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RENEWING THE UNITED NATIONS MANDATE FOR IRAQ: PLANS AND PROSPECTS

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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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RENEWING THE UNITED NATIONS MANDATE FOR IRAQ: PLANS AND PROSPECTS

WEDNESDAY, NOVEMBER 19, 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 10:09 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 eighth in a series of hearings which the subcommittee has held on the Bush administration's efforts to consummate what was initially described as a long-term security agreement with the Government of Iraq. I appreciate the involvement of my friend and colleague and ranking member, the gentleman from California, in this undertaking; he is presently attending another meeting, and I am going to proceed with my opening statement and when he arrives he will deliver his.

The first hearing in this series was held on December 19, 2007; almost a year ago. Much has changed since then. I would note that the proposed agreement is now called Agreement on the Withdrawal—here he is. I am going to suspend, because in a prior conversation we discussed that I would defer to him to make his opening statement, because I know he will be going back and forth because the Republican Conference is organizing today and I know they have a series of votes.

So with that, let me recognize and welcome back my good friend from California, the ranking member, Mr. Rohrabacher.

Mr. ROHRABACHER. Thank you very much, Mr. Chairman. And first and foremost I would like to commend the chairman for being one of the very first elected officials to understand the significance of this Status of Forces Agreement, and he has made sure that our subcommittee has been playing a significant role in oversight of that effort that is going on in Iraq. So I would commend you for it. I think that the country is better for the hearings that we have had and the discussions that we have had on issues relating to the Status of Forces Agreement and the importance of it.

Let me note that I have supported the President during these years of war in Iraq and I would probably do it again. Unfortunately, I would say that the cost that we projected and that the President presented was far less than what any of us expected. Whether or not we should have made that decision in the first

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place, whether the President should have made that decision is, I think, very debatable even on our side of the aisle; and certainly our Democratic friends by and far disagree with that decision in much greater unanimity than our side of the aisle.

In retrospect perhaps that was a wrong decision to try to replace or displace Saddam Hussein, one of the world's most vicious dictators, before we completed the task at hand in Afghanistan, and it caused great turmoil in that by not completing the job in Afghanistan, that when you try to do too much, you end up not being able to do anything at all well. And I have always told people, "If you try to do everything, you are not going to be able to do anything."

And the Status of Forces Agreement that we are now confronting is something that was predictable; something not only predictable, something that is expected, and a totally justified—how do you say—writing down of the rules, et cetera, and an understanding of what exactly our agreement will be in terms of our forces in Iraq.

I have made it clear for over a year to the administration that I would not be supporting a Status of Forces Agreement unless part of that agreement was that the Iraqi Government pick up at least a major share of the cost of the American troops being in their country, similar to what we have in Japan, for example. If indeed the Iraqi Government, as we have helped the people of Iraq establish that government, are unwilling to do so, that would suggest to me, Mr. Chairman, that they do not want us there to help them. And if, by and large, the people do not want us there to help them thwart radical Islam or other forces that may be at play in that region, well, then we should not be there.

I know that a lot of people claimed that Republicans think that America is an imperial power. We are not an imperial power. We are a country. And I believe that the motives of most of us who supported the effort in Iraq have been honorable and have been based on the idea of exchanging that vicious dictatorship of Saddam Hussein that slaughtered hundreds of thousands of his own people. Exchanging that for a more democratic system that could be an example to the rest of the Islamic world was a goal that was a laudatory goal.

It may well not have been as within reach as we thought it was. However, Iraq to the degree that it has a representative government now that we have helped them establish, that we have paid dearly for in blood and in treasure, if that government does not want American forces there to assist them in stabilizing their country and defeating radical elements, then they should refuse to pay for it and we should heed that decision.

So I am looking forward—I am sorry I am going to have to run back and forth. We are electing the leadership in the Republican Party in Congress right now and I should participate in that election as well. But I am very interested in the outcome of this hearing to find out exactly what is included in the Status of Forces Agreement and how it reflects the willingness of the Iraqi people to express their gratitude to the United States by ensuring that any help that we give them they will be willing to pay for in the future, if not right off the bat, perhaps as even some sort of willingness to give us an IOU for the future, some kind of debt to be repaid in the future. But just having the United States send our

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troops over there, do the fighting for the other side, for the Iraqi people, when they should be doing their own fighting, having us—at a time when we have to borrow money from China in order to maintain any type of operation while we are deeply in debt—for us to assume the financial burden and to continue to assume the burden of losing our own men instead of having the Iraqis fight their own battle, I think we have left those days behind.

And I think this new Congress will see not only a new President of the United States, but changes in basic policy that will demand that all of us reexamine what our positions are and then we can discuss whether or not in retrospect the decisions we made were the right or wrong decisions. Thank you very much for holding this.

Let me just make one note before this, and that is this: When the Iraqi Government, if the Iraqi Government refuses to pay for the United States military operation in that country, and at the same time is signing agreements with China in order to provide them the use of their oil and other natural resources rather than signing that contract with American companies, we should be getting the message. The message is loud and clear to me if indeed the Status of Forces Agreement does not have a payment clause and the Iraqi Government continues to sign contracts with countries like China which are not necessarily friendly to the United States.

So with that said, Mr. Chairman, I will be running back and forth. I will try my best to keep up with what is being said, but I also will read the testimony and hopefully we will have a chance to participate as the hearing goes on. And thank you.

Mr. DELAHUNT. Thank you, Mr. Chairman. Mr. Chairman?

Mr. ROHRABACHER. Mr. Chairman?

Mr. DELAHUNT. I want to take that one back quickly.

Before you leave, I want to know: Are you a candidate in the Republican Caucus for any leadership position?

Mr. ROHRABACHER. I am a candidate for best congressional father of triplets of this session.

Mr. DELAHUNT. I think you win that one unanimously on both sides of the aisle. And congratulations.

Okay, Dana, thank you.

I want to note the presence of the vice chair of the subcommittee, the gentleman from Missouri, Mr. Russ Carnahan. I am having trouble. And I always pronounce the gentlelady's name from California inaccurately, but I am going to give it a real good try here. We are joined by Congresswoman Lynn Woolsey.

Ms. WOOLSEY. You got it.

Mr. DELAHUNT. This is cause for applause. From us. Not from you, from us.

As I was saying, the first hearing that the subcommittee held was back in December 2007; almost a year ago now. As I said, much has changed since then and one of the changes, of course, is that the proposed agreement has been relabeled. It is now called the Agreement on the Withdrawal of United States Forces from Iraq.

I think it is fair to say that this particular hearing is most timely in light of the signing this week of the proposed agreement by representatives of the two executive branches. And we indeed have

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come a long way since President Bush and Prime Minister Maliki signed the so-called Declaration of Principles on a long-term relationship back in November 2007, which seemed to embrace a broad American security commitment to defend Iraq against external and internal threats. Now, there is a timetable that references specific dates. American combat troops are scheduled to be withdrawn from Iraqi cities by June 30th of next year, and all United States forces must be withdrawn from Iraq by December 31, 2011.

I hope that the hearings that we held contributed to those positive changes. And when I think of the Iraqi parliamentarians who sat before us this past June urging that a timetable for complete withdrawal be at the core of any security agreement, I do believe that my hope has some basis in reality, as we concurred with them.

However, I want to be very clear. I still have serious reservations about this pact. For instance, I share the concerns expressed by our colleague and friend, the chairman of the Armed Services Committee, Ike Skelton, who has been quoted as being deeply troubled because the agreement contains, as he says, "vague language that will cause misunderstandings and conflict between the United States and Iraq in the future."

I could go on and on, but a review of the substance of the agreement is in fact not the purpose of this hearing. And by the way, no one should forget that this agreement has just been provided to Congress and that there has been no time to conduct the analysis required by such a significant document, one that purports to end the conflict that has had such momentous and tragic consequences for both the Iraqi and the American people. And remember, there has been no meaningful consultation with Congress during the negotiation of this agreement. And the American people, for all intents and purposes, have been completely left out. Even now the National Security Council has requested that we do not show this document to our witnesses or release it to the public, a public that for over 5 years has paid so dearly with blood and treasure.

Now, I find that incredible. Meantime, the Iraqi Government has posted this document on its media Web site so that anybody who can read Arabic can take part in the public discourse. But this is typical of the Bush administration and its unhealthy and undemocratic obsession with secrecy. As I said, much has changed in this year.

Just yesterday, for example, the agreement was effectively endorsed by the Government of Iran. I commend to you this quote from Ayatollah Sharudi, and these are his words. He's in charge of the Judiciary in Iran. "In regards to the agreement, the Iraqi Government has performed well, and we hope that the result will be to the benefit of Islam and the sovereignty of Iraq."

Well, in any event, one important thing has not changed. A renewal of the U.N. mandate may very well be the only option available to protect our troops, given the calendar and the time constraints. As we will hear in testimony today, the bilateral security agreement will not become legally valid unless, number one, the Iraqi Parliament enacts by a two-thirds majority—184 of its 275 members—a law governing the ratification of international agreements.

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Number two, the Iraqi Parliament then enacts the proposed bilateral security agreement under that ratification law which, as introduced this past Monday in their Parliament, also would require a two-thirds vote of approval.

And number three, the United States Congress enacts a law that approves and implements the security agreement and authorizes offensive combat operations by U.S. forces.

Now I would suggest that the odds of all three of these events occurring before December 31st of this year is about zero, given the administration's insistence that it need not seek congressional approval of the agreement which clearly embraces offensive combat operations.

So where will we be on January 1, 2009? In legal limbo, with our troops dependent on a potentially invalid agreement for their immunity from Iraqi prosecution as they undertake combat missions with no constitutional authority. If the mandate goes, the legal authority goes; a situation that can only endanger our troops and complicate President-elect Obama's plan to undertake a responsible withdrawal.

For months the Bush administration has been implying that renewal of the U.N. mandate is not a viable option. First we heard that Russia would block any renewal. I traveled to New York expressly to discuss that issue with the Russian Ambassador to the United Nations, and he confirmed for me what had been publicly stated by his Foreign Minister: Russia will not stand in the way of a request from Iraq for renewal of that mandate.

Now, we no longer hear about the Russian problem. But now the administration is saying that a renewal is not possible for another reason. And I quote from the McClatchy newspaper report about a briefing by an American negotiator, and this is the excerpt from that newspaper report:

> "The senior government official cautioned, however, that there is no alternative if the security agreement fails in Parliament. The U.S. official said the Iraqis were not interested in renewing the U.N. mandate."

Now that simply, demonstrably, is inaccurate. Iraqi political figures from both the executive branch and the opposition-controlled Parliament have stated that if the agreement is not completed in valid form before December 31st, they can accept a renewal of the mandate.

Let me just read a few of those statements. From the Iraqi Foreign Minister Mr. Zebari, as recently as September 11th of this year, "if such an agreement is not signed, which is a possibility, the alternative would be for the United States to go to the Security Council in agreement with the Iraqi Government. We may request that the Security Council resolution be extended for 1 year. If an extension takes place, it will be a routine one." Those are the Foreign Minister's words.

Just this past Monday Dr. Karbuli, also of a government party, said that a coalition of his party and two others opposes the passage of the agreement at this time and supports working toward extending.the mission of the U.S. forces through a U.N. mandate.

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After the mandate is extended, negotiations on the agreement should be resumed.

From the opposition: Former Prime Minister Dr. Allawi, who testified before this subcommittee in July, recently wrote me a letter which I received Monday reaffirming his support for extending the U.N. mandate for another 6 months or 1 year.

On this topic, I want to note my surprise at a recent remark by Foreign Minister Zebari. He said, "If the Iraqi Government asked for amendments and changes on the resolution, I believe the United States will use its veto power." What is that about? Why would the Iraqi Foreign Minister anticipate that the United States would veto a renewal of the U.N. mandate?

Well, maybe this is the answer, consider this troubling report from the Iraqi Government newspaper today:

> "The U.S. side stressed the importance of approval by the end of the U.N. mandate, indicating that United States negotiator David Satterfield told the political parties that in the event the Iraqi Government does not announce the approval of the United States-Iraqi agreement, the United States will withdraw its troops and refuse to approve the extension of the mandate when the United Nations Security Council discusses it."

If this report is accurate, the Bush administration owes this Congress, the U.S. Armed Forces, and the American people an immediate explanation.

Mr. DELAHUNT. On behalf of myself and Mr. Rohrabacher, I want to thank some of our, what I will call regulars who are testifying here today, for their assistance over the course of all of our hearings, and that would be Professor Hathaway and Professor Matheson and Mr. Jarrar. It is safe to say, and you know this to be true, that we couldn't have done it without you. And frankly, I don't know how you get any other work done this year, given the demands that we have placed upon you.

And I obviously want to welcome Mr. Donnelly there who is a first-timer. And we are looking forward to his testimony, which I have read, and his input.

Let me call on my colleague, the gentlelady from California, Ms. Woolsey, to see whether she wants to make any comments or observations.

Ms. WOOLSEY. Thank you, Mr. Chairman, for letting me sit in on your meeting. I am a member of the Foreign Affairs Committee, but not of your subcommittee. But I find this, if not "the," one of the most important issues in our Congress.

The Bush administration has said for a long time that our presence in Iraq is a multinational force and an international effort. So what I am looking for today and will ask again if I don't hear it in your testimony, is with SOFA being a bilateral agreement between the United States and Iraq, where does this agreement leave the United Nations and its member nations? How does this provide for any meaningful international cooperation? And is there anything in the platform—which I am really concerned about in this treaty—that will include reconciliation, reconstruction, help for the Iraqi people, with a real commitment?

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And so that is what I will have my ears open for, and I look forward to your testimony. Thank you very much.

Mr. DELAHUNT. Thank you, Lynn.

Mr. DELAHUNT. Law Professor Oona Hathaway has migrated from Yale to Berkeley in the period of time that she has been appearing before this subcommittee. And I am happy that Rosa DeLauro has been unable to join us today in one respect, because I know she would be disappointed that you left New Haven. But seriously, in Professor Hathaway's appearance we are privileged to have one of the country's leading constitutional scholars and authors. She clerked for Supreme Court Justice Sandra Day O'Connor and we are truly fortunate to have her here.

Our next witness would have been Issam Saliba, a foreign law specialist at the Law Library of Congress. He unfortunately cannot be with us today but he submitted a statement, and I ask unanimous consent that it be entered into the record.

[The information referred to follows:]

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Statement of

Issam Michael Saliba
Senior Foreign Law Specialist
The Law Library of Congress

on

The Approval of International Agreements and Treaties Under Iraqi Law

before the

U.S. House of Representatives
Committee on Foreign Affairs,
Subcommittee on International Organizations,
Human Rights, and Oversight

at a hearing on

RENEWING THE UNITED NATIONS MANDATE FOR IRAQ:
PLANS AND PROSPECTS

November 19, 2008

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THE APPROVAL OF INTERNATIONAL AGREEMENTS AND TREATIES UNDER IRAQI LAW

Statement before the House Committee on Foreign Affairs,
Subcommittee on International Organizations, Human Rights, and Oversight

Issam Michael Saliba
Senior Foreign Law Specialist, Law Library of Congress

November 19, 2008

Chairman Delahunt, Ranking Member Rohrabacher, and distinguished members of the Committee:

It is an honor and a privilege to be asked to provide your Committee with my testimony on how international agreements and treaties are to be approved under Iraqi law and what parliamentary majority is needed for the ratification of such treaties and agreements.

Based on my review of the applicable law, it is my opinion that unless there is a law providing otherwise, international agreements and treaties negotiated by the Iraqi Government need a two-thirds majority of all members of Parliament for ratification.

The 2005 Constitution presently in force in Iraq contains three articles relevant to the process of negotiating, signing, and ratifying international agreements and treaties.

Under Article 80, Section 6, the Council of Ministers or its designee has the authority to negotiate and sign international agreements and treaties.[1]

Article 73, Section 2, requires international treaties and agreements to be ratified by the Council of Representatives or Parliament and confirmed by the President of the Republic.[2]

Article 61, Section 4, gives a majority, consisting of two-thirds of all members of Parliament, the authority to enact a law regulating the approval process of international agreements and treaties.

This law might, for example, provide that, for the ratification of certain types of agreements, such as those executed for a term of one year or less, a simple majority vote of Parliament will be sufficient for their ratification.

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[1] Art. 80 of the 2005 Constitution, as published in the Iraqi official gazette, Issue No. 4012 of December 28, 2005 (Constitution), reads in part as follows: "The Council of Ministers exercises the following authorities ... sixth: negotiation and signing of international agreements and treaties directly or through a designee." (Translation by the author.)

[2] Art. 70 of the Constitution reads in part as follows: "The President of the Republic assumes the following authorities: ...second: confirmation of international agreements and treaties after ratification by Parliament, and they are considered confirmed after the passage of fifteen days from the date they were received." (Translation by the author.)

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In the absence of an approval law so providing, there is no legal basis for a simple majority vote of Parliament to ratify any international agreements or treaties.

But how would an agreement negotiated by the Government be ratified if no approval law was enacted pursuant to Article 61, Section 4 of the Constitution?

In this situation the two-thirds majority of all members of Parliament that has the authority to enact the approval law certainly has also the authority to ratify a specific treaty or agreement.

The Iraqi Parliament has not yet, as far as can be determined, enacted the approval law provided for in Article 61, Section 4, of the Constitution. Therefore, it is logical to conclude that the ratification of an agreement negotiated by the Iraqi government needs a two-thirds majority of all members of Parliament for its ratification.

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Mr. DELAHUNT. His statement reaffirms his testimony last December about the need for a two-thirds vote for approval by the Iraqi Parliament for the security agreement to take effect.

