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THE NOVEMBER 26 DECLARATION OF PRINCIPLES: IMPLICATIONS FOR U.N. RESOLUTIONS ON IRAQ AND FOR CONGRESSIONAL OVERSIGHT

HEARING

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS, HUMAN RIGHTS, AND OVERSIGHT

OF THE

COMMITTEE ON FOREIGN AFFAIRS HOUSE OF REPRESENTATIVES

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THE NOVEMBER 26 DECLARATION OF PRINCIPLES: IMPLICATIONS FOR U.N. RESOLUTIONS ON IRAQ AND FOR CONGRESSIONAL OVERSIGHT

FRIDAY, FEBRUARY 8, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS,
HUMAN RIGHTS, AND OVERSIGHT,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:41 a.m. in Room 2175, Rayburn House Office Building, Hon. William D. Delahunt (chairman of the subcommittee) presiding.

Mr. DELAHUNT. The subcommittee will come to order. This is the third in a series of hearings on the Declaration of Principles signed by President Bush and Iraqi Prime Minister Maliki on November 26, 2007. The declaration appears, and I underscore "appears," appears to be a pledge by the two leaders to negotiate a number of substantial commitments. Most significantly, the declaration suggests an indefinite United States military presence in Iraq with multiple responsibilities to be assumed by our Armed Forces.

Let me read into the record excerpts from the declaration which reflect some of the most significant of those responsibilities:

> "Supporting the Republic of Iraq in defending its democratic system against international and external threats; providing security assurances and commitments to the Republic of Iraq to deter foreign aggression against Iraq that violates its sovereignty and integrity of its territories, waters or airspace; supporting the Republic of Iraq in its efforts to combat all terrorist groups, at the forefront of which is Al-Qaeda, Saddamists, and all other outlaw groups regardless of affiliation, and destroy their logistical networks and their sources of finance, and defeat and uproot them from Iraq."

I would note that the Declaration of Principles is not just about military commitments, but also includes a broad political and economic agenda that involves significant and possibly open-ended commitments and obligations.

For the third time in 3 months, we have invited the administration to explain the import of this document to the Congress and to the American people, and for the third time they have declined our invitation.

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I would note for the record, on January 29, Chairman Tom Lantos sent an invitation to the Secretary of State, Condoleezza Rice, asking her or someone she designated to testify at this hearing. The State Department responded that no representative would appear on the grounds that the agreement to be negotiated was still preliminary. This seems to contradict a January 25 New York Times report that a 15-page draft proposal does in fact exist.

The State Department informed me that Ambassador David Satterfield would be briefing members of the Foreign Affairs Committee in classified session yesterday. I could have attended that briefing, and according to the State Department, could have asked unclassified questions and received unclassified responses that I then could discuss in public.

Well, I find that unsatisfactory. It is my position that the American people have a right to be fully and directly informed as to the intentions of the administration regarding any agreement with the Government of Iraq. The American people have paid dearly for that right, almost 4,000 of our sons and daughters have died in that conflict, and tens of thousands have been seriously injured. Possibly hundreds of thousands of innocent Iraqi civilians have been killed and millions have been forced to flee their homes and are now refugees in neighboring countries.

Furthermore, the financial cost of this war is on its way to $1 trillion with no end in sight, and the record of this administration, in terms of consulting with Congress, has been abysmal. As Senator Hagel, our Republican colleague in the other body, has said in regards to the run-up to the war, the Bush administration considered Congress, and these are his words, "to be an adversary, an enemy in fact . . ."—that is what he said—"and a constitutional nuisance."

Well, so be it. We will be a nuisance.

I find it particularly disturbing that the Bush administration has even ignored State Department regulations requiring, and again I am reading from the Department of State regulations, the following:

> "The appropriate congressional leaders and committees are advised of the intention to negotiate significant new international agreements, consulted concerning such agreements, and kept informed of developments affecting them."

I have checked with the House leadership and I have checked with the leadership of this committee as well as that of the House Armed Services Committee, and there has been no such consultation unless you count the classified briefing that occurred yesterday. There has been one exception to this lack of consultation and transparency, and that occurred just this week.

Secretary Gates appeared before the Senate and House Armed Services Committee on Wednesday and seemed to minimize the Declaration of Principles as nothing more than a press release. He testified that the administration is not seeking to make—and in fact he pledged that it would not make—security commitments to defend Iraq. All that is being negotiated, he said, is a standard Status of Forces Agreement that governs the conduct of U.S. forces in another country.

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Now, on its face, this would appear to be a major reversal of the administration's position. So it is all the more important now to remove any confusion and explore the apparent contradictions between the Declaration of Principles signed by our President, George W. Bush, and the testimony of Secretary Gates. We will re-issue our invitations to the administration once more in an effort to achieve definitive clarity for the American people. This is just simply too important an issue given the past 6 years and our involvement in Iraq.

Our witnesses today will address at least four main questions. Question 1: What is a Status of Forces Agreement (SOFA) and can it provide authority for U.S. forces to engage in combat in or on behalf of another country? Dr. Douglas Macgregor, a retired army colonel with a distinguished record in both combat leadership and military strategy and someone who has negotiated, served under and implemented Status of Forces Agreements will focus his testimony on that question.

Question 2: If, as the Declaration of Principles implies, the agreement were to include a commitment to defend the Maliki government against internal and external enemies, could it be carried out by the administration alone or would Congress have to approve it as a treaty or a congressional executive agreement? Constitutional Scholar Oona Hathaway, a professor at Yale Law School, and Michael Glennon, a professor at The Fletcher School of Tufts University, who is counsel to the Senate Foreign Relations Committee and helped craft legislation in this area, will address that question for us.

Question 3: What consultation is required with the Congress by law and by State Department regulations on both the form of the agreement and the issues to be negotiated, and has such consultation occurred? Former State Department legal advisor, Michael Matheson, who is now a professor at The George Washington University Law School, will assist in this matter.

Finally, question 4: What procedures must be followed within the executive branch as it makes decisions on what form the agreement should take and how the negotiations are to be organized, and have they been properly taken to date? Professor Matheson will walk us through these procedures. I note that he can also guide us through the implications of terminating the U.N. mandate and perhaps other U.N. resolutions regarding Iraq as contemplated in the Declaration of Principles. This is an area that really has not been reviewed.

And we are very pleased also to have the benefit today of testimony on any and all of these questions from our witness who has been suggested by my friend and colleague, Mr. Rohrabacher, Professor Ruth Wedgwood of Johns Hopkins University, who has served in a variety of administration legal positions.

So before we hear from our witnesses, let me turn to my friend and ranking member, Mr. Rohrabacher of California, for his remarks, and Mr. Rohrabacher, let me note the presence of two distinguished colleagues, Congresswoman Rosa DeLauro of Connecticut, who has filed legislation addressing this issue, and one of our senior members on the Democratic side, Howard Berman of California, and I would ask unanimous consent that they be al-

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lowed to participate in this hearing today and inquire of the witnesses as they may see fit. Without objection?

Mr. ROHRABACHER. Yes, not a problem, and thank you for your leadership in calling this hearing, and let me just note that your microphone is now working and you may now resume the chair——

Mr. DELAHUNT. Thank you.

Mr. ROHRABACHER [continuing]. With my permission.

Mr. DELAHUNT. Thank you.

Mr. ROHRABACHER. All right. [Laughter.]

See, that empty chair, it is just a lure for Republicans. [Laughter.]

Mr. Chairman, I have supported the Iraqi war from the beginning, and I continue to support our efforts to ensure that we accomplish those things in Iraq which will permit us to have an honorable exit from that conflict rather than a retreat and a defeat from that conflict, which I believe would have serious consequences, long-term consequences for the security of the United States as well as the stability of the entire Middle East.

With that said, I also support the Constitution of the United States and what it says about the role of the United States Congress. It is unacceptable, Mr. Chairman, that you, the chairman of this Oversight Subcommittee, had to find out about a bilateral security agreement and the negotiations that were going on between the United States and Iraq by reading it in the newspaper, and also, it is embarrassing for me, as someone who worked in a Republican White House for 7 years—I worked in the Ronald Reagan White House for 7 years—and to find out that the administration officials continue to ignore your requests for participation in an open discussion and dialogue about issues that are of such significance to our country.

This attitude breeds mistrust on the part of Congress and it undermines the public's trust in this administration. Let me just note that an open dialogue about such long-term, potential long-term commitments and strategies that the United States should or should not be making in the Middle East or elsewhere throughout the world is something that will serve our country well.

If the people of the United States believe that there are deals being reached behind closed doors, and that there hasn't been proper discussion, we would not have the public support necessary to be successful, and that is the difference between a society that doesn't rely on public opinion and the democratic process and those societies that are dictatorships.

George Bush was not elected President of the United States to be King of the United States. There are three separate branches of Government, equal branches of Government, and while we recognize that the executive branch does have a lion's share of the responsibility in foreign policy, there is an important role for the Congress of the United States and I do not see that this President is respecting the constitutional authority and duties that we have as Members of Congress, and that is demonstrated by the fact that today we do not have someone here from the administration, and have not had in our hearings before a representative here to have some dialogue about what the goals in Iraq should be, and what is trying to be accomplished in these negotiations.

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Let me note that this administration had negotiations with Mexico over something called the "Totalization Agreement," and we were kept in the dark about that. That is when the Republicans controlled the House, and here the President had a Republican-controlled House, yet we were kept in the dark of those negotiations. For 2 years, we had to struggle to find out what was in an agreement that had already been reached with Mexico, although not sent to the Senate. We wanted to find out whether or not this administration had agreed to include illegal immigrants from Mexico in our Social Security system. Sounds like a pretty important issue to me. But we were intentionally kept in the dark by this administration. That is unacceptable.

Today, we are negotiating; we are involved in negotiation with the Government of Iraq about a possible long-term commitment by the United States and we are being kept in the dark about what that commitment might or might not be, or what it should be. It is totally unacceptable.

Well, after months of congressional and public pressure, this administration has recently shed some light on the Declaration of Principles' bilateral security agreement, as it is called. Two days ago, Secretary Gates appeared before the Senate Armed Services Committee and said there will not be a long-term agreement that commits the United States to defend Iraq without a vote of Congress.

Well, perhaps if U.S. policy will include a vote of Congress, perhaps the administration should be discussing with Congress what is in the agreement to ensure that an agreement is possible.

Yesterday, we were offered a secret briefing on this issue. I did not attend that secret briefing as you did not, as well. No, secret agreements don't make it in a free society. Yes, there may be some elements to what is going on that need to be said in secrecy, and we have no problem with that. But obviously there are very significant elements to the negotiations that are going on that do not need to be secret and it should instead be part of a public discussion, and we are offered secret briefings.

Clearly, the administration may be trying to do the right thing, and I will grant this administration, my President, that it may well be trying to do the right thing, but the cloak of secrecy regarding these discussions and this, basically, approach that the President has been taking has been undermining the potential success that he would have in implementing that policy if, indeed, Secretary Gates is right that it would need a vote of Congress.

I certainly believe that any long-term commitment by the United States of America to defend anyone would in some way require an agreement by Congress.

So let us hope that from this moment until the President leaves the Presidency that this administration will do a better job of consulting Congress, but don't hold your breath.

Today, we will hear from expert private sector witnesses who will discuss the prospect of this agreement. I look forward to hearing what they have to tell us, and this is an issue that obviously is of great significance to the people of the United States of America and they deserve an open discussion.

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I try my very best to go to Los Alamitos Air Station and Reserve Center every time that one of the local National Guard or Reserve units from our area takes off or returns from Iraq or Afghanistan. Let me note, I am usually the only Congressman there in an area where we have about 20 Members of Congress within a drive, and these folks are heroic people. They go there, you know, most of them are the guys who used to drive the UPS truck, or somebody who worked down the street at the drugstore, or some young lady who was the clerk at the 7-Eleven, and they are Reserves or National Guards who are out there now, our neighbors and our friends, who are out putting their lives on the line for us.

But it is not just friend, what is us? You know, the recognize us, U–S, us, it is all of us. The United States of America is us, and the Constitution of the United States of America is what brings us together and those guarantees of not only personal freedom, but the balance of power that our Founding Fathers established to ensure that freedom.

These issues and the important issues today demand open discussion, and this administration is not giving us that open discussion, and I believe in doing so is letting down those brave people who are defending our country.

So with that said, thank you very much. I am looking forward to this hearing.

Mr. DELAHUNT. Mr. Rohrabacher, let me thank you for a very eloquent statement, and one that I am proud to associate myself with.

Let me ask my colleagues to the left if they wish to make some very brief comments. I see Mr. Berman in the negative. Ms. DeLauro.

Ms. DELAURO. Thank you very much, Mr. Chairman, and let me say thank you to you, Mr. Rohrabacher and Mr. Berman, for allowing me to testify this morning at this hearing. As explained, I do not sit on the Foreign Affairs Committee, but have an interest in this area with legislation. I also believe that mapping out our future relationship with Iraq is vital to our national interest in the region, and as has been expressed, we have good reason to be concerned.

In June, Defense Secretary Gates said we would have "a long enduring presence in Iraq, borrowing from the Korea model, and the security relationship that we have with Japan." Then in November, we note that President Bush and Prime Minister Al-Maliki agreed to the Declaration of Principles for a long-term United States/Iraq relationship to be finalized by July 31.

I, too, am concerned about the security commitments and assurances that our Nation plans on providing according to this declaration. And as has been described as well, when you take a look at "defending Iraq's democratic system against internal, external threats," what are these undefined threats? Would we be obliged to preemptively strike Sunni fighters beyond Iraq's borders, or strike even home-grown armed factions Maliki's government deems to be a threat?

This week Defense Secretary Gates indicated that the agreement "will not contain a commitment to defend Iraq," yet I remained concerned that such a commitment is nevertheless included in a writ-

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ten document signed by two heads of state. This begs the question: Do Secretary Gates' comments indicate that the President will abrogate the Declaration of Principles? Either way it is clear that any agreement with Iraq would likely authorize our forces to engage in combat.

Currently, United States forces in Iraq are operating under the U.N. mandate. Should the mandate end as proposed in the Declaration of Principles? I believe any continued authority for United States forces to engage in combat in Iraq should be approved by legislators both in Iraq and the United States. I am interested to hear what our witnesses have to say about past U.N. resolutions on Iraq, the current U.N. mandate, and Congress' role as we transition into a new security arrangement.

Secretary Gates also testified that the administration will not "seek permanent bases in Iraq," contradicting an earlier statement from Assistant to the President, Deputy National Security Advisor for Iraq and Afghanistan, Lt. Gen. Douglas Lute, who called permanent bases "a key item for negotiation."

Despite Secretary Gates' comments, the President actually made matters worse by issuing a signing statement along with a 2008 National Defense Authorization Act declaring that he had the power to bypass a provision in the bill, barring the establishment of "any military installation or base for the purpose of providing for the permanent stationing of United States Armed Forces in Iraq."

I would be interested in hearing our witnesses' professional and legal opinions on the executive's authority to issue such statements, especially in the realm of foreign policy and defense.

I also understand that the administration has finally come around, consulted members of the Foreign Affairs Committee about the agreement in a closed setting. Administration officials, as has been stated here time and again, declined to come and openly testify. If they are serious about transparency and openness, then they should come to testify rather than keeping the public in the dark and the Congress in the dark.

I have the honor of serving on the Budget Committee and we heard from Mr. Nussle yesterday or the day before yesterday, where the President's budget asked for $70 billion for Iraq and Afghanistan. Secretary Gates says that it ought to be $170 billion. Nowhere in any discussion is what our costs will be as a result of this Declaration of Principles and what that means, so there is just total bypassing what the impact of this effort will be.

We have been in Iraq for nearly 5 years. I have introduced the Iraq Strategic Agreement Review Act talking about our long-term relationship in Iraq. We have been there 5 years. A clear majority of Americans believe we should bring our troops home as soon as possible, and a part of this Congress was elected out of dissatisfaction with this war. The President must not be permitted to unilaterally tie the hands of a successor. We in the Congress have the right, we have the responsibility, to help to plan our future course on an issue of such import to this Nation.

I am looking forward to our witnesses' testimony. Let me personally welcome, if you will indulge me, Mr. Chairman, Professor Hathaway, Yale Law School, who is a constituent, and thank you for your good work and for being here, as well as Ms. Wedgwood

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who taught at Yale not that long ago. So my district is very well represented here this morning. I hope our offices can work together so that we better understand the constitutional issues that are at stake as we move forward.

Again, thank you to the chairman and the ranking member for allowing me to be here today.

Mr. DELAHUNT. Well, thank you, and this is truly a very distinguished panel. This is an independent—I feel like I am at a seminar in a Ph.D. program at The Fletcher School, obviously, Professor Glennon, and The Fletcher School, of course, is in Greater Boston. I know that you are aware of that.

Ms. DELAURO. Mr. Chairman, you should that note many, many years ago as a graduate of Marymount College, I really truly wanted to pursue my own career at The Fletcher School, but my life and career took a different course, so I acknowledge The Fletcher School.

Mr. DELAHUNT. Well, we are grateful you are here. You are a welcome addition to this Congress.

We are going to begin with Dr. Macgregor and we will just go down the row. So if you would proceed, Colonel.

STATEMENT OF DOUGLAS MACGREGOR, PH.D., COLONEL, U.S. ARMY, RETIRED, SENIOR FELLOW, STRAUS MILITARY REFORM PROJECT, CENTER FOR DEFENSE INFORMATION

Colonel MACGREGOR. Mr. Chairman, distinguished members, ladies and gentlemen, thank you for the opportunity to speak this morning. What I would like to do is make a relatively short presentation, focusing on just three points, some of which will echo some of the comments that have already been made.

First, I think it is important that whatever course of action the Bush administration decides to follow in Iraq, it should not pretend under any circumstances that a major United States defense commitment, internal and external to Iraq, is a matter for resolution inside a Status of Forces Agreement.

A Status of Forces Agreement exists preeminently to protect the legal rights of soldiers, sailors, airmen and Marines permanently stationed on foreign soil in a country that is hosting a permanent or semi-permanent U.S. military presence. It also is from the vantage point of those of us who were soldiers—and I might add here that I served for 8 years of my 28-year career outside of the United States, 6 of those in Germany and 2 of those in Belgium, and so I frequently interacted with German Federal authorities for a whole range of reasons, and I can tell you that the Status of Forces Agreement not only protects United States forces but it creates a framework through which we then can communicate with the local citizenry and its government to ensure that whatever conflicts do arise are quickly resolved.

But there is no language, as far as I am aware, in either the Korean SOFA or the German SOFA which, to my knowledge, are the most important, given the numbers of forces involved that stipulate when, where, or how United States military power will be employed against either external or internal enemies. Those things are normally reserved for treaties involving mutual defense, and

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the SOFA itself and its legal basis flows from mutual defense treaties in both Germany and Korea.

The second point is that I think any elected official contemplating the commitment of United States forces to the survival of a government like Iraq's, a government that already confronts powerful armed opposition inside its own borders, should recognize the potential damage that the government's reliance on U.S. military power would cause its legitimacy.

The best strategy for the United States, in my view, is to stay out of Iraq's internal conflict until that is resolved and a new legitimate Iraqi leadership emerges without direct United States military support.

Finally, an open-ended pledge by the United States Government to commit its military establishment to the defense of the Iraqi Government in Baghdad against internal enemies on the grounds that the United States is defending "a democratic system," something that I think is at least misleading, if not fundamentally untrue, seems to me uncomfortably close to the old Soviet notion of defending socialism in Central and East Europe inside the Warsaw Pact, which ultimately was an excuse for intervention to prop up unwanted Communist regimes in Central and Eastern Europe.

So those are the three basic points that I wanted to make, and I will now yield to my distinguished fellow witnesses.

[The prepared statement of Mr. Macgregor follows:]

PREPARED STATEMENT OF DOUGLAS MACGREGOR, PH.D., COLONEL, U.S. ARMY, RETIRED, SENIOR FELLOW, STRAUS MILITARY REFORM PROJECT, CENTER FOR DEFENSE INFORMATION

On November 26, 2007, the Bush Administration announced that a joint declaration of principles had been endorsed by President of the United States of America, George W. Bush, and Iraqi Prime Minister, Nouri Kamel Al-Maliki. As envisioned by the Bush Administration the United States' future relationship with Iraq includes a range of entangling measures, foremost of which is the pledge to defend Iraq from internal and external security threats. Article 2 of the Declaration of Principles is quite specific insisting that U.S. Forces will support, "the Republic of Iraq in its efforts to combat all terrorist groups, at the forefront of which is Al-Qaeda, Saddamists, and all other outlaw groups regardless of affiliation, and destroy their logistical networks and their sources of finance, and defeat and uproot them from Iraq."

The joint declaration will also reportedly lead to a status of forces agreement (SOFA) between the government of the United States and the government of Iraq. This agreement will not only replace the existing Security Council mandate authorizing the current presence of the U.S.-led multinational forces in Iraq. It will also define the U.S. military's role inside Iraq in ways that are normally agreed only within the framework of mutual defense treaties.

It is therefore the opinion of this witness that the Committee should recommend that the House and the Senate resist any proposed arrangement that commits American military power to any long-term presence in Iraq without a mutual defense treaty in place, if that is the aim of the American people. Whatever course of action the Bush Administration decides to follow in Iraq, it should not attempt to make policy on the sly. Nor should the Bush administration pretend that a major U.S. defense commitment, internal and external to Iraq, is a matter for resolution inside a SOFA. Instead, the Bush Administration should explain its true strategic aims and work with the Congress, because that is how successful, long-term security policy is made.

Setting aside the commercial arrangements that bring to mind the British Empire's attempts to extract economic benefit from a weak Iraqi state after World War I, there are a number of problems with the Joint Declaration of Principles that merit the Committee's attention. Chief among them is the notion that a SOFA should be used to determine the conditions for the use of American military power together with the stated commitment of the United States to support the Republic

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of Iraq in defending Iraq's "democratic system" and, by implication its government, against internal and external threats. The use of a SOFA to define a military mission for U.S. forces for internal defense of the Iraqi government is a significant break with established practice because SOFAs normally do not address the use of American military power against external or internal threats to the governments that host the permanent presence of the U.S. Armed Forces. These issues are normally addressed in mutual defense treaties.

