committee sent a letter to the President outlining the following hostilities in Bosnia:

1. Jan. 28, 1996, Lt. Shawn W. Watts of the 66th Military Intelligence Group based at Augsburg, Germany, was wounded by a sniper in Ilidza, Bonsia.

2. NATO spokesman Lt. Col. Brian Hoey was quoted the next day: "unfortunately, this shooting is not an isolated incident. . . . In a city like this, it would be difficult to establish trends, but this is one of a series of recent incidents that have put soldiers at risk."

3. Jan. 31, 1996—U.S. Humvee struck by sniper fire.

4. Jan. 31, 1996—Two U.S. A–10 attack aircraft called in to support threatened Spanish troops near Mostar.

5. Feb. 17, 1996—U.S. A–10 and Kiowa attack helicopters were flown as part of 44 NATO sorties in Han Pojesak and Han Kram, areas controlled by the Bosnian Serbs.

Since Chairman Gilman's letter, the following additional hostilities have occurred.

6. March 15, 1996—U.S. soldier, Spec. Shawn Austin, 21, of Tacoma, Washington, was shot and wounded in northeastern Bosnia when he confronted an intruder at U.S. base Camp Linda near Olova, and U.S. General George Joulwan, Supreme Commander of NATO, told the press, "I think we've been expecting this (sort of) thing all along."

7. March 22, 1996—U.S. soldier Private First Class Floyd E. Bright, was killed and another U.S. soldier was injured when their vehicle struck a land mine.

8. June 4, 1996—French troops in three armored vehicles rescued an American patrol surrounded in a Serb-run police station by a crowd of 200 Bosnian Serbs who threatened them because they were angered by the earlier arrest of an armed Serbian man in the

[1] "The power to declare war was constitutionally vested in Congress. The debates, and early practice, establish that this meant that all wars, big or small, 'declared' in so many words or not—most weren't, even then—had to be legislatively authorized." J.H. Ely, "War and Responsibility."

Serb-held Kula suburb. Forty French soldiers used force to clear the area, allowing the Americans to return safely to base.

9. November 12, 1996—U.S. and Russian troops used tanks, Bradley fighting vehicles and attack helicopters to break up a firefight in Gajevi between Serb and Muslim-Croat federation forces. A U.N. spokesman reported multiple explosions and sporadic fire continuing throughout the day leading U.S. and Russian troops to take up positions between the two sides to impose order, and disarm Serb police illegally carrying AK–47 rifles.

3. Inference of hostilities by casualties to non-U.S. NATO troops

Section 8(c) of the War Powers Resolution provides:

> For purposes of this joint resolution, the term 'introduction of United States Armed Forces' includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

Accordingly, the War Power Resolution requires the taking into account the hostilities in which other NATO, IFOR, or SFOR troops have been involved in Bosnia, in order to evaluate whether the War Powers Resolution has been triggered.

Chairman Gilman's letter of February 29, 1996, sets forth:

1. Jan. 30, 1996—Two British Land Rovers were fired upon by snipers, one driver was wounded.

2. Feb. 1, 1996—French troops were threatened, in response to which, they killed one sniper and captured another.

3. Feb. 3, 1996—Two British soldiers were wounded by sniper fire.

4. Feb. 12, 1996—A NATO vehicle was hit by sniper fire, one occupant wounded.

Since Chairman Gilman's letter, the following additional hostilities against NATO, IFOR, or SFOR troops have been reported.

5. April 17, 1996—Two NATO soldiers were killed and two injured when their vehicle, which was part of a convoy traveling on a gravel road about 12 miles southeast of Doboj, hit an anti-tank land mine.

6. July 16, 1996—Czech peacekeeping soldiers on night patrol were directly fired upon with automatic weapons from a Muslim home as they drove their armored combat vehicle in a zone of separation between Muslim and Serb territories near the village of Memici in northwest Bosnia.

7. September 8, 1996—a Ukrainian NATO peacekeeper was shot dead when three unidentified gunmen opened fire on troops guarding an OSCE warehouse in Sarajevo that contained voting material for the upcoming Bosnian national elections.

4. The inference of hostilities from combat pay

Professor Bonner has pointed out the usefulness of "following the money" in determining whether there are hostilities.