And I also would note for the record that as much as we respect Mr. Saliba's work, it is perhaps more important that his position is shared by the Speaker of the Iraqi Parliament, Dr. Mashhadani, who said on August 31st of this year that the Iraqi Constitution determines that the Council of Representatives, which is the Iraqi Parliament, must first enact a law to ratify the law of treaties and agreements. It must vote or pass this law through Parliament by a two-thirds majority. This law will take a long time to pass due to the two-thirds requirement, so it will be not be enacted before the end of year. We are constitutionally barred from ratifying any agreements without the enactment of this law, and the law has not been enacted so far.

By the way, the ratification law referred to by the Iraqi Speaker was introduced this past Monday. And it too, as I indicated, sets a standard of a two-thirds vote for the approval of this particular agreement.

Raed Jarrar will follow Professor Hathaway. He is an Iraqi architect; he is a consultant on Iraq at the American Friends Service Committee. But that introduction doesn't do him justice. He has certainly been invaluable in our efforts.

Tom Donnelly is a new friend with talents that we hope to exploit, and he is a resident fellow in defense and national security studies at the American Enterprise Institute. He has been writing about our making U.S. military policy for three decades, is the author of numerous books, too numerous to enumerate. He recently coauthored a report with Fred Kagan, the godfather of the search strategy in Iraq, on the future of United States ground forces. So welcome, Mr. Donnelly.

Our final witness will, appropriately, be the Nation's leading authority on the operations of precedence of the United Nations Security Council; he actually wrote the book about halfway through. It is not night-time reading, but it is certainly informative. Current George Washington University law professor, Mike Matheson. Welcome back.

And, again, thank you for all your time and your expertise.

And let's begin with Professor Hathaway.

STATEMENT OF OONA A. HATHAWAY, ESQ., PROFESSOR OF LAW, BERKELEY LAW, UNIVERSITY OF CALIFORNIA BERKELEY

Ms. HATHAWAY. Thank you. Thank you to the subcommittee and especially to Chairman Delahunt for having me here again today to talk about the proposed agreement between the United States and Iraq.

I will focus my remarks on what I believe are the three most pressing legal issues regarding the proposed bilateral agreement with Iraq. There are, of course, many others I am happy to talk about. And then I will conclude by outlining what I think are the possible ways forward of addressing these concerns.

Before I do, let me address Representative Woolsey's questions off the bat, so you get them answered and you can follow up if you

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have any others. I think your first question is very pressing; this question of what about the other countries who are there with us, are they covered? And the answer is they are not covered by this agreement. You are absolutely right about that. They are free, of course, to conclude their own bilateral agreements, but this is a significant difference between the bilateral agreement and the U.N. mandate, because, of course, the U.N. mandate does cover all the multinational forces. It gives immunity to all of them, not just U.S. forces, and it provides for all of the rules that apply to the United States forces apply to all the multinational forces under the U.N. mandate. That is not true of the SOFA agreement or the proposed bilateral agreement. And the only provisions on construction in the agreement that I am aware of are about construction on military bases, not civilian construction, which I understand to be your question.

So let me turn to the three, what I believe are the three most pressing legal issues surrounding this agreement. First, the agreement in my view threatens to undermine the constitutional powers of President-elect Obama as Commander in Chief, and does so in two ways. So, first, this agreement gives operational control to a joint military operations coordination committee, which is made up of Iraqis and Americans and is jointly lead by both sides, according to the agreement.

The provisions on this are relatively unclear, but it appears to be the case that American commanders in the field who want to engage in military operation must receive approval of this joint committee in order to engage in military activities, the only exception being the ability to engage in self-defense without getting prior approval. But it appears from the agreement that all other military operations must be approved by this joint committee.

Now, this is quite unprecedented. Whatever you think of the merits, it is extremely unusual. In fact, as far as I am aware, there is no prior example of this kind of handing over command control to foreign forces or foreign governments except in narrow circumstances where an agreement has been reached that has been approved by Congress. So there have been instances where, of course, we give foreign control over some troops in peacekeeping operations, but those are always in the context of agreements approved by the United States Congress. Never has a President unilaterally handed over control.

The proposed agreement also undermines the constitutional powers of President-elect Obama as Commander in Chief by binding him to observe specific timetables that are outlined in the agreement for the withdrawal of U.S. troops. Here the specifics of the timetables are fairly clear. It is 16 months for withdrawal from the cities, towns and villages, and 3 years for withdrawal from Iraq.

What is uncertain is what President-elect Obama would have to do if he wanted to withdraw early. There are two different texts that we are working with. One is the translation of the Arabic language text which has been, as Chairman Delahunt said, made available by the Iraqi Government. That text says the following. It says:

> "The United States recognizes Iraq's sovereign right to request a U.S. forces withdrawal from Iraq at any time. The Iraqi Gov-

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ernment recognizes the United States' sovereign right to request a United States forces withdrawal from Iraq at any time."

So the language here seems to me to suggest the United States can request the right to withdraw but cannot simply withdraw early. And if that is in fact what the agreement says, then that creates serious concerns because, of course, President-elect Obama campaigned on a promise of withdrawing forces much earlier than 3 years, and this would seem to require him to get the approval of the Iraqi Government in order to actually carry out that promise.

Now, the English language version which I just received last night states what seems to be quite different. It states the following: "The Government of Iraq recognizes the sovereign right of the United States to withdraw the United States forces from Iraq at any time." So that seems to give much more leeway to the President to withdraw our troops earlier; so, of course, if conditions on the ground turn out to make it difficult or impossible or unsafe to withdraw troops earlier than 3 years, he would have to obtain the approval of the Iraqi Government in order to keep troops in the country longer. In any case, this raises, obviously, concerns about which of these texts we should be believing and whether they in fact say the same thing.

The basic concern I have here is that this agreement commits the President to abide by timetables that he has had no role in shaping, and may even make it more difficult for him to meet his campaign promise of bringing troops home within 16 to 18 months.

Second, the conclusion of this agreement without any congressional involvement is unprecedented and in my view unconstitutional. So Presidents can enter into agreements on their own—they are called sole executive agreements—but these agreements must be within the President's own independent powers. This agreement goes far beyond the President's own independent constitutional powers in several ways.

Now, the administration has responded to this critique in the past by saying this is simply a Status of Forces Agreement (SOFA). We have got hundreds, we have more than a hundred of these around the world. All of these have been concluded as sole executive agreements, entered by the President by himself, so what are you so concerned about? And the answer is this is not a SOFA. This is in fact a much more comprehensive agreement than any Status of Forces Agreement that is out there. And it includes a variety of provisions that, as far as I am aware—and I have read about 60 to 80 of these agreements—have never been a part of any Status of Forces Agreement. In particular, the provisions granting authority to U.S. troops to engage in military operations; the grant of power over military operations to this joint committee that I mentioned earlier; and the specification of timetables for withdrawal of military forces. These are unprecedented in a standard Status of Forces Agreement, have never been part of a standard Status of Forces Agreement, and extend in my view far beyond what the President can do without obtaining congressional approval.

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The administration has also suggested that the agreement doesn't really grant authority to fight and therefore it does not need to be approved by Congress. In my view that is manifestly incorrect. This agreement's entire purpose is to grant the authority to fight. It is meant to replace the U.N. mandate. The U.N. mandate is the authority under which United States troops are currently present in Iraq, and the entire reason for the proposal of this agreement at this time is because that mandate is about to expire. And when it does, there will no longer be a legal authority for the United States troops to be present in Iraq. This agreement, in fact, gives that authority to fight, to replace the U.N. mandate. So to suggest that it doesn't do that, and therefore need not be approved by Congress, clearly is not correct.

The third pressing legal issue in my view is that if the administration proceeds as planned, the war will likely become illegal under United States law when the U.N. mandate expires on December 31st. At present, domestic legal authority for the war in Iraq is based on House Joint Resolution 114 which was passed in October 2002. The resolution authorizes the President to use the armed forces for two purposes: One, to defend the national security of the United States against the continuing threat posed by Iraq; and, two, to enforce all relevant United Nations Security Council resolutions regarding Iraq.

Let me take the second first. The second is in my view what is currently operative at this moment. There is a Security Council resolution in effect that is currently governing the presence of United States troops, and therefore it is the case that in fact we are there, the President may enforce all relevant United Nations Security Council resolutions regarding Iraq. And as long as that resolution is in effect, this domestic legal authority is also in effect. But when the mandate expires at the end of the year, as it is due to expire, that legal basis for the war in Iraq no longer exists.

So then we are left with the first part of the authorization to defend the national security of the United States against the continuing threat posed by Iraq. Now this was enacted, remember, in 2002 when Saddam Hussein was in power and we were hearing about threats of weapons of mass destruction. And so it was clear what the threat posed by Iraq was—it was posed by the Government of Iraq. Of course, that government has changed and those same threats to the United States do not exist. And in fact the bilateral agreement with Iraq recognizes this change. That agreement itself states that "the danger posed to the international peace and stability by the former Iraqi Government is now gone."

So this agreement, to my mind, says what we all know to be true, which is that the threat that this resolution was meant to address has been resolved and there no longer is this threat by the Government of Iraq against the United States. So once this mandate expires at the end of the year, if it is not renewed, then legal authority for the war in Iraq, as a matter of United States law, no longer exists.

So what do we do? And this is where I am going to end. There are in my view two legal options available. The first, as Chairman Delahunt mentioned, is renewal of the U.N. mandate. A simple renewal of the mandate for a period of 6 months would address all

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of these problems. It would give legal authority as a matter of international law for U.S. troops to be present. But it would also extend authority as a matter of U.S. law, because the resolution that I just mentioned clearly incorporates any future Security Council resolutions and extensions of those resolutions. So that is very real and, I think, one of the best options available.

There is a second possible option as well, which is submitting this agreement to Congress for approval. If Congress were to approve this agreement, then all of these concerns would also be addressed. Then this would no longer be a sole executive agreement and the Congress would have had a chance to address, consider, and respond to the concerns that might be raised about the substance of the agreement. And if it chooses to approve that agreement, then these constitutional and legal concerns that I have raised would be addressed. Thank you.

[The prepared statement of Ms. Hathaway follows:]

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Statement of Professor Oona A. Hathaway,
University of California, Berkeley, School of Law

Before the House Committee on Foreign Affairs
Subcommittee on International Organizations, Human Rights, and Oversight

November 18, 2008

The U.S.-Iraq Bilateral Agreement: Constitutional and other Legal Concerns

I have been asked to review the key legal issues regarding the proposed bilateral agreement between the United States Iraq. Here are my central remaining concerns.

(1) The Agreement Undermines the Constitutional Powers of President-Elect Obama.

The proposed agreement undermines the constitutional powers of President-elect Obama as commander in chief in two ways. First, it gives operational control to a Joint Mlitary Operations Coodination Committee (JMOCC), made up of Iraqis and Americans and "jointly led by both sides." It appears from the text of the agreement approved by the Iraqi Cabinet (as translated from the Arabic) that American commanders in the field retain their power to act without advance approval of JMOCC only in cases of self-defense. This is unprecedented and is, in my view, unconstitutional in the absence of congressional approval. While American troops have been placed under foreign control in peacekeeping operations, this has occurred only under treaties approved by a majority of both houses of Congress or two-thirds of the Senate.

Second, the proposed agreement undermines the constitutional powers of President-elect Obama as commander-in-chief by binding him to observe timetables for the withdrawal of U.S. troops. Because the Administration has not released the official English text, I am working from an English translation of the Arabic text that is far from transparent. It states that "The U.S. recognizes Iraq's sovereign right to *request* a U.S. forces withdrawal from Iraq at anytime[sic]. The Iraqi government recognizes the United States' sovereign right to *request* a U.S. forces withdrawal from Iraq at anytime[sic]" (emphasis added). Moreover, the agreement provides that "Cancellation of this agreement requires a written notice provided one year in advance." From this language, it appears that President-elect Obama may "request" a change in the timetables, but that both sides must agree to it. In the absence of such an agreement, it appears that both sides are bound to continue abiding by the agreement for a minimum period of one year.

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(2) The Proposed Bilateral Agreement Raises Constitutional Concerns.

The Administration intends to conclude the agreement with Iraq as a "sole executive agreement," without seeking the approval of Congress or of the Senate. This agreement, however, includes commitments that reach far beyond any made in any prior sole executive agreement and move far beyond anything that is constitutionally permissible without the consent of Congress or the Senate.

Under the *Youngstown* framework, when the President "acts in absence of either a constitutional grant or denial of authority, he can only rely upon his own independent powers." If he exceeds these powers, he must obtain Congress's assent. In this case, that would mean seeking approval of the agreement either as a congressional-executive agreement (requiring the approval of a majority of both houses of Congress) or as an Article 2 treaty (requiring the approval of two-thirds of the Senate).

The Administration has asserted that the bilateral agreement with Iraq is simply a status of forces agreement (SOFA), more than a hundred of which have been concluded as sole executive agreements. That is incorrect. Although it has been called a SOFA, it includes provisions that haven never been a part of any prior SOFA—most notably, provisions granting the authority for U.S. troops to engage in military operations, the grant of power over military operations to a joint U.S.-Iraq Committee, and a specification of timetables for military operations. These commitments go beyond the President's own constitutional authority and must be approved by Congress.

The Administration has suggested that the agreement does not grant the authority to fight and therefore need not be approved by Congress. That is manifestly incorrect. The bilateral agreement is proposed precisely to replace the UN Mandate, which currently gives the multinational forces the authority to engage in military operations in Iraq. It can only replace the Mandate's grant of authority to engage in military operations in Iraq if, in fact, it grants the United States legal authority to engage in military operations in Iraq.

(3) Domestic Legal Authority to Engage in Military Operations in Iraq Will Expire on December 31, 2008.

Domestic legal authority to engage in military operations in Iraq expires on December 31, 2008. The bilateral agreement does not replace that authority unless it is approved by Congress. At present, domestic legal authority for the war in Iraq is based on H.J. Res. 114 (P.L. 107-423) (October 22, 2002).[1] The resolution authorizes the President to use the armed forces of the United States "as he determines to be necessary and appropriate in order to: (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq."

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[1] This is the central legal basis for continuing combat operations put forward by the Administration in a written response from Ambassador David M. Satterfield to Chairman Gary Ackerman on March 5, 2008, in response to a question posed at a hearing on March 4, 2008 before the Subcommittee on the Middle East and South Asia, Committee on Foreign Affairs, House of Representatives. This represents the most authoritative public statement of the Administration's position on the domestic legal authority for the continuing combat operations in Iraq.

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This authority will no longer be operative after December 31, 2008. On that date, the Security Council Resolution that governs the presence of the multinational force in Iraq ("the UN Mandate") expires. With it expires congressional authorization of the use of force under the second prong of H.J. Res. 114 quoted above.

The Administration appears to recognize this point, because it relies (through Ambassador David M. Satterfield) on the first prong of H.J. Res. 114, asserting that it continues to be operative after December 31. I disagree. H.J. Res. 114 was enacted when Saddam Hussein governed Iraq. The Resolution was clearly intended to authorize use of force to defend against a threat posed *by* Iraq—that is, by the Hussein-led government of Iraq. Indeed, the most recent draft of the bilateral agreement between the United States and Iraq supports this view. It states: "Recognizing the important and positive developments in Iraq, and keeping in mind that the situation in Iraq is fundamentally different from that time the Security Council adopted resolution number 661 (1990), especially that *the danger posed on the international peace and stability by the former Iraqi government is gone now*." (Iraq Agreement, Art. 26, cl. 3) (emphasis added).[2]

(4) Immunity Provisions in the Bilateral Agreement Expose Americans to Prosecution in Iraqi Courts.

The immunity provisions in the present agreement may expose private military contractors defending our diplomats to prosecution in the Iraqi courts for actions taken in the course of their employment. The proposed agreement provides in Article 12 that U.S. has "primary legal jurisdiction" over U.S. armed forces members and civilian members concerning issues that occur inside the installations and while they are on duty outside the installations. In other words, they are exempted from prosecution for criminal acts unless off duty and off base. Included within the definition of "civilian members" are "any civilian working for the U.S. Department of

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[2] Ambassador Satterfield alluded to two other legal bases for continuing combat operations in Iraq in his written response to the Subcommittee. First, Satterfield stated that: "Congress has authorized the President to use all necessary and appropriate force against nations, organizations, or persons involved in the September 11, 2001 attacks on the United States, 'in order to prevent any future acts of international terrorism against the United States" by those same entities." In support of the argument that this 2001 Resolution provides legal authority for continuing combat operations in Iraq, Satterfield noted that the President had made determinations on March 18, 2003 that military operations in Iraq were "'consistent with the United States and other countries continuing to take the necessary actions against international terrorists and terrorists organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.'" Once again, however, this reasoning is no longer accurate. No reasonable assessment of the present-day situation in Iraq can support the claim that continuing military operations are necessary to prevent future acts of terrorism against the United States *by the same entities* involved in the 2001 attacks. Second, Satterfield stated that, "In addition, Congress has repeatedly provided funding for the Iraq war, both in regular appropriations cycles and in supplemental appropriations." It is true that some scholars have advocated the view that appropriations bills can be interpreted as congressional approval for ongoing military operations. *See* John C. Yoo, *The Continuation of Politics by Other Means*, 84 CAL. L. REV. 167 (1996). Yet this is generally not regarded as the best reading of the applicable law. Notably, the Supreme Court has held that appropriations bills do not substitute for enactments except in very limited circumstances. The Court acknowledged that both substantive enactments and appropriations measures are "Acts of Congress," but explained that "the latter have the limited and specific purpose of providing funds for authorized programs." Tennessee Valley Authority v. Hill et al., 437 U.S. 153, 190 (1978).

