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“Congressional Perspectives on the War Powers Resolution”
Subcommittee on International Organizations, Human Rights, and Oversight
Committee on Foreign Affairs
U.S. House of Representatives

March 13, 2008

Mr. Chairman, Congressman Rohrabacher, Members of the Subcommittee, it is a great pleasure for me to appear before this Subcommittee to testify on the War Powers Resolution. The single most important component of the jurisdiction of the Committee on Foreign Affairs undoubtedly is its jurisdiction over questions of war and peace. Accordingly, I commend you for the efforts you are making to review how that jurisdiction has been exercised in the past and how it might be exercised more effectively in the future.

My perspective on the War Powers Resolution is shaped by the four years I spent as an Associate White House Counsel to President George H.W. Bush focusing on national security matters, followed by the ten years I spent as Minority Chief Counsel and then Chief Counsel to this Committee. I am, therefore, familiar with the legal arguments that both the Executive Branch and the Congress bring to bear on this debate, as well as the political constraints under which both branches operate when it comes to the use of military force. On the basis of this experience, I will make several observations at the outset.

The War Powers Resolution Is Not a Partisan Issue

Because of the history of the War Powers Resolution—its enactment over President Nixon’s veto in the wake of the Vietnam War—the Resolution is commonly thought of as a partisan issue, something that Democrats generally support and Republicans generally oppose. This view has some foundation historically, but it is certainly misleading. For the majority of my time on the staff of this Committee, I worked for Congressman Benjamin Gilman, a Republican from New York. Congressman Gilman was a strong supporter of the War Powers Resolution. He voted for it in 1973, and he was committed to strengthening and preserving it as Ranking Member and later Chairman of this Committee.

In 1995, Congressman Henry Hyde, who was at that point Chairman of the Judiciary Committee, offered an amendment on the House floor to repeal the War Powers Resolution. Despite Republican control of the House, and despite support from such prominent Democrats as Congressman John Murtha, the Hyde amendment was defeated on a vote of 201-217. Chairman Gilman opposed the amendment, and he was reassured to hear from me prior to the vote that if

the amendment passed the House, at least half of the likely House Republican conferees would oppose it in conference.

Congressman Hyde, of course, later became Chairman of this Committee, and as Chairman he continued to oppose the War Powers Resolution because he saw it as an unconstitutional infringement of the President's authority to deploy U.S. Armed Forces abroad in defense of vital U.S. interests. Chairman Hyde was, of course, an iconic figure to many Republicans, as was his counterpart in the Senate, Chairman Jesse Helms. Like Chairman Hyde, Chairman Helms was also opposed the War Powers Resolution, but for a completely different reason. Chairman Helms opposed the War Powers Resolution because he thought no President should deploy U.S. Armed Forces into combat without the express approval of Congress, and he viewed the "sixty-day clock" during which the War Powers Resolution permits such deployments as an unwise delegation of congressional authority.

During the 1990s, debates over U.S. involvement in peacekeeping operations became increasingly frequent and contentious in Congress. Some proponents of U.S. involvement in such operations—most often Democrats—grew increasingly uncomfortable with the constraints imposed by the War Powers Resolution on the ability of the United States to engage in peacekeeping. At the same time, some critics of U.S. involvement in such operations—most often Republicans—became more supportive of the Resolution. In the Senate, it was even proposed at one point to deem the requirements of the Resolution satisfied any time the United Nations Security Council authorized the use of armed force. Had this idea been adopted, Congress effectively would have ceded at least some part of its authority over the use of force to the United Nations.

The War Powers Resolution Is a Separation of Powers Issue

If the debate over the War Powers Resolution is not a partisan debate, it most emphatically is a debate between the two political branches of government. So far as I am aware, every President since Richard Nixon, Republican and Democrat, has decided that the War Powers Resolution is ill-conceived. When Congressman Hyde sought to repeal the Resolution in 1995, he was able to circulate separate signed letters from Gerald Ford, Jimmy Carter, and George H.W. Bush, all endorsing his amendment. President Carter's letter stated "I fully support your effort to repeal the War Powers Resolution. Best wishes in this good work."

The Political Dimension

When a particular case arises under the War Powers Resolution, most Members of Congress are guided more by what they think about the military operation in question than by abstract legal principles. In my experience, even Members of Congress who care passionately about the War Powers Resolution have sometimes been willing to look the other way when a military operation came along that they supported but a majority of their colleagues did not.