> [T]he specific reason that the administration decided not to designate El Salvador as a hostile fire zone was that to have done so would have triggered the provisions of the War Powers Act. . . . Even if a country is not so designated, a soldier is entitled to the extra $65 if he is in fact fired upon. The GAO auditors found that the U.S. military personnel in El Salvador, from early 1981 until mid-1982, were receiving hostile fire pay for 97 percent of the person-months involved. . . . R. Bonner, "Weakness and Deceit; U.S. Policy and El Salvador" (1984) pp. 274–275.

In Bosnia, U.S. armed forces are receiving "Imminent Danger/Hostile Fire Pay".

According to the Department of the Army's Personal Financial Readiness and Deployability Handbook (TC 21–7), "Imminent Danger/Hostile Fire Pay" is defined on page 9 as:

> Soldiers who are deployed from their unit of assignment and serve on land, aboard a ship, or in an aircraft within an area officially declared by the Secretary of Defense as a "hostile fire zone" or "imminent danger area" are eligible for hostile fire pay, which is an extra $150 a month.

The Office of Assistant Secretary of the Army's Contingency Operations Branch, Management Control Directorate reports that the Army paid Imminent Danger/Hostile Fire Pay to U.S. troops during their deployment to Bosnia in December of 1995, and every year since. Specifically, the Army expended $25.7 million in hostile fire pay in FY '97, and $18 million is budgeted for FY '98.

5. Hostilities as of the time of introduction of U.S. troops

Even if U.S. armed forces have not been subject to hostilities or a situation where imminent involvement in hostilities is clearly indicated by the circumstances since the time of their introduction in December, 1995, the War Powers Resolution requires the President to receive the approval of Congress as of the time he introduces troops.

As of December, 1995, such a situation did exist precisely for the reason that the U.S. troops were introduced. The President believed, and Administration officials stated clearly, that, but for the introduction of U.S. armed forces, the killing would continue.

It is absurd to maintain on the one hand that the introduction of U.S. armed forces was absolutely necessary to prevent massive killings in a civil war, and on the other hand to maintain that the exact same U.S. troops were not being introduced into a situation where imminent involvement in hostilities was clearly indicated by the circumstances at that time.[2]

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[2] President Bush attempted such a circumlocution in 1990, while building up troops in Saudi Arabia prior to Desert Storm, and prior to his changing his mind and requesting the approval of the U.S. Congress. "For some time, despite our deployment of 200,000 troops and concomitant number of ships, planes, and tanks on or near the Saudi-Kuwaiti border, the administration took the position that hostilities were not imminent because the Iraqis were likely to be deterred by our presence." Ely, "War and Responsibility, Constitutional Lessons of Vietnam and Its Aftermath" (1993) at p. 123. It was at this time that our former colleague, Cong. Ron Dellums, commenced his lawsuit that led to the decision in *Dellums* v. *Bush* 752 F. Supp. 1141 (D.D.C., 1990), to be discussed below.

Under Secretary of Defense Slocombe, in response to an inquiry posed to Secretary Cohen in his testimony before the International Relations Committee, responded on August 7, 1997, that he did not consider it likely that hostilities would resume in Bosnia.

> Despite the continuing political tensions in Bosnia and the difficulties with implementation of the civilian aspects of the Dayton Accords, a resumption of military hostilities in the near term appears unlikely. (Complete letter follows this section.)

The phrase, "resumption of military hostilities" says it all. At one time, there were "military hostilities." Otherwise, it would be illogical to refer to their being resumed.

Except for one logical possibility, the Under Secretary's letter constitutes an admission by the Administration that "hostilities" existed in Bosnia at a time relevant to the present discussion.

The only remaining other logical possibility is that the Under Secretary meant to say military hostilities had, indeed, existed in Bosnia, but that they terminated sometime (perhaps an instant) BEFORE American troops were introduced.

If so, then why were our troops introduced? If hostilities were over, why introduce U.S. troops? The answer must be because it was feared that hostilities would otherwise soon resume. But that condition is picked up by the alternative phrase in the War Powers Resolution, where "imminent involvement in hostilities is clearly indicated by the circumstances."

6. The perversity of waiting for U.S. troops to be killed in large numbers

There is another approach to all this. One could argue that hostilities do not exist under the circumstances in Bosnia. If one pursues this route, then one should be prepared to answer when hostilities would be held to be present.