Instead, SOFAs are incorporated into the larger security framework of such treaties. For instance, the SOFA that defines the relationship of U.S. Forces stationed in Korea to the Republic of Korea is contained inside article IV of the mutual defense treaty between the United States of America and the Republic of Korea, signed on October 1, 1953. This is because SOFAs actually deal with the routine administrative and legal issues that shape the U.S. military's conduct of day-to-day business inside the host country. These activities are wide ranging and involve actions such as the notification of the host country of the entry and exit of U.S. forces along with the transportation into or out of the host country of individual items belonging to U.S. service members (i.e. automobiles), legal claims and susceptibility to income and sales taxes. In places like Korea, Germany or Japan where U.S. forces are permanently stationed, SOFAs also address matters such as the delivery of mail, environmental impact concerns, recreation and banking facilities.

In Germany, Korea, and Japan, SOFAs deal first and foremost with the issues of civil and criminal jurisdiction over U.S. service members to ensure that the Department of Defense protects, to the maximum extent possible, the rights of soldiers, sailors, airmen or Marines who may be subject to criminal trial by foreign courts or imprisonment in foreign jails. Once again, there is no language in these SOFAs that determine the legal framework for the use of American military power to defend the host governments against internal or external threats.

In the case of the Federal Republic of Germany, the 1949 North Atlantic Treaty that is the legal basis for the current SOFA with Germany has an exclusively external focus and does not contain language that could be construed as legitimating the use of American military power for the purpose of defending the German government against internal threats. Article 6 of the NATO Treaty specifically defines the term "armed attack" as an external attack and limits the allied response to territories within specific geographical limits. The Treaty states that NATO regards an armed attack as one:

> "on the territory of any of the Parties in Europe or North America, on the territory of or on the Islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer; on the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer." [1]

What is notably absent from the NATO Treaty and the content of the existing status of forces agreements with Germany that flow from it is any reference to the use of U.S. military power inside or on the territory of Germany against internal enemies of the German government. In Germany (and Korea) where U.S. Forces are stationed, the governments are strong, legitimate and secure their own borders. This is yet another reason why the institutionalization of internal U.S. military intervention in Iraq's domestic affairs moves the United States government into an entirely new international security role, one that is uncomfortably close to the security arrangements the Soviet Union imposed on the Warsaw Pact states.

In the 1955 Warsaw Treaty, article 8 expressed respect for the independence and sovereignty of its non-Soviet members, the treaty also acknowledged the international duty of its members including the Soviet Union to provide fraternal assistance in protecting the gains of socialism. The gains of socialism equated in Soviet Russian terms to the installation of puppet communist regimes in Central and Eastern Europe resulting from Soviet Russian occupation in 1945. Between 1953 and 1981, the Soviet armed forces provided fraternal assistance on several occasions in the form of massive military interventions to defeat open rebellions against Central-East Europe's ruling communist parties.

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[1] The definition of the territories to which Article 5 applies was revised by *Article 2 of the Protocol to the North Atlantic Treaty* on the accession of Greece and Turkey signed on 22 October 1951. On January 16, 1963, the North Atlantic Council noted that insofar as the former Algerian Departments of France were concerned, the relevant clauses of this Treaty had become inapplicable as from July 3, 1962. The Treaty came into force on 24 August 1949, after the deposition of the ratifications of all signatory states.

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In 1953, Soviet forces moved into Berlin to suppress opposition to the East German Communist government after Stalin's death. In 1956, Soviet tank armies intervened to crush the Hungarian uprising that removed Hungary's communist party from power. In 1968 the Soviet suppression of popular political dissent in the former Democratic Republic of Czechoslovakia resulted in the commitment of several hundred thousand Soviet and non-Soviet troops under Soviet command to occupy the country's major cities. The action to crush the Czechoslovak people's bid for independence from Moscow subsequently became known as the Brezhnev Doctrine. Leonid Brezhnev, the Soviet premier and communist party chief summed up the doctrine of the Warsaw Pact's concept of limited sovereignty in the defense of socialism with the words, "What we have, we hold."[2]

The Bush Administration's proposed commitment to defend Iraq's "democratic system," seems uncomfortably close to the Soviet notion of defending socialism. The fact that Iraq's claim to democracy is extremely tenuous makes this article in the Joint Declaration particularly disturbing because it contradicts America's historic fight for the self-determination of peoples in Europe, Asia, Africa, the Middle East and Latin America during the Cold War. Members should also recall that history is littered with examples of outside forces that intervened in the internal affairs of other states with the best of intentions, only to watch events spin out of control, and massive human tragedies result.[3] This description would seem to fit contemporary Iraq.[4]

An open-ended American military pledge to defend the Iraqi government in Baghdad against internal enemies also has the practical, if surely unintended effect of strengthening alternative legitimacy inside Iraq; namely, Kurdish, Shi'a, and Sunni legitimacy. Moreover, staying in Iraq much longer has the potential to undermine American legitimacy among Americans—and U.S. allies. Collaterally, the use of American force inside Iraq also potentially undermines America's military presence in Afghanistan. In view of these points, it would make sense for congress to identify specific benchmarks of eroding legitimacy for the Iraqi government based on continued U.S. military involvement in Iraq's internal affairs.

Furthermore, the use of Al-Qaeda as a brand name for any Arab rebelling against the U.S. military occupation is a tactic used repeatedly over the last five years by general officers and Administration spokesmen to persuade the American people that our soldiers, sailors, airmen and Marines confront an exclusively Al-Qaeda inspired rebellion. In fact, as General John Abizaid, former CENTCOM commander, pointed out in testimony, Al-Qaeda's adherents have never represented more than 3–5% of the armed resistance to U.S. Forces in Muslim Arab Iraq.[5] In view of al Qaeda's specific mention in the Joint Declaration, it seems plausible that the Al-Qaeda brand name could be exploited in the future to commit U.S. Forces to suppress any Arab in Iraq who opposed the Iraqi government in Baghdad or the U.S. military presence.

The second area of the Joint Declaration where problems arise is the characterization of Iraq as a sovereign state. In fact, Iraq is neither a sovereign state nor a modern nation-state. A nation-state is defined as having an internal structure of political power that exercises a monopoly of control over the means of violence within its territory; as having the authority to enforce the distribution of goods, services and resources throughout the polity; and, as having a government that is the legitimate focus of national political identity. None of these conditions currently applies to the Maliki government. The truth is that the Maliki government would not survive the withdrawal of U.S. military power from Iraq.

The Maliki government enjoys tepid support from Iraq's Arab population and meets of necessity inside the Green Zone under heavy U.S. military security. Depending on the region, the Maliki government evokes a visceral response from Iraq's

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[2] Jeffrey Simon, *Warsaw Pact: Problems of Command and Control*, (Boulder, CO: Westview Press, 1985)m pages 10, 50 and 51.

[3] Russian intervention to restore order in Poland during the last decade of the 18th Century is one example. French intervention in Mexico during the 1860s to support an unpopular government is another. American intervention in Vietnam destroyed millions of lives. Also, see Joseph L. Galloway, "Death Squads Undoing Surge's Progress," *Miami Herald*, January 29, 2008, page 1.

[4] Charles J. Hanley, "American Airstrikes In Iraq Rise Above '06 Total," *Seattle Post-Intelligencer*, June 6, 2007. Four years into the war U.S. warplanes are dropping bombs at more than twice the rate of one year ago. Also, see Jeffrey Gettleman, "As U.S. Detains Iraqis, Families Plead for News," *New York Times*, March 7, 2004.

[5] Amit R. Paley, "Iraqis Joining Insurgency Less For Cause Than Cash," *Washington Post*, 20 November 2007, page 1.

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Arab population ranging from quiet disdain to armed hostility.[6] Today, Iraq is dominated by militias of every kind and its central government wallows in corruption.

Khalid Jamal al-Qaisi, the deputy commander of one of the new, U.S. funded Sunni Arab militias in Baghdad proclaims, "We are an independent state; no police or army is allowed to come in."[7] He and his contemporaries among the nearly 100,000 Sunni Arab Insurgents now on the Army payroll refuse to cooperate with Iraqi Army and police, claiming with considerable justification that they too are infiltrated by Shi'ite militias and riddled with sectarian bias.

For these reasons, any elected official contemplating the commitment of U.S. Forces to the survival of a government like Iraq's, a government that already confronts powerful, armed opposition inside its own borders, should recognize the damage that reliance on U.S. troops does to the legitimacy of Iraq's government. For this reason, the best strategy for the United States is to stay out of Iraq's internal conflict until the conflict is resolved and a new, legitimate Iraqi leadership emerges without direct U.S. military support.[8]

This was the general strategy the United States followed in El Salvador, often cited as a case study in how the United States can defeat insurgencies. However, it was not the U.S. military that defeated the FMLN guerrillas, but the Salvadoran military under the control of its own government with U.S. encouragement and no more than fifty U.S. military advisors. Moreover, El Salvador was not simply a sovereign state, but El Salvadoran society was and is a single identity—an essential prerequisite for successful internal defense of a government struggling for survival and legitimacy.

These points notwithstanding, there are other considerations that merit the committee's attention. Iraq's borders are uncontrolled and for geographical reasons, they are likely to remain so. In view of the popular hostility among the Muslim Arabs to a permanent U.S. military presence in the region and Iraq's uncontrolled borders, U.S. Forces concentrated in large, fixed installations could be at severe risk. The possibility of a weapon of mass destruction (WMD) in the form of a low-yield nuclear weapon smuggled into the country and detonated in close proximity to a large U.S. installation like Balad Air Base where 30,000 U.S. troops and 7,000 contractors reside should not be excluded. Temporary U.S. military installations in Iraq have already presented radicalized elements in the region with an opportunity they would otherwise never have—to directly attack U.S. forces. The use of WMD against a more permanent U.S. base like Balad Air Base would probably constitute an immediate catalyst for larger, regional war.

Finally, it appears to many in the United States and in Iraq, that the true basis for the Administration's current approach is the popular narrative that Iraq has turned a strategic corner that suddenly in the space of a few months, after nearly five years of bloody conflict involving the massive loss of Arab life and property, new U.S. counterinsurgency tactics are working and Iraq's Muslim Arab population welcomes the presence of American military power as the guarantor of their future prosperity and freedom. Members must understand that this popular narrative is an illusion, one that is likely to vanish as quickly as it was created.

Iraq's bloody Civil War created a brief strategic opportunity for U.S. ground forces that a million additional U.S. troops could not. More than two year's of sectarian

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[6] BBC "Monitoring International Reports" carries a translation from the USG Open Source Center of an interview on the situation in al-Anbar and Fallujah by Al-Arab al-Yawm, a Jordanian newspaper, with Dr. Tariq Khalaf Abdullah, head of al-Anbar Reconstruction Commission. Abdullah, from a strongly Sunni region, blames tensions between Sunnis and Shiites on the government of Prime Minister Nuri al-Maliki: "so long as there is a sectarian government in Iraq, it is highly likely that it will seek to divide the country." He blames terror attacks on nihilists and the Iranians: **"There are two types of occupation now in Iraq, the American and the Iranian . . . " He doesn't seem to have a problem with people attacking Americans—he refers to them as the "resistance."** But he complains about those who conduct random violence against Iraqis, implying that many are backed by Iran *and also by the United States*! **Moreover, he blames the Iranian presence and influence on the United States: "the United States was the main reason that helped Iran come into Iraq." He is clearly eager to get the US out of the towns and cities of al-Anbar Province, and thinks their presence provokes violence.** So to sum up, he dismisses the Iraqi government as "sectarian," sees Iraqi Shiites as cat's paws of Iran, wants the US out of his province, and blames the US for bringing Iran into it and well as for secretly backing death squads. And this is a Concerned Local Citizen with strong ties to the Awakening Council! Oh, yeah, the US is sitting pretty in Iraq now.

[7] Sam Dagher, "Market Bombings: Baghdad Locals Want Security, Not Iraqi Police. The Monitor accompanied a high-level militia member on a walk through an area near Friday's bombing." *Christian Science Monitor*, 4 February 2008, page 3.

[8] Chet Richards, *If We Can Keep It*, (World Security Institute's Center for Defense Information, 2008), pages 50–53.

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violence made the districts in and around Baghdad completely Sunni or Shi'ite, significantly reducing the violence and improving conditions for neighborhood businesses to operate. Where once there was one country called Iraq, there are now three emerging entities; one Kurdish, one Sunni and one Shi'ite. For the moment, this new strategic reality combined with huge cash payments to the Sunni insurgents and Muqtada al Sadr's self-imposed cease fire, not the much touted troop surge, explains the drop in U.S. casualties.

Officers with years of experience in Iraq warn that the "Great Awakening" could be transitory. "The Sunni insurgents are following a fight, bargain, subvert, fight approach to get what they want," said one colonel.[9] And what the Sunni leaders want and what they are getting is both independence from the hated Shi'ite-dominated government with its ties to Tehran and money; lots of money.[10] Meanwhile, the Sunni leaders who sit on the Awakening Councils are telling the Arab press that they defeated the American military that is leaving and paying reparations.[11]

Terms like, "concerned citizens" or "voluntary Iraqi security forces" conceal the militant character of these heavily armed tribal and sectarian-based forces. Cash-based deals that support what is called the Sunni Arabs' 'great awakening' have little, if anything, to do with winning Arab "hearts and minds," or building democracy. The Sunni "Awakening" is neither democratic nor permanent.[12] Some of the watersheds that congress might anticipate as warnings of renewed and reinvigorated conflict inside Iraq might, for example, include a gradual Sunni Arab turn against U.S. Forces, or when Moqtada al Sadr's 60,000 fighters "stand up" and resume attacks on U.S. Forces.

Finally, adding mass in the form of more soldiers to fight an insurgency is not the path to success[13] and cash payments to the enemy are always a temporary solution. In time, hatred for the foreign military presence overwhelms greed. If numbers of troops won insurgencies then Vietnam would be the 51st state today. Since the end of World War II no Western army has defeated an insurgency without the overwhelming majority of its soldiers coming from the host country. In fact, the very act of flooding the host country with foreign troops always guarantees that the occupied population will never support the foreign invader.

Finally, there is no incentive for the various Iraqi factions struggling for power to settle their differences as long as the American military behaves as a co-belligerent, manipulating factions with cash and violence in the country's internal struggle for power. It is hard to imagine how the U.S. military would disengage from this role if it were pledged to an internal defense role as envisioned in the November 2007 declaration of principles.

The British military and political leadership reached similar conclusions about the futility of a continued British military presence in Ireland during the Irish insurgency against the British Army between 1917 and 1922 and opted to withdraw from Ireland as a result. Thus, counterinsurgency (COIN) is a fatally flawed concept because it encourages a self-defeating strategy in the pursuit of "victorious" tactics as seen in Iraq, in Ireland and in a host of other countries.

After World War I when the cost of maintaining British military control of Iraq in the face of a Sunni and Shiite Arab revolt approached the cost of Britain's national health budget, Sir Winston Churchill, then, a member of the government, made the following recommendation to the Prime Minister, David Lloyd George.

> Winston S. Churchill to David Lloyd George
> 1 September 1922
>
> I am deeply concerned about Iraq. The task you have given me is becoming really impossible . . . I think we should now put definitely, not only to Feisal but to the Constituent Assembly, the position that unless they beg us to stay

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[9] From the author's discussion with officers on leave from Iraq.

[10] Sam Dagher, "Will 'Armloads' of US Cash Buy Tribal Loyalty? The US policy of paying Sunni Arab sheikhs for their allegiance could be risky," *The Christian Science Monitor*, 8 November 2007, page 1. Also, see Lauren Frayer, "US accidentally kills 9 Iraqi civilians," *Associated Press*, 3 February, 2008, 11:10 PM EST.

[11] Question: [Al-Arab al-Yawm] "Do you believe that the Americans will withdraw just like that without any resistance?"Answer: [Al-Abdallah] "I confirm 100 per cent that their withdrawal in itself is the result of the honorable national Iraqi resistance, which has been confronting them since the first day of the occupation to this day."

[12] "If there is no change in three months there will be war again. If the Americans think they can use us to crush al-Qa'ida and then push us to one side, they are mistaken" said Abu Marouf, the commander of 13,000 fighters who formerly fought the Americans. Patrick Cockburn, "If there is no change in three months, there will be war again," *The Independent*, 28 January 2008, page 1.

[13] Simon Jenkins, "Fall Back, Men, Afghanistan Is a Nasty War We Can Never Win," *London Sunday Times*, 3 February 2008, page 1.

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and to stay on our own terms in regard to efficient control, we shall actually evacuate before the close of the financial year. I would put this issue in the most brutal way, and if they are not prepared to urge us to stay and to co-operate in every manner I would actually clear out. That at any rate would be a solution. Whether we should clear out of the country altogether or hold on to a portion of the Basra vilayet is a minor issue requiring a special study . . .

Surveying all the above, I think I must ask you for definite guidance at this stage as to what you wish and what you are prepared to do . . . At present we are paying eight millions a year for the privilege of living on an ungrateful volcano out of which we are in no circumstances to get anything worth having.

In summary, an American pledge to defend current or future Iraqi governments in Baghdad from internal threats is a volcano waiting to erupt. The American military establishment cannot juggle Iraq's multiple warring identities in perpetuity and as long as U.S. military power plays a significant role in Iraq's domestic affairs, no Iraqi government will be entirely legitimate.

Lastly, if the current U.S. occupation is converted to a permanent military presence with this mission, the unifying impact on Muslim Arabs across the Middle East could be profound. Millions of Sunni and Shi'ite Arabs, the vast majority of which oppose a permanent U.S. military presence inside Iraq, may well set aside their differences to join forces in eliminating the hated foreign military presence and its associated puppet government. The consequences of this development for U.S. Forces and for the United States' international standing would be extremely negative. The Committee should recommend that the House and the Senate demand to review any proposed arrangement committing the American people to such a dangerous course of action.

Mr. DELAHUNT. Thank you, Colonel. Now we will go to Professor Hathaway.

STATEMENT OF OONA A. HATHAWAY, ESQ., ASSOCIATE PROFESSOR OF LAW, YALE LAW SCHOOL

Ms. HATHAWAY. Thank you. Thank you to the subcommittee for having me here today, particularly to Congressman Delahunt and his staff who have been extraordinarily helpful.

I have written extensive remarks that I would like to, with your permission, submit for the record, and I will simply summarize my thoughts here today.

There is a central principle that I want to establish that is the foundation of my remarks today, and that is that the President cannot make an international agreement that exceeds his own constitutional authority without the agreement of Congress. That is the bottom line, and the rest of my remarks will flow from that.

This means that the President, if he seeks to conclude an agreement on his own, what is often referred to as a sole executive agreement, is severely limited in what he can do in that agreement. As the Supreme Court held in *Youngstown*, the Steel Seizure case, which I am sure is familiar to most of you, when the President acts pursuant to an express or an implied authorization of Congress, his authority is at its maximum.

When, on the other hand, the President acts in absence of either a constitutional grant or denial of authority, he can only rely on his own independent power. So again he has to rest his agreement entirely, on his own constitutional powers.

Let us apply this principle to the Iraq agreement. I was pleased to hear that Secretary Gates is not suggesting that in fact the agreement is going to include a mutual defense guarantee. That is the right decision because an agreement entered by the President on his own authority could not guarantee that the country would come to the defense of Iraq. That is because, although the Presi-

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dent is the Commander in Chief, he does not have the power to declare war. That is a power that is given in the Constitution to Congress, and therefore any agreement that would involve a guarantee that the United States would go to war on behalf of another country must be entered with Congress' consent.

It is also the case that an agreement entered by the President on his own authority could not appropriate funds unless there is a prior congressional authorization for that appropriation. That is because, once again, this is not a power that is granted to the President in the Constitution. This is a power that is granted to Congress.

So, if there is an appropriation of funds in an agreement, it must be approved by Congress unless Congress has already approved that appropriation. In several cases Congress has given authority to the President in advance to enter into certain kinds of agreements so he may be able to find some prior legislative authority, but you have to be able to trace it at some point to assent by Congress either beforehand or after the fact.

Third, a sole executive agreement arguably could not establish a broad and deep long-term commitment of friendship by the United States to the Government of Iraq. Agreements of this kind have almost always been concluded by treaty, on rare occasion, by congressional executive agreement. That is because it envisions a deep agreement to engage in long-term, extensive relationship with another country. And, again, this is the sort of power that is generally reserved to Congress.

Now let me say just a few words about what could be included in an agreement that is negotiated by the President on his own authority.

The administration has stated that it intends to negotiate a "typical Status of Forces Agreement." These have, as they have said, typically been done as a sole executive agreements and that is permissible. What is not permissible, however, as has already been said, is to include in that Status of Forces Agreement, SOFA agreement, a guarantee to come to the defense of another country.

What I believe is also not acceptable would be to include in that Status of Forces Agreement immunity for private military contractors. Once again, this would exceed what is typically included in a Status of Forces Agreement, and I believe is not within the President's own constitutional authority.

It would be permissible, however, for the President to make individual agreements that draw on authority already granted by Congress, as I have said. For instance, there is a line in the Declaration of Principles that states there might be agreement for debt relief. That might fall under prior legislative authority granted by Congress, but again you would want to look and see where there has already been legislative authority granted by Congress. There has to be an assent by Congress either before the fact or after the fact.

Now, let me end by saying that even if a President may conclude an agreement on his own constitutional authority, he or she is never required to do so. In this case, in particular, where this is an agreement involving a matter of intense political debate, and as Congressman Rohrabacher so eloquently stated, putting the lives

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on the line of the American people, even if you could craft an argument that there are certain portions of this that might be within the President's sole constitutional authority, I would argue that the President nonetheless ought to come to Congress for Congress' consent to the agreement, not only because I think that is the right thing to do, because it involves American people in the debate in a way that a sole executive agreement doesn't, and because I believe it strengthens the hand of the President in negotiations to have the Congress behind him, and to have the word of the American people through Congress behind him as he is sitting at the negotiating table with the other side.

Even though as a constitutional matter there may be pieces of this that could be negotiated as a sole executive agreement, I would encourage the President and the administration to seek the assent of Congress in negotiating these agreements, and to involve Congress in the consultation leading up to the agreement, not simply present a fait accompli after the agreement has been negotiated.

Thank you.

[The prepared statement of Ms. Hathaway follows:]

PREPARED STATEMENT OF OONA A. HATHAWAY, ESQ., ASSOCIATE PROFESSOR OF LAW, YALE LAW SCHOOL

I have been asked to give my thoughts on the legal rules that apply to international lawmaking and specifically those that would apply to the proposed agreement with Iraq, as outlined in the November 26 Declaration of Principles.

I will begin by laying out the legal framework that applies to the process of making international commitments on behalf of the United States. I will then say a few words about what I believe this framework means for the proposed agreement with Iraq.