While this may sound like a criticism, I do not intend it as one. To the contrary, I think this fact reminds us of a reality that is easily forgotten in discussions like the one we are having today, divorced from the facts of any particular case. Debates over the use of military force involve questions of life and death. Legal principles that sound good in the abstract become much less compelling in a discrete case where Members firmly believe that the application or non-application of those principles may either cause or prevent unnecessary death and human suffering.

Chairman Lee Hamilton was a strong supporter of the Resolution, but in 1993 he chose to remain silent when the Clinton Administration came into noncompliance with the Resolution in Somalia. I am attaching to my statement a copy of an Extension of Remarks, entitled "Death of the War Powers Resolution in Somalia," that Ranking Member Gilman entered into the Congressional Record on August 4, 1993, chastising Chairman Hamilton for his silence.

Chairman Gilman was also a strong supporter of the Resolution, but six years later he faced a similar dilemma when President Clinton initiated military operations in Kosovo without congressional authorization. Like Chairman Hamilton, Chairman Gilman decided against seeking a confrontation with the Executive branch over a military operation that he supported. His rationale was very simple: he thought President Clinton's intervention in Kosovo was justified on humanitarian grounds, even if a majority of the House of Representatives did not, and he was not going to do anything as Chairman that might constrain the President's ability to save the lives of innocent civilians.

Just as supporters of the War Powers Resolution sometimes go silent when the Resolution risks interfering with a military operation that they favor, opposition to a particular military operation can turn critics of the Resolution into supporters. I mentioned that in 1995 I had to assure Chairman Gilman that there would be votes in conference to strip out Chairman Hyde's amendment to repeal the War Powers Resolution if that amendment passed the House. The reason Chairman Gilman needed this reassurance was because it seemed clear to us as we began the House debate on the underlying measure that the Hyde amendment was going to pass. Had Chairman Hyde offered his amendment before the Memorial Day recess in 1995, it likely would have passed. Chairman Hyde was afforded that opportunity, but he decided to hold his amendment until after the recess in order to allow more time to debate it.

During that two-week recess, press reports emerged that the Clinton Administration was preparing to deploy U.S. Armed Forces into Bosnia to conduct peacekeeping in that war-torn country. These reports changed the character of the floor debate on the Hyde amendment, turning it to some extent into a debate on the merits of a U.S. peacekeeping operation in Bosnia. At least one Member stated on the floor that he had previously supported repeal of the Resolution, but the prospect of a peacekeeping operation in Bosnia had changed his mind about the issue.

Of course, not all Members have been prepared to bend their views on the War Powers Resolution. I believe I am testifying in the company of two such former Members. Another such Member was Congressman Tom Campbell, a Republican from California who had previously been a law professor at Stanford University. He was sufficiently exercised by Congress's inaction in the face of President Clinton's initiation of combat in Kosovo that he took matters into his own hands. To circumvent this Committee and his own Leadership, he introduced two resolutions pursuant to the expedited procedures of the War Powers Resolution. His first resolution directed the President to withdraw U.S. forces from Kosovo, and the second declared war on Yugoslavia. The expedited procedures of the War Powers Resolution afforded him floor votes on both measures. He argued on the floor that Members logically had to vote in favor of one of the two options he was presenting. In the end, two other options were presented as well, including a Senate-passed measure that would have authorized continuation of the air campaign—but not a ground war—against Yugoslavia.

Both options presented by Congressman Campbell were defeated. His concurrent resolution directing the President to remove U.S. Armed Forces from the conflict was defeated on a vote of 139-290. His joint resolution declaring war was defeated 2-427. The Senate-passed measure also failed on a tie vote. At the time, this entire exercise was seen as an embarrassment to the House of Representatives. One White House spokesman quipped that the House had “voted no on going forward, no on going back, and . . . tied on standing still.” My own view, however, was that the House had tried to fulfill its responsibilities and had thoroughly debated an important issue. The problem was that the debate took place under defective procedures that did not guarantee a clear outcome.

I do not mean to suggest with these examples that Members of Congress are the only ones to take a result-oriented approach to the War Powers Resolution. Presidents do so as well. In my experience, once a President becomes determined to use military force, he typically is interested in seeking congressional authorization for that use of force only to the degree he is satisfied that he will win. I believe this accounts for the willingness of President George H.W. Bush to seek authorization for the first Persian Gulf War, and the willingness of President George W. Bush to seek authorization for the response to 9/11 and the second Persian Gulf War.