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Defense." Excluded are civilians working for other departments, including the Department of State. Iraq has primary legal jurisdiction over these individuals, which the agreement labels "U.S. contractors."

This provision arises from a real and serious problem. Many of the non-DOD contractors are now beyond the jurisdiction of both U.S. and Iraqi courts. They are essentially operating within a no-law zone and are able to victimize not only Iraqis but fellow American contractors with impunity. In my view, however, subjecting these contractors to the nascent Iraqi criminal justice system is almost certainly not the best answer to this problem. Instead, Congress should be involved in devising an appropriate solution.

One possible solution would be to extend immunity to the contractors while at the same time extending extraterritorial jurisdiction of U.S. courts to non-DOD contractors working with U.S. forces in Iraq (presently extraterritorial jurisdiction applies only to civilians operating in direct support of the DOD). This could be accomplished through an amendment to the Military Extraterritorial Jurisdiction Act (such an amendment was proposed after the Blackwater incident). Another possible solution that has been discussed would be to allow contractors to be prosecuted under the Uniform Code of Military Justice (the court martial system), though this may be found to be inconsistent with the Supreme Court's ruling in *Reid v. Covert*.

(5) It is in the U.S. Self-Interest to Ensure that Iraq Follows its Constitutional Rules.

The Iraqi Constitution requires that in order for an international agreement to be implemented, the agreement must receive a vote of approval by the Iraqi Cabinet and Parliament. It is in U.S. interests to ensure that these rules are followed in the approval of the bilateral agreement between the United States and Iraq. Were an agreement to be concluded in contravention of the Iraqi Constitution, it would be possible for the Iraqi government to disavow that agreement at a later point in time. That would leave U.S. troops without necessary minimum legal protections. Moreover, a central stated aim of the war in Iraq is to encourage democratic governance in the country. It would therefore be counterproductive to recognize an agreement approved by the Iraqi government in contravention of the Iraqi Constitution.

(6) The English Text Must Be Released and Translation Concerns Resolved.

The full text of the agreement in English should be released to the public immediately, and any discrepancies between the Arabic and English texts must be resolved before the agreement is approved by the Iraqi Parliament. The Arabic language newspapers have published the proposed bilateral agreement. The U.S. government has not disputed the accuracy of the published text. Any claims that the agreement must remain secret are therefore rendered moot. It is also important that any remaining discrepancies between the Arabic and English texts of the proposed bilateral agreement be resolved. The administration has declared that the current text is "final" and the Arabic version has been submitted to the Iraqi Parliament for approval. If there are, in fact, discrepancies between the two versions, those discrepancies must be resolved immediately---at a minimum before the agreement is approved by the Iraqi Parliament. The text that is approved by Parliament will be the authoritative text under Iraqi law, regardless of any discrepancies between it and the English text.

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(7) The Best Way Forward: Extend the UN Mandate

The best legal option available at this point is renewal of the UN Mandate. Renewal of the mandate for a period of six months would give President-elect Obama an opportunity to craft his own agreement with Iraq and to win approval of that agreement from Congress. This approach would address all of the problems identified here. (It would be important, however, to act quickly to close the legal-immunity loophole identified at (4) above for non-DOD military contractors.)

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Mr. DELAHUNT. Thank you Professor.
Mr. Jarrar.

STATEMENT OF MR. RAED JARRAR, IRAQ CONSULTANT, MIDDLE EAST PEACE BUILDING PROGRAM, AMERICAN FRIENDS SERVICE COMMITTEE

Mr. JARRAR. Thank you, Chairman, for having me today. I will be speaking about procedural and legal aspects of the debates in Iraq more than the political ones. The political ones have been really confusing in the last few days. We saw how groups that have been working for at least the last 5 years to demand the U.S. withdrawal are the opponents of the agreement now, and how groups who have been asking the U.S. to stay for the last 5 years are the supporters of this agreement. So it is kind of confusing to have an agreement that is supposedly ending the occupation but then the roles inside Iraq.

Now, this confusion I think is based on a lot of skepticism from the Iraqi side, because many of the Iraqi parliamentarians and political leaders who I have talked to don't think there are enough guarantees in the agreement to implement this United States withdrawal, and they don't think that there is enough oversight. In fact, yesterday there was a form of small panic, I can call it, because the three names of the nominees to head this joint committee from the Iraqi side, the joint committee that will decide the future of the United States and Iraqi troops, the three names included the name of Ahmed Chalabi, the same person who took the United States into Iraq in the first place. Many people are saying this is full circle. They are saying it is full circle; the same person who started this mess will end up now getting charged.

Mr. DELAHUNT. That is cause for panic, Mr. Jarrar. I concur.

Mr. JARRAR. So there are many reasons to discuss about the content. Now, the issue that is really being discussed this week, now that the agreement has been sent to the Parliament on Monday and the first meeting of the agreement has been done, is that people are asking for more time. I have read a lot of statements of parties who don't necessarily have reservations about the agreement. They think the agreement sounds okay, but they want more time. They think that this agreement that will decide Iraq's future should not be discussed in a few days in the Parliament; it should be given at least a few months.

So that is why I think many people on the Iraqi side, many political leaders in the Iraqi Parliament, legislative branch or in the executive branch, have been talking about doing both; doing the extension of the United Nations mandate and discussing bilateral agreement with the United States that would end the U.S. occupation. So it is not either one, it is not choosing one option. But for the time being, I think the extension of the U.N. mandate would give some people enough time to discuss this.

Now let me talk about the procedural aspects. Mr. Chairman, you mentioned a lot of the details and quotes showing how in the last year, if not more, the discussion in Iraq has been going. I found quotes in the Iraqi public record, of the Parliament that goes back to March 2007, of discussions regarding this implementation

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law required to pass any agreements, not just the agreement with the United States.

Now, the implementation law, all of these discussions that have been happening in the last year and a half maybe, indicated that the constitutional requirement, which is a two-thirds majority of the Parliament, is required to pass this law of ratification was a clear understanding for all different sides, whatever their politics were.

Now this requirement of a two-thirds majority is actually both in the Iraqi Constitution in Article 61, paragraph 4, and in the Iraqi Parliament's Bylaws in Article 127. So it is a parliamentarian internal issue and an Iraqi constitutional issue.

Mr. Mashhadani, the head of the Parliament, has laid down the steps very clearly saying that first we have to pass this law required by the Constitution by a two-third majority; and then after this, we have to discuss the agreement with the U.S. and pass it by most likely another two-thirds majority of the Parliament—184. And this was confirmed by many of the important figures in the Parliament. For example, the head of the legal committee of the Parliament shares the same opinion with Mr. Mashhadani. Many of the other leaders in the Parliament who I have talked to shared this agreement.

Now what is surprising is that during the last few weeks the parties that are running the executive branch in Iraq came with a new argument. They say the agreement can pass; it can be ratified by a simple majority in the Parliament. I haven't heard this before, because all of the proposals for a law that ratifies a law that governs how international agreements are ratified suggested that any agreements that has to do with Iraq sovereignty, borders, or military aspects must get a two-thirds majority. There are other agreements that require a simple majority, like some cultural agreements or something, but no one has ever proposed to have a simple majority vote for this type of agreement.

Now many people think that the current new idea of just requiring a simple majority is politically motivated. The parties who have passed the agreement through the Iraqi Cabinet, through the executive branch, have been lobbying to pass this agreement through a simple majority in the Parliament because they don't control a supermajority in the Parliament. The five parties that are in the executive branch, all combined, have less than the quorum in the Parliament. So it seems like a politically-motivated legal opinion.

Now I think where we stand now, we have around 10 days until the Iraqi Parliament adjourns. The Iraqi Parliament will go on recess because of Muslim pilgrimage, the Haji, the big Muslim holiday.

From now until the Iraqi Parliament goes on recess or adjourns, we will have and we will understand the real opinion of the Parliament. Whether the head of the Parliament and the constitutional and legal communities will follow the constitutional and legal requirements or whether they will cave in under the political pressures; either way, I think what will happen is if the agreement did not get the needed vote, if it was rejected in the Parliament within the next 10 days, before the Parliament adjourns, or if they did not discuss it on the floor of the Parliament within the next 10

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days, that will make discussing it before the end of the year very, very hard.

We should not forget that the Iraqi Ambassador to the United Nations was asked by the New York Times earlier this month about his opinion regarding the renewal of the U.N. mandate. And he said something to the effect that it is a good Plan B in case we didn't agree on the agreement. But, he said, it required a couple of weeks to discuss it in the United Nations Security Council. So I think if the agreement does not pass within the next 10 days, if the Iraqi Parliament adjourns without passing the agreement, rejecting all without passing the agreement, I think the alternative plan, Plan B, is very clear to everyone, which is an extension of the mandate.

Now all of the major leader groups in the Parliament who control the majority of the Parliament, whether they were Sunnis or Shiites, seculars or Christians, or from other backgrounds—I have talked to most of them, Mr. Chairman, you invited a lot of them here to the subcommittee to give their testimony—and I don't think any of them think of the United Nations mandate extension as a strategic solution for what is happening in Iraq. But now they think about it as a good solution that will keep Iraq's assets protected and will give enough time for both sides, the Iraqi and American side, to reach an agreement that will end the United States presence in Iraq completely.

So I don't know of any Iraqi groups who have said on the record, or off the record during less public meetings, that they oppose the U.N. mandate as an alternative to signing this long-term agreement. I think many people view it as the lesser of two evils at this point. Instead of signing a long-term agreement that will tie the hands of the next Iraqi administration or the next United States administration, let us have an alternative agreement that will give both sides some time.

I will stop here and am more than happy to answer your questions after that.

[The prepared statement of Mr. Jarrar follows:]

PREPARED STATEMENT OF MR. RAED JARRAR, IRAQ CONSULTANT, MIDDLE EAST PEACE BUILDING PROGRAM, AMERICAN FRIENDS SERVICE COMMITTEE

Mr. Chairman, Ranking Member, and other distinguished members of the committee, thank you for inviting me to appear before you today.

I want to begin my testimony today with a brief overview of the political and legal frameworks that are important to understanding the current developments in Iraq. According to article 47 of the Iraqi constitution, the federal government consists of the legislative, executive and judicial branches. Articles 48 and 66 specify that the legislative branch consists of the Council of Representatives and the Federation Council, and the Executive branch consists of the President of the Republic and the Council of Ministers.

The Council of Representatives (parliament) consists of 275 members. The Federation Council has not been formed yet, leaving the Iraqi Council of Representatives as the only entity in the government which has been directly elected by the Iraqi people. The Council of Ministers (cabinet) originally had 40 members, which consisted of the Prime Minster and his two deputies along with 37 ministers. The Council of the Presidency includes the President of the Republic with his two deputies.

The attached diagram (see Appendix I) shows all of the major groups represented in the Iraqi Council of Representatives. Large circles indicate the original sectarian-based coalitions that Iraqis voted for during the elections. The vertical line in the

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middle reflects the current political alignment. As you can see, these alignments are not based along sectarian or ethnic divisions.

Parties on the left side of the diagram control the minority within the Council of Representatives, but are the only parties represented in the Executive branch. Parties on the right side of the diagram control a very slight but certain majority in the Council of Representatives, but are not represented in the executive branch (neither in the presidency nor in the cabinet).

Parties in control of the Executive Branch have a significantly different sociopolitical agenda than parties in control of the Council of Representatives. The two branches have been working at cross purposes and on opposing agendas, thus giving the impression that the Iraqi government is at a standstill. Beneath the surface of this standstill the Iraqi government is in a state of constant confrontation. For example, the two branches are trying to promote different types of federal systems to be implemented in Iraq. The Executive branch supports the creation of 3 regional federations that are sectarian and ethnic based, while the legislative branch prefers a federalism that more closely resembles the system in the United States: namely, a geographic, not demographic, federation with one strong central government. Another cause of conflict between the two governmental branches is the issue of the administration of natural resources. The Executive branch passed a new Oil and Gas Law last year, but the law was rejected by the parliament on grounds that it was a threat to the county's territorial integrity, sovereignty, and financial resources.

I appreciate the opportunity you have given me today to testify about another key factor in the conflict between the legislative and executive branches: namely, the issue of the U.S. military presence in Iraq and the debate over the U.S.-Iraqi agreement.

I have been following this matter closely through the Iraqi local media, the Iraqi government's official statements, and through my direct contact with numerous Iraqi leaders in both the executive and legislative branches since November 2007 when President Bush and PM Al-Maliki signed a declaration of principals for the current agreement. The declaration of principles sparked a national public debate in Iraq, both among the public and government officials. The debate inside the Iraqi government has focused on both the political and legal aspects of signing the agreement, but I will focus today on the legal and procedural aspects of it.

Legally, the Iraqi Council of Representatives has not yet issued a law required to regulate the ratification of any international treaties and conventions. Article 61, paragraph IV of the Iraqi Constitution and article 127 of the Iraqi Council of Representatives' bi-laws indicate that "a law shall regulate the ratification of international treaties and agreements by a two-thirds majority of the members of the Council of Representatives". The Iraqi council of representatives has yet to pass this law.

A debate over this required law has been taking place for over a year. For example, the Minister of State for Parliamentary Affairs proposed in session 3 held on the fourteenth of March 2007: "We will propose a law to your council and define three types of treaties: some treaties will require a two-thirds majority in case they related to issues of sovereignty, borders and or any other Strategic issues related to the national interest of the State; other treaties with specified importance will require an absolute majority, and there will be cultural and other treaties that are not important, they will need a simple majority as it exists in the law of treaties". Other members of parliament proposed adopting the old Law of Treaties (No. 111) of 1979 which stipulates that the ratification of international agreements and treaties usually require only a simple majority, but they require a 2/3 majority in cases related to issues of sovereignty and territory.

But despite the request sent by the House Speaker Mahmoud al-Mashhadani at session 20 held on the 30th of October 2007 to Iraq's "Foreign Relations Committee in cooperation with the Legal Committee to enact the Law of International Treaties and Conventions as soon as possible and submit to the Presidency of the House of Representatives," the actual procedures just started this week.

During the last months of debate, there has been one clear understanding of the requirements needed to pass the U.S. Iraqi agreement. I will quote the President of the Iraqi Parliament, Dr. Mahmoud Al-Mashhadani, during an interview he had with al-Arabiya TV on August 31st 2008. Here is Dr. Al-Mashhadani answering a question about the requirements:

Dr. Mahmoud Al-Mashhadani: the Iraqi constitution determines that the House of Representatives must first enact a law to ratify the Law of Treaties and Agreements, and must vote or pass this law through parliament by two-thirds majority. So before discussing the treaty we must enact this law by two thirds, and then submit it to the Presidency for ratifying it, and then it will go into effect. As before this law noth-

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ing can be done because the parliament is not ready yet, according to the constitution, to ratify this agreement. It can only do so after the enactment of this law. This law will take a long time to pass due to the two-thirds requirement, so it will not be enacted before the end of this year.

Dr. Mahmoud Al-Mashhadani: We are constitutionally barred from ratifying any agreements without the enactment of this law and the law has not been enacted so far. After enactment of this law we may introduce the agreement and then it must be ratified by whatever majority is decided by the law: it might be an absolute majority or it might be two-thirds majority for important international agreements and an absolute majority for economic accords. The intention now is that important international agreements will require two-thirds majority, and economic agreements an absolute majority, and perhaps other charters and accords are by simple majority. So, whatever is included in the law and approved by the parliament.

Dr. Mahmoud Al-Mashhadani: the negotiating team is not authorized to make any decision until they go back to Mr. Prime Minister, if he approves it he will send it to the Political Council for National Security, if approved by the Political Council for National Security with two thirds majority, then they can send it to the parliament. The parliament must wait until it enacts the law to ratify international treaties and agreements, then we can submit the US-Iraqi agreement to the parliament after the approval of this law.

Surprisingly, a new argument has been made in the last few weeks that passing the law only requires a simple majority, and does not require the passage of the law indicated in article 61 paragraph IV. Most of the ruling parties in the executive branch are supporting this new argument now.

This Monday, November 18, 2008, the Iraqi executive branch approved the agreement and sent it to the parliament, but Dr. Al-Mashhadani seemed to be following what he has described as the legal requirement rather than accepting the new suggestion that the law require only a simple majority to pass. Forty three members of parliament submitted a law proposal to the parliament presidency, and they were permitted to perform the First Reading in the parliament this Monday. This took place at the same session the First Reading of the U.S. Iraqi agreement took place.

If a simple majority is chosen as a requirement, there is a slim possibility for the agreement to pass, but if the 2/3 majority requirement is kept, the possibilities for the agreement to pass are closer to impossible.

If the agreement was rejected or did not pass during the next 10 days or so, the Iraqi parliament will go on recess for the Islamic Pilgrimage "Al-hajj" until mid December. In that case, it seems like there is only one "plan b" that has been discussed by the Iraqi leaders, including the Iraqi foreign minister and the Iraqi ambassador to the UN. This Plan B is requesting a renewal of the UN mandate for another year.

While renewal of the UN mandate met strong opposition by the majority of Iraqi members of parliament in the past, their resistance was not to the UN mandate per se. Their opposition was generally based on a rejection of what was viewed as a mechanism to ensure an open-ended mandate to keep the Multi National Forces in Iraq indefinitely. For example, the Majority of Iraq's MPs demanded that the mandate should include a timetable for all MNF troops' withdrawal so that it will become a "reason to end the occupation rather than prolonging it".