THE CONSTITUTIONAL LIMITS ON SOLE EXECUTIVE AGREEMENTS

In addition to the treaty-making process outlined in Article 2 of the U.S. Constitution,[1] there are three ways in which the United States makes international agreements. First, the President may conclude an agreement in cooperation with a majority of both houses of Congress. Second, the President may conclude an agreement pursuant to an existing or concurrent treaty obligation. And third, the President may conclude an agreement solely on his or her own constitutional authority. These final types of agreement are usually referred to as "sole executive agreements."[2]

Sole executive agreements must rest on the President's own constitutional authority.[3] The question that has to be asked in determining whether an agreement may be rightfully concluded as a sole executive agreement, therefore, is whether the agreement may properly rest on that authority alone. That, in turn, depends on the allocation of powers between the President and Congress in the U.S. Constitution. The President may not, for example, conclude a sole executive agreement that requires the appropriation of funds. The power to appropriate money is granted in the Constitution not to the President, but to Congress, and indeed such bills must originate in the House of Representatives.[4] Nor may the President conclude a sole execu-

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[1] U.S. CONST. Art. II, §2.

[2] This division of executive agreements into three categories appears in the 1955 Department of State Circular, which directed its officers to use the executive agreement form "only for agreements with fall into one or more of the following categories: a. Agreements which are made pursuant to or in accordance with existing legislation or a treaty; b. Agreements with are made subject to Congressional approval or implementation;" or c. Agreements which are made under and in accordance with the President's Constitutional power." Dep't of State Circular No. 175, Dec. 13, 1955, *reprinted in* 50 AM. J. INT'L L. 784, 785. It was common well before then, as well. See HUGH EVANDER WILLIS, CONSTITUTIONAL LAW OF THE UNITED STATES 437 (1936); 1 WESTEL WOODBURY WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES 467–78 (1910).

[3] *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §303(4) (1987) ("[T]he President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution.").

[4] U.S. CONST. Art. I, §7, cl. 1 ("All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.").

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tive agreement that commits the United States to go to war. Once again, that is because although the President is commander in chief, it is Congress, not the President, who has the constitutional power "to declare war."[5]

It is worth noting that relatively few of the thousands of international agreements entered by the United States during the last several decades have been true sole executive agreements. Most executive agreements are not concluded on the President's constitutional authority alone, but instead are based on, at a minimum, prior congressional authorization in a statute.[6] That is both because most of these agreements rely upon Congress's and the President's shared constitutional authority (particularly Congress's power to appropriate funds) and because of more prudential concerns that I will return to at the conclusion of my testimony.

THE IRAQ AGREEMENT

I now apply the constitutional framework just outlined to the proposed Iraq Agreement. I would like to first note that the U.S.-Iraq Declaration of Principles is itself a sole executive agreement. It is properly so because it does not create any binding legal obligations. It constitutes instead an outline for future negotiations. This is a quintessential sole executive agreement.[7]

The central concern of this committee is not the Declaration itself, however, but the future agreement between the United States and Iraq that it appears to outline. That agreement, unlike the Declaration itself, would likely create binding legal obligations. The question, therefore, is what such an agreement-concluded without congressional assent-could and could not include.

Let me begin with what it could not legally include. First, it would be beyond the authority of the President to conclude a sole executive agreement that would "provide security assurances to the Iraqi Government to deter any external aggression and to ensure the integrity of Iraq's territory."[8] The President can act without Congress in times of extreme emergency, but that power would not extend to an open-ended commitment to defend the Iraqi government against future attacks. Prior practice reflects this constitutional limit. No binding mutual defense agreement has even been concluded without the participation of Congress.[9]

Second, it would be beyond the authority of the President to conclude a sole executive agreement that requires appropriations of funds, unless there is prior congressional authorization for the portion of the agreement that requires the appropriation. An agreement that promises, for example, to "support the development of Iraqi economic institutions" may, depending on the specific commitment it entails, require approval of Congress.[10]

Third, it is arguably beyond the authority of the President to conclude a sole executive agreement that includes a wide array of economic, political, and military terms that establish a broad and deep long-term commitment of friendship by the United States to the government of Iraq. Agreements of this kind (originally termed treaties of "friendship, commerce, and navigation") have always been concluded by treaty or congressional executive agreement.[11] That is largely because these agree-

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[5] U.S. CONST. Art. I, § 8, cl.11.

[6] See Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, YALE L. J. (forthcoming 2008). My findings are roughly similar to those of a 1984 study by the Senate Committee on Foreign Relations, which found that "88.3 percent of international agreements reached between 1946 and 1972 were based at least partly on statutory authority; 6.2 percent were treaties, and 5.5 percent were based solely on executive authority." See http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm.

[7] These were often referred to as "protocols of agreement." In 1900, for example, the president concluded agreements with Costa Rica and Nicaragua to enter future negotiations for the construction of an inter-oceanic canal by way of Lake Nicaragua. *See* SAMUEL B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 87 (1904).

[8] The White House, Fact Sheet: U.S.-Iraq Declaration of Principles for Friendship and Cooperation (November 26, 2007) (hereinafter "Declaration of Principles").

[9] The United States is currently party to eight collective defense arrangements. Seven have been concluded as treaties (with the North Atlantic Treaty Organization (1949); Australia and New Zealand (1951); Philippine (1951); Southeast Asia (1954); Japan (1960); the Republic of Korea (1953); and the American States (in the "Rio Treaty" of 1947)), and one as a congressional-executive agreement with express congressional approval (with the Republic of the Marshall Islands and the Federated States of Micronesia, embodied in the Compacts of Free Association (1986)).

[10] Declaration of Principles, *supra* note 8, at p. 2.

[11] *See, e.g.*, Treaty of Amity, Commerce and Navigation, U.S.–U.K., Nov. 19, 1794, 8 Stat. 116, T.S. No. 105; Treaty of Friendship and Cooperation with Spain, Jan. 24, 1976, United States-Spain, 27 UST 3005, TIAS No. 8630. Though typically concluded as treaties, there were some agreements establishing friendship and commercial relations concluded pursuant to specific con-

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ments establish the foundation for commercial relations with other nations, including implicit if not explicit commitments regarding commerce between the two nations—a prerogative once again granted in the Constitution to Congress.[12]

Now let me focus on what *could* be concluded as a sole executive agreement. If the agreement were truly limited to a "standard" status of forces agreement with Iraq, it could be concluded without congressional approval. The power to enter status of forces agreements arises from the President's constitutional role as commander-in-chief. Status of forces agreements typically provide for the protection of United States military personnel who may be subject to foreign jurisdiction, proceedings, or imprisonment.[13] They generally address issues necessary for day-to-day business, such as entry and exit of personal belongings of personnel, and postal and banking services. They may grant exemption to covered persons from criminal and civil jurisdiction, or from taxation, customs duties, immigration, and similar laws of the foreign jurisdiction. Because they generally have a limited purpose—connected directly to the President's authority as commander-in-chief—all but a small number of the United States' status of forces agreements have been concluded as executive agreements, usually without the express approval of Congress.[14]

A typical status of forces agreement would not, however, include a mutual defense guarantee. Such a guarantee would, as I have already said, reach beyond the President's own constitutional power and, hence, would mean that the agreement would have to be approved by Congress. A typical status of forces agreement would also not include an exemption of civilian contractors from prosecution under Iraqi laws.[15] If those civilian contractors are not "supporting the mission of the Department of

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gressional legislation in the early 1800s with Samoa, Fiji, Sulu, Tahiti, and Hawaii. *See* Hathaway, *supra* note 6, at n. 141.

[12] U.S. CONST. Art. I, §8, cl. 3. The term "commerce" arguably had a broader meaning than economic interactions, referring to "all forms of intercourse in the affairs of life, whether or not narrowly economic or mediated by explicit markets." *See* AKHIL AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 107 (2005). A review of the content of the early friendship, commerce, and navigation treaties entered by the United States, supports the view that the term "commerce," while most often used in circumstances involving economic exchange, was not limited to trade in goods. *See, e.g.*, 1 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA (Hunter Miller, ed. 1931) (including, among others, the Treaty of Amity and Commerce between the United States and France (1778), Treaty of Amity and Commerce between the United States and the Netherlands (1782), Treaty of Amity and Commerce between the United States and Sweden (1783)).

[13] *See, e.g.*, Department of the Army and the Navy, Status of Forces Policies, Procedures, and Information, (15 December 1989) (specifying regulations regarding status of forces policies, procedures and information, and noting that "[t]his regulation provides for the implementation of the Resolution accompanying the Senate's consent to ratify the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA). . . . Although the Senate Resolution applies only to countries in which the NATO SOFA is currently in effect, the same procedures for safeguarding the interests of U.S. personnel subject to foreign jurisdiction will be applied, insofar as practicable, to all foreign countries").

[14] With the exception of the NATO Status of Forces Agreement, Jun. 19, 1951, 4 U.S.T. 1792, and an agreement entered with Spain prior to Spain's accession to NATO, Agreement in Implementation of the Treaty of Friendship and Cooperation, Jan. 31, 1976, U.S.-Spain, T.I.A.S No. 8361, both of which are Article II treaties, all other status of forces agreements to which the United States is currently a party are executive agreements. See, e.g., Agreement Concerning the Status of Members of the United States Armed Forces in the Kingdom of Tonga, July 20, 1992, U.S.-Tonga, K.A.V. No. 3363; Agreement on the Status of United States Personnel, Jan. 22, 1991, U.S.-Isr., 30 I.L.M. 867; Agreement Concerning the Status of United States Forces in Australia with Protocol, May 9, 1963, U.S.-Austl., 14 U.S.T. 506. Many of these executive agreements are concluded, however, pursuant to obligations specified in a prior mutual defense treaty. This is true, for example, of the agreements with Japan and Korea and all the supplementary arrangements to the NATO SOFA. See Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Regarding Facilities and Areas and the Status of United States Armed Forces in Japan with Agreed Minutes, Jan. 19, 1960, U.S.-Japan, 11 U.S.T. 1652; Agreement Under Article IV of the Mutual Defense Treaty of October 1953, Regarding Facilities and Areas and the Status of United States Armed Forces in Korea with Agreed Minutes [Agreed Understandings, Exchange of Letters and Other Implementing Agreements], Jul. 9, 1966, U.S.-Korea, 17 U.S.T. 1677, as terminated by the Agreement Terminating the Agreed Understandings & Exchange of Letters Related to the Agreement of July 9, 1966 Under Article IV of the Mutual Defense Treaty Regarding Facilities and Areas and the Status of United States Armed Forces in Korea, Feb. 1, 1991, U.S.-Korea, T.I.A.S. No. 6127; Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany, Aug. 3, 1959, 1 U.S.T. 531, 481 U.N.T.S. 262.

[15] Thom Shanker & Steven Lee Myers, *U.S. Asking Iraq for Wide Rights on War*, N.Y. TIMES (January 25, 2008) (stating that a "draft proposal that was described by White House, Pentagon, State Department and military officials on ground rules of anonymity" would "guarantee civilian contractors specific legal protections from Iraqi law").

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Defense overseas,"[16] then it is almost certainly beyond the President's commander-in-chief power to unilaterally conclude an immunity agreement on their behalf.

It would also be permissible for the President to make individual agreements with Iraq that draw on authority already granted by Congress in earlier legislation. For example, the Declaration of Principles states that the United States will "assist Iraq in its efforts . . . to secure debt relief."[17] During the 1980s and 1990s, the United States concluded over two hundred international agreements granting debt relief—all as executive agreements. Authority to enter into these agreements appears to flow from prior authorization by Congress in the Act of International Development of 1961 and other similar legislation.[18] It is therefore possible that an agreement to secure debt relief for Iraq could be entered as an executive agreement based on one of these earlier sources of legislative authority. The same is likely true of an agreement to "support the Iraqi government in training . . . the Iraqi Security Forces."[19]

Finally, it would be permissible for the President to enter a nonbinding agreement with Iraq. An exchange of letters or a memorandum of understanding that does not create a binding international commitment on behalf of the United States would be within the legal limits of a sole executive agreement.

WHY THE PRESIDENT MIGHT SEEK CONGRESSIONAL APPROVAL, EVEN IF IT IS NOT REQUIRED

Even if a president *may* conclude an agreement on his or her own authority, it is worth noting that he or she is never *required* to do so. Indeed, there are strong reasons why a President might choose to seek congressional approval for an agreement when that approval is not strictly necessary. Even when it is within a President's sole power to make an international agreement, the President can substantially strengthen his or her authority, both as a matter of domestic and international law, by obtaining the approval of Congress.

As the Supreme Court has explained, when the President acts pursuant to an "express or implied authorization of Congress, his authority is at its maximum."[20] When the President instead "acts in absence of either a constitutional grant or denial of authority, he can only rely upon his own independent powers."[21] In other words, the President's authority is markedly strengthened when his or her actions have the approval of Congress.

This is as true in international lawmaking as it is in domestic lawmaking. Sole executive agreements are concluded by the President alone and hence carry force only so long as they are not inconsistent with federal law. In a clash between ordi-

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[16] The Military Extraterritorial Jurisdiction Act of 2000, as amended in 2005, applies only to those civilians who are "supporting the mission of the Department of Defense overseas." Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No. 106–523, § 3261(a), 114 Stat. 2488, 2488 (2000). Civilian contractors whose work does not support the mission of the Department of Defense therefore fall outside the Act's jurisdiction. It has been argued that Blackwater's employees, who primarily provide security to the State Department, are therefore not covered by the Act. If true, this would mean that exempting such contractors from prosecution under Iraqi law has the potential to leave them immune from criminal prosecution. By contrast, all other persons (military and civilian) who are protected from prosecution in a host country under a status-of-forces agreement can be prosecuted in an alternate jurisdiction.

[17] Declaration of Principles, *supra* note 8, at p. 2.

[18] There are at least three separate legislative acts that give authorization to the President to negotiate debt relief agreements: (1) the Act of International Development of 1961, (2) the Enterprise for Americas Act of 1992, and (3) An Act to Amend the Foreign Assistance Act of 1961 to Facilitate Protection of Tropical Forests Through Debt Reduction with Developing Countries with Tropical Forests. *See* Hathaway, *supra* note 6, at n. 74.

[19] Declaration of Principles, supra note 8, at p. 2.

[20] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The full language is as follows: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty." *Id.* at 635–36.

[21] *Id.* at 637 ("When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least, as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables, rather than on abstract theories of law."). There is also a third category of presidential authority: When the President "takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.*

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nary federal legislation and a sole executive agreement, federal legislation has primacy.[22] An executive agreement that is approved by Congress, on the other hand, automatically has the force of federal law. That means that if it conflicts with an earlier statute, the later in time agreement will take precedence.[23]

Even more important, an agreement approved by Congress has the force of a commitment supported by the American people. A sole executive agreement—particularly a controversial one relating to an issue of intense domestic political debate—does not carry the same force. While a President could enter a sole executive agreement that is within the President's constitutional competence even if it were clear that the agreement does not have the support of Congress, it would be inadvisable to do so. Such an agreement is much more likely to be revoked by a subsequent President or by Congress through a subsequent statute. In either case, the revocation harms the reputation of the United States and could make it more difficult for the country to secure favorable international commitments in the future.

It is also highly advisable for the President to seek congressional approval in cases where an agreement falls within prior congressional authorization yet still requires an additional act by Congress to bring the agreement into effect. The most common example would be a controversial agreement that requires a future appropriation of funds by Congress. Failure to seek and receive congressional support under these circumstances might lead to an international commitment the United States is at risk of violating. Once again, that result would undermine the country's ability to enter advantageous international commitments in the future.

RECOMMENDED FORM OF CONGRESSIONAL APPROVAL

There remains the question as to what form any congressional approval of an agreement between the United States and Iraq ought to take. It would be legally permissible for congressional approval to be given either through the Article II Treaty Clause or through the approval of a congressional-executive agreement by both houses of Congress. There are a variety of reasons, however, that a congressional-executive agreement might be preferable. In particular, the legislation approving a congressional-executive agreement could be fashioned to include any appropriations necessary to carry out the agreement, thereby rendering separate implementing legislation unnecessary. A congressional-executive agreement also includes the House of Representatives directly in the international lawmaking process. Particularly for an issue that has been at the center of political debate in the country, that has significant democratic advantages. And, finally, depending on how the legislation is fashioned, a congressional-executive agreement could create more durable commitments than a treaty.[24]

Mr. DELAHUNT. Thank you, Ms. Hathaway. Dr. Glennon, welcome.

STATEMENT OF MICHAEL J. GLENNON, ESQ., PROFESSOR OF INTERNATIONAL LAW, THE FLETCHER SCHOOL, TUFTS UNIVERSITY

Mr. GLENNON. Thank you, Mr. Chairman. Mr. Chairman, members of the subcommittee, thank you for inviting me to testify today on the proposed agreement with Iraq. I have prepared a written statement but rather than read it I would simply ask that it be entered in the record, and with your permission, I will then proceed to summarize.

Mr. DELAHUNT. So ordered. Please proceed.

Mr. GLENNON. Thank you.

My views on the proposed agreement can be quickly summarized. First, as you mentioned, the administration has spelled out what

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[22] This is true unless the sole executive agreement was expressly intended to effect a treaty obligation, in which case the last-in-time rule is applied. In this case the executive agreement takes on the force of a treaty obligation, as a matter of domestic law. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 115, cmt. c. (1987).

[23] This applies if the international agreement is concluded either as a congressional-executive agreement or as a treaty. See Hathaway, *supra* note 6.

[24] For more on the advantages of congressional-executive agreements over Article II treaties, see Hathaway, *supra* note 6, Part III.

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it intends to include in the agreement in the November 26 Declaration of Principles. In critical respect, that declaration is ambiguous. In the past, however, the administration has made broad claims of executive power, and it is therefore reasonable to construe this declaration broadly in light of those past claims.

Second, broadly construed, the declaration appears to contemplate a legally-binding security commitment by the United States to Iraq. The concept of a security commitment was defined by the first President Bush in a report to Congress in 1992. The report said that a security commitment is an "obligation binding under international law of the United States to act in common defense in the event of an armed attack on that country."

Broadly construed, the provisions of the proposed agreement with Iraq fall within this definition.

Third, the security commitment that seems to be contemplated by the declaration would go beyond the terms of any security commitment that is now in force for the United States in two respects: First, none of the security commitments now in force commits the United States to defend against internal threats or outlaw groups as the proposed agreement apparently would. No provision of the Rio Treaty, for example, requires any party to intervene militarily to protect one of the 21 Latin American member governments from military coups.

Second, no security commitment to which the United States is a party commits any party to use military force automatically in the event of an attack on another party. Each makes clear that the use of force is not required if some other response is deemed more appropriate. The proposed agreement broadly construed could require the automatic use of force by the United States.

Fourth, the proposed agreement seemingly would also go beyond the scope of typical Status of Forces Agreements. SOFAs, as they are called, traditionally set up rules applicable to the activities of U.S. troops present in host countries and the legal relationships with those countries. SOFAs do not include security commitments as the proposed agreement with Iraq seemingly would.

Fifth, under the Constitution, the President therefore cannot conclude the proposed agreement on the basis of his own constitutional authority. Senate or congressional approval would be constitutionally required for two reasons: First, the proposed agreement could reasonably be construed as a promise to place the Nation in a state of war. Unless there is an emergency created by a sudden attack or a threat of one, it is evident from the constitutional text, from the intent of the Framers, from subsequent custom and practice, and from Supreme Court case law that the Constitution vests the decision to place the Nation in a state of war in the hands of the Congress.

Second, the Senate Foreign Relations Committee has said that the treaty clause requires that, normally, significant international commitments be made with the advice and consent of the Senate. It is difficult to imagine an international commitment more significant than the one seemingly contemplated by the Declaration of Principles, which would clearly fall beyond the constitutional authority of the President acting alone. None of the security commit-

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ments to which the United States currently is a party was entered into by the President under his own constitutional authority.

Fifth, while an unauthorized security commitment of this breadth would be unprecedented, Congress has in fact had long-standing concerns about the making of such commitments. I might say that in the 1970s, when I was legal counsel to the Senate Foreign Relations Committee, the issue that we are talking about today was a very, very big deal.

During the sixties and seventies, the Senate expressed its belief several times that various base agreements should be submitted as treaties, in the belief that the presence of bases in certain countries implied security commitments. The Senate adopted the National Commitment Resolutions in 1969, warning that a national commitment cannot be made by the President acting alone. Congress ultimately required that executive agreements be reported to it in the Case-Zablocki Act, but it never enacted framework legislation like the War Powers Resolution or the Congressional Budget and Impoundment Control Act that would have restricted the abuse of executive agreements.

What the Senate did do was to exercise its advice power under the Constitution concerning what form an agreement should taken. In 1978, the Senate adopted S. Res. 536, which provided that in determining whether a particular agreement should be submitted as a treaty, the President should have the timely advice of the Senate Foreign Relations Committee. In practice, the House Committee on Foreign Affairs was also included in these consultations.

In recent years, it is true consultation under S. Res. 536 appears to have become, to put it charitably, somewhat uneven. Still the administration may have a constitutional obligation to seek Senate advice on such an agreement because the Senate is a continuing body and S. Res. 536 continues to be in force. Consultation with the Congress could help avoid misunderstandings that will inevitably arise either through studied equivocation or inadvertent ambiguity.

Finally, in conclusion, you recalled the words of Secretary of Defense Gates before the Senate Armed Services Committee 2 days ago. It is possible that the administration may now be moving away from a broad construction of the Declaration of Principles of the sort that I have just outlined, but it seems to me that it would be, at this point, premature to jump to any such conclusion.

First, I have read the entire transcript of his testimony before the Senate Armed Services Committee. This comment was not included in his prepared statement. It was made in answer to questions by Senators Kennedy and Levin, and if you read the commentary surrounding his response to Senator Levin, I believe it is fair to say that it is not clear to what extent this position was carefully thought through.

And as the chairman emphasized in his opening statement, is important to note the President, after all, did sign the Declaration of Principles which seems on its face to be inconsistent with the statement made 2 days ago by the Secretary of Defense, leading to the conclusion that it is all the more important for Congress to get to the bottom of this, to get the facts straight, and to insist upon clarity.

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I don't want to impute any illicit intention to the administration, but I would simply observe that the administration has an understandable incentive to overstate the scope of the commitment in its communications with the Iraqis and to understate the scope of the commitment in its communication with the Congress.

It is essential that the Congress not be led to believe that there is no security commitment if there is one. It is also essential that the Iraqis not be led to believe that there is a security commitment if there is not one. When it comes to the role of the United States in Iraq's future security, Congress and Iraq must be on the same page. If they are not, the consequences could be catastrophic both internationally and domestically.

So, Mr. Chairman, I commend you and this subcommittee for taking on this critically important issue, and I would be happy to answer any questions. Thank you.