The other extreme is illustrated by Somalia. In that case, neither the first Bush Administration nor the Clinton Administration requested authorization to deploy peacekeeping forces to Somalia. The Senate nevertheless voted to provide it, and after some hesitation the House voted to provide authorization for a period of twelve months. The Clinton Administration concluded that all it was likely to get if this issue went to a conference committee was authorization for twelve months. It decided that this would be worse than no authorization at all, and so it asked the Leadership of both houses to drop the matter. Presumably the Clinton Administration regretted this decision some months later after 18 U.S. Rangers died in the Blackhawk Down incident and political support for peacekeeping in Somalia collapsed, but by then it was too late for it to build a policy that Congress would support.

What Should be Done?

I believe the War Powers Resolution has succeeded in forcing Presidents to consult more closely with Congress than they otherwise would. It also has succeeded in forcing both branches of government to more carefully consider whether to authorize or seek to authorize particular deployments of U.S. Armed Forces. The part of the Resolution that has most visibly failed is the so-called “sixty-day clock.”

I have never approved of the sixty-day clock. Because of the serious consequences that the Resolution seeks to attach to expiration of the sixty-day clock, all Presidents have had an incentive to either not report under the Resolution on deployments of U.S. Armed Forces, or to submit evasive reports. The clock has also led the Executive branch to adopt tortured legal interpretations that make a mockery of the law. One such interpretation is spelled out in the Extension of Remarks regarding Somalia that I have attached to my statement.

I believe the sixty-day clock has had an even more insidious effect on Congress. While the intention was to put teeth into Congress’ assertion that the President cannot commit U.S. Armed Forces to combat without congressional authorization, in practice the effect has been to tell Congress that it need not do anything when a particular case arises. The message to Congress is that it does not need to act, because the War Powers Resolution will act for it. Not only is this bad policy, but it does not work, as we have seen on numerous occasions since 1973. The problem is not just that the Executive branch has figured out clever ways to avoid the sixty-day clock, but also that in a surprising number of cases many Members of Congress have been satisfied for it not to work.

If Congress wishes to be a full partner in national decision-making with respect to the use of force, it does not need a default that can serve as an excuse for inaction. Rather, it needs procedural arrangements that will force it to act. I believe that Congressman Campbell was onto something nine years ago when he tried to confront his colleagues with two options regarding Kosovo, and argued that they had to pick one. His message was that Members should either authorize the operation, or order the President to end it. The rules of that debate nine years ago did not force Members to choose, so both options were rejected and the House ended up looking foolish. But I have great confidence in the ability of the Rules Committee to structure debates in ways that would force Members to choose. And there is no procedural device the Rules Committee can construct by Rule that Congress cannot write into the law.

I therefore suggest that Congress should consider replacing the sixty-day clock with a requirement that Congress must vote when U.S. forces are deployed into hostilities. Congress could further specify that when it votes under these circumstances, an affirmative vote will be a vote to authorize and a negative vote will be a vote to order the withdrawal of U.S. forces. Some might object that Congress should have before it more options than just these two. There is no

reason not to allow more options, so long as the consequence of adoption of each option is made clear. If the option is adopted, will the President be allowed to go forward with the military operation, or will he be required to end it?

I see only two arguments against this kind of approach. The first is that it would deny Congress the option of equivocating on the use of force. The second is that there may be cases in which Congress is unable to enact legislation regarding a particular military operation. This could happen, for example, because the House and Senate disagreed over whether to authorize or prohibit a particular operation. It could also happen because Congress approved legislation forbidding a particular operation by less than a veto-proof margin, and the President went ahead on the strength of his veto pen.

I think cases in which the President decided to proceed after Congress failed to override his veto would be rare and fraught with political danger for any President. I acknowledge that Presidents may feel less politically constrained in cases where one House has voted to authorize an operation and the other has voted to forbid it. This risk does not exist in a vacuum, however. It must be compared to the risk that exists today of evasion by the Executive branch of any sort of automatic clock that Congress might establish. As we know from the uneven record of enforcement of the clock that exists today, that risk is considerable.

Thank you, Mr. Chairman.