This year, the dynamic is different. Many Iraqi groups are now asking for a renewal of the same UN mandate they have been opposing for years, mainly because they see it as a vehicle to oppose the bi-lateral agreement with the U.S. that might prolong the occupation even longer from their point of view. The renewal of the UN mandate is seen now as the lesser of two evils, but not as a strategic goal. Many Iraqi groups in the parliament think it is better to give the parliament more time to debate the agreement rather than just rushing it within the next few weeks. These groups vary in their goals from those who want to wait until the next U.S. administration is in place, such as the secular Iraqi National list led by Dr. Ayad Allawi, or those who think an Iraqi public referendum is a better idea to pass the agreement like the Sunni Accord front, to those who want enough time to consider Iraq's options like the Shiite Al-Fadila party, or those who are against any agreement with the US like Al-Sadr group. Some of these groups might end up changing their position during the next few days if they concluded that the proposed U.S.-Iraqi agreement does fulfill their demands.

If the U.S. Iraqi agreement does not pass within the next 10 days or so, a UN mandate could be requested for one year, with a review after six months. This will keep Iraq's assets protected and give enough time to negotiate a final deal with the next administration.

Once again, thank you for allowing me this opportunity to share information about current internal dynamics of the Iraqi government in relation to the proposed agreement. I would be happy to address any questions you might have.

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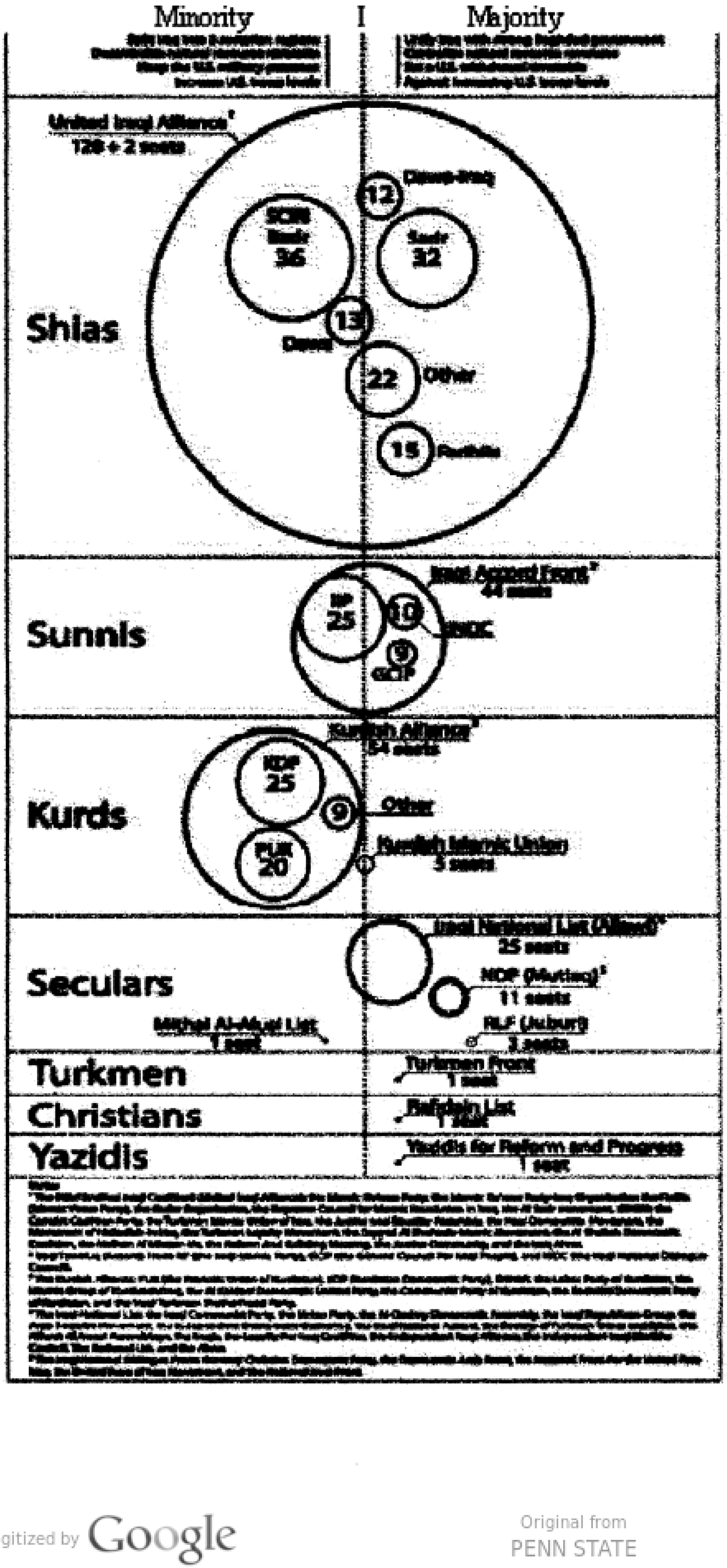
Appendix I



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Mr. DELAHUNT. Thank you, Mr. Jarrar.
Mr. Donnelly.

STATEMENT OF MR. THOMAS DONNELLY, RESIDENT FELLOW, AMERICAN ENTERPRISE INSTITUTE

Mr. DONNELLY. Thank you, Mr. Chairman. Thank you to the committee for inviting me to what has obviously been sort of a family gathering. I would add my commendations to the committee's work, whatever one's policy views are on Iraq. And as a former employee of the House of Representatives, I appreciate the role that you have played in ensuring the debate about these issues in the American public body is as thorough and as deep as it has been. So thank for having me.

I will not go through my entire prepared statement. I would like to build on a couple of issues raised by my colleagues here on the panel and stress the main points that my testimony highlights.

First of all, I think, as far as anyone can tell, the most likely outcome of events in Baghdad over the next week is that the agreement will be ratified by the Parliament. As my colleague said, the first reading has already happened. People expect the second reading very quickly, and then final passage, as he said, before the hot season break begins. So I think it is important not only to have a Plan B if for some reason this scenario does not play out, but to figure out what we will do if Plan A comes and how best to seize what I regard as a tremendous opportunity for both the United States and Iraq.

In that regard, I would particularly like to turn to one of the comments that Professor Hathaway made, again without getting into the legal niceties, but simply observing that there are conflicting legal opinions about the argument she made.

It would certainly be the case that if the U.S. Congress were to pass some enabling legislation that would remove the doubts about the legal status of American soldiers in Iraq, it would be, I submit, rather ironic if the Iraqi Parliament were able to act on this, but the American Congress were not.

Again, to return to the core point that I would like to make, I think this agreement, for its imperfections, is a huge step forward for both the United States and Iraq, not simply because of the prospect of the drawdown or withdrawal of American forces in Iraq, but because this is a prime measure of Iraqi sovereignty and what I think we all should begin to try to think about as a long-term, strategic partnership between a free Iraq and the United States, which is, after all, what we have all been sacrificing for and hoping for over the last couple of years; and we should try to seize this opportunity as fully as it presents itself.

I would just like to conclude with a couple of observations as to why I think this is such a critical moment.

First of all, it represents a tremendous change in Baghdad and inside Iraq. Again, who knows how the vote in the Iraqi Parliament goes, but it is certainly the case that really the only serious holdout block is likely to be the Sadrist block; and this will be, I think, another nail in the coffin of the Sadrist rejectionist project. That has been his power base. It has been eroding and collapsing and been

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dismantled by both the actions of the United States military and the Iraqi military over the past year.

Muqtada al-Sadr has been a large thorn in our sides—again, both the Iraqi side and the American side—for too long now; and to the degree that this represents a serious rejection on the part of the Iraqi Government of the Sadrist course of action or the Sadrist program, that is a very important development and one that bodes enormously well for the future political health of Iraq and, again, for our interests there. So that is certainly an important reason for us to try, as I say, to maximize the value of this.

Secondly, the acceptance of the agreement—and despite what I would accept as a puzzling statement by the Iranian Government, as they are sort of prone to making—a foolish consistency is not the hobgoblin of the Iranian political mind; let's put it that way. It is clear that the agreement is clearly a rejection on the part of the Iranian program of influence and meddling, and more than that, of violent intimidation and murder in Iraq. So, again, this is another critical step both for the Iraqis, but particularly for our regional security interests.

Our hope has been—and I think everybody agrees that it should be, going forward—that Iraq will be something of a bulwark and a partner against the dangers that Iran poses to our interests in the region, to our allies and friends in the region, in fact, to the interests of the world in the region. So not only is this an important agreement for limiting Iran's ability to make mischief in Iraq, but it is an important step forward in, again, Iraq's own self-image as a free and independent state, not sort of too much under the influence of Tehran.

Nobody expects that there won't be communication between Iraqis and Iranians that preexists all of the current events in Iraq; and we ought to, I think, also look at that as a potential for us to better shape the course of Iranian behavior in the future. We should not lose sight just by the struggles we have had over the last couple of years of what a free and representative government in Baghdad means, not only to us, but to others in the region.

So, it is a big defeat for Iran and, therefore, important for us to reinforce the legitimacy and the continuity of government in Baghdad.

I think it is also critical for ensuring that the upcoming elections in Iraq are conducted as smoothly and as legitimately as possible. Whether we believe that the Maliki government is our preferred partner going forward in Iraq, the process, the democratic process, in Iraq is critical; and for better or for worse, these will be elections conducted under the aegis of the Maliki government. So we have a larger agenda in reinforcing the democratic bona fides or the legitimacy of the government in Baghdad.

It is quite possible that things—you know, there is no guarantee that this will—again, it is ripe with opportunity, but it is also ripe for bad things and mischief to happen, and I believe it is important that the United States remain engaged as much as possible in helping to validate and legitimate the elections and the election process that is coming upon us next year.

As I said earlier, there are elements of the agreement, just speaking from a military perspective, that make me antsy. We

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have been asked before and have acceded to Iraqi requests to pull out of Iraqi cities, villages and towns. I would hope that that is not something that turns out to be a cover for the return of sort of ethnic cleansing on the part of the government.

So while American trainers and training teams will continue to be embedded in Iraqi units—and I believe the plan is to increase the size and capabilities of those units—that is something that we should be worried about.

Also, we have to remember that many elements of this agreement—and the agreement is as important for what it does not specify as what it does specify. It doesn't really cover anything that happens after the end of 2011. It is also an agreement that could easily be modified according to the desires of the United States, of the Obama administration, or of a change in circumstances in Iraq. So it is a snapshot in time. Again, I believe, on balance, it is a remarkably hopeful snapshot and one that, given the likely alternatives or possible alternatives, is one that we do better to embrace.

I do think that the question of command and control of American units is substantially different from what Professor Hathaway described. And certainly in speaking to United States operational commanders in Iraq, they expressed their reasonable satisfaction with the arrangements. This commission, as Professor Hathaway did say, is a highly undefined body, but certainly the opinion of our commanders on the ground is that this is something that we can make work to our advantage. It is a necessary compromise with the Iraqis, but it preserves American interests in the implementation of it.

Again, I would allow that that is something that is very difficult to discern from a distance what that means in practical, everyday terms, but I would say resist the temptation to try to be overly direct about that. We have to really put our trust in the folks on the ground. I am sure they will run up a distress flag if there are things that they don't like about it. So it is certainly something to watch, but it is not something that I would say at this juncture needs the application of a 9,000-mile screwdriver to improve.

Again, I would try, on balance, to be somewhat positive, but keep my powder dry about the value of this. I do think it would be useful for the United States Congress to end the uncertainties that may exist after the Iraqi Parliament ratifies that. I think that is something that this committee ought to think about because of your long engagement with this issue. It would certainly be something that would set President Obama's mind at ease, because he will soon be the Commander in Chief and responsible. And although the transition team in the Defense Department hasn't really said much about this, I am sure if you talk to those people, they would welcome help in this regard.

Now that Mr. Rohrabacher has returned, I would particularly like to take an extra 30 seconds to address his concerns.

It is true that the agreement does not specify any Iraqi cost-sharing program, not like, as you said, the arrangements that we have had in Japan. I think there are some ameliorating aspects that need to be taken into account.

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First of all, the most dear price that the Iraqis are paying is in the sacrifice of Iraqi lives; and this will continue to be more so the case as this process plays out. It will be much more Iraqi soldiers and—let's hope not, but likely so—Iraqi civilians who are the ones who pay the highest price for this continuing and developing partnership between the United States and Iraq.

I think our primary concern is that the Iraqis improve the execution of their own budgetary process so they can build their armed forces, which is largely being equipped with United States equipment, which is a hugely positive development from the viewpoint of the U.S. Armed Forces, both for current operations and for the future. So building an Iraqi armed force that is as compatible and simpatico with American forces is, I think, an important American security interest.

Secondly, and apropos of Ms. Woolsey's concerns about economic and social reconstruction in Iraq, that is particularly and rightly the concern of the Iraqi Government and will be the test, really, of the legitimacy of the Iraqi Government in the coming years. And I believe it is really critically in our interests to focus Iraqi Government budgetary execution issues on stabilizing their own society so that we don't have to be in a position of doing for the Iraqis not so much the fighting per se, because they are already taking a heavier role in that, but that Iraqis learn how to come together as a society and don't rely so much on Americans, not as occupiers, but as interlocutors between communities that have very little trust for one another. So, again, those may not be entirely apropos or directly satisfying of your desires.

I would like to conclude with one observation about China in this regard. I share many of your concerns, and certainly your large concern about the role of the People's Republic in the future, its military modernization and the potential danger that poses to us.

On the other hand, there are two things that are worth remembering. China's economic modernization and rise is a product of American international security guarantees. So American power, so to speak, has been the framework for China's rise.

The Chinese have now begun to try to hedge against that, and their support for the most noxious kinds of governments, as in Sudan or Zimbabwe, in their quest for natural resources and particularly energy resources, has been a problem not only because of the actions of their local proxies, so to speak, but because of the bad incentives that it provides for China to become a responsible stakeholder, using that term of art.

So I think it is much better to have Beijing invested in the stability and the future of an American-allied representative government in Baghdad than to be looking toward Khartoum or Robert Mugabe or Hugo Chavez as alternatives. Again, this is a glass that is not entirely full, but it is at least partially full. So I am going to give one-and-a-half cheers for the accords between the Iraqi Government and the Chinese. There are ways in which that works to our interest.

Thank you, Mr. Chairman. I apologize for going on so long.

[The prepared statement of Mr. Donnelly follows:]

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PREPARED STATEMENT OF MR. THOMAS DONNELLY, RESIDENT FELLOW, AMERICAN ENTERPRISE INSTITUTE

IRAQ, THE STATUS OF FORCES AGREEMENT AND AMERICAN INTERESTS

I would like to begin by thanking the Chairman and ranking Member for this opportunity to testify on an issue I believe to be critical to America's strategy and military force posture not only in Iraq but the broader Middle East.

Since the committee invited me to appear, there has been excellent news: the approval by the Iraqi cabinet of a strategic framework and status-of-forces agreement, defining the role of U.S. military in Iraq when their current UN mandate expires at the end of the year, represents a tremendous success for the United States and for a free Iraq. Word out of Baghdad is that the Iraqi parliament will ratify the agreement by the end of the month. If so, U.S. forces in Iraq will avoid the plague of legal uncertainty and will be free to continue their effective operations without having to worry about a potentially debilitating debate in the United States or at the United Nations. These developments also free me to talk about the larger issues and interests at stake.

To focus, as the media have done, on the timetable for withdrawal of American troops at the end of 2011, is to miss the forest for a single tree: agreements such as these define the relationships between nations that are strategic partners, based upon their sovereignty but recognizing shared geopolitical interests. Five and one-half years is a long time, and the United States has paid a high price in blood and treasure, but make no mistake, this is what we have been fighting for: an Iraq with an increasingly legitimate, effective and representative central government; an Iraq increasingly aligned with the United States instead of constantly at war with us; and a bulwark of strategic stability in a volatile region.

The agreement itself protects vital immediate and enduring U.S. interests in Iraq. To begin with, allowing the UN mandate to expire without at least a bridging arrangement permitting U.S. operations in Iraq to go forward would have been a disaster, risking the loss of the initiative so arduously won during the "surge season." And, as successful as U.S. operations have been and as marked as Iraqis' rejection of extremist elements has been—both in regard to al Qaeda and Sunni jihadis but also Iranian influence and Shi'ite militias—the situation remains fragile. The fundamental truth that everyone in Washington, Baghdad and the larger region know but rarely acknowledge publicly is that the surge represented, above all, a renewed American commitment to success in Iraq. This agreement is one of the fruits of that strategic decision.

Likewise, the agreement represents a serious setback for Iran. The Islamic Republic has lost and apparently still is losing influence in Iraq. The Tehran regime has been vehemently opposed to this agreement, strongly pressuring the Maliki government and portraying the negotiations as evidence of U.S. and Western neo-colonialism. When Prime Minister Maliki visited Tehran this past June, Iran's Supreme Leader Ayatollah Ali Khamenei lectured Maliki on the subject, and pressed the Iraqis for a "memorandum of understanding" on defense cooperation. Maliki has remained steadfast, and his position has been immensely strengthened since he launched Operation Knight's Charge in Basra last March, cleaning out Shi'ite militias and Iranian "special group" operators. Maliki clearly has the votes within the Shi'ite bloc in the Iraqi parliament—despite the fact that his *Dawa* party has itself only 15 votes in the 275-member body—as well as the Kurdish bloc, to ensure approval by the end of the month, when the Iraqi parliament adjourns for the *hajj* season.

Tehran also intensely lobbied and, reportedly, even bribed Iraqi politicians to oppose the agreement. More broadly, the Iranian government has been sponsoring an extensive propaganda campaign since last May, playing to Iraqi nationalism—although Iraqi nationalism more traditionally has a strong anti-Iranian flavor—and circulating rumors that Grand Ayatollah Ali al-Sistani, arguably the most revered figure in all of Shi'a Islam, opposed the pact. In early October Maliki visited the reclusive cleric in Najaf to discuss the agreement, and recently, an Iraqi parliamentary delegation returned this past weekend with what one of the ayatollahs' spokesmen described as a "green light" of support from Sistani, thus thoroughly undercutting Tehran's position. Ayatollah Sistani went further to say that a majority vote in the parliament would represent the will of the Iraqi people, a critical expression of support for the democratic process and additional embarrassment to Tehran.