[The prepared statement of Mr. Glennon follows:]

PREPARED STATEMENT OF MICHAEL J. GLENNON, ESQ., PROFESSOR OF INTERNATIONAL LAW, THE FLETCHER SCHOOL, TUFTS UNIVERSITY

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify today on the proposed U.S. security commitment to Iraq.

THE PROPOSED AGREEMENT

As you know, an Agreement that would contain a security commitment is now being negotiated with the Iraqi government, pursuant to the "Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America," which was concluded on November 26, 2007. According to the Declaration, the Agreement will, among other things, provide "security assurances and commitments . . . to deter foreign aggression against Iraq that violates its sovereignty and integrity of its territories, waters, or airspace." Further, the Agreement would commit the United States to defend Iraq not simply against foreign aggression but "against internal and external threats," and would commit the United States to support the Iraqi government in its effort to "defeat and uproot" "all outlaw groups" from Iraq. The proposed Agreement apparently would have no expiration date and no termination provision. The Agreement is to be completed by July 31, 2008.

SUMMARY

The President cannot under his own constitutional authority conclude a security commitment that would be legally binding under international law. At this point, the Administration's intent concerning the form and substance of the proposed Agreement is not altogether clear. The President does have constitutional power to extend a security assurance to Iraq that is not legally binding. The President should consult with Congress concerning what form the Agreement may take. Should it take a form that is inconsistent with constitutional requirements, legislative remedies are available.

ANALYSIS

1. It is unclear from the Declaration of Principles which provisions of the Agreement, if any, will be submitted for some form of congressional approval and which provisions will not. In November 2007, when the plan was announced, Lt. Gen. Douglas Lute implied that none of the provisions of the agreement would be submitted for congressional approval. He said: "We don't anticipate now that these negotiations will lead to the status of a formal treaty which would then bring us to formal negotiations or formal inputs from the Congress." In the past, President Bush has claimed an extraordinary breadth of presidential power, and thus such a statement may mean that no congressional approval will be sought. On the other hand, in stating that "we don't *anticipate now*," Gen. Lute may have meant to suggest that it was not possible to know at the outset, before the Agreement has been negotiated, whether Senate approval would be required, whether House and Senate approval would be more appropriate, or whether the Agreement would be entered into under the President's sole constitutional authority. Negotiators typically do not

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decide *ex ante* what form an agreement should take, recognizing instead that an agreement's negotiation may produce something substantively different from what was originally contemplated.

2. It is also unclear from the Declaration of Principles which provisions of the Agreement will be binding under international law and which provisions will not be binding. There are many precedents for non-binding international agreements, ranging from the Ford Administration's 1975 Helsinki Accords on human rights to the Carter Administration's 1977 "extension" of the SALT I interim agreement. The latter expired but continued to be observed by both the United States and the Soviet Union as a political matter, with no binding international obligation to honor it. More important, within a single international agreement, some provisions can be legally binding and others non-binding. It is conceivable that in making the Declaration of Principles, the Administration contemplated that some of the provisions of this Agreement will be binding and that others will be non-binding. It is also possible that the Administration did not know at the outset which would be which, or that the Administration believed that whether a certain provision would be binding will itself be a subject of negotiation.

3. International agreements that are valid under the Constitution are equally binding in international law, but an international agreement that is invalid under the Constitution might not be binding under international law. There are not "degrees" of "bindingness" in international law. All international agreements that are valid under a state's domestic law are equally obligatory international law. This is true regardless of the form that domestic approval might take. In the United States, for example, some international agreements are entered into as treaties, requiring the advice and consent of two-thirds of the Senate; others are entered into as "congressional-executive agreements," requiring the approval of a majority of the House of Representatives and a majority of the Senate; and others are entered into as "sole executive agreements," without any form of Senate or congressional approval. A unilateral statement made by a state can also be binding in international law if the state intends to assume an international obligation. All are equally binding under international law, provided they are constitutionally permitted.

An agreement that is invalid under the Constitution, however, might be invalid in international law. Article 46 of the Vienna Convention on the Law of Treaties provides that a state may invoke the invalidity of a treaty if four conditions are met: (1) the state's consent to be bound by the treaty was expressed in violation of a rule of its internal law; (2) the rule that was violated related to competence to conclude treaties; (3) the rule was of fundamental importance; and (4) the violation is manifest. Article 46 does not represent a codification of customary international law but was devised by the drafters of the Convention to fill a gap in the law. This is important because the United States is not a party to the Vienna Convention, and Article 46 thus has no direct application to the United States. Nonetheless, the Convention is widely accepted, and many states therefore would seemingly accept the principle that a sole executive agreement that is obviously *ultra vires* under the United States Constitution is not binding on the United States under international law. The *Restatement of the Law (3rd): Foreign Relations Law of the United States* concludes simply that international "case law" supports the rule "that a state is bound by apparent authority where lack of authority is not obvious to outside parties." (§311, Reporters' Note 4.) As indicated in point 4 below, the President's lack of authority to conclude an agreement such as the NATO Treaty without Senate or congressional approval might be regarded as "manifest." And as indicated in point 7 below, the scope of the commitment seemingly contemplated in the proposed Agreement would go beyond that of the NATO Treaty.

4. The President does not have authority under the Constitution, without Senate or congressional approval, to make a binding international agreement that would constitute a security commitment to Iraq. The concept of a "security commitment" was defined by President George H.W. Bush in a report to Congress in 1992. The report said that a "security commitment," as understood by the Executive, is an "obligation, binding under international law, of the United States to act in common defense in the event of an armed attack on that country." The report proceeded to list U.S. security commitments, none of which was concluded by the President acting alone. All these security commitments were approved either by the Senate as treaties or by both houses of the Congress as congressional-executive agreements. The State Department web site maintains a current list of "U.S. collective defense arrangements." Each of the arrangements listed was, likewise, approved by the Senate as a treaty.

The practice of the Executive's concluding security commitments only with Senate or congressional approval did not arise through political accident or historical happenstance but rather reflects constitutional requirements. Absent an emergency cre-

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ated by a sudden attack or the threat of one, it is evident from the constitutional text, the intent of the Framers, Supreme Court case law, and subsequent custom and practice that the Constitution places the decision to put the nation in a state of war in the hands of the Congress. Moreover, the same constitutional sources suggest that, as the Senate Foreign Relations Committee stated in its report on the Panama Canal Treaties, "[t]he Treaty Clause requires that, normally, significant international commitments be made with the advice and consent of the Senate." It is difficult to imagine an international commitment more significant than one that might place the nation at war. Hence the *Restatement* concludes that "some agreements, such as . . . the North Atlantic Treaty, are of sufficient formality, dignity, and importance that, in the unlikely event that the President attempted to make such an agreement on his own authority, his lack of authority might be regarded as manifest." (§ 311, Comment c.)

5. The President does have authority under the Constitution to enter into binding international agreements without Senate or congressional authorization when they fall within his exclusive constitutional powers, such as some "status of forces" agreements (SOFAs). "SOFAS," as they are called, relate to rules that will govern the presence of U.S. troops in countries in which they are stationed. They define the legal status of U.S. personnel and property in the territory of that nation. Typical SOFAs set out the rights and duties of the United States and the host government on such matters as criminal and civil jurisdiction, the wearing of the uniform, the carrying of arms, tax and customs relief, entry and exit of personnel and property, and the resolution of damage claims. Nearly 100 are now in force. Some provisions of some SOFAs have been concluded under the authority of statutes or existing mutual security treaties. Many other SOFA provisions (which, for example, merely exempt U.S. personnel from the operation of foreign law) have been concluded under the President's authority as commander-in-chief. The President does have sole power to conclude international agreements with respect to subjects that fall within his exclusive constitutional powers; in addition to his commander-in-chief powers, these sole powers include the authority to negotiate and conclude cease-fires, to recognize and de-recognize foreign states and governments, and to grant pardons. The Declaration of Principles indicates that some of the provisions of the proposed Agreement would address matters that traditionally fall within a SOFA.

6. The President has authority under the Constitution to make non-binding security assurances without Senate or congressional approval that do not purport to bind his successor. The Helsinki Accords and the policy declaration issued in connection with the SALT I Interim Agreement did not require Senate or congressional approval in that they created no legal obligation in international law. The President has constitutional power to issue "political" assurances and policy declarations. However, because this is a plenary power of the President, he could not purport to divest a successor President of plenary powers by, for example, promising that the United States would not negotiate a certain treaty during the successor's term, or by promising that the successor would grant a certain pardon. The successors of Presidents Ford and Carter thus had complete freedom to adopt new policies that differed from those laid out in the Helsinki Accords and SALT I policy declaration, respectively.

Presidents have on occasion made promises to use armed force in defense of foreign nations without securing Senate or congressional approval. On January 5, 1973, for example, President Richard Nixon, in a letter to President Nguyen Van Thieu of the Republic of Vietnam concerning the Paris peace negotiations, promised that "we will respond with full force should the settlement be violated by North Vietnam." Following the Iraqi invasion of Kuwait, then-Secretary of Defense Dick Cheney promised on behalf of the President George H.W. Bush that the United States would defend Saudi Arabia if it were attacked by Iraq. The view of these agreements most consistent with constitutional principles is that they constituted non-binding assurances of political intent that applied to those Presidents' own Administrations, not international agreements that bound the United States or were legally binding on successive administrations.

7. The Agreement contemplated by the Declaration of Principles would go beyond the provisions of existing SOFAs in that it would include a security commitment. The Agreement would also go beyond the provisions of existing U.S. security commitments in that it would commit the United States to respond to internal threats to Iraq and may require the automatic use of force. As indicated in point 5 above, SOFAs set out rules applicable to the presence and activities of U.S. troops present in host countries. None of them contains a security commitment, as would the Agreement contemplated by the Declaration of Principles. Furthermore, none of the security commitments currently listed by the United States (see point 4 above) commits the United States to defend a state party against internal threats or outlaw groups. No

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provision of the Rio Treaty, for example, requires a party to intervene militarily to protect one of the 21 Latin American member governments from a military coup.

In addition, apparently unlike the proposed Agreement, no security commitment to which the United States is a party commits any party to use military force automatically in the event of an attack on another party. Each makes clear that the use of force is not required if some other response is deemed more appropriate. A security commitment entered into by the President and Senate as a treaty that required the automatic use of force would create serious constitutional problems because it would exclude the House of Representatives from the decision to go to war. It is precisely because of this constitutional limitation that the United States has never concluded a treaty, even with its closest allies, that contains an automatic commitment to use force. An agreement that excluded not only the House of Representatives from this decision, but the Senate as well—which may be the case with the proposed Iraq Agreement—would raise the gravest constitutional concerns.

8. Constitutional difficulties with the proposed security commitment to Iraq can be cured by avoiding a binding security commitment *and by issuing, instead, a non-binding security* assurance. As indicated in point 6 above, a security assurance, in contrast to a security *commitment*, is not intended to be legally binding. Security assurances are statements of political intent. The President's 1992 report to Congress lists a number of security assurances with nations such as Pakistan and Egypt that express a generalized political intention to support the government in meeting security threats. Security assurances create no obligation under international law. Nor are they binding on the issuing President's successors, who retain full constitutional discretion to alter or terminate them.

9. Congress has had long-standing concerns about the making of unauthorized security commitments. Prompted largely by the war in Southeast Asia, congressional concerns were expressed regularly in Congress during the 1960s and 1970s regarding unauthorized U.S. military commitments to other nations, which were often seen as flowing from base agreements.

- In January, 1969, the Senate Foreign Relations Committee created a Subcommittee on U.S. Security Agreements and Commitments Abroad. The Subcommittee developed significant new information about hitherto secret security arrangements entered into by the Executive with a number of countries.
- In June, 1969, the Senate adopted the National Commitments Resolution, a sense-of-the-Senate resolution that warned that a national commitment "results only from affirmative action taken by the executive and legislative branches of the U.S. Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment." S. Res. 85, 91st Cong., 1st Sess. (1969).
- In December, 1970, the Senate adopted S. Res. 469, 91st Cong., 2nd Sess. (1970), expressing the sense of the Senate that nothing in an executive bases agreement with Spain should be deemed to be a national commitment by the United States.
- In March, 1972, The Senate adopted S. Res 214, 92nd Cong., 2nd Sess. (1972), expressing the sense of the Senate that "any agreement with Portugal or Bahrain for military bases or foreign assistance should be submitted as a treaty to the Senate for advice and consent."
- In 1972, Congress adopted the Case-Zablocki Act, P.L. 92–403 (1972), requiring that the President to transmit to Congress the text of any international agreement other than a treaty as soon as practicable but no later than 60 days after it entered into force.
- In 1976, the House International Relations Committee held six days of hearings on, but did not report, H.R. 4438, 94th Cong., 1st Sess. (1976), which would have subjected unauthorized military commitments to a legislative veto.
- On May 15, 1978, the Senate Foreign Relations Committee reported a measure (section 502 of S. 3076, 95th Cong., 2nd Sess. (1978)) that would have subjected an unauthorized agreement to a point-of-order procedure that would have cut off funds for the implementation of the agreement in question, but the measure was rejected by the full Senate. (Section 502 incorporated the "Treaty Powers Resolution," S. Res. 24, 95th Cong., 2nd Sess. (1978)).
- In September, 1978, the Senate adopted S. Res. 536, 95th Cong., 2nd Sess. (1978), stating the sense of the Senate that in determining whether a particular international agreement should be submitted as a treaty, the President should have the timely advice of the Committee on Foreign Relations through agreed procedures established with the Secretary of State.

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10. The President should consult with Congress concerning what form the Agreement should take. S. Res. 536, 95th Cong., 2nd Sess. (1978), referred to above, formalized a request by the Senate pursuant to its "advice" power that the Executive consult with it in deciding whether to submit a particular Agreement as a treaty. In practice that arose immediately after the adoption of S. Res. 536, the House Committee on International Relations was included in consultations. It and the Senate Foreign Relations Committee received a periodic list of significant international agreements that had been cleared for negotiation, and each Committee was given the opportunity to express its views. In recent years consultation under S. Res. 536 appears to have become uneven. Still, the Administration may well have a constitutional obligation to seek Senate "advice" on such an agreement, as detailed in S. Res. 536. Because the Senate is a continuing body, that Resolution is still in effect.

In addition to S. Res. 536, the State Department itself has adopted regulations for negotiating and signing treaties and executive agreements, which are referred to as the "Circular 175 Procedure." The procedure calls for "timely and appropriate" consultation with Congress with respect to both the form and substance of a proposed agreement.

11. Should Congress wish to remedy the problem, short-term and long-term solutions are available. As is evident from the above sketch of congressional attention to the issue, Congress has often expressed concerns about the making of unauthorized security commitments. However, except for requiring that international agreements containing such assurances be reported to Congress (under the Case-Zablocki Act), Congress has not enacted "framework legislation," such as the War Powers Resolution of 1973 or the Congressional Budget and Impoundment Control Act of 1974, that would systematically restrict the making of such commitments.

Should it wish to do so, one possibility lies in resurrecting the approach of the "Treaty Powers Resolution," S. Res. 24, 95th Cong., 2nd Sess. (1978), described in point 10 above. This approach could be attractive because it would both obviate the possibility of a presidential veto (the framework can be put in place by simple or concurrent resolutions) and also would not constitute a legislative veto, which the Supreme Court ruled constitutionally impermissible in *INS* v. *Chadha*, 462 U.S. 919 (1983). It would amend the internal rules of the House or Senate (or both) to cause a point of order to lie on the floor of that House against any measure that contains budget authority to carry out an international agreement that that House has previously found, by simple resolution, should be submitted for congressional or Senate approval.

A short-term solution would lie simply in enacting legislation that would cut off funds to carry out an agreement with Iraq that contains a security commitment. Such legislation would, of course, be subject to the possibility of a presidential veto. S. 2426, 110th Cong., 1st Sess., introduced by Senators Hillary Clinton and Barack Obama, would take essentially this approach.

CONCLUSION

Some of the provisions of the proposed Agreement could be comparable to the provisions of traditional status-of-forces agreements that have been concluded by the President under his own constitutional authority. Other provisions of the proposed Agreement, however, could constitute a binding security commitment and cannot be concluded by the President acting alone. The President can constitutionally extend a non-binding security assurance to Iraq under his own constitutional authority. The President should consult with Congress on the form that the Agreement should take. Short-term and long-term solutions are available to Congress should an unauthorized security commitment be contained in the Agreement.

Mr. DELAHUNT. Thank you so much, Professor Glennon, and Mr. Matheson, welcome back. You are becoming a regular.

STATEMENT OF MICHAEL J. MATHESON, ESQ., VISITING RESEARCH PROFESSOR OF LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. MATHESON. Thank you, sir, and I do appreciate the invitation to appear before you again.

I have also submitted a written statement and I would suggest that it be included in the record and that I give an oral statement now.

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As you say, I did appear at your first hearing on January 23, and I did address some of the issues which other members of the panel have just been discussing, in particular, with respect to the question of whether congressional action would be required for the agreements contemplated. I suggested that this would depend on the specific content of the agreement and the relationship with other statutory provisions. For example, I think congressional action would be required if the agreements included a security commitment in the sense of an obligation of the United States to come to the defense of Iraq, or if they included some commitment to bases for a permanent United States military presence in Iraq.

On the other hand, I suggested that if all the agreements included was a simple promise to consult on security threats or exemptions of United States forces from Iraqi law, such as are usually contained in the standard SOFA agreement, that the President might do this without any further congressional action.

I also commented on language which appears in the declaration which seems to suggest that Iraq's status under the Security Council resolutions adopted under Chapter 7 of the Charter would end, and if that were meant literally, I suggested this could have some significant policy implications; in particular, with respect to the continuing deduction of amounts to pay compensation for damage and injury suffered during the Gulf War and also the continuation of existing restrictions on Iraqi acquisition of items that might be used in a program for weapons of mass destruction, and of course, I would be very glad to elaborate upon those aspects, if you like, during the question and answer period.

But this morning you have asked me to focus on the process by which the executive branch organizes and concludes international agreements, and in particular, such issues as the involvement of Congress and consultations with Congress and the determination of the form of the agreements. So what I would like to do now is to just highlight a few aspects of that area.

First of all, with respect to the authorization for negotiations, of course, the President has the constitutional responsibility for negotiating international negotiations, and this process is regulated by a set of State Department regulations which are usually called the Circular 175 Procedure. This procedure is designed to do a number of things, including to make sure that the negotiations stay within constitutional and legal limitations, but also to ensure that there is an appropriate consideration of foreign policy issues, and an appropriate involvement of the Congress in the process.

The Circular 175 Procedure requires that the authorization of the Secretary of State or his designee be given in advance before negotiations for a significant new international agreement can begin, and that, of course, would include the agreements we are talking about now which are surely significant agreements.

This authorization usually is taken by means of a memorandum which is sent to the Secretary or his designee which does various things, including describing what the agreement will involve, addressing any foreign policy implications of it, addressing the question of whether congressional consultations have been arranged, addressing the question of funding sources, and so on.

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It is generally accompanied by a legal memorandum which talks about the form of the agreement, the legal basis for the agreement, and any domestic law issues that may be implicated. And if there is a question about what form the agreement should take, that is, whether to be a treaty or an agreement giving approval or authorization by Congress, or an agreement on the President's own constitutional authority, then that issue is to be referred to the Office of the Legal Advisor in the State Department and, if necessary, sent to the Secretary of State for a decision.

Once the negotiations have begun, of course, they must stay within the bounds of the authorization given to them unless the negotiators come back for further authorization.

Secondly, with respect to the process for the involvement of Congress in this, the Circular 175, as you, yourself, have noted, definitely does contemplate the involvement of Congress in this process even if the agreements are to take the form of a sole executive agreement under the President's constitutional authority.

What it says is that the appropriate leaders and committees of Congress are to be advised of the intent to negotiate a significant new agreement. They are to be consulted about the proposed agreements, and they are to be kept informed of developments which may occur during the process. This consultation is to cover both the substance and the form of the proposed agreement.

Now, there is no specific designation of exactly when these consultations are to occur, but it seems logical to me that if they are to be meaningful they need to occur in sufficient time that the views of Congress can be taken into account in the actual process of negotiation, and I think no sensible negotiator would do it any differently, particularly in a case like this one where the ultimate success of the agreements may well depend upon later congressional action or congressional political support.

Once the agreements are concluded, then they have to be reported to Congress. The Casey-Lockheed Act requires that this be done as soon as practicable after their conclusion, but in any rate, no later than 60 days thereafter.

Third, with respect to the U.N. resolutions, and as I have said, the declaration seems on its face to contemplate that some or all of the existing Security Council resolutions may be terminated. This, of course, is not something that the United States and Iraq can do on their own. It does require a decision by the council, so the most that any agreement could do at this point would be to commit the United States to supporting such action.

The negotiation and conclusion of decisions by the council, of course, is within the President's authority over foreign relations, but it seems to me that changes of this kind might have significant policy implications, and that therefore there would be a legitimate interest of Congress in being consulted with respect to such changes, if they were to occur.

Mr. Chairman, that concludes my oral summary, but, of course, I would be very happy to answer any questions on any of these aspects. Thank you, sir.

[The prepared statement of Mr. Matheson follows:]

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PREPARED STATEMENT OF MICHAEL J. MATHESON, ESQ., VISITING RESEARCH PROFESSOR OF LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

THE PROPOSED AGREEMENT ON THE FUTURE U.S. PRESENCE IN IRAQ

On January 23 I testified here on the subject of U.S. security commitments to Iraq. Among other things, I suggested that the agreement or agreements contemplated by the November 2007 U.S.-Iraq Declaration of Principles might or might not require Congressional action, depending on their specific content and their relationship to applicable statutory restrictions. In particular, I suggested that Congressional action would be needed if the agreements included a security commitment to use U.S. forces in the defense of Iraq, or a commitment to build bases for a permanent U.S. military presence in Iraq, or an exemption from U.S. laws for Iraqi personnel. On the other hand, I said that a simple pledge to consult in the event of a security threat to Iraq or an exemption from Iraqi laws for U.S. forces and personnel might be done by means of an executive agreement without Congressional authorization.

I also commented on the part of the Declaration that seemed to call for the end of Iraq's status under Chapter VII of the UN Charter and its return to the legal position prior to August 1990, when the Security Council began its series of resolutions on Iraq. I pointed out that, if this literally meant that the Council's Chapter VII resolutions on Iraq would be terminated, this would raise several issues of possible significance to the United States. In particular, those resolutions provide for a continuing deduction from Iraqi oil export revenues to pay compensation awarded by the UN Compensation Commission to those suffering loss from the Iraqi invasion and occupation of Kuwait (including American claimants); and those resolutions continue to impose constraints on the acquisition and possession by Iraq of various items that might be used in a program for biological, chemical or nuclear weapons. I suggested that these questions merited policy consideration, so as not to result in unintended consequences.