Herein lies a great danger. If hostilities are measured in terms of the number of Americans killed, then there is a perverse incentive for the foes of America, hopeful that the Congress will vote against the use of force if given the chance to do so, would then set about killing the requisite number of Americans in order to end the involvement of U.S. armed forces.

There is already some incentive of this nature from the history of U.S. troop involvement in Lebanon and in Somalia. In each case, armed forces were withdrawn when casualties were sustained. However this happened, it was not as a result of a guarantee that the killing of a certain number of Americans would trigger a systemic step in the U.S. constitutional process.

There are two ways to prevent this. The first is simply to cut the Congress out entirely. Such an approach would argue that there is no longer a role for Congress under its constitutional war declaration or other international affairs authority.

The second way to prevent this result is to require the involvement of the U.S. Congress at the start of the introduction of U.S. armed forces into a situation where hostilities appear imminent. Such a decision made at that time is then not subject to an automatic vote on reversing policy when things get rough. There is a

good policy reason to favor this latter course. The strength of the U.S. commitment, and the likely duration of it, would be greatly bolstered by an affirmative vote of Congress at the outset.

B. OTHER AUTHORIZATIONS FOR USE OF FORCE

If the War Powers Resolution is constitutional (see next section), then it becomes the sole route for Congress to authorize the use of U.S. armed forces, absent a declaration of war, in conflict overseas.

Because of all the many prevarications and circumlocutions surrounding the role of Presidents in waging war without Congress' approval, the drafters of the War Powers Resolution were explicit that one could not infer approval in the future by reference to an appropriation, or to a treaty, unless the War Powers Resolution was specifically mentioned.

> Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred (1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution) including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or (2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

Section 8(a). There has been no such explicit language, referencing the War Powers Resolution, in any appropriation bill approved by Congress regarding Bosnia. Regarding a treaty, there have been no new treaties approved by the Senate regarding Bosnia since our recent involvement there. And as for the United Nations Charter, under which the IFOR and SFOR have purportedly been acting, the United Nations Participation Act of 1945 prevents any such authority for U.S. troops without a separate act of Congress.

> '[E]xcept as authorized in section 287d–1 of this title, nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements.' 22 U.S.C. sec. 287d (1988). . . . (Section 287d–1 deals only with non-combatant assistance 'not involving the employment of armed forces contemplated by chapter VII' of the Charter; Articles 42 and 43 are both parts of Chapter VII.)" J.H. Ely, "War and Responsibility" (1993) p. 152, n. 60.

To summarize: there has been no Congressional authorization of U.S. armed forces in Bosnia, through statute, appropriation, treaty, or resolution, that satisfies the requirements of the War Powers Resolution. Hence, that resolution itself has not been satisfied and, unless there is no role for Congress in connection with the use of force overseas, permission must be obtained from Congress to continue the U.S. armed forces' involvement in Bosnia.[3]

C. THE CONSTITUTIONALITY OF THE WAR POWERS RESOLUTION

The fundamental purpose of H. Con. Res. 227 is to require a vote on the House and Senate floor on the involvement of U.S. armed forces overseas in Bosnia. However, it is reasonable to anticipate that the Administration and others may wish to contest the constitutionality of Congress exercising such a role. Accordingly, this concurrent resolution has been drafted in such a way as to provide the best possible vehicle for resolution of the important constitutional issues of the separation of power between Congress and the President on issues of war and the use of armed forces overseas.

1. The position of the Administration

"Question: 'Does the Administration fail to follow the War Powers Resolution because it believes it to be unconstitutional?'

"Answer: '. . . While every Administration since the enactment of the Resolution has raised questions about the constitutionality and wisdom of certain of its provisions (including the withdrawal provisions to which you allude), the Clinton Administration recognizes that as a practical matter the Executive and Legislative branches must continue to consult and cooperate in decisions relating to the deployment of U.S. armed forces, and has acted in a manner consistent with the consultation and reporting provisions of the Resolution.'"

Questions for the Record Submitted by Representative Campbell to Secretary of State Madeleine Albright, House International Relations Committee, February 11, 1997.

So, the Administration refuses to take a position on whether the War Powers Resolution is, in fact, unconstitutional. Gratefully, we do not need the Administration to reach a position to constitute a "case or controversy" appropriate for judicial resolution.