Nearly as important, the agreement is a defeat for the firebrand Iraqi cleric Moqtada as Sadr, whose populist movement has been losing support for more than a year. While the Sadrist bloc in the Iraqi parliament continues to oppose the agreement, Sadr himself has been increasingly marginalized and, the combined U.S.-Iraqi

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operations in Baghdad's Sadr City slum have decimated the leadership cadres of Sadr's militia, the so-called Jaysh al-Mahdi, or "Mahdi Army." In sum, the Iraqi government has made remarkable strides in the wake of the American surge, even if these strides have been one a different timetable and come from different quarters than we anticipated 18 months ago.

Looking forward, there are reasons to hope for a continued transformation of the U.S.-Iraqi partnership. The upcoming Iraqi elections are nearly certain to bring to power a more responsive and representative group of legislators, especially from the Sunni community. This will also be critical to the successful implementation of the agreement, as in many ways it is the Sunnis who have most at stake in a continued U.S. engagement in Iraq. To repeat: stability in Iraq is fragile and the path of progress depends upon additional accommodation between Iraq's communities. Americans in Iraq have never been simple "occupiers;" our current and future role should be to serve as "interlocutors," the most trustworthy arbiters among people who have had little reason to trust each other.

And so, despite press coverage and political rhetoric in Iraq, I am less certain about what will happen at the end of 2011; the language about future U.S. presence in Iraq has been stricken from the agreement, but the potential need endures. The Iraqi government will not want to regard this framework agreement and any status-of-forces rules as a suicide pact. The Iraqi army well knows, and its leaders have often said, that its ability to sustain itself—operationally, logistically, administratively, personnel-wise, institutionally—is limited, and it is a real question whether it will be mature enough in three years' time to do without the partnering presence of U.S. forces. The Iraqi army is the most trusted institution of the new Iraqi state and we would be fools to take excessive risks in the service of an arbitrary timetable.

I hope the Obama Administration takes a similar approach: a campaign pledge in not a suicide pact, either. While it is impossible to know precisely what circumstances in Iraq or the region will be three years from now, it is certain that the United States will have important strategic interests in the Gulf and throughout the Islamic world. These interests predated 9/11 and go well beyond terrorism; we have been a party to the "Long War" for at least a generation and, arguably, since Franklin Roosevelt met Saudi King Abdul Aziz about an American warship in February 1945. As CIA Director Michael Hayden said last week, Iraq may no longer be—thanks to American and Iraqi efforts of the past 18 months—the "central front," but Iraq's critical importance to regional security is in no way diminished.

I would also hope this committee and the Congress will keep an open mind. Under Saddam Hussein, Iraq was the region's most constant menace; today, Iraq is arguably our most constant ally—though I would admit that, in this region, this is a lamentably low standard. Certainly the Iraqis have made immense sacrifices to create the prospect of a better future for themselves and we should not forget that. Dealing with the Maliki government and other Iraqi leaders is not easy and this agreement won't be an end to the challenges. At best, this marks the end of the beginning of a long-term strategic partnership with an Iraq where representative government has put down real roots. But it must not be the beginning of the end of America's engagement with and commitment to a free Iraq. There is a corollary to former Secretary of State Colin Powell's "Pottery Barn Rule." We broke it, and we've done much to fix it—we don't want to see it smashed to pieces again.

Thank you, and I look forward to your questions.

Mr. DELAHUNT. Well, thank you, Mr. Donnelly. I am sure that Professor Hathaway will comment later.

Before I go to Mike Matheson, I think that Professor Hathaway was referring to the constitutional issue, which would be the derogation of the responsibility of the President to foreign forces, as opposed—I don't think I have a disagreement with you in terms of the military policy, but I become very concerned about the erosion of constitutional powers, particularly of the first branch of government, the United States Congress. I think it is important that we continue that concern, even as we move into a Democratic administration, as we have experienced over the past 8 years. And my friend, Mr. Rohrabacher, has been critical of the erosion of legislative power, and we share that concern.

Professor Mike Matheson.

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

Mr. MATHESON. Thank you very much, Mr. Chairman, and thank you for your kind introduction, as usual. Forgive me if I appear a little hoarse today. I am at the end of a bad cold.

I have submitted a written statement. I was asked to review in that statement the possible options for the extension of the current mandate and status of U.S. forces in the event that it becomes not possible to bring into force a long-term agreement before the current U.N. mandate expires.

As you have pointed out, I think this is still an important and relevant question, notwithstanding the fact that the agreement has been signed this week, because of the considerable uncertainty that, I gather, exists as to whether the agreement can be brought into force, particularly with respect to Iraq during this period. So, just to start with a review of what is in that statement with respect to these possibilities: As we have said before, United States forces in Iraq are currently there as part of a multinational force that was authorized by the Security Council under Chapter 7 of the charter. That mandate has been periodically renewed, and the last renewal expires on December 31.

The status and the privileges and immunities of United States forces are still governed by CPA 17, which is the order given by the Coalition Provisional Authority during the occupation period, which is still in force because of the provisions of the Iraqi Constitution, which by its own terms expires when the U.N. mandate ends and U.N. forces withdraw. So, if the long-term agreement is not brought into force by December 31, then it would be important to find some other way in which U.S. forces will have adequate status and protections while the status of the long-term agreement is finally resolved.

Now, one obvious option for doing this—and it has been mentioned several times already—is for action by the Security Council to extend the current mandate. This could be done under either Chapter VI or Chapter VII of the charter. The basic difference between those two is that the council under Chapter VII can impose mandatory obligations on the state without necessarily having its consent, whereas under Chapter VI, the consent of the state is necessary.

To start with Chapter VII: As I have said before, I don't see any reason why the current mandate could not be acceptably renewed under Chapter VII. It would require a determination of a threat to the peace, but this would not necessarily mean that the council would find that the Iraqi Government was a threat, but rather that the situation was a threat because of threats by other elements.

If this was done, it would not only extend the current mandate of U.S. forces, it would extend the applicability of CPA 17 and the protections of the forces. I think it would also extend the 2002 congressional authorization with respect to the enforcement of Security Council decisions.

I don't see any reason why Iraq should take this as a derogation of its sovereignty, particularly if it is being done with Iraqi consent. There are many respects in which U.N. members are still subject

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to Chapter VI decisions, and I don't see that as a problem. However, I understand that there may be political objections to the use of Chapter VII at this point, in which case we could also consider Council action under Chapter VI. This would be based upon the request or consent of the Iraqi Government, but in the past there have been many military operations that have been authorized under Chapter VI, and some have involved rather robust military missions.

A Chapter VI resolution would not require a finding of the threat to the peace, and since it would expressly rest upon the consent of Iraq, there is no reason why Iraq should see any derogation of its sovereignty in that.

I think a Chapter VI action would have essentially the same operation consequences in the present circumstances as a Chapter VII extension would. The existing mandate and authority of the MNF forces would continue, this time as a result of Iraq consent. The status and the immunity of the forces would continue under CPA 17. The congressional authorization from 2002 would continue. So, in effect, it would have essentially the same consequences whether under Chapter VI or Chapter VII.

Now, these are not the only possible options for extending the current mandate and authority of United States forces in Iraq. You could have the two governments bilaterally entering into some kind of simple agreement which would extend the current mandate and protections. This could be done, for example, by a simple exchange of letters or by some other bilateral document.

This could raise questions as to whether there would then be a need for further legislative action, either in the United States system or in the Iraqi system. I think possibly such questions could be resolved if the council were to adopt a further resolution which would essentially give its blessing to this bilateral agreement and would approve extension of the mandate under the agreement. Then I think you could argue that both CPS 17 and the congressional authorization would continue under the rubric of enforcing a Council resolution.

Now, to the extent that any of these options involve action by the Security Council, obviously that is going to require advance planning and consultation. If such action were needed by December 31, I think it would be prudent to begin that process right away, if in fact it has not already started.

Presumably what will be required is extensive consultation both in New York and in capitals, particularly with Iraq, with the permanent members of the council, with the member of the council who will be president during the time the action is taken, and possibly with other members of the council to ensure broader support.

Under any of these options, I think the two governments would then have temporary breathing room to resolve the status of the final arrangements. They would also have time to take whatever legislative action they might consider to be appropriate in their respective domestic systems. U.S. forces would still have the necessary authority to operate, the necessary protection to operate. I see no reason why Iraq would consider there would be any derogation of its sovereignty in such a situation.

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Having said that, Mr. Chairman, as Professor Hathaway has said, we do have a text of an agreement which has been circulated on the Internet and which I have no idea whether it is actually the authentic text, but if it would be useful to you, there are a few issues I might point out about what is in that which may require further——

Mr. DELAHUNT. Please proceed.

Mr. MATHESON [continuing]. May require further clarification or confirmation from the administration, which you may want to seek.

First is Article 4, which has already been referred to, on the conduct of U.S. military operations. As I read the text I have here, the United States could engage in military operations in defense of United States forces without Iraqi permission, but otherwise, Iraqi permission would be required for military operations. And this would be subject to joint coordination.

Now, I am not surprised that Iraq asked for such a provision. Under international law, in fact, it is true that the United States could not conduct military operations in Iraq unless there were self-defense or authorization by the council or permission of Iraq. However, I think you may wish to ask military experts whether this arrangement adequately satisfies the operational military needs of United States forces under the current circumstances in Iraq.

Next, Article 12, which talks about criminal jurisdiction: Here, this text says that Iraq would have jurisdiction for what it calls grave, premeditated felonies if they occur outside the U.S. areas and if they occur by personnel who are off duty. The U.S. would have jurisdiction in other cases.

If I read this text correctly, the U.S. would decide when someone is off duty, but the question of what would constitute a grave, premeditated felony would be subject to jointly agreed procedures.

There are several practical questions you may want to ask about this. One is the extent to which the United States does, in fact, have confidence in the Iraqi judicial system to deal with offenses against U.S. military personnel, or alternatively, whether any such problems could be handled either through the joint procedures, which apparently are going to be negotiated, or possibly simply by restricting U.S. military personnel to their bases when they are not on official duty.

Article 22 deals with detentions and searches by the United States in Iraq. As I understand it, the United States could carry out searches during combat operations, but otherwise would require Iraqi permission. On the other hand, the United States could not detain Iraqis unless there was some kind of Iraqi decision. And I think you may wish to ask whether that, as an operational matter, is going to do the job for United States forces who might face a combat situation in which they need to detain someone temporarily without necessarily having prior Iraqi permission.

Article 24 deals with the withdrawal of U.S. forces. Of course, it does have a timetable by which they must withdraw or relocate to Iraqi cities. As I understand this provision, it does clearly say that the United States may leave at any time, including before these timetables. I do have a question about the provision that says that

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the United States is to withdraw forces into Iraqi cities by next June.

Mr. BERMAN. From Iraqi cities.

Mr. MATHESON. From Iraqi cities, I am sorry. And that is whether this would still permit the possibility of United States operation in those cities with Iraqi consent, notwithstanding the fact that U.S. forces are basically stationed in their own areas.

Articles 25 and 26 deal with the other aspects of the current Chapter VII regime for Iraq and the disposition of Iraqi assets. They seem to say that, as of December 31, the Iraqi status under Chapter VII ends and the United States will do what is necessary to achieve this by the end of December. I do have some questions about whether that is actually feasible. For example, ending the U.N. regime on compensation for Gulf War victims would presumably require some kind of negotiation between Iraq and Kuwait, who holds most of the outstanding claims; and I wonder if that is really possible by December 31.

Also it talks about the extension of the protection of Iraqi oil assets, which is currently done under Chapter VII, and I think would have to be done under Chapter VII, so I suspect there may be some respects in which the Chapter VII regime would be continued past December 31. Maybe that needs to be clarified.

Then Article 27 talks about security threats to Iraq, an important provision. As I read this, in the event there is an external or internal threat to the security of Iraq, the United States is required to engage in deliberations with Iraq and is required to take appropriate measures as it may agree upon. But as I understand this, the United States is not required to use its military forces if it doesn't agree to that. That is an important point which I think perhaps you will want to have clarified.

Those are just a few initial observations on this text which you may want to pursue. But at any rate, I thank you very much, and I would be happy to answer any questions.

[The prepared statement of Mr. Matheson follows:]

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

I have been asked to review the possible options for extension of the current mandate and status of U.S. forces in Iraq for some interim period in the event that a long-term agreement for this purpose is not brought into force by the time the current UN mandate expires at the end of December. Given the short time remaining in the current mandate and the uncertainty of the political situation in Iraq, it would seem to be prudent to be preparing now for that possible eventuality.

THE CURRENT MANDATE AND STATUS

As we have discussed in previous hearings before the Subcommittee on this subject, U.S. forces are currently present in Iraq as part of the Multinational Force (MNF) authorized by the UN Security Council under Chapter VII of the UN Charter. Security Council Resolution 1511 in October 2003 authorized the MNF "to take all necessary measures to contribute to the maintenance of security and stability in Iraq", which includes the use of force against terrorists and insurgent groups and the freedom of movement necessary to accomplish this mission.[1] This authorization

[1] This mandate has been elaborated and expanded by the Council from time to time. See, e.g., UN Security Council Resolution 1546 (2004) and the letters incorporated by reference in that resolution.

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and mandate has been periodically renewed by the Council, the latest extension continuing through December 31, 2008.[2]

The status, privileges and immunities of U.S. forces in Iraq are still governed by an order issued in June 2004 by the Coalition Provisional Authority as the occupying authority during the initial period of U.S. operations in Iraq. That order, known as Coalition Provisional Authority Number 17 (or CPA 17), grants immunity to all MNF personnel from Iraqi arrest and criminal jurisdiction, and regulates other matters usually covered by Status of Forces agreements (SOFAs), such as contracting, travel, taxes and fees. CPA 17 was continued in force beyond the end of the occupation by a provision of the Iraqi Constitution. However, by its own terms, CPA 17 will terminate when the UN mandate ends and MNF elements have left Iraq. At that point, if no further action were taken, U.S. forces would no longer have authority to operate in Iraq and would be subject to the full scope of Iraqi law, including the possibility of prosecution in Iraqi courts.

EXTENDING THE UN MANDATE

If a long-term agreement for the mandate and status of U.S. forces is not brought into force by the end of this year, then it would be necessary to find some other means to provide for their mandate and status for some interim period while the status of the agreement is resolved. This could be done by extension of the current mandate pursuant to action by the Security Council under either Chapter VI or Chapter VII of the UN Charter.

The basic difference between Chapters VI and VII is that under Chapter VII, the Council may impose measures on states that have obligatory legal force and therefore need not depend on the consent of the states involved. To do this, the Council must determine that the situation constitutes a threat or breach of the peace. In contrast, measures under Chapter VI do not have the same force, and military missions under Chapter VI would rest on consent by the state in question. Until now, Chapter VII has been used in the case of Iraq for various reasons, including the fact that it was initially necessary to use force and impose measures in the absence of Iraqi consent, and the need to adopt measures that would bind other states with respect to the disposition of Iraqi assets and other matters.

Action under Chapter VII. This option has been exercised by the Security Council on a number of occasions in the past with respect to forces in Iraq. By extending the current mandate and authority of the MNF, this would automatically continue the current status and immunities of U.S. forces under CPA 17, which remains in force "for the duration of the mandate authorizing the MNF under U.N. Security Council Resolutions 1511 and 1546 and any subsequent relevant resolutions."[3] It would also confirm the continuing applicability of the 2002 Congressional authorization for the presence of U.S. forces in Iraq, which authorized the President to use the armed forces to "defend the national security of the United States against the continuing threat posed by Iraq" and to "enforce all relevant United Nations Security Council resolutions regarding Iraq."[4]

It is true that at the time of the last extension, the Council declared that it would terminate the mandate whenever requested by Iraq, and Iraq advised the Council that it would not request a further extension.[5] However, Iraq could decide that a temporary extension for the purpose of allowing for the resolution of the long-term arrangements would be desirable, or the Council could decide on its own that such a temporary extension would be called for. In adopting such a resolution, the Council could take express notice of an Iraqi request for such an extension, as it has done in the past, and could expressly state that this would be only a temporary measure that would not affect Iraq's long-term status.

There is no reason in principle why this could not be done under Chapter VII. Such an extension need not amount to any derogation from Iraqi sovereignty or require a determination that the Iraqi Government is currently a threat to the peace. The Council could base its action on a finding that the *situation* in Iraq is a continuing threat to the peace because of the actions or threats of other elements inside or outside Iraq. Chapter VII has been applied in many countries without derogating from their sovereignty, and in fact all states (including the United States) currently have obligations under Chapter VII with respect to international terrorism and the proliferation of weapons of mass destruction to non-state entities. Iraq itself would

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[2] UN Security Council Resolution 1790 (2007).

[3] CPA 17, as revised, goes on to say that the MNF mandate "shall not terminate until the departure of the final element of the MNF from Iraq, unless rescinded or amended by legislation duly enacted and having the force of law."

[4] Authorization for the Use of Military Force Against Iraq Resolution of 2002, P.L. 107–243.

[5] UN Security Council Resolution 1790 (2007).