For this morning's hearing, I have been asked to focus on the mechanics of how the Executive Branch makes international agreements, with particular emphasis on the determination of what form the agreement will take and the procedures followed for consultation with Congress. The U.S. process for the making of international agreements is in fact one that is carefully regulated and subject to definite legal and policy requirements, which I will try to describe.

AUTHORIZATION OF NEGOTIATIONS

It is of course the Constitutional responsibility of the Executive Branch to negotiate international agreements. The process for doing so is governed by the regulations of the State Department that are commonly known as the "Circular 175 procedure."[1] The procedure is designed "to confirm that the making of treaties and other international agreements by the United States is carried out within constitutional and other legal limitations, with due consideration of the agreement's foreign policy implications, and with appropriate involvement by the State Department."[2] It is also designed to ensure "that timely and appropriate consultation is had with congressional leaders and committees" on such agreements and that the requirements of U.S. law on the transmission of such agreements to Congress are complied with.[3]

The Circular 175 regulations state that:

> Negotiation of treaties, or other "significant" international agreements, or for their extension or revision, are not to be undertaken, nor any exploratory discussions undertaken with representatives of another government or international organization, until authorized in writing by the Secretary [of State] or an officer specifically authorized by the Secretary for that purpose.[4]

A request for such authorization takes the form of a memorandum to the Secretary of State, or to another principal officer to whom such authority has been delegated (such as an Undersecretary of State), cleared by the Office of the Legal Adviser, the Office of the Assistant Secretary of State for Legislative Affairs, and other bureaus or agencies that may have a substantial interest in the matter. These re-

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[1] The Circular 175 procedure originated in Department Circular No. 175 of December 13, 1955. It is currently codified in the State Department's Foreign Affairs Manual at 11 FAM 720–25 and 22 CFR 181.4.

[2] *See* the explanation of the Circular 175 procedure given by the Office of the Legal Adviser of the State Department at www.state.gov/s/l/treaty/c175.

[3] 11 FAM 722 .

[4] 11 FAM 724.1.

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quirements apply whether the agreement is to be concluded in the name of the U.S. Government or in the name of a particular U.S. agency.[5]

According to the Department, this memorandum "will generally address, where applicable" the following issues:

- The proposed agreement's principal features, indicating any special problems that may be encountered and, if possible, the contemplated solution to those problems;
- The policy benefits to the United States, as well as potential risks;
- Whether congressional consultations on the agreement have been or will be undertaken;
- The funding sources that will be committed by execution of the proposed agreement;
- Whether the proposed agreement reasonably could be expected to have a significant regulatory impact on domestic entities or persons; and
- The environmental impact that may arise as a result of the agreement.

The memorandum is to be accompanied by any texts to be negotiated.[6]

Also accompanying this memorandum is a memorandum of law prepared by the Office of the Legal Adviser. According to the Department, that memorandum of law will generally include:

- A discussion and justification of the designation given to the proposed agreement (treaty vs. executive agreement);
- An explanation of the legal authority for negotiating and/or concluding the proposed agreement, including an analysis of the Constitutional powers relied upon as well as any pertinent legislation;
- An analysis of the issues surrounding the agreement's implementation as a matter of domestic law (e.g., whether the agreement is self-executing, whether domestic implementing legislation or regulations will be necessary before or after the agreement's execution). . . .[7]

On the specific question of the form of the agreement—whether a treaty to be given advice and consent of the Senate, an agreement authorized or approved by act of Congress, or a sole executive agreement—the Circular 175 regulations say that this matter is to be brought to the attention, in the first instance, of the Legal Adviser's Office and, if the matter is not resolved after consultation with the affected bureaus, it is to be referred to the Secretary of State (or his designee) for a decision.[8]

The office or officer to whom the task of negotiating the agreement is entrusted is reminded by the Circular 175 procedure that "no proposal is made or position is agreed to beyond the original authorization without appropriate clearance" and that the Secretary of State or other principal officer is to be "kept informed in writing of important policy decisions and developments" in the negotiation.[9] Any substantive changes in the original draft text are to be cleared with the Legal Adviser's Office and the other bureaus involved.

The memorandum seeking authorization to negotiate may also request authorization to sign the agreement when the negotiations are concluded. Otherwise, the responsible officer must come back with a separate request for authority to sign the agreement, which has to include all the information described above.[10] When the agreement is signed, the responsible officer must transmit the completed text to the Legal Adviser's Office, together with all accompanying papers, such as agreed minutes or exchanges of notes.[11]

All of these requirements will of course apply to the negotiation of the agreement or agreements contemplated by the Declaration of Principles. Given the obvious importance of these agreements for U.S. foreign policy and national security interests, they are certainly "significant" in the sense that this term is used in the Circular 175 procedure.

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[5] 11 FAM 724.3.
[6] *See* www.state.gov/s/l/treaty/c175.
[7] *Id.*
[8] 11 FAM 723.4.
[9] 11 FAM 725.1.
[10] 11 FAM 724.3.
[11] 11 FAM 725.7.

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INVOLVEMENT OF CONGRESS

The Circular 175 procedure clearly contemplates the involvement of Congress in the negotiation of significant agreements. This is true even if the agreement is to be concluded as an executive agreement without formal Congressional authorization or approval. Specifically, the "appropriate congressional leaders and committees" are to be "advised of the intention to negotiate significant new international agreements, consulted concerning such agreements, and kept informed of developments affecting them, including especially whether any legislation is considered necessary or desirable for the implementation of the new treaty or agreement." (Also, according to the Circular 175 regulation, the interest of the public is "to be taken into account" and, where in the opinion of the Secretary of State or his or her designee the circumstances permit, the public is to be given an opportunity to comment.)[12]

Consultation with Congress is to cover both the substance and form of the proposed agreement. In particular, with respect to whether an agreement should be concluded as a treaty or in some other form, "consultations on such questions will be held with congressional leaders and committees as may be appropriate." Arrangements for these consultations are to be made by the Assistant Secretary of State for Legislative Affairs.[13]

The regulations do not specify precisely when consultations must take place. However, as noted above, the memorandum seeking authorization to negotiate is to say whether congressional consultations on the agreement have been or will be undertaken, and Congress is to be informed of the intention to negotiate such an agreement—obviously before the negotiation occurs. If such consultations are to be meaningful, they should logically start in sufficient time that Congressional views can be taken seriously into account in the negotiation. No sensible negotiator would do otherwise, particularly in a case where the implementation of the agreement will ultimately depend on Congressional appropriations, implementing legislation or political support from the Congress.

If the agreement is to be concluded in the form of a treaty, then it must be signed subject to ratification, which of course can only occur after the Senate gives its advice and consent. If some other form of Congressional action is required and has not been obtained in advance, it would normally be sensible to condition the agreement on obtaining that Congressional action or hold it in abeyance until Congress acts.

Once the agreement is concluded, it must be reported to Congress. The 1972 Case-Zablocki Act requires that the Secretary of State transmit to Congress the text of any international agreement other than a treaty "as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter."[14] It also requires that the Secretary put such agreements on the Department's website and maintain an annual compilation of all treaties and other international agreements which have entered into force during the previous year.[15]

UN RESOLUTIONS

Once again, the November 2007 Declaration says that, after a one-year extension of the mandate of the current multinational force, "Iraq's status under Chapter VII and its designation as a threat to international peace and security will end, and Iraq will return to the legal and international standing it enjoyed prior to the issuance of U.N. Security Council Resolution No. 661 (August 1990). . . ." As I noted in my previous testimony, this raises the question of whether it is contemplated that the existing series of Chapter VII resolutions will be terminated or modified in some way. If so, this would raise several issues, including the continuation of deductions from Iraqi oil export revenues to pay compensation for damage suffered during the invasion and occupation of Kuwait, the continuation of restrictions on Iraqi acquisition of items that might be used for weapons of mass destruction, and the guarantee of the border demarcation between Iraq and Kuwait.

If the agreement or agreements to be negotiated with Iraq do contemplate such changes to the Security Council's resolutions, then of course the United States and Iraq could not accomplish this on their own, and at most the agreement could only commit the United States to pursue such changes with other members of the Council. While it would be within the authority of the President to pursue such a course of action, the Congress would of course have a legitimate interest in being consulted on such changes and their effect on the interests of the United States and its na-

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[12] 11 FAM 725.1.
[13] 11 FAM 723.4.
[14] 1 USC 112b.
[15] 1 USC 112a.

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tionals. Once again, the language of the Declaration on this point seems to focus on the termination of the mandate of the multinational force, so it is not clear whether the Administration actually has in mind any other changes in the Council's resolutions.

CONCLUSION

The requirements contained in the Circular 175 procedure have served the Executive branch well over the years as a means of regularizing the process of negotiating and concluding international agreements in a way that respects legal requirements, the role of the State Department in directing and conducting international negotiations, and the role of Congress in the process. It also provides a practical means whereby U.S. negotiators can be sure that they have the legal authority, policy coordination and political support that they need to carry out their responsibilities effectively. Those who will be charged with responsibility for negotiation of the proposed agreement or agreements with Iraq would do well to follow these procedures carefully.

Mr. DELAHUNT. Thank you, Mr. Matheson. Dr. Wedgwood.

STATEMENT OF RUTH WEDGWOOD, ESQ., EDWARD B. BURLING PROFESSOR OF INTERNATIONAL LAW AND DIPLOMACY, DIRECTOR OF THE INTERNATIONAL LAW AND ORGANIZATIONS PROGRAM, THE PAUL H. NITZE SCHOOL OF ADVANCED INTERNATIONAL STUDIES, JOHNS HOPKINS UNIVERSITY

Ms. WEDGWOOD. Well, thank you very much for having me, Mr. Chairman. I guess I am the last-minute witness who was invited to take part a bit later, so my testimony——

Mr. DELAHUNT. We will have you back, too, I am sure.

Ms. WEDGWOOD. Thank you. It is a pleasure to be with Congresswoman DeLauro who was my Congresswoman for a very long time, and with Congressman Berman with whom I had the pleasure of being at an onerous Aspen Institute Conference in a very nice location, and I am happy to be here. I am here speaking only in a personal capacity.

I joined the Secretary of State's Advisory Committee on International Law some 14–15 years ago in a different administration, so I like to think of myself as being reasonably balanced. I should do a disclosure. I do serve on the Defense Policy Board currently. We have not discussed this issue, and I have not been briefed by anyone. I am here solely in a private voice.

When I read the Declaration of Principles just as a law professor might, the first thing I noticed about it was the last paragraph which says that there would have to be bilateral negotiations, to be sure it says beginning as soon as possible, to achieve any of these aims. So I think by its very nature the Declaration of Principles from last fall eschews any status as itself a binding agreement. It is a kind of memorandum of things to cover.

I also did notice early on that some of the things that are in it are not within the purchase of any government to grant in a sole capacity. Admission to the WTO, forgiveness of debts, flow of foreign investments, recovering illegally exported funds, these are things which the U.S. could be helpful on, but are not within our province to grant.

So what I took this—and I have been wrong before—but what I took this to be was a statement of interests that the President saw as being in common with those that Iraq had. It is a public statement. This is not secret. This indeed is a list of things to do, and

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then one can have a debate over the scope of constitutional authority of the President alone or the President with Congress, or President with the Senate.

It is a wise President who, particularly one who wants to grow the army, to be solicitous of Congress' point of view because, indeed, I think we have deep structural problems post-Iraq with the size of our own forces, and perhaps some of us regret their downsizing during the nineties. So I do think that any President will want to work in the future with Congress to look at the capacity of the Armed Forces and therefore open its—as Lyndon Johnson said, "It is good to be long in the takeoff before you land." But I do think this is not a binding agreement.

I also have always followed the lawyer's nostrum of taking a yes for an answer, which is that Secretary Gates, who has struck me as a very forthright and clear individual, in his testimony yesterday before two different committees, Senate Armed Services, House Armed Services, said over and over and over again in his colloquy with Congresswoman Tauscher that "we do not want, nor will we seek permanent bases in Iraq." That the Statue of Forces Agreement "will not contain . . . any security commitment to Iraq." And he committed the Defense Department to "transparency and openness" as to any future Status of Forces Agreement negotiated with Iraq. So I think at least the Pentagon, which is, I think, the cat birdseed for this kind of negotiation, has pledged itself to work with the Congress.

So to Senator Kennedy, Secretary Gates said again, the "Status of Forces Agreement that is being discussed will not contain a commitment to defend Iraq, and neither will any strategic framework," and again he pledged himself to openness and transparency.

So the first thing you teach in cross-examination is take yes for an answer and learn when to stop pushing the witness to change his mind because I think you have the Secretary on record, different committee, but same Congress.

Third, I would just note that—and this is the law professor in me, and I do have a reasonably reserved account of executive power, but I also wrote an article on Curtiss-Wright and the "sole organ" language, and love history, and there are occasions when Presidents are called upon, and should give their view of what general U.S. security interests are, whether it is the open door policy back under McKinley or the Root-Takahira Agreement, lend lease, some of these push the Congress' authority but there are times when the failure to say, I think, in a robust way that as President one views the protection of certain interests as important can give the wrong idea to adversaries, and the obverse of is before the beginning of the first Gulf War, when we all wish that in the interchange with Saddam, there had been a tougher set of locutions in that conversation, like, "I will take you to the wringer."

So at times I think the signaling that a President engages in, whether it is by send—when Bill Perry sent two carrier battle groups into the Taiwan Straits to signal something to China—that at times you want to use power legitimately to sketch out what seems to be the appropriate security architecture for foreign policy, albeit knowing that you may have to go to Congress for important portions of that.

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Finally, I will just say that—not to bore you to death—but you can buy a $200 book here from Oxford Press on SOFAs written by a wonderful German scholar, Deitre Fleck, who is sort of the Hays Parks of Germany, and it sketches out the role of so-called Status of Forces Agreements (SOFAs) in a variety of contexts. NATO has them, the U.N. has them, PFP has them, I dare say they are probably used in the Proliferation Security Initiative. It is absolutely ordinary to want to have an agreement that makes clear which authority the territorial state that is the receiving state or the state of nationality, the sending state, which will have jurisdiction over certain kinds of acts, and the traditional structure is that the sending state will deal with wrongs committed that are part of official duties, and the receiving state will deal with any crimes that are private acts, a robbery or a sexual misconduct, whatever.

So a Status of Forces Agreement which, to a layman might sound like it is an agreement to send a bunch of troops, is something that we have with a host of countries, places I dare say we have hardly anybody to clarify what the status is as to jurisdiction, criminal and civil over people who do go there. There is an interesting question and it is one that I think is worldwide about what to do with the status of folks who work for intelligence agencies or who are contractors.

My own personal view first cut is that it is probably not outside the President's authority to have a SOFA that would cover contractors who in fact are engaging in sort of quasi-combatant roles, but this is, I think, a fair subject to be explored.

My only point would be that—I am not going to go into the causation for Secretary Gates' statements yesterday, but he is a wise and prudent man, and he did make very plain representations for the record as to what any future agreement would and would not entail, and I think this committee should take cognizance of that.

Thank you very much. I would ask to enter my written statement for the record. Thank you.

[The prepared statement of Ms. Wedgwood follows:]

PREPARED STATEMENT OF RUTH WEDGWOOD, ESQ., EDWARD B. BURLING PROFESSOR OF INTERNATIONAL LAW AND DIPLOMACY, DIRECTOR OF THE INTERNATIONAL LAW AND ORGANIZATIONS PROGRAM, THE PAUL H. NITZE SCHOOL OF ADVANCED INTERNATIONAL STUDIES, JOHNS HOPKINS UNIVERSITY

I appreciate the invitation by the Chairman and members of this Subcommittee to comment on the "Declaration of Principles" issued on November 26, 2007, following a video conference between President George W. Bush and Iraqi Prime Minister Nouri Kamel Al-Maliki of Iraq.

I have been asked to comment as well on the type of international instrument commonly called a "Status of Forces Agreement"—and the relationship between the November 2007 Declaration of Principles and this type of agreement.

We are all aware that it is an election year. There has been widespread speculation in the public press, indeed even in the new journalistic world of "blogs," as to whether the November 2007 Declaration of Principles is somehow an attempt to "tie the hands" of a future President. There has been speculation as to whether the Declaration somehow would exclude the Congress from its important role in developing the nature of America's relationship to the democratic government of Iraq.

In my judgment, both characterizations are inaccurate. With the end of the regime of Saddam Hussein, and the ongoing efforts to quell the terrorist attacks against civilians in Iraq, the long-enduring people of that country have a right to look forward to a return to an ordinary status in the community of nations. The Declaration is a set of aspirations and moral commitments to govern the period when the formal authority of the United Nations Security Council is ended, and the

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Multi-National Force will give way to ordinary cooperative relationships between states.

Iraq has had a multinational United Nations force deployed in country, under a Security Council mandate, since 2004. The Iraqi government has now stated that it wishes, after a limited period of time, to return to the enjoyment of full sovereignty and control over the administration of its affairs. The Declaration of Principles looks forward to the negotiation of a formal Status of Forces agreement by July 2008.

For any observer who wonders why there is some temporal urgency for thinking about the period when the United Nations mandate will end, a chronology of the requests of the Iraqi government may help to provide an answer.

In particular, on December 7, 2007, Iraqi Prime Minister Malaki wrote to the President of the Security Council, requesting that the Council extend the Chapter 7 mandate of the Multi-National Force for Iraq until December 31, 2008.

But Iraq also stated that it wished to condition this request upon "a commitment by the Security Council to end the mandate at an earlier date if the Government of Iraq so requests and that the mandate *is subject to periodic review before June 2008.*" (Emphasis added).

On December 18, 2007, in Resolution 1790, the Security Council indeed voted unanimously to extend the mandate for the Multi-National Force for Iraq (MNF–1) until December 31, 2008.[1] But, pursuant to Iraq's request, the Council also provided that "the mandate for the multinational force shall be reviewed at the request of the Government of Iraq or no later than 15 June 2008, and *declare[d]* that it will terminate this mandate earlier if requested by the Government of Iraq." (Emphasis in original).

Thus, there could be a need to address the status of any foreign personnel in Iraq substantially before the end of the term of the current American president.

I do not read the November 2007 declaration of principles to be any attempt to steal the show, or preempt future judgments by the Congress or the next President. Rather, it is a rehearsal of the needs that Iraq will have in its return to full function, including developing its economic institutions, gaining foreign investment, winning access to the World Trade Organization, and seeking recovery of the funds and properties stolen and smuggled abroad by the former regime. It includes the importance of support for Iraq's democracy and efforts at national reconciliation. Necessarily, it also recognizes that Iraq will need to be secure in a difficult regional neighborhood, and must develop ways to protect its people against violence by al Qaeda and remnants of the old regime, and any threat of foreign aggression.

A pledge of cooperation in addressing these needs is something that every state in the international community owes to the people of Iraq. The United Nations Charter of 1945 is itself a statement of the joint burden of responsible states to meet threats to international peace and security.

The November 2007 declaration of principles is not a defense treaty. It is not the equivalent of Article 5 of the NATO Treaty. It is, no more or no less, a pledge to look for ways in which Iraq can enjoy the necessary preconditions for its future success.

In a hearing before the House Armed Services Committee, this last Wednesday afternoon, on February 6, 2008, Secretary of Defense Bob Gates was asked by Congresswoman Ellen Tauscher about U.S. plans in Iraq. The Secretary replied that

> "we do not want, nor will we seek permanent bases in Iraq" and further stated that any future formal "status of forces" agreement "will not contain . . . any security commitment to Iraq." Mr. Gates noted that the United States has, at any one time, 80 to 100 "status of forces" agreements world-wide, which have been handled as executive agreements rather than ratified treaties. But he committed the Defense Department to "transparency and openness" as any future status of forces agreement is negotiated with Iraq.[2]

So, too, on Wednesday, February 6, 2008, in a hearing before the Senate Armed Services Committee, Secretary Gates was asked by Senator Ted Kennedy about plans to conclude a bilateral Status of Forces Agreement by July 2008. Mr. Gates affirmed that "the status of forces agreement that is being discussed will not contain a commitment to defend Iraq, and neither will any strategic framework agree-

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[1] The extension of the mandate of the Multi-National Force for Iraq (MNF–I) thus provided in Security Council Resolution 1790 has built upon prior Security Council resolutions 1546 (2004), 1637 (2005), and 1723 (2006).

[2] So, too, in a colloquy with Congressman Joe Courtney, Secretary Gates stated: "The status of forces agreement will not have a security component to it. It will not be a security agreement with the Iraqis.//

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ment. . . . we certainly do not consider the declaration of principles a security commitment to the Iraqis." He also stated again that "My view is that there ought to be a great deal of openness and transparency to the Congress as we negotiate this status of forces agreement, so that you can satisfy yourselves that those kinds of commitments are not being made, and that there are no surprises in this."

Mr. Gates also noted that "my view is that there is nothing in the Status of Forces Agreement, that we are just beginning to negotiate, that would bind a future administration. It basically, like other Status of Forces Agreements, sets forth the rules by which we continue to operate in Iraq—in terms of protecting our soldiers, in terms of the legal relationship, and so on. I don't think that there's anything here that, in a substantive way, binds any future administration."

To be sure, Mr. Chairman, it is my private view that any future President will be obliged to consider the long-term reputation of the United States as a reliable partner. As President, he or she also will be bound to consider the situation of Iraq, and the moral obligations that the world community has to help that country climb back to a state of normalcy. But that judgment is not precluded by the November 2007 Declaration of Principles, though a wise President will want to pay heed to the human aspirations that are reflected in its language.

For clarity, let me briefly address the general nature of "status of forces" agreements—often called "SOFA's"—and what they typically entail. These are relatively commonplace agreements. The United Nations uses SOFA agreements. NATO has them, as does the Partnership for Peace or PfP. They are used in United Nations peacekeeping missions. And of course, there are also bilateral SOFA agreements.

SOFA agreements are designed to clarify the important question of *legal jurisdiction over visiting forces*. They are often rather dull. In a technical but useful book called THE HANDBOOK OF THE LAW OF VISITING FORCES (Oxford University Press 2001), German legal scholar Dieter Fleck has noted (at page 3) that SOFA agreements are an attempt "to elaborate clear status provisions for military and civilian personnel of foreign armed forces in a receiving state" and may be used for "exercises and even for transit operations."

