FIFTEENTH CONGRESS OF THE REPUBLIC)
OF THE PHILIPPINES)
First Regular Session)

SENATE

Jt. Res. No. 3

Introduced by Senator Miriam Defensor Santiago

JOINT RESOLUTION
TERMINATING THE VISITING FORCES AGREEMENT AND DIRECTING THE SECRETARY OF FOREIGN AFFAIRS TO GIVE NOTICE OF TERMINATION TO THE UNITED STATES

WHEREAS, the Constitution, Article 18, Section 25 provides that: "After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning military bases, foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting State";

WHEREAS, last 23 September 2009, the Philippine Senate adopted Resolution No. 205 calling for the renegotiation of the VFA, and in case of denial, the Department of Foreign Affairs (DFA) should give notice of termination;

WHEREAS, despite a commitment made by the DFA to conduct a full balanced review of the treaty, they have yet to submit the recommendations to the Senate;

WHEREAS, although the RP-US VFA calls itself a "**visiting**" agreement, it has been in force for some 10 years;

WHEREAS, the fatal flaw of the VFA is the failure to specify the period of stay of visiting forces, and the failure to define what are the "activities" that they can engage in while in Philippine national territory;

WHEREAS, as early as 2004, the pretense that US troops are intended only to train RP soldiers and to conduct joint military exercises, was belied in an article by the first commander of the Joint Special Operations Task Force Philippines, Col. David Maxwell, who wrote: "However, a correct reading of the Philippine Constitution reveals that it prohibits only the stationing of foreign forces in the Philippines. . . . The **Constitution does not prohibit combat operations** and provides an exception to this if there is a treaty in force and a treaty has been in force between the two countries since 1951." ("Operation Enduring Freedom - Philippines: What Would Sun-Tzu Say?" US Army Combined Arms Center, *Military Review*, May-June 2004);

WHEREAS, the VFA, in circumvention of the prohibition against foreign military presence under the Constitution, opens the way to all forms of military activities of the US forces in Philippine territory, short of establishing a permanent military base;

WHEREAS, Article 62 of the Vienna Convention on the Law of Treaties enunciates the doctrine of **rebus sic stantibus**, which provides that a treaty is concluded with the implied condition that it is intended to be binding, only as long as there is no vital change in the circumstances;[1]

WHEREAS, if by an unforeseen change of circumstances, the continuance of the treaty would jeopardize the existence or vital development of one parties, that party should have a right to demand to be released from the obligations imposed by the treaty;[2]

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[1] Coquia and Defensor Santiago, "International Law," Central Lawbook Pub., 2005.
[2] *Ibid.*

WHEREAS, the change of circumstance is that although US troops were ostensibly limited to military training exercises, today they are now embedded with Philippine combat troops, wearing uniforms and carrying firearms;

WHEREAS, the changes that have taken place within the last ten years constitute the essential basis of the consent of both parties to be bound by the VFA, and the changes are so fundamental as to transform the nature and extent of the obligations to be performed by the Philippines;[3]

WHEREAS, in the 2009 case of *Nicolas v. Romulo*, the Supreme Court upheld the constitutionality of the VFA, on the ground that it has been recognized as a treaty by the other contracting state;

WHEREAS, the RP Congress submits that the US has **NOT** recognized the VFA as a treaty, because the US Senate has never given its advice and consent to the VFA; instead, the US President merely transmitted to the US Congress the VFA and all other executive agreements, to comply with the Case-Zablocki Act;

WHEREAS, this American law requires the US President through the Secretary of State, to transmit to the US Congress international agreements entered into by the US government, **which are not characterized as treaties**;

WHEREAS, the ruling in *Nicolas* that the US has recognized the VFA as a treaty, is contradicted by the language of the US law itself, which refers only to international agreements **which are not characterized as treaties**;

WHEREAS, in *Nicolas*, the Court adopted the theory that the VFA merely implements the RP-US Mutual Defense Treaty; but nowhere in the VFA (1998) is there any mention of the MDT (1951), both of which are separated in time by almost 50 years;

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[3]Agabin, Pacifico, "VFA After Ten Years: Altered Circumstances Have Rendered It Unconstitutional," 2009.

WHEREAS, the VFA is not qualified to be valid and constitutional for the reason that it is not recognized as a treaty by the US as a contracting State on the account of its own Constitution and law;[4]

WHEREAS, Article 54 (a) of the Vienna Convention provides that the termination of a treaty or the withdrawal of a party may take place in conformity with the provisions of the treaty;

WHEREAS, the VFA provides for the manner of termination: "This agreement shall remain in force until the expiration of 180 days from the date on which either party gives the other party notice in writing that it desires to terminate the agreement." (Article 9, 1998 RP-US VFA);

WHEREAS, the treaty-making power is shared by the President with the Senate, under the constitutional provision that: "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate." (Article 7, Section 21);

WHEREAS, in *Government of USA v. Purganan*[5], the Court ruled that this constitutional requirement is, for legal intent and purposes, an equivalent to the required transformation of treaty law into municipal law;

WHEREAS, the RP Senate submits that treaty termination like treaty making should also be a shared function;[6]

WHEREAS, in *Hooper v. US*[7], the US Court of Claims ruled that Congress was the correct authority to abrogate the treaty and had properly issued the terminating act, on the grounds that a treaty was the law of the land;

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[4] Magallona, Merlin, "Issues Arising from the SC Decision on Nicolas v. Romulo," 2009.
[5] 389 SCRA 623, 24 September 2002.
[6] Roque, Harry,"Legal Mechanics of the Abrogation of VFA," UP Law Center Institute of International Legal Studies, 2005.
[7] 22 Ct. Cl. 408 (1887). "The treaties therefore ceased to be a supreme law of the land. The annulling act issued from competent authority and was the official act of the government of the United States. So far as it was within the power of one party to abrogate these treaties it was undisputedly done by the Act of July 7, 1787."

WHEREAS, it is well within the powers of Congress to terminate the VFA, through a joint resolution, giving the mandatory notice specified in the agreement and the Executive's role should be to give notice of termination to the United States although the decision itself is one for Congress to make;[8]

RESOLVED by the Senate and House of Representatives in Congress assembled, that the Visiting Forces Agreement with the United States should be terminated; and

RESOLVED FURTHER, that the Secretary of Foreign Affairs is hereby directed to give the notice of termination to the United States.

Adopted,

MIRIAM DEFENSOR SANTIAGO

[8] Roque, *supra*.