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continue to be subject to certain other aspects of the existing Chapter VII regime even after the expiration of the MNF mandate, such as the provisions for compensation for Gulf War victims from Iraqi oil export revenues,[6] and Iraq's obligations not to acquire weapons of mass destruction.[7]

The adoption of a further Chapter VII resolution could also have benefits to Iraq in that it could also be used to continue Council measures affecting other states that Iraq might find useful. Specifically, the current immunity from attachment of Iraqi petroleum products and the proceeds of their sale, which was continued in the same Council resolution that extended the MNF mandate, will expire on December 31, 2008, unless further extended by the Council.[8] This would have to be done under Chapter VII if it is to protect against attachment in other states.

Action under Chapter VI. If a Chapter VII extension is nonetheless thought to be undesirable for political reasons, the same results could be achieved in the current situation through a Council decision under Chapter VI, based on the request or consent of the Iraqi Government. To be sure, Chapter VII is the vehicle that has generally been used in recent years to authorize the robust use of force by multinational forces. Nonetheless, in the past, a number of peacekeeping and other military operations have been authorized by the Council under Chapter VI with the consent of the affected states.[9] This, for example, was the case with respect to a number of peacekeeping operations in the Middle East, South Asia and the Congo, sometimes involving robust military missions.

A Chapter VI resolution would not require any finding of a threat to the peace; and since the mission would rest expressly on the consent of Iraq, there would be no question of intrusion on Iraqi sovereignty. This could all be made abundantly clear in the text of the resolution and in communications to the Council by Iraq and the United States. It could also be useful to have a brief U.S.-Iraqi agreement or exchange confirming that the two governments had consented to the extension of the mandate and status of MNF forces.

Such an extension would in practice have essentially the same operative consequences as a Chapter VII resolution in the current circumstances in Iraq. The existing mandate and authority of U.S. forces within the MNF would continue, this time based on the consent of Iraq. The status and immunities of U.S. forces would continue under CPA 17, which continues to apply so long as the MNF authorization continues under Security Council resolutions, without regard to whether they are under Chapter VI or Chapter VII. Likewise, the provision in the 2002 Congressional resolution authorizing the use of U.S. forces to enforce all relevant Security Council resolutions, without regard to whether they are under Chapter VI or Chapter VII, would continue to apply.

Such a shift from Chapter VII to Chapter VI with respect to the MNF could well be seen in Iraq as a positive reaffirmation of the Iraqi desire to reassert its sovereignty and independent status and to avoid the appearance of a continuing international protectorate. The limited duration of such an interim extension would further emphasize that it is not aimed at the indefinite continuation of the current situation. It might also simplify matters for the Iraqi Government under its own law, since it would fall within the terms of CPA 17 that are already in force under the Iraqi Constitution, and hopefully would not require further action by the Iraqi Parliament. (As already noted, certain other aspects of the existing Chapter VII regime would continue, such as the provisions for compensation for Gulf War victims from Iraqi oil export revenues.)

I would stress, in passing, that I am not at all suggesting that the use of Chapter VII would be undesirable, or that it should be abandoned in other cases as the usual vehicle for authorization of military operations where the robust use of force may be necessary. Chapter VII authority is often necessary or desirable, particularly where the Council cannot be confident that it will continue to have consent for the operation, or where there is doubt about the authority or stability of the regime giving consent, or where there is some other reason to give binding legal effect to the measures adopted by the Council. However, this should not be a problem with respect to a temporary extension of the MNF mandate with the consent of Iraq.

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[6] UN Security Council Resolutions 687 (1991), par. 16–19; 1483 (2003).
[7] UN Security Council Resolutions 687 (1991), par. 7–14; 1762 (2007).
[8] UN Security Council Resolution 1790 (2007), par. 3; UN Security Council Resolution 1483 (2003), par. 22.
[9] *See, e.g.*, M. Matheson, *Council Unbound: The Growth of UN Decision Making on Conflict and Postconflict Issues after the Cold War* (U.S. Institute of Peace, 2006), Chapters 4–5.

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OTHER OPTIONS

The extension of the UN mandate is not the only possible option for ensuring that U.S. forces continue to have appropriate status and operational authority while the status of the long-term agreement is resolved. The two governments might conclude a simple agreement extending the current authority and status of MNF forces for a temporary period to allow the resolution of the long-term agreement, or they might agree on a modified version of the current arrangements to deal with specific Iraqi concerns, such as the current immunity of contractor personnel. This could be done by a simple exchange or notes or by any other bilateral document that conveys the agreement of the two governments.

This could, however, raise questions as to whether further legislative action would be needed under either U.S. or Iraqi law, which could complicate the conclusion of any temporary arrangement. This possible problem could be resolved by the adoption of a Security Council resolution confirming the arrangement and approving the extension of the current mandate. For purposes of Iraqi law, this would bring the arrangement within the existing authority of CPA 17; and for purposes of U.S. law, it would fall within the terms of the 2002 Congressional resolution. The Security Council could take such action under either Chapter VI or Chapter VII, with the same pros and cons as suggested above.

PROCEEDING IN THE SECURITY COUNCIL

The Council is, of course, composed of fifteen UN member states. (A list of the current membership is attached.) It is presided over by the country which is President of the Council at the time. The Presidency rotates monthly among the Council members in English alphabetical order. (For example, Costa Rica is currently President and Croatia will be President during December.) The Council meets at least every fourteen days, but will meet more frequently whenever requested by any member of the Council.

If any of the options described above are to be ready in time for December 31, it would be prudent to be planning for that purpose now, if in fact this is not already underway. In the case of action by the Security Council, this would include consultations both in New York and in capitals, particularly with Iraq, the other permanent members of the Council, and the member that will be President when action is to be taken. But it would of course be desirable to have consensus among the Council as a whole, which would suggest broader consultations among its members as well.

CONCLUSION

If a long-term agreement on the mandate and status of U.S. forces is not brought into force by the time the current UN mandate expires at the end of this year, some action will be necessary to protect U.S. forces and to ensure that they can continue their operations during the interim period that would be required to resolve the status of the long-term agreement. The method used in the past was an extension of the MNF mandate by the Security Council under Chapter VII, and there is in principle no reason why this could not be done again. But if this is not possible for political reasons, the same objectives could be reached through Chapter VI action of the Council, based on the consent of Iraq; or it could be done through an interim bilateral agreement, with confirmation by a further Council resolution. Any of these options could be carried out without the need for further action by Congress during this interim period, and hopefully the same would be true with respect to the Iraqi Parliament. This would provide breathing room for the two governments to reach a satisfactory long-term solution and to secure whatever legislative action may be needed or thought desirable under their respective domestic systems. This would particularly be important for the United States in view of the impending change of administrations. Planning on these options should begin promptly if in fact it is not already underway.

Attachment:

Current Membership of the Security Council

Belgium
Burkina Faso
China
Costa Rica
Croatia
France
Indonesia

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Italy
Libya
Panama
Russia
South Africa
United Kingdom
United States
Viet Nam

Mr. DELAHUNT. Thank you, Professor Matheson.

I am going to request that all of the individual members of the panel, if they can submit to the committee their observations about the substance of the text and concerns that they may have for our review. Of course, we are not sure that this is the authentic, official, English version that was executed by U.S. Government representatives. I think that is indeed unfortunate at this stage.

I am going to, if the gentlelady would forbear, the ranking member indicates that he will have to depart shortly, so if I could recognize, for his time for questions, Mr. Rohrabacher. Then we will proceed to Ms. Woolsey.

And then I should note that we are joined by the chairman of the full committee, Mr. Berman. We will look forward to his questions.

Mr. Rohrabacher.

Mr. ROHRABACHER. Thank you very much. I hope to get back in time to vote for a couple of the other leadership positions that I am missing right now.

Let me make very clear, Mr. Donnelly, that I have been a supporter of this, and I would continue supporting America's, how do you say, commitment to the Iraqi people, if indeed it is clear that the Iraqi people want us to have that commitment.

One indication of whether they want us to be committed there is whether or not they are willing to pick up the tab and start paying the price, both in blood, which their soldiers will do no matter whether we are there or not, but the military expenses that we have. And our blood that is being shed is something that very much should concern us in our decision-making.

We are a country that is deeply in debt. We have an enormous level of deficit spending right now. For us to borrow money from overseas in order to pay the expenses to offer protection for people who have the second largest, I think it is, petroleum reserve in the world and a massive treasury—when that is included in their assets, for us to borrow money from others and then to pay—have our children paying interest on that debt from now on is totally ridiculous. I mean, the word is either, you know, they pay or we go. We have reached that point. Either they are going to step up or we are going to step out.

I try to make it go right down to the very basics here. That is coming from someone who has supported the war effort.

And, as I say, if there is an indication through their judgments and their commitments that they want us there or want to be our partners and are fighting against radical Islam and want to have stability in that region against these, I would say, totalitarian forces that are in play in that part of the world, well, then we will be their partner. But we will not carry the full load, and we will not permit our own people to be exploited.

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Our job is to watch out for the interests of the American people, not the Iraqi people or not people all over the world. Otherwise, we would have gone into Burma a long time ago, if it was just to get rid of all the dictators. But we can be proud that we did go into Iraq and eliminated one of the worst, brutal dictators on the planet, and we gave the Iraqi people their chance.

Well, we have given them their chance. It is now time for them to step up, and if they don't, we again should not have any hesitation or feel bad about committing ourselves to step out. It is as simple as that.

Let me ask you some things about this agreement. I take it it does not have any payment within it, that they are going to pay the bill.

Mr. DONNELLY. That is right.

Mr. ROHRABACHER. Which is something I would note.

For the last year—and Mr. Berman will note this as well—for the last year I have been making it very clear that many of us on the Republican side would be demanding for our support for this agreement that it contain some sort of provision of having the Iraqis paying the bill for our military operation.

Mr. BERMAN. Will the gentleman yield?

Mr. ROHRABACHER. Certainly.

Mr. BERMAN. But no one is asking for our support for this proposal.

Mr. ROHRABACHER. Okay. No one is asking. We will discuss that later.

So their unwillingness at this point to step forward is an indication of what their just national desires are all about. The fact is—now, can someone tell me whether or not Status of Forces Agreements require permission of the host country for military action to take place, for military operations to take place? With our other Status of Forces Agreements, do the other countries demand that right?

Mr. MATHESON. Typically a Status of Forces Agreement doesn't address the authority to conduct military operations, but I think in normal situations a Status of Forces Agreement is that the sending country is not conducting combat operations in the host country—for example, Japan and Korea and so on—so that it wouldn't be surprising if it didn't go into that.

Mr. ROHRABACHER. Our Status of Forces Agreement with Korea, does it demand that the Korean Government preapprove of military operation in Korea?

Mr. MATHESON. I don't think there is any authorization for United States forces to conduct operations at all in Korea.

Mr. ROHRABACHER. Say that again.

Mr. MATHESON. I don't believe there is anything in the Status of Forces Agreement that authorizes United States military forces to conduct combat operations in Korea.

Mr. ROHRABACHER. Even in case of an invasion?

Mr. MATHESON. That would be handled separately between the two governments.

Ms. HATHAWAY. There is a treaty that governs the military operations. The typical arrangement is to have an Article 2 treaty approved by the Senate that authorizes the military relationship, and

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then the SOFA is a separate agreement concluded by the President that deals with the sort of day-to-day, how do we deliver the mail, do we have to pay taxes, that sort of thing. They are very minor issues.

It doesn't address these kinds of questions you are raising. Those are generally raised in a treaty approved by Congress.

Mr. ROHRABACHER. And in these other agreements, I know that there are provisions that indicate how American military personnel will be adjudicated if they are put in a situation where they are charged with some kind of crime or wrongdoing.

Now, in Japan, I think that we can say they have a fairly advanced judicial system and maybe a respectable judicial system, and I think in Korea perhaps they have a respected judiciary.

Is there anyone here who could raise their hand and tell me that they think that we could trust an honest adjudication and honest assessment of a criminal matter concerning an American soldier by the current Iraq judicial system? Does anyone agree with that at all?

I didn't think so.

Mr. JARRAR. It seems like the United States did trust the Iraqis to take the former President to court by the Iraqi judicial system. So I think dismissing the entire Iraqi judicial system that has been destroyed in the last few decades——

Mr. ROHRABACHER. Saddam Hussein didn't have a judicial system as well, and we are trying to build one up from ground zero. But in the middle of a conflict and certainly at ground zero, I think to put our American military personnel on the ground with an agreement that they are going to be tried in a judicial system that we cannot say would be fair is not watching out for the interests of our own people.

Yes, sir?

Mr. DONNELLY. Mr. Matheson's testimony, I think, went to this point, and I have not seen the official English version of this, but the agreement seems to be very consistent with the draft through, say, the middle of October. So it is not like this is not something that hasn't been in development.

There is a lot of—essentially, it would require us to agree both to the definition—of what fit the definition of a serious crime that would be under the jurisdiction of an Iraqi court. So we have what amounts to a veto. Both parties must agree that, yes, we agree that this is a crime rising to that level of seriousness. So the definition of the crime is a provision that gives, certainly in a practical sense, an immense amount of American power and control over what would happen.

If we were uncertain——

Mr. ROHRABACHER. It gives us an influence, but not a controlling influence?

Mr. DONNELLY. No. The way I read it, essentially we have a veto over it. We must agree essentially that the crime was committed under circumstances that would make it a reference to the Iraqi judicial system and that we would have essentially the ability to make a case-by-case disposition.

Mr. ROHRABACHER. Whereas my chairman is a former prosecutor, I will let him proceed.

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Mr. DELAHUNT. I think both Professor Hathaway and Professor Matheson might want to respond to your question.

Ms. HATHAWAY. Obviously, that is not how I read the agreement. As I read the agreement, it is true that there is going to be a list of certain premeditated crimes that will qualify under this provision, and that is something on which there is consultation. But as I read the agreement, there isn't an individual veto power of the U.S. over an individual prosecution. So if the Iraqis believe that they have someone who fits within the definition of the agreement, my reading of the agreement is that that person would be subject to jurisdiction of the Iraqi courts.

Mr. BERMAN. Would the gentleman yield on that to follow up one thing?

I assume you mean assuming that person is off duty.

Ms. HATHAWAY. Yes, that is right. So this is for U.S. military. They must be off duty and off base.

Mr. BERMAN. In which case, there is not a case-by-case. There is a crime-by-crime, but not a case-by-case veto.

Ms. HATHAWAY. Exactly. It is worth noting that it is off duty. But it is worth noting that military contractors who are not working for the Department of Defense, but who may be working for, say, the Department of State or maybe in that capacity perhaps protecting diplomats or visiting dignitaries or other kinds of similar actions, they are not protected. They are granted no immunities.

Mr. ROHRABACHER. Let me note here, and I know there is a difference of opinion on people like Blackwater. I happen to think they are very dedicated. Most of them are former—as a matter of fact, almost all of them are former U.S. military personnel who have greatly contributed to the security of this country and risked their lives on numerous occasions, who then volunteered, yes, to make money, but also to go back into combat to further the interests of our country.

This agreement is basically throwing them out on their own, which I think is despicable. Again, I think they have done a terrific job, not only in Iraq, but Afghanistan and elsewhere.

Again, I am going to end with just one other area of discussion, and then I will leave the details on this to my—yes, sir?

Mr. MATHESON. I was just going to say, I think there are two possible ways in which the United States might try and protect its personnel against any possible unfair actions in the Iraqi process. One is, evidently Iraq cannot start exercising this jurisdiction until there is agreement on some joint procedures, and I would imagine it would be interesting to ask the administration what kinds of protections it contemplates trying to write into those procedures to protect Americans.

Mr. DELAHUNT. I am going to interrupt you, Mr. Matheson, because I wanted it noted for the record that the subcommittee extended an invitation to the administration to come to this hearing and testify, and they declined that invitation. I think that is indeed unfortunate. I think their statement was that this is at a sensitive time.

I concur, it is at a very sensitive time for the United States forces, for the American public, and for the Iraqi public. I just want to make sure that gets into the record.

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I yield back.

Mr. ROHRABACHER. One last area—I am sorry?

Mr. MATHESON. I was just going to say, the other classical possibility is simply to begin to restrict the presence of U.S. military when they are off duty to their own bases, and it might be interesting to ask whether that will in any way degrade the ability of the U.S. forces to operate effectively.

Mr. ROHRABACHER. Thank you.

This one area I would like to mention, and Mr. Donnelly commented upon it when we were talking about this major oil deal that the Iraqis have signed with the Chinese. Just for the record, I think the United States faces a current enemy in radical Islam, and I think that we face a potential enemy—at the very least, an adversary with malice at its heart—in the Communist government that now rules Beijing.

Beijing's investment in Iraq is something that causes great dismay to me, considering how much we have put ourselves out and paid such a dear price in lives and in treasure. And they are—this gentlelady mentioned it would be better to have them there in Sudan or with Chavez. They are Sudan and Chavez.

The dictatorship in Beijing currently throws religious believers in jail. They are the greatest human rights abusers in the world. And they are taking advantage of our military operations in different parts of the world in order to enrich themselves, and we are letting them do it. We are permitting that debasement of the great sacrifice our people have made by letting a country like that, controlled by this vicious dictatorship, profiteer off of the situations that we have engaged in.

So I think that is just totally unacceptable. And I would hope that, again, the basic decisions that we make have to be what is in the interests of the people of the United States of America. And if the Iraqi people do not step forward at this time, it is not in our interests to stay in a country like Iraq unless those people want us there to help them defeat evil forces that threaten to overrun their own defenses. So, if they don't, it is time to go. I am proud that we gave them a chance anyway.

Thank you very much, Mr. Chairman. I am going to run back and vote in my leadership votes.

Mr. DELAHUNT. Thank you, Mr. Rohrabacher. We will be here eagerly awaiting those results.

With that, let me yield to the gentlelady from California, Ms. Woolsey.