Thus, even in an exercise of the Partnership for Peace or the Proliferation Security Initiative, as well as United Nations peacekeeping, it is important to have SOFA agreements to determine which state has jurisdiction over the activities and status of soldiers, sailors, airmen and marines. Typically, a NATO SOFA is practically applied so that any mishaps arising in the course of official duties are handled by the state of the so-called "sending state," whereas completely private acts will fall under the concurrent jurisdiction of the so-called "receiving state."

SOFA's are important in protecting our armed services personnel all over the world. During the negotiations of the treaty for the International Criminal Court, the United States delegation took care to make sure that the "Rome" treaty text included, in Article 98(2), a provision that the international court would respect the terms of standing SOFA agreements all over the world, that immunized American soldiers from foreign jurisdiction over official activities. We have not joined the International Criminal Court or the Rome treaty, but to meet our concerns about the Rome treaty's assertion of third-party jurisdiction, the SOFA agreements give some important protection.

In layman's terms, a SOFA can be likened to an immunity treaty for diplomats or consular personnel. The common element is that the responsibility to investigate and proceed against any wrongful acts committed in the course of official duties is left to the country of the alleged offender's nationality, i.e., the so-called "sending" country. A SOFA is not a pledge to station a certain number of forces or indeed, any forces at all. There is no mystery or diplomatic intrigue in a SOFA.

In our security posture around the world, there are difficult issues to be addressed, including the status and supervisory mechanism for private contractors, and other non-military personnel. But again, a SOFA has no implications for the size, duration or intensity of any military involvement. The virtue of a standing SOFA agreement is that the matter does not have to be addressed anew, each time official personnel are visiting or transiting or working in a foreign country.

This is not to prejudge our future relationship with the people of Iraq. There are so many truly extraordinary people in the American armed forces, and in the forces of cooperating allies, who are rightfully proud of their brave work in trying to quell the wanton violence directed against innocent civilians by suicide bombers and al Qaeda operatives. A future President may well conclude that we are honor bound not to precipitously abandon the mission of assisting them in rebuilding their country.

But no matter who is chosen as the next President, and what view is taken of America's role in assisting the Iraqi people, we would wish to have a SOFA agree-

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ment with the government of Iraq, as we do with dozens of other countries in the world.

Mr. DELAHUNT. So ordered, and thank you all for that very informative tutorial since I am looking at professors. I am going to be brief in terms of the questions because I know that my ranking member has to depart at 11:30. I want him to have as much time as he needs to explore in depth the issues that he wants to discuss, and I see my two other colleagues here, and we will stay here as long as necessary to fully explore the concerns that we all have.

Let me get to the issue of the SOFAs. I noted where Secretary Gates, and by the way, I do share that opinion of Secretary Gates. I think he is a man that is forthcoming and is a man of great integrity. I welcomed his assumption of that particular position, but he made this statement: "More than 90 percent of this will be a pretty standard SOFA." Well, he didn't make the statement. This is a quote from some senior official who is involved in drafting the American proposal: "It is not something that will bind the hands of the next President."

I think maybe it is that other 10 percent that causes us some concern. We also have read statements from anonymous officials. In fact, General Lute also equated it to a typical SOFA, but Dr. Wedgwood, you just raised the issue that I want to raise. Let me begin with Dr. Macgregor about the issue of expanding immunity or expanding the terms of the SOFA to private contractors.

Are there other SOFAs that implicate the substantive provisions of SOFAs to private contractors, and if not, or even if they do, in the opinion of any of you, would that require congressional approval? Let me begin with Dr. Macgregor.

Colonel MACGREGOR. Well, I know that the treaty between the United States and Korea involves some provisions that address supporting elements of the U.S. Armed Forces that are not necessarily uniform. This is also true to some extent in Germany.

But I think what we are discussing, which is this issue of immunity in the context of Iraq, is well beyond anything that we currently have in any of the Status of Forces Agreements. Of course, for me personally the other question I have is, With whom are we negotiating this SOFA? I don't regard the Iraqi state as a nation state. I don't regard Mr. Maliki and his government as legitimate. Does Mr. Maliki speak for the Sunni Arab tribal sheikhs in Anbar province? Does he speak for the other Sunni Arab insurgent forces now funded by the U.S. military as independent militias? Does he speak for Shiite militias in the south, particularly Mohammed al-Sadr? Does he speak for the effectively Kurdish state in the north?

I am not sure we are being honest with ourselves. What are we actually negotiating and with whom are we speaking?

Mr. DELAHUNT. Dr. Hathaway.

Ms. HATHAWAY. Yes, I would like to add a few words about this. I am not the expert on Status of Forces Agreements that Dr. Macgregor is, but I have read a good number of them in preparation for this meeting and beforehand, and as far as I am aware—and please correct me if I am wrong—the typical SOFA may include exclusion of prosecution in the host country for civilians who are dependents or who are acting directly in support of the armed services.

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What is unusual here is that there is talk about providing immunity to contractors like Blackwater, which are not working directly with the Department of Defense. They are working with the State Department, and this is important because, in 2000, Congress closed a loophole that existed under these SOFAs. There had been negotiated immunity for civilian who are there with the armed services, operating in support of the armed services, and yet they could not be prosecuted through the military courts martial for violations that they may have committed while in the country. This created a huge problem, and in fact there were significant issues where, for instance, a spouse might commit a crime, sometime even against a service member, and all they could do was put them on a plane and send them back home. There was no way to prosecute them.

So, Congress, very rightly, said this is a loophole we ought not have. We ought not negotiate an agreement with a foreign country saying that these civilians can't be prosecuted in the country and yet have no way of bringing those people to account through our own justice system. So Congress wrote the Military Extraterritorial Jurisdiction Act which provided jurisdiction over those crimes.

Now, here is what is important, and this is what is distinct about the Blackwater private military contractor actors. It is that, as I understand it and I understand that Justice is still debating this question, I don't think it has been fully settled, but the Military Extraterritorial Jurisdiction Act applies to those civilians who are "supporting the mission of the Department of Defense overseas." So those folks who are acting in support of the DoD overseas can be prosecuted under this act.

Now, I understand that there is a lot of debate. In fact, a general sense that folks like Blackwater, the contractors like Blackwater don't fall under that definition; that they are not acting "in support of the Department of Defense" because they are acting in support of the State Department. Therefore that creates a law-free zone for these contractors that doesn't exist for the spouse, that doesn't exist for the cook who is acting in direct support of the armed services, and while these issues are still being worked out, and there may be some creative legal arguments we can come up with for prosecuting the private military contractors who fall outside of the act, perhaps through international law and other mechanisms, at the moment there doesn't seem to be one. That immunity is what is not typically included in a SOFA and that is what I think is particularly dangerous because we have over 100,000 of these private military contractors on the ground——

Mr. BERMAN. Would the chairman yield?

Ms. HATHAWAY [continuing]. And that is dangerous.

Mr. BERMAN. Would the chairman yield on just that one issue?

Ms. HATHAWAY. Of course.

Mr. BERMAN. Could Congress pass a law that essentially said we apply this extraterritorial jurisdiction on a contingency basis for any situation where a person, a contractor not directly responsive, working for, supporting the defense mission——

Ms. HATHAWAY. Yes.

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Mr. BERMAN [continuing]. Is given immunization by virtue of a Status of Forces Agreement that we could—that that person is subject to the laws of the United States?

Ms. HATHAWAY. Yes. And as I understand it, there has been some interest in Congress to do just that. I don't know what the status of the legislation is, but I think that is absolutely necessary. There is this huge gaping hole that currently exists in the criminal responsibility and ability to bring American citizens who engage in crimes in Iraq to account, and that would help close that loophole, and I think that would be the most obvious way to proceed.

Mr. DELAHUNT. Mr. Glennon.

Mr. GLENNON. Let me respond specifically to your question, if I may, which I think gets to the heart of the matter. Your question, as I recall, was whether the President acting alone has authority to enter into a SOFA that would exempt U.S. personnel from applicable laws.

The short answer is, it depends which applicable laws you are talking about. If the agreement entered into by the President merely exempted American personnel from the operation of foreign or Iraqi laws, as Commander in Chief, in my view, he could enter into that agreement.

If, on the other hand, the President purported to exempt U.S. personnel from the operation of Federal law which was applicable to those personnel, obviously not. Of course he could not grant that exemption absent some form of Senate or congressional approval.

Mr. DELAHUNT. Go ahead.

Mr. MATHESON. Thank you. I think, in theory, the President could seek agreement from Iraq to exempt civilian contractor personnel from Iraqi law, but the problem is, as Professor Hathaway says, it would appear that the executive branch does not currently have sufficient legal authority to carry its end of the bargain, which would be to ensure that there be some mechanism to hold personnel responsible who commit crimes, and I would therefore think that it might be somewhat difficult to persuade the Iraqi Government to give us an exemption for these personnel with no clear, reliable mechanism to deal with their misconduct.

Mr. DELAHUNT. Dr. Wedgwood, would you like to——

Ms. WEDGWOOD. I don't do it for very much, but this was a problem, really ironically, that began with a civil liberties decision, *Reed* v. *Covert*, by Hugo Black, when he said—it was the murdering wives case, that you can't try the wife who is a dependent of an overseas serviceman in a military court martial. You had to try her some other way. It has certainly become more complicated since then.

I do agree that the Extraterritorial Jurisdiction Act probably should be extended to cover others abroad, and that is something that the Congress should take up. Nationality as the basis for criminal jurisdiction is perfectly acceptable under international law. It is not one that the U.S. uses very often, but it is certainly orthodox and permissible from the point of view of other countries, and clearly we need reasonable rules of engagement, or training for contractors if they are going to act in quasi-combatant roles.

Whether the President, however, can negotiate a broader immunity agreement, a Status of Forces Agreement, status of contractors

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agreement, if you will, I think there he probably can for two different reasons. One is that, in general, the President has the prerogative through the State Department of negotiating immunities for trade missions, anybody who is traveling abroad in a quasi-official capacity. It is often done ad hoc and de facto. So ex ante, he can do that before the fact.

Secondly, since these contractors were, I take it, allegedly acting in support of the State Department to protect diplomats who were abroad, it is very much part of the President's power in foreign diplomacy.

But I take the point and agree with the point that there ought not to be a loophole in which there is a want of appropriate follow up for misconduct, and additionally to that one needs to have people embedded who are good at crime scene investigation, who know how to conduct an investigation without giving unwarranted immunity which then spoils the criminal case.

Mr. DELAHUNT. Well, and I am going to go to Dr. Hathaway, this is an interesting discussion but I think what I am hearing is despite the characterization by officials from the administration that this is a typical SOFA—put aside all of the other concerns that I and others have expressed about the declaration—it doesn't appear to be a typical SOFA like we have with 80 or 100 other nations. This is a different hybrid, if you will, that seems to require some response or clarification if we are to follow the suggestion by Dr. Hathaway and yourself to clarify the immunity in terms of private contractors, and that is why I am baffled that there has been no consultation to this point in time.

Now, some might say, well, the Declaration of Principles was enunciated in November. We know that discussions have been going on for better than a year surrounding a bilateral agreement, and yet when I inquire of our leadership, and I am sure that the Republican leadership has not been consulted on this either, there is nothing, and I guess that goes to how one would define consultation. Is it a fait accompli or is it a legitimate back and forth in terms of what our interests are even if it is just a SOFA and doesn't include all of the other concerns?

Dr. Hathaway, I see you nodding and want to respond.

Ms. HATHAWAY. I just want to add one point. First of all, I agree with everything you have just said, and I think it is extremely important to note that this is a point that the administration has not backed off of as they have off of the defense guarantee. There has been no indication that there is any intent not to include this in the SOFA agreement, that is, an immunity for private military contractors.

But I wanted to return to the constitutional point that I began with, which is the question as to whether this could constitutionally be included in a SOFA agreement without the assent of Congress, because I think this is a bit of a point of disagreement with Professor Wedgwood, my former colleague. I think that, in fact, it is extremely questionable whether the President could do this on his own authority. The President has authority to enter into a typical SOFA because of his powers as Commander in Chief.

Now, if I am right, if in fact Blackwater doesn't fall under the Military Extraterritorial Jurisdiction Act because it is not acting in

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support of the DoD, then it is hard to say that if they are not acting in support of the Department of Defense and the armed services, that this falls under the President's Commander in Chief power.

Moreover, while I agree that there has been immunity granted to quasi-official missions, those are official missions whereas it is not clear that Blackwater is acting in an official capacity. It is a private entity that is not under the authority, not under the direction of the U.S. military or the U.S. Government, to be frank, and so it is not clear to me that you could make that analogy strongly. I think the main point is this is very tenuous territory, and to return to the point that I made before, even if one could make a somewhat strained argument that this is within the President's sole constitutional authority, it is the kind of extension of authority that really ought to be brought to Congress. Congress ought to participate in this conversation. This has been a matter of intense public concern, and even if one could make a strained constitutional argument that this is permissible, which I think is not right, I think nonetheless Congress ought to be involved in this decision.

Mr. DELAHUNT. Well, thank you. Like I indicated earlier, I know that Mr. Rohrabacher is leaving at 11:30, and I want to yield to him because I know he will consume some time, and then myself and the remaining two colleagues can take full advantage of as much time as we need to elicit your views. Dana.

Mr. ROHRABACHER. Yes, thank you, Mr. Chairman. There does seem to be a few points that would require some comment and consideration.

I would suggest that trying to offer an argument about Blackwater based on whether it is officially there to support the State Department or is officially there to support the Defense Department is nitpicking at worst, and I am not a lawyer so I don't try to use little differentiations like that as a means to negate a policy. The policy should be discussed, certainly consultation should be made, but I think that clearly the U.S. brains at our Embassies are there to support the State Department, but they are certainly U.S. Marines and thus part of the Defense Department as well. I mean, the Defense Department, the State Department are part of the United States Government after all, and I do believe Blackwater is playing a very significant and positive role in protecting the diplomatic personnel in conflict situations. So I wouldn't necessarily try to focus on that type of distinction to make a fundamental decision.

Obviously, the decision as to whether or not we are going to do—what they are going to do, whether Blackwater will be sent in the first place is a fundamental decision that Congress should be consulted on, and should not be something the President can just do on his own.

Anyway, with that said, let me note my area of disagreement with the Colonel. Colonel, do you like to be called Colonel or Doctor?

Colonel MACGREGOR. I answer to most things, so whatever works for you.

Mr. ROHRABACHER. Yes, sir. Well, I noticed you did spend a career service in the military as well as now a trained diplomat, but

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let me just note this, that I do fundamentally disagree with your comparison, and it has always been something that rubbed me the wrong way as to comparing a United States support of a democratic government to a Soviet action in support of defense of socialism.

The Soviet actions in the defense of socialism were basically to maintain the Marxist-Leninist dictatorship, and Leninism is by its very nature, and unapologetically for the dictatorship of the proletarian, dictatorship, and I think it is fundamentally different when the United States goes out to defend countries or groups of people that are trying to establish democracy in a country rather than trying to establish socialism as they said it, but it was actually dictatorship because we could have cared less whether it was socialism or capitalism being implemented in a society as in El Salvador and elsewhere where we supported a Socialist group down there as opposed to the Communist group. So that I disagree with, that designation, and I just wanted to make that part of the record.

Let me see here. And back to that point, I think that the United States of America, I think that it is an honorable thing for us to try to be willing to use force and be willing to extend our help to those people throughout the world who are actually promoting or maintaining, trying to maintain democratic institutions in the face of an onslaught either—for example if you have a group of people, and Colonel, again you mentioned that you have trouble figuring out who is the legitimate government in Iraq, and who we are really talking to.

I will have to say that in every conflict situation you are going to have that trouble. Just who were we dealing with when we dealt with de Gaulle? Was de Gaulle elected as someone who could legitimately represent the French interests? Well, we dealt with de Gaulle because de Gaulle was a counterbalance to the Nazis and the Vichy regime that had been placed in power by the Nazi invasion of France.

If we want to be so definitive that people have to go through certain processes before they are legitimate enough for us to deal with, and to make agreements with, well, we are severely limiting our impact on the world while enhancing the ability of totalitarian forces to have their influence on the world.

My only suggestion is that when we deal with de Gaulle or anybody else that we make sure that we do it within a democratic framework here at home, and whether or not we are going to send Blackwater overseas should be based on whether or not a consultation with Congress in that fundamental decision as to whether they should go or not. Whether or not that is part of the President's prerogative to declare them to be free of liability or not, we can discuss that here at home, and establish that concept and that precedent. But certainly if they are going to be sent, they need to come here and it has to be approved. I think there is no doubt about that.

Now, some of the other points that have been made, pardon me for reading my own notes here. Oh, yes, about the concept of wouldn't it—the discussion with Saddam Hussein about that initial discussion did get us into a problem and should someone have been able to, in discussing that, threaten the use of force to Saddam Hussein, and did that indeed impact on the creation of the problem

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that we face today, and let me just note in that discussion with Saddam Hussein, that infamous discussion with Saddam Hussein, the problem was not whether or not the person expressing that, and I believe it was April Gillespie, the problem wasn't whether she had the authority or whether the President had the authority to say we are going to stop you and all this other stuff, it is what she said was the problem. What she said gave the impression that we didn't care whether or not Saddam Hussein went into Iraq.

Now, whether or not someone who is having discussions with Saddam Hussein from the State Department or any administration should have the power to say, "If you go into Kuwait, we are going to stop you," that is a matter of discussion of whether we want the President to have that kind of authority. I think we do, and I think that we have suggested, for example, and I think law—you would probably agree with the assessment that under the War Powers Act the President would have had power for at least 90 days to commit U.S. troops to prevent Saddam Hussein from invading Kuwait, and whether or not he needs power to expand that power, I wouldn't, and I know the chairman and I will have a major disagreement about that particular issue in the months to come, I understand that he has got legislation that——

Mr. BERMAN. Would the gentleman yield?

Mr. ROHRABACHER. Certainly.

Mr. BERMAN. Is the gentleman assuming in that point that the War Powers Act is a constitutional constraint on the President's authority?

Mr. ROHRABACHER. Absolutely. I am one of the few Republicans who voted, I think, not to eliminate the War Powers Act if you remember back in——

Mr. DELAHUNT. Maybe we won't have a disagreement then.

Mr. ROHRABACHER. No, I think we will. I do not believe it is necessary, however, to declare war every time there is—and I haven't read your legislation yet—to declare war every time there is a use of troops beyond the 90-day period which is required by the War Powers Act. It just, however, requires congressional approval, and we will see how that emerges in the legislation that is being proposed by yourself and Congressman Jones.

So in that discussion that we were talking about in terms of April Gillespie, I don't think she necessarily would have had to have the right to—I don't think there was a problem, she did have a right to suggest force would be used against Saddam Hussein if he invaded Kuwait. The problem was that she gave the indication that no force would be used because that—and I believe the words were internal something—an internal issue for Iraq, which gave Saddam Hussein the wrong impression as to what United States policy really was.

So I would be very happy to have, Colonel, if you have some disagreement with what I said or if anybody has disagreement with some of the points I have made, feel free to as a——

Colonel MACGREGOR. Well, Mr. Rohrabacher, I am actually a long-time admirer of yours for other reasons politically, including some of your stances on immigration, but I would urge you to reconsider your assumption that the government you are dealing with in Baghdad is a democratically elected and constituted gov-

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ernment on the Western model. Keep in mind that the vast majority of Sunni Arabs did not participate in that electoral process and they do not regard Mr. Maliki and his government as legitimate. In fact, they are very, very hostile to that government.

The other thing I would ask you to do is, and all members should do this, is look at the current Iraqi Constitution. One of the keystones in this Constitution is the declaration of Iraq as an Islamic state. This is hardly consistent with American, English-speaking, Anglo-Saxon values with regard to secular democracy. I think if most Americans were aware that we were supporting a government with a Constitution that declared itself to be an Islamic state, they would demand the withdrawal of all 169,000 American troops very quickly.

There are a whole range of problems. My concern is that you mentioned Charles de Gaulle. It is very interesting. I am also a great admirer of de Gaulle. De Gaulle was extremely unpopular with Franklin Roosevelt. We didn't like him. We didn't want to deal with him, and ultimately he was forced upon us by the French people that regarded him as the only legitimate voice.

The problem that we have today in the Middle East is not different from one that has existed there for many hundreds of years. If you look at British and French attempts to establish governments, parliamentary democracies, these governments, whether they were monarchies or constitutional monarchies or democracies, did not survive the withdrawal of their forces. I don't think that Mr. Maliki and his government would survive the withdrawal of U.S. forces.

My concern is that we come to some sort of Status of Forces Agreement with him, and we are subsequently severely embarrassed because we discover that what we thought we had signed with him ultimately doesn't have much meaning beyond the Green Zone, and keep in mind that his government has never met anywhere but inside the Green Zone under heavy American military security, and he doesn't have the ability to authoritatively reallocate resources.

We have been very frustrated with the government's pilferage of money and corruption, their mishandling of affairs. We are actually flooding many of the Sunni areas with cash ourselves to compensate for what the government hasn't done, but also to buy the cease fire we have had with most of them.

These things are not evidence for a modern nation state. We are talking about a traditional society, a tribal society, and it is a very complex place to do business, and my concern is that we sign an agreement that doesn't turn out to be as meaningful as these members would want it to be if we, in fact, sign such a thing.

Mr. DELAHUNT. If my friend would yield for a moment, just one moment, all right?

Mr. ROHRABACHER. All right.

Mr. DELAHUNT. I also think it is important to note that when the request for the extension of the U.N. mandate was made by the Maliki government, it was represented to the Iraqi Parliament, the so-called Council of Representatives, that their consent under the Iraqi Constitution would be secured by the Maliki government.

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The Maliki government reneged on that promise, that pledge to the Council of Representatives. We raised that issue, and there was a letter that is in the possession of this committee that was signed by 144 members of the Iraqi Parliament that was forwarded to Ban Ki-moon, Secretary-General of the United Nations, and to Secretary of State Rice, that they objected to the extension of the U.N. mandate unless a timetable for withdrawal of American troops was made part of that extension.

Now, it concerns me that given that apparent violation of the Iraqi Constitution by the Maliki government, and I am aware that there have been pledges made by the Maliki government that on this occasion they will respect their own Constitution and will not enter into this bilateral agreement, whatever form it should take, upon expiration at the end of this year of the U.N. mandate, that they will secure the consent of the Iraqi Parliament, and by the way, that requires two-thirds of the membership of the Council of Representatives. So, to me that was a very undemocratic act for a government that we are heavily invested in because of the policies of this administration.

I yield back to the gentleman.