2. The requirements for a lawsuit

Under the War Powers Resolution, the President is obliged to withdraw troops, on his own, without any need for Congress to act, a maximum of 90 days after he submitted, or should have submitted, a report that they were being introduced into hostilities or a situation where imminent involvement in hostilities is clearly indicated by the circumstances. Section 5(b).

A lawsuit might seek an injunction upon the President to do so in Bosnia.

[3] Whereas there are concerns about the constitutionality of other parts of the War Powers Resolution, there are no such concerns about Congress' ability in section 8(a) to say what it intends to construe of its own actions in appropriations matters and future treaty ratifications. The War Powers Resolution contains a separability clause, section 9, so that, should other provisions of the Resolution eventually be struck down, the parts not held to be unconstitutional, such as 8(a), remain.

However, when our former colleague, Congressman Ron Dellums, went to Court in 1990 over the build-up of troops in Saudi Arabia, he was prevented from proceeding to the merits because he had not obtained a resolution from Congress.

Judge Harold Greene explicitly found:

> (a) that the Constitution places unambiguously in the legislative process authority to decide whether the nation goes to war;
>
> (b) that whether the required congressional authorization has been obtained is not a "political question" that courts should refuse to decide; and
>
> (c) that the congressional plaintiffs had standing to bring the challenge.
>
> The lawsuit ran aground, however, on a fourth finding by Judge Greene, that unless and until the plaintiffs could get a majority of their colleagues to join their challenge, the case was not "ripe" for decision. J.H. Ely, "War and Responsibility" (1993) p. 58.

The only way to avoid this pitfall in the present situation, therefore, is to seek a resolution by Congress. And only a concurrent resolution under section 5(c) of the War Powers Resolution provides an automatic vote in Committee and on the floor, through Section 7.

Once in court, Congress should rely on section 5(b) as well as section 5(c). Section 5(b) requires the President to withdraw troops lacking an authorization; section 5(c) gives Congress the power to withdraw the troops upon the passage of a concurrent resolution. Section 5(c) will undoubtedly be challenged as a legislative veto under the precedent of *INS* v. *Chadha,* 462 U.S. 919 (1983).[4] Section 5(b), however, will not be open to that challenge.

A declaration of Congressional intent through a concurrent resolution should satisfy Judge Greene's standing requirement whether it is brought under 5(c) or 5(b); so, to take advantage of the War Powers Resolution's streamlined Congressional procedure provisions, H. Con. Res. 227 refers to section 5(c).

3. Neutrality on Bosnia policy

The style of section 5(c) requires that the concurrent resolution call for the removal of troops. If it did not do that, it couldn't be called a 5(c) concurrent resolution. However, H. Con. Res. 227 is otherwise entirely neutral on whether the policy of the United States should be to have armed forces in Bosnia under the present circumstances or not.

The final section of H. Con. Res. 227 states:

> The requirement to remove United States Armed Forces from the Republic of Bosnia and Herzegovina under subsection (b) does not necessarily reflect any disagreement with the purposes or accomplishments of such Armed Forces, nor does it constitute any judgment of how the Congress would vote, if given the opportunity to do so, on

[4] There is, nevertheless, a good argument that *Chadha* does not invalidate section 5(c). See Ely, op cit., at 119–120 and n. 21.

> either a declaration of war or a specific authorization for the use of such Armed Forces.

Indeed, even the 5(c) triggering language of the War Powers Resolution itself says that the President is to withdraw the troops—but only if he has not obtained the approval of Congress required by the War Powers Resolution. It implies no judgment on the merits.

In response to the passage of H. Con. Res. 227, the President might seek that approval. Or he can choose to ignore this concurrent resolution.

4. Consequences of the President's refusal to honor H. Con. Res. 227

Serious constitutional issues remain to be resolved concerning the War Powers Resolution. Some parts may be unconstitutional. Other parts are quite clearly constitutional, however, and there is a "severability clause" in the War Powers Resolution so that the constitutional parts may continue in force even should some of the Resolution be struck down as unconstitutional. At the very least, the Congressional procedure provisions are not in any constitutional doubt. Accordingly, there should be no hesitation on constitutional grounds for H. Con. Res. 227 to be considered in an expedited fashion by Members of Congress in the International Relations Committee and on the floor.