Ms. WOOLSEY. Thank you, Mr. Chairman. You know, if I don't get anything out of this hearing, which I have gotten a lot out of, it is very clear to me that there are many different interpretations of what this treaty/agreement is. Whether it is a treaty or an agreement seems to be in question. The difference in the English and Arabic translation, it was like it was virtually two different documents. That is really not okay.

And when the gentleman from California, the Republican gentleman, speaks about evil, evil forces, well, what was the evil force that got us there in the first place in 2002? And why are we even thinking that that evil—it wasn't an evil force; it was a lie in the

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first place—but that we could envision or pretend that there is an evil threat going on right now to the United States of America?

So I think we have a lot of work to do. I think we need to put some light around this.

Yesterday Representatives Barbara Lee and Maxine Waters and I sent a letter to Speaker Pelosi requesting that the House take up legislation that would require any agreement with the Iraqi Government to come before the Congress for approval before it goes forward, because we are very concerned, I am very concerned, that this agreement may not be legal in the first place, may tie the hands of President-elect Obama, and may even put our troops and our military and our nonmilitary contractors in legal limbo.

Mr. DELAHUNT. Would my friend yield for a moment?

Ms. WOOLSEY. Yes, sir.

Mr. DELAHUNT. I am sure you are aware that both myself and Congresswoman DeLauro have also filed similar legislation. But I think much more importantly, prior to the break for the elections, I think it is worthy of note that Senator Clinton actually filed legislation that would require that an agreement of this order or magnitude be brought before the Congress for its approval; and it is my memory that Senator Obama, our President-elect, was a cosponsor of that legislation. I also understand that Senator Biden, now the Vice President-elect, concurred in that particular legislation.

But I think it is important to understand, Lynn, that we are not going to—the administration, and I want to ask Professor Hathaway at some point in time—somehow the administration has concluded that there is no need whatsoever to bring this agreement before the U.S. Congress for anything other than a courtesy.

So, with that, I yield back to my friend from California.

Ms. WOOLSEY. Well, thank you.

I am not going to repeat the question, because that is exactly what I would like to ask, particularly Professor Hathaway. What is the legal standing? Will an agreement/treaty have standing if it does not come before the House of Representatives or the Congress in general?

So that is my question.

Ms. HATHAWAY. Well, this is a complicated question, as you might imagine.

In my view, it would be unconstitutional, because it would extend beyond the President's power to conclude an agreement under his own independent powers; and for all the reasons we have discussed, it clearly goes beyond those limits. The question is: How would you challenge it; how would you demonstrate that? One possibility, obviously, is a resolution in Congress. Another is a challenge in the courts. That is unlikely to succeed.

So the likely result would be that we would be operating under an unconstitutional agreement. And what worries me is not only that, although that is quite worrisome in and of itself, but the precedent that sets. So we then set a precedent that the President can enter into an agreement to commit U.S. troops without having to get the assent of Congress; and moreover, that the limits we all thought applied to sole executive agreements, the limits that had been observed by Presidents for generations on agreements that

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are entered into by Presidents on their own, no longer apply. All bets are off.

So could President Obama enter Kyoto on his own? Could he enter the Law of the Sea Agreement on his own? If we don't know what the limits are, it creates real questions about where the constitutional limits are. If they are not going to be observed, then that creates problems not just in this instance, but in every future case as well.

Ms. WOOLSEY. So how do you think we can untangle this mess?

Ms. HATHAWAY. My view is, I think that this legislation is very positive. I think—if in fact something like that were to pass, demanding that Congress approve the agreement, I think that could have a significant effect.

As I said, that would in my view address all the legal questions that I have raised about the procedural issues. Congress could work out the substantive concerns, if it had any, about the agreement.

But if this agreement were approved by Congress, and there is nothing that would stop the President, I should say, from simply submitting this agreement as it is for approval as what is called an ex post congressional-executive agreement, that is a legal procedure that is available to the President; and then this Congress would be able to pass that through majority votes in both Houses, and then it would become a legal agreement with the seal of approval of Congress and would be Federal law and address all the concerns that I have raised.

So that, to my mind, is a very real and, I think, would be an extremely positive development, though sadly, I am afraid, not entirely realistic.

Another possibility is renewal of the U.N. mandate, because that does address both the international and domestic law issues that I have raised. In effect, that kicks the ball down the road, because then we still have the issue of then what do we do? That mandate would only be in effect for a short period of time. The period of time talked about is 6 months. You would have to enter an agreement then.

My hope would be that, given the stated position of the President-elect and Vice President-elect on this issue, that they would not only negotiate a good agreement, but would submit that to Congress for approval.

Ms. WOOLSEY. Right. And that would give us the light we are looking for.

Mr. Chairman, our letter is in support of yours and Congresswoman's DeLauro's intent.

Mr. DELAHUNT. Thank you, Lynn.

Now let me go to the chair of the full committee, the distinguished gentleman from California, Mr. Berman.

Mr. BERMAN. Say that with a straight face.

Mr. DELAHUNT. It was tough.

Mr. BERMAN. I thank the gentleman. Just on this last point, rather than get into if we are going to pursue politically futile avenues to produce something before January 1st—and by the way, is that a key date, or could action come after January 1st?

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Why doesn't it make more sense to take the agreement—and in a way, Mr. Donnelly sort of threw out this idea—authorize it and, in the context of doing it, seek to clarify certain interpretations, or perhaps reject specific provisions, or—perhaps even you could throw out Mr. Rohrabacher's notion—impose some additional conditions in terms of sharing burdens or things like this? Rather than go through a process of trying to legislate the requirement that the President must submit an agreement to us, get right to the notion of—would that not have the same legal effect as an approval? Would that have a legal impact, putting aside the question of the President's ability to veto and the questions of an override? And again January 1st becomes an interesting consideration on that issue.

Ms. HATHAWAY. So this raises some very difficult issues. Let me give you what I think is the answer.

My view is a non-anti-presidentialist view on international law. In fact, I think that——

Mr. BERMAN. Well, you raised Youngstown Steel, so that is a little anti-presidential.

Ms. HATHAWAY. Yes. Well, I think that is applicable law in this case.

So my view is that you cannot have an international agreement without the President agreeing to it; so that this Congress could not take that agreement, modify it, and declare that the agreement, without the President agreeing to that, to the agreement that Congress passes and certifying that as in fact the agreement that he——

Mr. BERMAN. But then we also could not mandate him to seek a U.N. authorization for an additional 6 months probably. That would be sort of anti-presidential.

Ms. HATHAWAY. Well, so it is a different—I actually disagree. I think you could—well, could you mandate? Probably not.

Could you declare that this Congress would not accept this sole executive agreement as a constitutional agreement and that this is the only acceptable way forward? Certainly you could do that.

Again, these are tough questions, but in my view, Congress cannot, without the President being on board, make international law. But it is an essential player; it has to approve those agreements, so Congress is absolutely necessary in this case. Congress absolutely must approve the agreement, in my view, in order for it to be constitutional.

Mr. BERMAN. Let's focus on that statement. I take your points about these other issues. I came in somewhat late. I didn't hear your testimony. I did quickly read your statement.

You have an interesting argument, because on the one hand this agreement inappropriately, if it isn't approved by Congress, restricts President-elect Obama's flexibility, and at the same time you argue that this gives the President powers that Congress appropriately has for itself. That is sort of your second argument. It both restricts his power and gives him too much power at the same time.

On the restrict side, you say this JMOCC, as you read it, provides an unprecedented authority to control U.S. forces. But what if it is interpreted as, No, no, this does not give the Iraqis any say

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on how United States forces are controlled; what it does is require an Iraqi role in seeing whether a particular operation is allowed? And if it is true and we all accept that Iraq could ask our forces to leave, and we would, then why can't they also be involved in the process which is a lesser authority, which is they have to sign off on a particular operation? And is it really unprecedented?

Ms. HATHAWAY. So the aspect of this that is unprecedented is the granting of authority to a foreign government to approve individual military operations under an agreement that is not approved by Congress, so under an agreement that is entered into by the President on his own.

Now, as everyone here has said, this language is incredibly vague, so we can only read it and do our best to interpret it. We don't have information from those who negotiated this as to what in fact they really mean this committee to do. There is no definition of the committee. There is no statement of who precisely makes up the committee, about what it means for "operations to approve." Does that mean individual operations? Does that mean operations in a particular area? We don't know, because the agreement is not clear on this.

But there is certainly the possible reading, and I think that the best reading is that, in fact, operations have to be approved by this committee, with the exception of actions in self-defense. So military actions that are purely in self-defense do not have to be approved by this committee.

Mr. BERMAN. What do you mean by "purely" and in whose eyes is something in self-defense?

Ms. HATHAWAY. Well, that is a good question; and there is no answer to those questions in this agreement.

It is striking, actually, though, that this agreement is long perhaps to read. It is incredibly short by international law standards. SOFAs often run 300 pages and this agreement is somewhere around 20 or less. So it is striking that these kinds of details that are so incredibly important are not specified. And so there are a lot of open questions which I gather the administration has declined to come and answer about what exactly this committee is supposed to do, what exactly is intended.

Mr. DELAHUNT. Professor, if you would yield.

I want to be clear. They are declining the invitation of this committee.

It is my understanding that later today there will be a classified briefing. My position is, I think the American people have a right to know the answers to these questions. Why not have the American people part of this discourse? Clearly, the Iraqi people and the Iraqi Government are having a rather robust go at it, and yet this democracy is doing it behind closed doors and in secret. I just think it is important to make that note.

I yield back.

Mr. BERMAN. There is something both bizarre and seems inappropriate about a text being disseminated to the Iraqi parliamentarians and people and we being told that we can't distribute the English language version of that same agreement. There is something strange about the Iraqi Parliament being asked to approve it before it operates. I guess you could have different constitutional

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views of different things, but it still seems inappropriate. But I am taking more time than I should.

I have a lot of questions, but the one last question I will ask: Let's take your second argument regarding the usurpation of the congressional role. I can't even remember how the Youngstown Steel decided to bring an action. Who has standing in this case to get a judicial determination of whether you are right in your second argument? Or is this a political question that will never get resolved?

Ms. HATHAWAY. Sir, I have read every case that has addressed these kinds of questions; and I think that the likelihood of the court resolving this question in time for it to be helpful is unlikely.

I think the courts are not the place to go for this. I think this body is the best body to address these issues. I think that there is no option other than to press, as you have and as you are in holding these hearings, the President to come to account, to tell us what agreement he has negotiated and to stand up for Congress' own powers in this case.

Because, again, if you relinquish those powers here, I think you are setting a precedent that scholars and practitioners will be citing for decades that suggests that the limit of sole executive agreements and what the President can do by himself are not what we thought they were. That, in fact, Presidents can commit U.S. troops, can put troops under foreign command, can commit to construction of military bases. It can give up immunity for U.S. citizens without having to even show the agreement to the American public or get the approval of Congress. I think that is a very worrisome precedent that this agreement could set.

Mr. BERMAN. Could I ask a final, final question, Mr. Chairman?

Mr. DELAHUNT. Mr. Chairman, you take all your time. Your questions are so incisive.

Mr. BERMAN. Your footnote on the administration's position as articulated by Mr. Satterfield has the authorization for the use of force expanded. The chairman has raised that issue a number of times as well. Tell me why it is defective to say that, even though that was a bogus reason for going into Iraq, the fight against terrorism, al-Qaeda or however you want to put it, in the context to what happened since we went into Iraq, that now becomes a legitimate basis for being in Iraq, based on the authorization after 9/11.

Ms. HATHAWAY. So this whole turn, if I understand your question right, on the interpretation of the 2001 resolution that I mentioned in the footnote. So the letter that Ambassador Satterfield gave in response to questions that had been raised in an earlier hearing laid out the administration's position on what the legal basis was for the war in Iraq. And their central argument was the 2002 resolution that I mentioned which lays out the two bases, two legal bases. One is to address a threat by the Government of Iraq which, as I have said, I believe is no longer applicable after the fall of the Saddam Hussein government, and the second was to carry out Security Council resolutions.

Mr. BERMAN. And now they are doing alternative pleading and saying, oh, by the way, if you don't like those arguments, we have the resolution after 9/11 and al-Qaeda in Iraq, blah, blah, blah.

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Ms. HATHAWAY. Exactly. So this is why I addressed it in a footnote. Because they throw in the 2001 resolution and, oh, by the way, the Commander in Chief power and appropriations. So it is sort of the kitchen sink. So it is hard to know where to begin in response to this.

I think the 2001 resolution, in my view, isn't a strong argument as a legal basis for this war, because that was clearly passed with the intent of going into Afghanistan. And that was, if you look at the legislative history—I don't have to tell you this—that was the intent of that resolution, that that was aimed at those who committed the 9/11 and going after them.

Mr. BERMAN. We didn't write it very well and very narrowly. They are now saying, hey, this is the language you chose. You gave authorization. The same folks or agents of the folks who did 9/11 are now our enemy in Iraq, and that is why we are there.

Ms. HATHAWAY. Well, that is right. I think that is what they are doing. And I think that this Congress can't accede in that. Because, if you do, then this is essentially a blank check for military operations in any country in which al-Qaeda may possibly be present in which there might be a possible terrorist threat. As we know, sadly enough, there are a lot of countries that meet those criteria.

And to read this 2001 resolution, which had a clear narrow intent, though, you are right, the language was not as carefully crafted as it ought to have been. To read that to allow military action in Iraq when the government itself, the President himself clearly didn't read it that way because he sought the 2002 resolution—what is the point of having the 2002 resolution if you already had authority to go into Iraq?

Mr. BERMAN. No, because at that time in 2002 that argument wouldn't have worked.

Ms. HATHAWAY. I agree. There is some irony here that because of our action in Iraq, which led the way to allow al-Qaeda to enter in Iraq now, the 2001 resolution is somehow reactivated in this. I just think that those arguments are much too tenuous.

Mr. DELAHUNT. Would the gentleman yield for a moment?

Mr. BERMAN. Yes.

Mr. DELAHUNT. That tortured explanation, I would submit, on it manifestly, is just so dubious.

I guess I would ask you, Professor Hathaway, in the process of reaching the legal opinion—and I know you sit on the Advisory Board of the Office of Legal Counsel in the Department of State—how would that opinion be vetted?

And before you answer, I think it is very important and I am going to ask you to review for us the legal opinions of the Department of Justice on the so-called torture issue that resulted in the leaving of scholars, legal scholars, such as Jack Goldsmith and others, where a memorandum was put forward. And that is why the law is so important, and we have got to be thinking about precedent in these cases. And what we do now could very well be referred to at some future date much to our chagrin if we don't stand up and take some sort of action.

My option is extend the U.N. mandate, because that solves all of these issues. It protects our troops. It provides the authority to conduct offensive military operations.

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But if you would just run us through the process of vetting. Because when I received that letter back I thought for a moment that they were joking. It just didn't pass the laugh test.

Ms. HATHAWAY. So I have the letter right here, and it was not, apparently, vetted in the normal process that a memorandum would be vetted if it were issued by the Office of Legal Counsel in the Justice Department. It is issued by Jeffrey Bergner, the Assistant Secretary of Legislative Affairs at the Department of State.

My guess—and I can only guess because I certainly wasn't there—was that they assisted in the drafting of this response. Which you are right. It is very brief and I think sort of throws in a bunch of possible arguments without really responding directly to the question that was asked.

It does not, I think, have the status that an opinion of the Office of Legal Counsel would have, which would have gone through a formal process, but it does stand as the last public, most authoritative word of the administration on a legal basis for the war in Iraq. And so that is what we have to look to here. And certainly I think you are right that Congress should object to this interpretation of the legal authority.

Mr. DELAHUNT. And we do have precedent. I am going to ask you again if you could review for the record the issues surrounding the rationale for Mr. Goldsmith leaving the Department of Justice because of the so-called torture memorandum which he rescinded.

Ms. HATHAWAY. As you know, that is on a separate topic.

Mr. DELAHUNT. It is a much different topic, but I think it is important that whoever might be hearing or watching or observing these proceedings understand that there is, I would put forth, a pattern here of finding a conclusion based upon policy considerations and having somebody draft a memorandum. It is a conclusion in search of a rationale, and it is going to happen, and this is, in my judgment, too significant.

Ms. HATHAWAY. Well, I agree that the Justice Department has rendered some pretty terrible opinions in recent years, certainly on the torture issue above and beyond any other of which I am aware. And this is one of the areas that I study most closely, and we are all deeply troubled by the opinion the Government issued in that case which my friend, Jack Goldsmith, did rescind, which I understand has in turn been partially reinstituted, though we don't have the details of that because it is all classified.

This is a somewhat different process, because it is not through the Office of Legal Counsel. But the basic point as I understand what you are saying is that the Justice Department is sometimes issuing opinions that are not as well vetted or carefully thought out and that might be guided by policy as much as by law. And I think that is certainly possible and in this case I think this is the reading that was—the answer that was given here in writing to the committee is, in my view, not the best reading of the law.

Mr. DELAHUNT. Thank you.

And I am just going to ask Mr. Jarrar a question. One of the concerns that I have, to go to the issue of the vote in Iraq on the so-called implementation or ratification law, my reading in the statements that I have noticed from the Speaker of the Council of Rep-

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resentatives and the legal committee of the Iraqi Parliament are clear that a two-thirds vote is required.

In your testimony, you indicated that there is now discussion about a simple majority. If in the end there is a vote of approval by a simple majority, in your opinion, could this provoke unrest and violence in Iraq predicated on the opinion of some, including elements within Iraq that are hostile to our interests? Could this provoke them to cause mischief, if you will, and provide them a rationale which would be, look, they are circumventing the law and yet they preach respect for the rule of law and democracy?

Mr. JARRAR. Before I answer the question, let me just state very clearly that the Iraqi Constitution and court has not been formed yet. So the Iraqi Constitution and court is a court that is supposed to deal with such questions.