Mr. ROHRABACHER. Let me just note that I find that criticism of—specific criticisms of the Government of Iraq or even our own Government in times of great peril and turmoil not to be what I would call nitpicking, and I am not saying that too much in a pejorative way or a dismissive way, but let us note this, that at times of historic moments when you have monumental things going on, we are trying to determine not only the future of Iraq which itself is an important country, but also the future of the region, and we realize that radical Islam will either dominate that region and dominate Iraq or some other form.

Now, whether or not Maliki and his government and his Constitution in some way reaches the threshold of unacceptability, okay, we can talk about that, but do they have imperfections? The answer is absolutely yes, and there has been no government that I know of that has ever been in a moment of turmoil of historic decisionmaking that has not been imperfect, and imperfect in some very definitive and very observable ways, but that does not mean that we should just let history go in the opposite direction then.

If there is a chance that Iraq will be a more Western-oriented society, it will be because of what we do and what we have done, and the decisions we make as to how we will extricate ourselves from the conflict that currently is going on either in a way that leaves the door open to radical Islam or whether or not we leave in a way that leaves behind the possibility that the people of Iraq can live in a somewhat Western society, if not imperfect.

So while conceding perhaps specific points about imperfections or such and mistakes and actually decisions and policies that we disagree with, that should not blind us to the fundamentals of what is going on here and what will be the product of our demand for a more perfect situation.

But perhaps Dr. Wedgwood would like to jump in at this point.

Ms. WEDGWOOD. I wanted to make one point. Well, first I wanted to say on behalf of April Gillespie that some people say she was

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operating under instructions and had to say what she said, so as a female power or something I——

Mr. ROHRABACHER. Boy, that would be very conspiratorial, I think.

Ms. WEDGWOOD. So the source of the loculation that was used is not entirely clear to me.

Mr. ROHRABACHER. All right.

Ms. WEDGWOOD. It may not be her. But the point I did want to enter into the conversation is a phrase that is very, very new but cherished in the human rights community, which is R2P, it is not a robot, it is responsibility to protect, and it is sometimes put in the context of genocide, but the point is if you feel an obligation toward human rights strongly, it is not simply sufficient to be passive, to refrain yourself from committing human rights violations, but you may have a duty to interpose yourself and prevent others from committing human rights violations.

In that sense, I think the circumstance of a people who really have, I think, what everyone's view of the start of the war suffered hugely from the attempt of al-Qaeda to be a spoiler, blowing up the Samara Mosque at just the time that Zhow thought he had a deal is not to be overlooked insofar as it may inform anybody's constitutional views.

On just when the President has ever used force without going to Congress, I mean, again, it is better to have more folks with you, but Bosnia, when Bill Clinton bombed the Serbs, and Panama and Grenada, there are instances of at least reasonable size presidential actions that have not had declarations of war. It is always smarter to have one, but if you look at constitutional practice, kind of an institutional customary law argument of the sort that Chief Justice Rehnquist gave against Reagan, an understanding of Article 1 and Article 2 is informed by what has gone before, and Presidents have done this where they felt compelled.

Thank you very much.

Mr. ROHRABACHER. Let me just add a couple of notes here and that is, number one, back to de Gaulle, which is an interesting thing to come up in this hearing, de Gaulle would never ever have prevailed, no matter how much support he had from the French people, had United States troops not been involved in the equation, never.

Colonel MACGREGOR. Absolutely.

Mr. ROHRABACHER. I mean, the Vichy government would have been installed by a regime or by a military action taken by a government that believed in the will, the triumph of the will, and we have to note that when you have forces in this world that will triumph because they have the will to triumph, like radical Islam believes they have the will to triumph over the decadent West or like communism felt they had the will to triumph over the decadent democracies and the decadent West, that even a public opinion in a society is so much in another direction, that minority, if supported from the outside and having the ability to draw upon military strength, can overwhelm that popular will and the question is whether or not the United States should in various countries around the world be a force that prevents that triumph of the will of anti-democratic forces, and to what degree, and is indeed what

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we are doing going to eventually lead Iraq to a more Western or a more freer or more open society? I think certainly there is no doubt about it, more open than the radical Islam alternative, certainly that is true.

But I remember, and look, I did some things in Vietnam, but I was not in the military, let me note I always add that because I don't want anybody to think that I am claiming to have been in the military in Vietnam, but I was in Vietnam doing some political work in 1967, and I was very dismayed, very, very dismayed about the corruption that I saw, and when we talk about corruption, Colonel, what is going on now, and clearly there is corruption going on in Iraq at the same time we have lost over 3,000 of our young people trying to establish something there, and that is a reason that tugs at our hearts, realizing that that is going on at the same time, I will tell you I was overwhelmed having seen blood for the first time in my life, blood and gore, and then seeing the corruption level in Vietnam.

When I came back, I remember talking to my father, who was a Korean War veteran, and my dad just told me, he said, "If you think it was bad, if you think there was no"—and there we questioned the legitimacy of their government even though we did have some free elections at that time, in 1967, which I was there to witness, fact, but he said, "Look, you should have seen what it was like in Korea. Talk about no legitimate government," he said. "Everything was total chaos and the corruption was unbelievable, and the only question," he told me, "when you are thinking about what you have got to do in the long run, what is going to be in the interest of the people of the United States and freedom in this world, and was it in our interest to stay in Korea? Are the Korean people today better off than what they would have been if the Korean, North Korean Communist dictatorship would have been in power the entire time since the Korean War?"

I think that we would probably have to say it probably was worth it, and I think that cost us around 35,000 American—well, maybe 50,000 American lives. Did that change the course of history in a positive way? I think it did. I think if Korea would have been under that Communist dictatorship, Japan would have been neutralized. There would have been a whole different power balance in the Cold War, and we may still have been in the conflict with these people who had the triumph of the will in mind in terms of establishing a Marxist-Leninist dictatorship on the planet.

So the criticisms, I think, are justified in the sense that it is truth. Truth is important. Whether or not how we make the decision as to what our strategic commitment will be cannot be based on the imperfections of the people involved at that moment.

One last note then—well, I think that was about it, and I appreciate this hearing. I will, however, be opposed to the idea that the United States, in order to make a commitment for more than 90 days needs to declare war in order to do so. However, I would say they certainly need some type of congressional approval and involvement, but a declaration of war also gives the President the power to nationalize industry, stop strikes, limit personal freedom in the United States dramatically, and I don't believe that declara-

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tions of war are necessary for long commitments to conflicts that will last more than 90 days.

So with that said, thank you.

Mr. DELAHUNT. I thank my friend, and I think after he has a chance to review the legislation he will find a lot in there to his liking.

With that, let me go to my other colleague from California, a senior member of the full committee, Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman. Thank you very much for a very interesting and important hearing, series of hearings.

Just a couple of really short questions first. Dr. Macgregor, were you saying in the very beginning in your testimony that we only have Status of Forces Agreements pursuant to treaty obligations?

Colonel MACGREGOR. No, what I was——

Mr. BERMAN. And you made a reference to Germany and Japan?

Colonel MACGREGOR. Right.

Mr. BERMAN. And I wasn't sure what the implication of that was.

Colonel MACGREGOR. No, we have Status of Forces Agreements whether it is no mutual defense treaty in existence. My concern was that the level of commitment we are talking about in Iraq is on a scale commensurate with what we have done on Germany and Korea. In those case where there were serious external threats to the German and Korean peoples, we negotiated Status of Forces Agreements within the framework of mutual defense treaties.

Now, what we are being told in the Declaration of Joint Principles is that we are going to defend Iraq from external and internal enemies. The interesting thing about that is that there are no Islamist Fascist armies mobilizing on the border of Iraq prepared to invade. In other words, there is no enemy army in Iran, or Syria, or Saudi Arabia, or Jordan, or the Emirates preparing to intervene in Iraq. The only army in the region, by the way, that has the capacity to project power over its borders any distance at all is the Turkish army and it has made it abundantly clear that its interests are limited exclusively to the elimination of the Kurdish terrorist threat to the Turkish state.

The issue for me is this notion that there should be an open-ended pledge on the part of the American people to defend a government in Baghdad that in my view is not legitimate and would not survive the withdrawal of U.S. military power. It is something that is not consistent with the way we had done business in the past. It is not consistent with our values. That is my concern.

Mr. BERMAN. I understand. And then just very specifically, Professor Hathaway, to the extent the authorization of the use of force in Afghanistan can be read as an authorization for war and surveillance in the war on terror, to what extent does the authorization for use of force in Iraq permit a level of security commitments if one is to invade Iraq? The security agreements are to defend Iraq, but to what extent can there be a legal argument that that authorization of use of force empowers the executive branch to make binding obligations and commitments to defend Iraq's security?

Ms. HATHAWAY. I think that is an excellent question, and I think it is one that really turns on close reading of the initial authorization to engage in combat operations in Iraq, and I have not prepared extensively to examine the legislation, but I think that there

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are serious questions as to whether the legislation continues to provide authorization as a matter of domestic law for continuing combat operations in Iraq, and it is certainly worthy of closer inspection.

Let me just say one quick——

Mr. BERMAN. You are going even further. You are saying you are not sure the—forget any guarantees and obligations that we might negotiate with Iraq, that the current operations may not be authorized?

Ms. HATHAWAY. I wouldn't say the current operations but the continuation beyond a certain period might be questionable. So I think they turn on similar questions. I think if you were to negotiate the kind of an agreement that is contemplated with the consent of Congress, then that would provide the authorization that is——

Ms. DELAURO. Would the gentleman yield for 1 second——

Mr. BERMAN. Sure.

Ms. DELAURO [continuing]. Because my question was similar, because I think this gets to the conditions stated in the 2002 law authorizing the use of force in Iraq. In fact, that was about defending the national security of us against a posed threat of Iraq and enforce U.N. securities. Have those conditions terminated? I mean, I would just add that to what the sense—that is terminated.

Ms. HATHAWAY. Well, again, I am not prepared to be able to give a definitive legal answer on that question because I didn't prepare for that for today, but I will say I think it is worthy of much deeper inspection. I think that certainly we cannot assume that those conditions continue to exist.

So I would be happy to continue to have a conversation about this over the longer period.

May I just add one very, very brief remark in response to Congressman Rohrabacher's question about the distinction, whether it is a distinction without a difference, between different kinds of private military contractors.

I actually agree with him. I wish he was here to hear that. To the extent that there is a distinction, it is a distinction that Congress has written, and what I am suggesting is that Congress should undo that distinction, and thereby extend the authority of the Military Extraterritorial Jurisdiction Act to all private military contractors in Iraq. That is simply my point.

Mr. BERMAN. Yes. I mean, I think there is an argument to be made that doesn't exist in Japan or Germany or Latin America or many other areas of the world where we have Status of Forces Agreements that says we aren't going to get contractors to go to these countries without some kind of immunity deal, but we cannot be in a situation where people essentially are unconstrained by rules of law, and therefore we have to fill that void by plugging up the loophole that I didn't know existed until you testified.

In other words, I don't know that I want to make my crusade there should never be immunization from laws in any situation because I think you may not—by being constrained from doing that, you may not get anybody to go.

Ms. HATHAWAY. I agree with you completely, Congressman. That is exactly what I would say, it is precisely that.

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Mr. DELAHUNT. If my friend would yield for a moment.

Mr. BERMAN. Sure.

Mr. DELAHUNT. But the point is, at least the point, and I think this is a good discussion, but it does implicate congressional action in terms of if this is just a Status of Forces Agreement between Iraq and the United States, this discussion, I think, demonstrates the need for congressional involvement in whatever agreement is finally concluded because there is a distinction, as you, Dr. Hathaway, point out, that was created by Congress, and if it is to be resolved and clarity is to be achieved, this Congress has to be involved, and yet we haven't heard anything from this administration until yesterday, and again that was not part of the prepared statement by the Secretary of Defense. It came in response to questions by Senators Kennedy and Levin, and our colleagues on the House side on the House Armed Services Committee. That, to me, is disturbing. It borders on insulting, and it is not a good approach.

Mr. BERMAN. Well, but if we have the power to correct this—I agree with you. We have got to be—they ought to be telling us what is going into this, making the case. The only issue, I am not sure I am quite at the point where I would say that we do not have to ratify a Status of Forces Agreement that provides immunity to people associated with our Defense Department operations in a particular country, the President has the power to do that, there should be a red line distinction between that kind of an agreement and an agreement that provides immunity to contractors supporting our diplomatic effort.

Rather, I think we ought to—it seems to me the logical thing to do is plug up this situation where such people then are untouched by any law. That is the only point I guess I was making, but certainly I think we ought to be in on the takeoff as well as the landing on all of this, and I guess that gets back to the point you just raised with the hearing though, and it is always interesting to hear Professor Wedgwood get off into sort of her speculations about different things.

So tell me, we have a Secretary who, I agree with you, is smart, seems to have a lot of character. I don't think, while it may not have been in his prepared statement, I have a feeling he anticipated being asked the question, and was stating policy, and I did attend the classified briefing where I was told it is not a matter of classification that the United States has absolutely no intention, will not seek, will not provide any security guarantees or commitments to Iraq in this Status of Forces Agreement. I was specifically told that. That statement is not classified. So it supports what the Secretary was saying in response to a question.

So tell me how this smart, upright individual makes those statements and watches—some months earlier—sees a Declaration of Principles signed by the President that says in the security sphere this document—providing security assurances and commitments to the Republic of Iraq to deter foreign aggression against Iraq that violates its sovereignty and integrity of its territories, waters or airspace, and supporting—then goes on about internal threats from terrorist groups?

In other words, did his thinking change? Did the administration's thinking change? By the way, I gathered he is not guaranteed to

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be Secretary of Defense for the next 12 months, but what went on that said it is okay to sign this Declaration of Principles, but we have no intention of actually doing that? I am just curious for your speculation.

Ms. WEDGWOOD. If I had to speculate some more, I think Bob Gates is going to be there for the duration because he is a good guy.

Mr. BERMAN. Yes.

Ms. WEDGWOOD. Smart, and gets along with folks, and I saw him at Veracunda last year facing down Putin when Putin was having his moment.

Mr. BERMAN. Did it very well, too.

Ms. WEDGWOOD. Yes, with humor.

Mr. BERMAN. He could be a Secretary of State as well as a Secretary of Defense.

Ms. WEDGWOOD. I mean, there are two logical explanations. Either he is re-reading the document because of his own reticence or it just could be, it just could be that this was all that was meant in the beginning, because the way I take this to read is these are things that Iraq needs to flourish. Some of them, again, are not within the province of any single government, and therefore you couldn't put them all in, you could not make this an operational treaty. We can't promise things we can't deliver.

I mean, the point you were making before about the war and when is it over and the original—and Congresswoman DeLauro was making the point also—how do you think about a declaration of war and its powers, or authorization to use force and its powers in an extended situation like this? This actually is a time when Guantanamo—excuse me, slip of the tongue—but when Geneva may have a more proactive demand than one supposes, which is the Geneva 4, which people take to be applicable to any situation of occupation, demands that the occupying power provide for security, for local security. If you're displacing the government then as an occupier, you have an affirmative legal duty.

Now we have an elected Government of Iraq, it is true, but it is unable to do it by itself, so I think, if I may, a penumbra of Geneva 4 would say that you really ought to, as part of the same war that you began, take responsibility for providing security.

On the point about Congress' role, yes. If you are ever going to expand criminal jurisdiction, you have to go to Congress. Common law crimes were abolished. You know, there is a wonderful old case of *Hudson* v. *Goodwin* in 1812 by the Marshall Court. So if you are going to expand criminal law and criminal statutes, you have to have Congress be the one to do that.

Mr. BERMAN. I mean, we could make a preemptive strike here.

Ms. WEDGWOOD. Pardon me?

Mr. BERMAN. We could make a preemptive strike and actually pass such a law.

Ms. WEDGWOOD. A plan to—never mind.

Anyway, but my last small footnote, just forgive me, this may be the last time I get the microphone, but it is a picayune point perhaps, but in regard to who is over in any country, the United States under President Clinton when it was negotiating the Rome Treaty, even though we didn't sign it, we were there in the negotia-

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tions. Bill Latshaw, a great Marine colonel, was there doing elements of crimes for us, and we did insist in Article 98, too, that that article of the Rome Treaty would protect all forms of immunities that would immunize or insulate all Americans, not just standard SOFAs, but anybody who was over there otherwise, Intel civilian contractors, it was meant to be a broad-based cutout.

So I don't think this is actually the first time that the Government has had to think about it and therefore I would take respectful dissent from my colleague and his views.

Mr. BERMAN. Well, I am sort of finished. My only point is a lot of this came, my guess is Ms. DeLauro and Mr. Delahunt saw that Declaration of Principles and said, "What is going on?" We may have differences among the three of us about exactly what our policy with respect to our forces in Iraq and how to deal with that should be on January 21, 2009, but the one thing I think we feel very strongly about, and we also are pretty obviously clear about, what this administration is intending to do between now and January 20, 2009, but the one thing we don't want is things done that are binding on a new administration that limit its flexibility to evaluate the circumstances and make a sensible decision by this, and this Declaration of Principles——

Mr. DELAHUNT. If the gentleman would yield.

Mr. BERMAN. Yes.

Mr. DELAHUNT. I would wonder and put out there that if this committee and other committees did not vigorously conduct oversight, as is our responsibility, and the Declaration of Principles had gone relatively unnoticed, would we have had these statements forthcoming from Mr. Gates and other anonymous officials, and what would the private, or what would the final product have looked like?

I don't think, at least from my opinion, given the extremely expansive nature of executive power as put forth by this administration, and given the voluminous number of signing statements, and the penchant for secrecy, to be candid, there is not a healthy relationship between Congress as an institution and the executive branch. They brought it on themselves, and there is, I believe, legitimate and real substance in terms of our exercising our responsibility and getting on the record exactly what the intentions of this administration is.

We have been burned before, and in my role chairing this Subcommittee on Oversight, I don't intend to let that occur again.

Mr. BERMAN. I think Professor Glennon wanted to make a point here, and I didn't want to——

Mr. GLENNON. Well, I just, if I might, wanted to return to the very important question that you raised at the outset, which is, What is the current status of the 2002 resolution that was adopted by the Congress, a joint resolution authorizing the use of force in Iraq, and constitutional questions aside, does that constitute potential authorization for a security commitment to Iraq? That is a question that none of us has really addressed in our testimony. We have been looking at the constitutional question.

You asked also, What is the effect of that resolution on current operations in Iraq? There are three very interesting Supreme Court cases decided by the Marshall Court on the question of imperfect

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war: *Talbot* v. *Seaman*, *Little* v. *Barreme,* and *Bas* v. *Tingy*. And the conclusion that the Marshall Court has left us with—and these cases have never been questioned over 200 years—is that Congress has the authority to authorize limited war for specified objectives, and that when those objectives are achieved, the authorization terminates and the President is without authority. He is acting, in effect, the Marshall Court concluded, in Justice Jackson's famous third category, where his power is at its lowest ebb.

Mr. BERMAN. So Scalia would think there is no authorization here because——

Mr. GLENNON. I am not too sure to what extent he actually signs onto the Jackson tripartite analysis from *Youngstown*.

Mr. BERMAN. Okay.

Mr. GLENNON. But most of the Court seems to, and it has been given new life by Justice O'Connor in recent opinions, as you probably know.

Anyway, there were two objectives, as you know, set out in the 2002 joint resolution. They were to end the Saddam regime in Iraq—that has been achieved—and second, to bring Iraq into compliance with preexisting United Nations resolution. That also has been achieved. These two objectives having been achieved, it is fair to think that at some point soon the congressional authorization will no longer be available as a source of authority on which the President can rely.

The problem is, however, as you also pointed out, there is this little thing called the AUMF, the Authorization to Use Military Force, that was enacted on September 16, which authorizes the President to use force against organizations that participated in these September 11 attacks. The extent to which this is actually happening is a fact question, but it is pretty clear that al-Qaeda is one of those organizations, and al-Qaeda is now operating in Iraq against American forces on the ground. So the President would be able to rely on the AUMF for at least some of the military operations now being conducted in Iraq.

Could a security commitment be entered into with Iraq based upon the AUMF? I think absolutely not. That would be a stretch and I don't believe the administration has made any suggestion that the AUMF confers authority that is that broad.

But I do believe that this whole question of the basis for the continuing authority is one that warrants close scrutiny by Congress. It is ultimately a fact question relating to the extent to which al-Qaeda is behind the attacks on American forces, and if I may, I would submit for the record a little piece that I wrote on this subject for the Washington Post in December 2006.

Mr. DELAHUNT. We will happily make that part of the record.

[The information referred to follows:]

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The Washington Post

Go Long? Go Big? Go Back To Congress

By Michael J. Glennon
Thursday, December 7, 2006; A31

With President Bush apparently inclined to accept some of the recommendations released by the Iraq Study Group yesterday and reject others, there's an important consideration to keep in mind. Although it's widely assumed that the president alone is empowered to decide what military option the United States should pursue in Iraq, that is not the case. Congress did not, as many believe, write the president a blank check in 2002 with regard to the use of force in Iraq. It still has a lot to say on the subject.

Since its earliest days, the Supreme Court has recognized a president's obligation to respect congressional restrictions when Congress has authorized "imperfect war" -- a war fought for limited purposes. In an imperfect war, Justice Bushrod Washington said in *Bas v. Tingy* (1800), those "who are authorized to commit hostilities . . . can go no farther than to the extent of their commission." The following year, in *Talbot v. Seeman* (1801), Chief Justice John Marshall wrote that "[t]he whole powers of war being, by the Constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry."

Congress in 2002 authorized imperfect war in approving the use of force in Iraq for specific, limited objectives. As those objectives are achieved, or different ones are pursued, legislative reauthorization will be required. Absent congressional approval, the president cannot use force in Iraq to pursue new objectives, beyond the protection of forces being withdrawn.

Congress specified two objectives in 2002: to "defend the national security of the United States against the continuing threat posed by Iraq," as its resolution put it, and to "enforce all relevant United Nations Security Council resolutions regarding Iraq." The "continuing threat" referred to the danger posed in 2002 and earlier by Saddam Hussein's regime. That threat was seen to flow from the regime's pursuit and possession of weapons of mass destruction. Iraq, the resolution noted, "attempted to thwart the efforts of weapons inspectors to identify and destroy" these weapons.

In 2002, Congress said Iraq continued "to possess and develop a significant chemical and biological weapons capability," actively sought a nuclear capability, and supported and harbored terrorist organizations. Doing so placed Iraq in "material and unacceptable breach" of its international obligations, as set out in various Security Council resolutions. The threat, the resolution found, was that "the current Iraqi regime" would either employ weapons of mass destruction in a surprise attack against the United States or "provide them to international terrorists who would do so."

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When President Bush signed the 2002 authorization, he said that "Iraq will either comply with all U.N. resolutions, rid itself of weapons of mass destruction, and end its support for terrorists, or it will be compelled to do so."