The concurrent resolution anticipates that the President may well resist, and that a lawsuit will have to be commenced. In the fullest possible deference to the President, the resolution, as amended, therefore does not compel the withdrawal of troops until after a final judgment has been entered in such litigation. Thirty days after losing such a case, the President must have obtained Congressional approval, or he must withdraw the troops. If he still refuses, then he will, indeed, have precipitated a constitutional crisis.

When the litigation is over, some, if not all, of the War Powers Resolution will be left standing. Congress can then legislate anew on what system might work to accommodate properly the President's powers as Commander-in-Chief and the Congress' sole authority to declare war, and other related international relations powers, under the Constitution.

But if H. Con. Res. 227 is not passed, that litigation will never happen, and Congress and the President will continue in a world of uncertain divided responsibility over the single most important authority delegated by the people to their government: the power to go to war.

D. CONCLUSION

There is no other way to test the constitutionality of the War Powers Resolution than to invoke it.

There is no other way to overcome ripeness objections to a lawsuit enforcing the War Powers Resolution than to pass a concurrent resolution of Congress to apply it. We know from experience that individual Members of Congress will not be allowed to proceed in court without such a concurrent resolution.

This concurrent resolution itself is scrupulously neutral on the advisability of being in Bosnia.

This concurrent resolution is honest with the facts. There are hostilities in Bosnia. There were hostilities at the time our troops were introduced. To say anything else is sophistry. To play with words is unconscionable where American servicemen and women's lives are at stake. Bosnia does present a situation for which the War Powers Resolution was intended.

To use circumlocution and clever verbal distinctions to allow Congress to escape from its responsibility to decide when American troops are to be committed overseas is to surrender our Constitutional right, and our Constitutional obligation.

AUTHOR'S NOTE: This memorandum was prepared personally by me. I acknowledge an intellectual debt of enormous proportion to Professor John Hart Ely, from whose book, "War and Responsibility" (Princeton Univ. Press, 1993), I have not only explicitly quoted, but from which source I have also obtained a great deal of the other material cited in this memorandum. I would also like to thank Joel Starr of my staff for his assistance.

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AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H. CON. RES. 227, AS REPORTED OFFERED BY MR. CAMPBELL OF CALIFORNIA

Strike all after the resolving clause and insert the following:

SECTION 1. REMOVAL OF UNITED STATES ARMED FORCES FROM THE REPUBLIC OF BOSNIA AND HERZEGOVINA.

(a) FINDINGS.—The Congress finds the following:

(1) The Congress has the sole power to declare war under article I, section 8, of the Constitution.

(2) A state of war has not been declared to exist with respect to the situation in the Republic of Bosnia and Herzegovina.

(3) A specific authorization for the use of United States Armed Forces with respect to the situation in the Republic of Bosnia and Herzegovina has not been enacted.

(4) The situation in the Republic of Bosnia and Herzegovina constitutes, within the meaning of section 4(a)(1) of the War Powers Resolution (50 U.S.C. 1543(a)(1)), either hostilities or a situation where imminent involvement in hostilities is clearly indicated by the circumstances into which United States Armed Forces have been introduced.

(b) REMOVAL OF ARMED FORCES.—

(1) IN GENERAL.—Pursuant to section 5(c) of the War Powers Resolution (50 U.S.C. 1544(c)), the Congress hereby directs the President to remove United States Armed Forces from the Republic of Bosnia and Herzegovina not later than 60 days after the date on which a final judgment is entered by a court of competent jurisdiction determining the constitutional validity of this concurrent resolution, unless a declaration of war or specific authorization for such use of United States Armed Forces has been enacted.

(2) EXCEPTION.—The requirement to remove United States Armed Forces from the Republic of Bosnia and Herzegovina under paragraph (1) shall not apply with respect to—

(A) a limited number of members of the Armed Forces sufficient only to protect United States diplomatic facilities and citizens; or

(B) noncombatant personnel to advise the North Atlantic Treaty Organization (NATO) Commander in the Republic of Bosnia and Herzegovina.

(c) DECLARATION OF POLICY.—The requirement to remove United States Armed Forces from the Republic of Bosnia and Herzegovina under subsection (b) does not necessarily reflect any disagreement with the purposes or accomplishments of such Armed Forces, nor does it constitute any judgment of how the Congress would vote,

if given the opportunity to do so, on either a declaration of war or a specific authorization for the use of such Armed Forces.

○