Iraq has now done so. Saddam Hussein's regime is history, and the threat posed by it is gone. Hussein himself has been captured, tried and sentenced. A new constitution has been adopted by the Iraqi people. A different government is in place. That government is in compliance with all relevant Security Council resolutions. It does not possess or seek weapons of mass destruction. It does not support or harbor terrorists.

There are, of course, terrorists present in Iraq today who pose a threat to American troops there. They may someday pose a threat to the general U.S. population. But Congress in 2002 authorized use of force against the old Iraqi government, not against groups unaffiliated with Saddam Hussein's regime (many of which actually opposed it). Fewer and fewer of those who are fighting American troops are remnants of Hussein's regime. Hostility to the American presence in Iraq is increasingly broad-based, with polls now showing majority support -- even among Shiites -- for attacking American troops.

Whatever the semantic characterization, the war looks increasingly unlike the one that Congress authorized. What options, then, would require renewed congressional approval? Negotiation is an exclusive presidential prerogative; a decision to talk directly with Syria or Iran or to convene a regional peace conference would be for the executive alone. But military options are another matter. The options to "go big" or to "go long" -- to increase the magnitude or duration of the U.S. effort by systematically taking on assorted Shiite militias, opportunistic criminals, foreign jihadists and others who were not part of Saddam's regime -- would not fit within Congress's existing authority. Congress in 2002 authorized the president to use force in a war against the sitting Iraqi government, not for an Iraqi government or against an opposition that did not then exist.

As a matter of sound policy, as well as constitutional principle, Congress should participate in weighing recommendations on future military action. Whatever military option is selected, its success will depend upon broad support from the American people. Congressional involvement will not guarantee that support, but congressional exclusion will almost surely preclude it.

The writer is a professor of international law at the Fletcher School of Law and Diplomacy at Tufts University and former legal counsel to the Senate Foreign Relations Committee.

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Mr. DELAHUNT. Mr. Berman? Congresswoman DeLauro.

Ms. DELAURO. Thank you very much, Mr. Chairman. I want to say thank you to all of you for not only your testimony, but for your clarity and your insight into this complicated area.

I guess, given what everyone has agreed to essentially is that this declaration goes beyond what the normal Status of Forces Agreement has been in the past. I guess, let me just step back for a second, and Secretary Gates was present at this effort, and put his imprimatur, I would assume, on the move forward, and it is pretty compelling here when you take a look at the security sphere:

> "Supporting the Republic of Iraq in its efforts to combat all terrorist groups at the forefront, which is al-Qaeda, other outlaw groups, regardless of affiliation, destroy their logistical networks and their sources of finance.
>
> "Supporting logistical networks in all of that, that is a military function. That doesn't occur by some administrators sitting someplace and doing it."

My point is the declaration itself, the Declaration of Principles, given the scope of it, the depth of it, it is beyond other agreements that we have seen. Should there have been congressional consultation prior to the President signing that Declaration of Principles, so that we are not calling the declaration itself into question, we have had two heads of state signing a document with far-reaching commitments? That is my first question.

Ms. HATHAWAY. I can say a word about that. So while it would have been prudent and advisable for the President to have consulted with Congress before issuing the Declaration of Principles, it is, I believe, within the President's authority to negotiate non-binding agreements, which is what this is. It is a non-binding agreement, expressly stated as such, to lay out intended future negotiations, and in fact that has been a very typical practice throughout history in the United States, that Presidents would negotiate, essentially, an agreement to negotiate, but what is important is that that document itself does not create any binding commitment.

There are two things that are troubling. First, it is so far reaching, and it caught Congress by surprise, and on something that is of this import to the country, that is a mistake. And second, to the extent that it clearly laid out, in my view, at least on its face, an intention to negotiate an agreement that has these terms, and in fact in introducing it the administration specifically said that "today's declaration outlines the main parts of what we expect that emerging agreement to contain."

So it seems to me pretty clear that in fact this was a roadmap for the agreement. That is deeply troubling. It is not an extra constitutional action, but it is prudentially a mistake in my view.

Mr. DELAHUNT. Well, it is prudentially a mistake in my view as well, and therefore, and we are really writing to the President to ask, Congressman Delahunt and myself, and about 50 or so members, that given what Secretary Gates said, should we start from scratch? This is an agreement that is far reaching, has all kinds of implications. It is a non-binding document, and my own view is that we should get real clarity on its non-binding nature, that it

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is not the roadmap, that it doesn't commit us to the extent that this document does commit us, and that we get agreement on that, quite frankly, from the administration before we move to set up some sort of an agreement with Iraq.

The nature of this is that it is supposed to be concluded by July 31. This was put into place, it must have been many, many months of discussion, et cetera, that led to the signing on November 26, and to date, as we all have concluded, there hasn't been one shred of congressional consultation even accepting yes for an answer, Dr. Wedgwood, but not part of a substantive statement, part of a substantive statement that the Secretary made, but a comment about it that my view would be that this is the roadmap, and unless we look at a new roadmap that we should—I mean, that ought to be our first line, if you will, and I view it as defense for our future relations with Iraq.

Can just anybody? Not everyone has to comment, but someone, and then I have two short questions. I am sorry to hold up the—yes, please.

Ms. WEDGWOOD. Just a brief comment. Again, I don't know the original etiology of the providence of the declaration, but I take it that it is, in part, impatience, and one sees this in every post-conflict situation. I mean, Sergio Veradalimo was being pressured quite heavily at one point by Ramos-Horta and Bishop Belo and Timor to hand over power. So whenever you have a post-conflict situation, I think the local folks think that if they don't get their own authority back quickly, it deresonates them with their own voters and their own population.

But I take it the hurry in this is that under the Security Council agreement that was passed in December, Iraq reserves the right to terminate the Security Council mandate at anytime it wishes. It is a "by your leave," and in that sense I think the timeframe may be, at least on the SOFA, on the presence of forces and their status in Iraq that there may have been some felt urgency because of the fact that this particular Security Council mandate extension is actually revocable at will by the Iraqi Government.

Mr. DELAHUNT. I think that it is important to note that just recently the Iraqi Ambassador made the statement that if a bilateral agreement could not be achieved, that it would, according to him in a story or a report in the Washington Times, that they would be agreeable to extending, to seek a further extension of the U.N. mandate. So I think it is important at least to note that, that that was a statement that was reported in the Washington Times.

So in terms of a need to hurry up the consummation of an agreement, that statement would give the lie to that, and in fact it is my own inclination that we have an administration that has achieved lame-duck status, that this is a significant agreement, whatever form it ultimately takes, and that any decisions concerning Iraq ought to be within the purview of the new administration, and a new Congress, and that we ought to consider discussing with the Iraqi Government and the Iraqi Parliament some sort of very short-term extension of the U.N. mandate so that we start with a clean slate.

This is an administration whose approval of, by most Americans in terms of how they have mismanaged Iraq from the beginning,

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has very little support. The polling data from Iraq continues to support the view that the Iraqi people want a timetable to see us out. Why not let a new administration and a new Congress deal with this issue? Rosa?

Ms. DELAURO. I concur with the chairman, which is what my question is. I think we are at a point here where this Declaration of Principles has been flawed in so many ways, and I understand the need to try to put something together, but historically what it includes, that it shouldn't include some areas where there is a presidential power, others where you need to have the authorization of the Congress, that it is so flawed in so many ways that it ought to be put aside and that we deal with what we try to do in addition to which there has not been congressional involvement at this juncture, and I think I may have this right—if I am wrong, I will get corrected by my staff and others—but with the Iraqi Parliament as well. We kind of side stepped what involvement they ought to have in this area.

So we have two signatures, but we don't have the full weight of force behind that. So that we should, if you will, say no, this is no longer the roadmap, the operative document, et cetera, and we are going to now work with the Congress.

Let me just say this. It is a question that I have. I don't understand what the obligations of the Iraqi Government are under this agreement. I think it is item six here that talks about promoting political efforts to establish positive relations between states in the region. You know, what are their obligations under this agreement? What is their end of the bargain? How do we know they are going to live up to any of these things? We have no assurances here.

So I really would like to get your sense of—I will throw in one more piece. We have got a President who has talked about a signing statement that again throws another oil in the water about the installation of military bases which Secretary of Defense says, "We are not going there, but yes, he has this authority."

I truly do want your view, your legal view, your expertise on whether or not we as the Congress should assert whatever authority we can here with legislation that does not tie the hands of the next President that says we are going to do a short-term extension of what this is, and let us start anew with the joint participation of the administration and the Congress to deal with our long-term commitments, with Iraq's long-term commitments as well as the United States' long-term commitments.

Mr. DELAHUNT. If you would yield for a moment, and then I am going to go to Dr. Macgregor and ask everyone to speculate and opine and give us your view. The Declaration of Principles, I think Professor Wedgwood concurred, I mean, almost dismissed it, but I really wonder. I think it goes to a point made by Dr. Glennon.

Would the Declaration of Principles—is it really a political document that was meant to play to different audiences? Was it designed to play to an audience in Iraq and certain provisions could be pointed out to send a message that we were going to be there in a very muscular way, and watch out, and yet to the American audiences, Oh, don't worry about it, we are not going to really—it is a press release, it is a sop to the Maliki government. It gives him something to talk about. I don't know, but, boy, at least in

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terms of my viewpoint the inconsistency between the Declaration of Principles and what the reality appears to be if we can take the comments by Secretary Gates, you know, is huge. It is a grand canyon between them.

I find that disturbing because it is misleading, and it is not being up front and honest with the American people as well as the people of Iraq. It is gamesmanship. That is really what it is. If it is the Declaration of Principles and they sign it and they have a photo opportunity so that everybody can maneuver and manipulate politically, this is too serious to do that. This is far too serious and the consequences are far too profound, and we have paid too much of a price as has the Iraqi people. Dr. Macgregor.

Ms. DELAURO. Mr. Chairman, can I——

Mr. DELAHUNT. Sure.

Ms. DELAURO. I would like to get an answer with your view that we put aside the Declaration of Principles.

Mr. DELAHUNT. I agree, yes.

Ms. DELAURO. I really would like to get an answer from you, and quickly, whether you think that is what our course of action should be. And anyone start wherever they would like.

Colonel MACGREGOR. Well, first of all, I recommended in the statement that I submitted for the record that under no circumstances should the United States Congress, Senate and the House support this joint Declaration of Principles for all of the legal reasons that you have heard, but it is a potentially dangerous document that commits us to all sorts of courses of actions that the American people would not normally ever undertake.

I want to make the point that if you look carefully at this joint declaration, setting aside the economic provisions, and those are very disturbing because those are really reminiscent of what the British Empire tried to do in Iraq after World War I, and I am certainly in favor of advancing the interests of American business, that is not the issue, but we are dealing with a very weak state right now, if you even want to dignify it with that word, and that is disturbing.

But the real issue for me is that the focus of this agreement is not really on an external thread of any kind, which has traditionally been our position. It is on propping up, supporting, defending, however you want to characterize it, this government in Iraq. It has serious problems, so many problems that one wonders why one would sign any agreement under these circumstances with the current government.

Then there is an undercurrent here that I think deserves some attention because Mr. Rohrabacher was very articulate in the way he presented the political rationale that the White House uses. The comparisons are always back to World War II, specifically, Germany and Japan, and subsequently to Korea. We need to understand that the conditions in that period of time that produced the outcomes that we saw in those countries have nothing to do with conditions today in Iraq. It is very important to understand that.

We staged in Germany because there were 15 million Soviet troops poised to march to Paris. That is why we staged in Germany, and the Germans, by the way, were very happy to have us

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because the alternative to us was the Red Army, a very unattractive alternative indeed.

The situation was not very different in Japan. Manchuria and Korea were rapidly overrun by the Soviets and their Communist allies, and it looked very grim indeed that Japan might also end up being part of the Communist orbit. We had to stay there.

The Korean War, the alternative to Americans remaining and negotiating a settlement with the Chinese was that the entire peninsula would become Communists, and the people that lived in the south end of the peninsula did not want to live under a Communist regime.

By the way, the government at the time that we were defending Sigmund Rhe was not democratic at all. In fact, it was so undemocratic at the time that the State Department wanted McArthur to hold elections and have Sigmund Rhe removed, and he pointed out that was absolutely unachievable, and he said the most important thing is that he is legitimate in the eyes of the Korean people and he is Korean, and Koreans must rule Koreans, not Americans.

Now, the chairman has talked about the series of mistakes that we have made, and they have been egregious. One of those mistakes from the outside has been to characterize any Muslim Arab in Iraq who shoots at us as an al-Qaeda terrorist when we have generals like Abizaid on record in testimony who tell us that al-Qaeda has never represented more than 3 to 5 percent of the opposition to us inside Iraq, and we know that al-Qaeda was not in the country in any strength or any significance until we arrived, and we know that the population, Shiites and Sunnis, are really not interested in having them in the country.

So the question that we ought to ask is, Whom have we been killing, wounding and incarcerating for 5 years in Iraq? Are these not simply people who would like us to leave?

I think that is the other aspect that you have pointed to. It is what the chairman has said. What about the so-called will of the Iraqi people? Specifically, we are talking about the Arabs of central and southern Iraq. We don't really know what that is, but we can say with relative certainty that they would like us to leave; that they do not want a permanent U.S. military presence in that country, and by the way, they are joined by hundreds of millions of other Muslim Arabs who oppose any permanent U.S. or foreign military presence on their soil.

We need to take those kinds of concerns into consideration. So the bottom line is this joint declaration is a very dangerous document. It commits the American people, the United States Congress to courses of action that I think are illegitimate and are courses of action that you as a body would normally never take. So it absolutely should be rejected.

Ms. HATHAWAY. If I understand your question, both of you are asking, Now what? Now that there is a general consensus that there are at least parts of the Declaration of Principles that extend beyond the President's own constitutional authority, and therefore require congressional consent, what do we do now?

And what I would say or what I would recommend is that Congress answer the President and say, in fact, much of what is laid out in the Declaration of Principles exceed the President's own con-

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stitutional authority, and requires the consent of Congress; that Congress wants to understand what is in fact going to be in the agreement that is being negotiated, wants to know the bounds of this 15-page document, what in fact is in there, because we are all playing guessing games about what is there. Is it really a standard SOFA or are there other things in there now that look more like what is laid out in the declaration? If so, Congress should examine whether in fact those are commitments the President can make on his own authority, and engage the President in negotiating this agreement, and request to call on the President to come to Congress for consultation on the significant portion of the agreement that is laid out in the Declaration of Principles that does require congressional consent. That is, to my mind, the way forward.

Yes, we may start with a standard SOFA, and if that is in fact what the agreement looks like, then many of the concerns voiced here today are no longer significant concerns, but there are lots of reasons to believe that is not what is in the agreement. We don't know until we actually see the agreement.

Mr. DELAHUNT. Let me interrupt you because I would like to add another factor here. In the testimony of Secretary Gates, he refers to the Status of Forces Agreement, and then he goes on to speak to a strategic framework agreement.

Now, I wasn't there. I don't know. Are we talking two distinct pacts because there is a conjunctive there, "and," and what is to be the subject of the strategic framework agreement while diverted into the issue of a SOFA? And again, he is an individual, I believe, of great integrity and I do respect him, and he has raised the issue of a strategic framework agreement, but what in the world does that mean?

There is more confusion, to be candid, than I think existed prior to his testimony before the Armed Services Committee, and it is the obligation of the Department of State working with General Lute to negotiate whatever is under consideration.

Just hearing from the two of you, and I am going to go to Mr. Glennon, the more I am listening I really want—in many ways, I want the end of this administration, and I really wonder about whether at this point in time they just act as a caretaker, and let—we are having a vigorous presidential debate in this country today. It would appear that Senator McCain is going to be the Republican nominee. I think this is a subject that the American people deserve to hear from the presidential candidates, the presidential nominees in terms of where we go from here.

I don't want this administration to have any input whatsoever because I just think that they have done a abysmal job. Mr. Glennon.

Mr. GLENNON. Mr. Chairman, Representative DeLauro asks whether we should go back to the drawing board. I actually would go further than that. I fail to see any urgency about proceeding presently with either a Status of Forces Agreement or a strategic framework agreement, whatever that may be. In light of the announced willingness of the Iraqis to seek and accept an extension of the U.N. Security Council mandate, I do not understand why this cannot be left to the next administration to negotiate.

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Under principles of accountability, it seems to me that the administration that is most likely to be called upon to honor the agreement ought to have the principal say in determining the substantive content of that agreement.

So my view is that, in light of the lack of urgency, the administration should seek to get an extension of the Security Council mandate for a few months—that should not be impossible—and leave it to its successor administration, be it a Democratic or a Republic administration, to work out the details of this.

Mr. DELAHUNT. Professor Matheson.

Mr. MATHESON. Thank you. Well, I think that the language of the declaration was ill-considered from the beginning. I suspect that it was not properly vetted within the U.S. executive branch with those folks who would know about some of the issues we have been discussing, for example, the lawyers.

Mr. DELAHUNT. Can I, and I will just interrupt for a moment. I find that just incomprehensible, and I mean that is absolutely—that is outrageous. It is the only word I can think of to describe it.

Here we have a document signed by the President of the United States declaring principles that, if one accepts them as being real and not just simply a political press release, that implicates a continuing investment of personnel and dollars, and I guess what we are saying is it was sloppily drafted and it doesn't count, I mean, that is baffling.

Mr. MATHESON. Well, I might agree that it is inconceivable except I have seen it many times over my career.

Mr. DELAHUNT. Okay. I stand corrected.

Mr. MATHESON. From the moment I saw the language, I realized that the administration was going to have to back away from it. Some of the things that are suggested by the declaration, like a security commitment, or the termination of Security Counsel resolutions, it seemed to me were clearly not in the interest of the administration, even on its own terms, and that there would have to be a process of backing away and reaching more reasonable and concrete proposals, and we have seen this over the past few weeks, and Secretary Gates' statements is probably another indication of that.

So I think we need to treat the declaration as what it is. It was a political statement which was inappropriately drafted, and the administration needs to now be very clear as to exactly what it does intend to do after full consideration of the practicalities and the policy requirements, and obviously the Congress needs to be part of that, but I would not overrate the declaration because I don't think from the beginning that it really represented what could be administration policy.

Mr. DELAHUNT. Dr. Wedgwood.

Ms. WEDGWOOD. Well, a couple of points. I won't sit here and have my rebuttal to Dr. Macgregor, but some of the language is a bit much, the British Empire, et cetera.

But on your questions, Congressman and Congresswoman DeLauro, Samuel Popkin once wrote this wonderful book called The Rational Peasant that said don't suppose that the people you are dealing with don't have minds of their own, and agendas of

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their own, plans of action of their own, and on one point, and I will just give an example.

In the letter of Mr. Maliki, which is penned to the Security Council resolution, he said, we want that 5 percent tax, which goes to the Iraq Compensation Claims Tribunal, 5 percent tax on oil sales, to be reduced because we need the money.

So in fact there is some push on some issues I think inferably coming from the Iraqi side, and again, I have never seen—I have read a lot of Security Council resolutions in my time, and I have never seen one before that, like the first paragraph of Mr. Maliki's letter, and as is recounted in the resolution itself, conditions of mandate on the continuing consent of the host government.

So I don't know whether the Iraqi Ambassador meant to change the——

Mr. DELAHUNT. Dr. Wedgwood, it is my understanding and I could be wrong, and I would ask if there are any other members of the panel, but that is not my understanding. I do not believe that the U.N. mandate that is due to expire on 12–31–08 is revokable unilaterally by the Iraqi Government.

Ms. WEDGWOOD. If I could just be a nitpicking——

Mr. DELAHUNT. Sure.

Ms. WEDGWOOD [continuing]. Lawyer for a second. In his letter of December 7, which is then incorporated into the resolution, it reads, "Government of Iraq requests the extension of the mandate of MNF 1 in accordance with the prior resolutions, provided that the extension is subject to a commitment by the Security Council to end the mandate at an earlier date if the Government of Iraq so requests and that the mandate is subject to review before June 2008."

Mr. DELAHUNT. Let me be a nitpicker, too. That is a letter and a request, and it is my understanding that that request was not honored and that language was not included in the final mandate, the extension of the mandate.

Ms. WEDGWOOD. Forgive me. This is my last law professor moment now. But if I fear me in the operative language it was, it says—in the resolution itself:

> "Acting under Chapter 7 of the Charter of the U.N., paragraph 1, the Security Council notes that the presence of the multinational force in Iraq is at the request of the Government of Iraq, and reaffirms the authorization for the multinational force as set forth in the prior 2004 resolution, and decides to extend the mandate as set forth in that resolution until 31 December 2008, taking into consideration the Iraqi Prime Minister's letter dated, including all the objectives highlighted therein. Paragraph 2 decides further that the mandate for the multinational force shall be reviewed at the request of the Government of Iraq or no later than 15 June 2008, and declares that it will terminate this mandate earlier if requested by the Government of Iraq."

So this one, I think, is by their leave. They have tied themselves to the permission of Baghdad.

Mr. DELAHUNT. Mr. Matheson.

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Mr. MATHESON. What you have heard is a declaration of intent by the Security Council but, of course, it is dependent upon the council actually taking action, so it could always decide to take a different view, and I assume that the voice of the United States wouldn't be very influential in whatever the council would decide to do at that point.

If Iraq actually wanted to terminate, then the council would have to consider notwithstanding its previous statements whether this security situation and the interests of the international community is served by a total termination of the mandate, so I don't think it is an open and shut situation.

Mr. DELAHUNT. Any other comments anyone would like to——

Mr. GLENNON. I agree with Professor Matheson.

Mr. DELAHUNT. Well, it is good to have a very healthy discourse, and it was extremely informative. You have provoked among members of the panel, I know, some new ideas and possibly some new directions, and we are not going to keep you here any longer, but this was a very worthwhile several hours for Members of Congress, and I am sure that we will be reaching out to all of you on a continuing basis as we go further down this path because clearly there are targets in terms of an agreement being presented in July and the expiration of the mandate, but your obvious experience and talent and insights are extremely valuable, and we will continue to call you as resources for our own deliberations.

With that, we will adjourn. Thank you.

[Whereupon, at 12:29 p.m., the subcommittee was adjourned.]

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THE NOVEMBER 26 DECLARATION OF PRINCIPLES: IMPLICATIONS FOR U.N. RESOLUTIONS ON IRAQ AND FOR CONGRESSIONAL OVERSIGHT

HEARING

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS, HUMAN RIGHTS, AND OVERSIGHT

OF THE

COMMITTEE ON FOREIGN AFFAIRS HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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