Now, this is just another sign of how premature this bilateral agreement is. It is falling on a very unprepared regime in Iraq that still has a lot of its basic components uncreated. They were not created yet.

Now the mere fact that the agreement was sent to Parliament was not sent because there is a respect of the Constitution or following of the Iraqi laws. Actually, it is sent, I think, by coincidence, because one of the major religious leadership in Iraq, Ayatollah Sistani, insisted that the law must be sent to the Parliament.

The Iraqi executive branch lobbied for months with Ayatollah Sistani. That, I think, has nothing to do with politics in Iraq. It seems like the Iraqi executive branch disagrees with me. They lobbied for months that they should just sign the agreement as an executive, rather than sending it to the Parliament. He said, "No." That is why they sent it to the Parliament.

So there is no real respect of the Constitution or laws, and this should create a case at least like it is worrisome that maybe next year they will create the Constitution in court and will look back and say this bilateral agreement with the U.S. is void, actually. It doesn't mean anything. And that will put everyone in a status of limbo, I am sure. That is why many people are saying any multilateral agreement like the United Nations is more guaranteed for both sides.

Now regarding the particular question of increased violence, there is an overwhelming rejection of signing an agreement with the U.S., regardless of its content. And we are not talking about marginal groups in the Parliament or outside the Parliament. We have major Ayatollahs, the major Ayatollahs from the Shiite side, like Ayatollah al Baghdadi or Ayatollah al Halasi or Ayatollah al Harari, who gave fatwa against signing the agreement, a religious order against signing the agreement.

From the Sunni side, it is the same. The major mainstream Sunni leadership has fatwas against signing the agreement. So there is rejection regardless of the content of it.

Inside the Parliament, this rejection can be seen in both—all different components in the Iraqi groups. Whether they were Sunnis or Shiites or Seculars, there is resistance to signing that agreement.

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Now I think Ayatollah Sistani has a very moderate voice. He actually asked for a national consensus. He said that all major groups, all major political groups must agree on this.

So the mere idea of passing it through a simple majority is very controversial. Because we know who will end up signing it: The parties in the executive branch, the two Iranian-backed bodies, the Supreme Council and al-Dawa; the two Kurdish parties, PUK and KDP. They have, combined, around 100 seats. They need another few seats to reach a quorum, like 38. So they will try to reach out to other parties like Al-Fadhila or other centrist parties. Now they will not get a national consensus by doing that if they just wanted to pass it by a simple majority.

Now most of the groups that are opposing it in the Parliament have been saying, if you want it to go through loopholes, do not send it to the Parliament or pass it through a simple majority, we will quit this political process as a whole and we will go back to armed resistance. And these groups include Shiites like Muqtada al-Sadr's group or Sunnis like the National Council of Resistance linked to a lot of Sunni groups in Parliament or even Seculars who have armed groups.

So there are many people who think that the signing of the agreement now will be divisive in Iraq. It will split the Iraqi community and the Parliament yet again. It will not be a reason for unification. It will be a reason for more violence and more fighting among Iraqis, and maybe it will push the security situation to deteriorate even more.

So I think the option of a two-thirds majority is not just a legal one but it is rational politically. Because we will make sure there is a national census and people will support it not as a marginal idea but as a mainstream agreement that is supported by all Iraqis.

And we shouldn't forget that there is a majority of Iraqis who want all United States troops to leave Iraq completely without leaving any permanent bases. There is a majority of Iraqi parliamentarians who want to see all United States troops leave completely without leaving any permanent bases.

So we agree on the basics here. I think the procedure must follow these basics and try to implement them the smart way.

Mr. DELAHUNT. You know, I am going to call on the gentlelady from Texas to take the gavel in a moment, because I have another meeting.

I think, Professor Matheson, you wanted to make a comment in response to a question that was posed earlier.

Mr. Donnelly, if you have any comments before I leave, I would be happy to welcome them.

Mr. MATHESON. Well, there are several things I wanted to comment upon.

First of all, you were asking about the interagency process with respect to Department of Justice opinions, e.g., the torture memo. When I was last in the Government during the '90s, there was a very effective interagency process by which legal issues of interest to all agencies could be discussed in a central way and a rationale decision taken with everybody's views into account. This was typically done under the direction of the NSC legal advisor.

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And what I found very disturbing about the torture memo and other similar actions at the beginning of the current administration was that this effective interagency process seemed to be abandoned; and, instead, secret references were made by one person in the White House to another person in an agency without the kind of vetting of the issues among State and the military and other places of expertise that could have brought some light onto this and would certainly have resulted in their not being the travesty that the torture memo represented. I am hopeful that with the new administration we can get back to a rational interagency process.

Mr. DELAHUNT. Well, let me just say the concern that—I have an unease with the scenario that you described about a whisper, I think. Somebody said, listen, we want to avoid going to Congress. Because I was at a meeting that was held in the Capitol building where Foreign Minister Zebari was asked—and the question was posed by myself—was there any discussion about the need for congressional approval? This was after I asked him about the necessity for submitting it to the Iraqi Parliament.

And his words—and I am paraphrasing—to the best of my memory were that, well, we were careful about the language so that we could avoid going to the U.S. Congress.

I think that is clear to me. I think it, again, is reflective of a pattern that we have seen with this administration; and I think it is unfortunate. Because I think if there had been the kind of consultation that is outlined in Circular 175 and doing it in a truly collaborative fashion, we might have been able to avoid the questions and the concerns that you have heard articulated here today.

In any event, I would have hoped that we would have learned from past practices that there are people in every administration of good conscience, of great scholarship that will act like a Jack Goldsmith, like a Jim Comey, and say, Huh-uh, I am not going to violate my oath of office. I am going to do this as a professional. I will look at it carefully, and I will proffer an opinion that does not compromise my integrity.

Because I think clearly—and I think Professor Hathaway has addressed this well—you know, there is no basis that could pass any kind of a smell test that would say that there is a nexus between the resolution that the administration is counting on to support, after the expiration of the mandate, that can support offensive military operations by the United States Government; and I think that is unfortunate.

Come, we will work together. You know, the President-elect has been very clear about a responsible withdrawal that would be done in a way that would take in the multiple concerns that I think everybody shares. And here we are. We are running the clock out; and the only alternative, from what I gather, is the extension of this U.N. mandate that I believe, you know, responsible Iraqis would agree to an extension for a short period of time so we can get our respective acts together and come in with an agreement that serves the best interest of the United States, Iraq and all of the players in the region.

Mike.

Mr. MATHESON. Second comment I wanted to make was with respect to the provision of this text, which apparently says that it is

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necessary to have Iraqi permission for non-defensive United States military operations.

I take a somewhat different view than Professor Hathaway on this. I don't think the United States can be in a position of insisting to Iraq that it must give advance approval for all United States non-defensive operations in Iraqi territory. That is not something we can insist upon as a part of international law. I think it is fair to ask about the operational consequences of this and how this coordination system will work, but I don't think we can just a priori insist that we have a right to do whatever we want regardless of Iraqi permission.

The third comment I had was what Mr. Berman was starting to say at the beginning; and I think agree with what I understand he was saying, which is that, logically, Congress should be taking an affirmative strategy now. It may be by the end of the week that we will find that it is not going to be possible to conclude this agreement before the end of the mandate, in which case we do have to go to the U.N. options, in which case there will be every opportunity for Congress to work this out with the new Obama administration, which seems to be sympathetic about the appropriate role that Congress will play in this effort.

In the meantime, I think it is logical for the committees to engage in the substance of this agreement to see what the administration will give in terms of clarifications and, on that basis, if the Congress is prepared to accept the deal, to go ahead and affirmatively authorize it. I think that is a good, positive strategy.

Mr. DELAHUNT. Thank you, Mike.

I am going to call on Ms. Sheila Jackson Lee, if she will take the gavel.

Again, let me extend my thanks to this excellent panel. It is good to have you on board now, Mr. Donnelly; and we will make you part of the family. Thank you.

Ms. JACKSON LEE [presiding]. Let me thank Chairman Delahunt for his kind indulgence and leadership on this issue. We have followed this issue, along with his very able staff, for a very long period of time.

The good news is I will not hold you for a very long period of time; and I thank you for allowing me to listen, as we had overlapping responsibilities. Maybe I should ask you the question of how you can solve the automobile industry crisis here, and it might be an easier challenge.

What I do want to add to my remarks or at least have recorded is that I consider this agreement the icing on the calamity cake. And my consternation really is Mr. Jarrar made a very valid point that I listened to when I was coming in: Time and the respect for time and the respect for deliberation and thoughtfulness.

I was one of the one-third of the caucus that voted against the 2002 resolution. I thought I had read it with dispatch; and that was my concern, that it was done with the expediency that I don't think a call to war is appropriate. And for many members who look back or many pro-resolution of 2002, those who were supportive of it, you watched slowly, as time went on, the dissolving of that support.

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And I believe that the 2006 election, not 2008, really was the first step of the American people saying they wanted this war ended and they wanted it resolved. But it also showed that they had an affection for the Iraqi people. We do have that. We have an affection for democracy.

So I pose a question, Ms. Hathaway, to you. When we think of the three branches of government and the constitutional rights of the Presidency, that is, in fact, both the Commander in Chief but also the chief policymaker, can President Barack Obama's administration undo this agreement?

Ms. HATHAWAY. That is a great question. So yes and no is the complicated answer.

As the agreement itself specifies a 1-year withdrawal period and so under the agreement we could notify the Iraqi Government that as of a year we intend to withdraw from the agreement, but as a matter of international law we would be required to abide by the agreement for a minimum period of 1 year. So unless—and the only exception would be if he could get the Iraqi Government to agree to either ending the agreement by mutual agreement or to modify the agreement, but you would have to get the approval of the Iraqis in order to do that.

Ms. JACKSON LEE. So, in essence, an agreement has been made in the waning hours, even though I know that the administration watching the progress over the summer certainly has been engaged.

We had, I believe, a full hearing—I know we had a subcommittee hearing—on the emergence of these talks; and we even made our firm statement on the record that Congress should be involved. And, of course, the administration proceeded on, I would almost say, in the dark of night. Because, obviously, when a country is focused on the business of a changing government and one of the stars of our cap is that we change government both nonviolently and democratically, obviously, minds are strained to be focused on the details of an agreement that really was kept secret.

To Mr. Jarrar, if I might take you on that issue of secrecy and the lack of full involvement of both populations, if you will. And I think, as I was listening, you mentioned the time needed for deliberative thought.

Let me ask you to also comment that the parties at the table are of one mind. The present Government of Iraq came up out of support for the way America came in. They are, in essence, selectees of the process of which we entered into Iraq and established a government and the terrible bloodshed that came about from one sect against another.

I don't know about the parliamentarians that are there, whether they participated through a Foreign Affairs Committee or a State Department. Help me understand how much transparency was there in Iraq on this agreement.

Mr. JARRAR. There was little to no transparency. In fact, the first drafts of the agreement were leaked by some of the officials, and they found them on line.

In fact, I was one of the first people to republish them and translate them into English. And then I called a number of Iraqi parliamentarians when I found the copies on line, and I am the one who

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gave them the copies. They needed someone sitting in Washington, DC, googling the agreement to send them a copy of it. So they were not aware of it. They were not included in any of the discussions.

Now the negotiations that happened in the last year were exclusively between the Bush administration and the Bush administration's allies in their executive branch, the Bush administration's allies, the five parties in Iraq that are in the executive branch. Two of them are Shiites, and two are Kurds, and one is Sunni Party. These five parties control a minority in the Parliament. All of them combined control around 100 seats out of the 275 seats.

The other Sunnis and the other Shiites and the other Kurds and Christians who control the majority of the Parliament were not included in the negotiations; and now they are expected to negotiate, to read the entire agreement and reach a conclusion within the next few days. So it is kind of shocking. Many of them are saying we need at least a few months to understand the agreement and get some professional response from it.

Now one of the articles that I thought many of the parliamentarians thought was very controversial is Article #29, which is a one-line article that says, both sides—meaning the joint committees—it doesn't really recognize that both sides are allowed to enter into additional implementation agreements, if needed.

Now, this is like a blank check. We are speaking about a very short, very vague agreement that gives this blank check for both sides to go and enter implementation arrangements without any Parliament approval, without any even executive branch approval. It is really scary. So there is a lot of fear that the content is not looked at in a very careful way.

Now I will end this by saying the bottom line is, whether people were supportive or against the content of the agreement, the majority of them want more time. And I don't think it is either the agreement or the extension—both of them can happen. Extension can happen, and this will give more time for the Iraqis and Americans to discuss a long-term bilateral agreement or a short-term one that will end the United States presence there.

Ms. JACKSON LEE. Let me quickly ask Mr. Donnelly and Mr. Matheson to comment on the transparency and stakeholder role that both countries should have in any agreement to end something as traumatic as the Iraq war.

Mr. Donnelly.

Mr. DONNELLY. Well, I would be very reluctant to certainly second-guess a vote of the Iraqi Parliament in support of the agreement. I believe that is the most likely outcome of the next week or so.

As I said in my opening remarks, I find it especially ironic if the U.S. Congress essentially said to the Iraqis that their representative and democratic process is illegitimate. So I wouldn't dispute that the Iraqi parliamentarians are under a lot of pressure. It is not dissimilar——

I am sorry. I can't tell if the light is on or not on. I hope you were able to basically hear.

Again, the Iraqi Parliament is under, no doubt, a lot of pressure both to understand what the text per se means and what the implications might be, just as the rest of us are. However, I would cer-

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tainly respect their vote, particularly a two-thirds super majority vote; and I think it would be a tragedy if we said to them that their democratic processes we found to be wanting at this juncture.

Ms. JACKSON LEE. Mr. Matheson.

Mr. MATHESON. Can I first comment on the question you originally asked Professor Hathaway?

Ms. JACKSON LEE. Please.

Mr. MATHESON. Basically, it seems to me that, in going forward, we do need to have an important role for Congress. I don't necessarily take as categorical a view about the legal situation as she does, but I do fully agree that it is important at this juncture for Congress now to play a role in improving what will be the regime in the coming years. So, in that sense, I agree entirely with the idea of transparency, congressional action and so on.

Ms. JACKSON LEE. That it is needed.

Mr. MATHESON. That it is needed. I see this as a matter of the appropriate role of the two branches within our constitutional structure as a matter of constitutional policy. I don't necessarily say this is absolutely required under the specific circumstances, but I do think it is important to do that.

Now, secondly, you asked her the extent to which President Obama would be constrained by the agreement if it goes into effect. I think we all want to preserve maximum flexibility for the new President to carry out his policies in Iraq. So I think it is important, given the fact that this may be the agreement, that we not overstate what constraints it may impose on him.

For example, he, as I understand this agreement, can always withdraw U.S. forces earlier or more rapidly than the timetables in the agreement. He doesn't need to take aggressive military actions that he thinks are unwise. He can cut back on U.S. military operations if he feels that that is responsible.

There are some respects in which he will be constrained. For example, the provisions on criminal jurisdiction will presumably apply unless there is this 1-year withdrawal period. I think it is important as we look forward to how this might be interpreted if we recognize the important degree to which he can still operate under his policies and notwithstanding what this administration has done.

Ms. JACKSON LEE. Quickly.

Mr. DONNELLY. I just want to underscore this last point. To the degree, for American purposes, the question as to whether this is a treaty that requires congressional approval or can be an executive action, President Obama would actually have more freedom to pursue his policies or actually execute his policies if, for purposes of consideration, it were an executive action for the executive to withdraw the United States from a treaty that had been ratified by the Congress, but, obviously, be a much more complex step that would have a constraining effect on the President's options going forward.

Ms. JACKSON LEE. Professor Hathaway.

Ms. HATHAWAY. Just on the narrow point about withdrawal, just in response to that point, you weren't here at the very beginning where I mentioned this. I just wanted to make sure you knew of it.

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The translation of the Arabic text appears to be quite different from the English text on this point in really important ways, and I think this is one of the things that certainly ought to be clarified.

So the translation of the Arabic text states as follows:

> "The U.S. recognizes Iraq's sovereign right to request a U.S. forces withdrawal from Iraq at any time. The Iraqi Government recognizes the United States sovereign right to request a U.S. forces withdrawal from Iraq at any time."

So it uses very parallel language in both cases. It seems to suggest that each side can request from the other withdrawal. But it seems to me the best reading of that is the other side then has to approve it.

And so here is the English text, which seems very different, which I just got last night. We don't know for sure that this is the authoritative text, but this is what is circulating on the Web.

It says,

> "The Government of Iraq recognizes the sovereign right of the United States to withdraw the United States forces from Iraq at any time."

That is the reading that Mr. Matheson has given us. If that is the case, certainly it gives a great deal more flexibility than what appears the Iraqi Arabic text appears to say. So on this incredibly important point there appears to be two very different texts circulating. And the first is obviously quite a bit more troubling for the questions that you raised about the flexibility for President-elect Obama than is the second.

Ms. JACKSON LEE. Absolutely.

Ms. HATHAWAY. The second: Then the concerns are much less, because he can withdraw within 16 to 18 months if he chooses to do so. Under the first translation of Arabic language text it appears he would have to get the approval of the Iraqis in order to shorten the time line. So that is a point on which I think there ought to be clarification.

Ms. JACKSON LEE. Thank you.

Mr. Jarrar.

Mr. JARRAR. I wanted to comment on the differences on the two versions, because this has been an issue that was discussed in Iraq during the last few weeks. A number of Iraqi parliamentarians are on the record. They have said on the record that there are some major differences between the Arabic and the English version.

Now the Arabic and English versions are supposedly equal in their legal binding, because this is what the agreement says.

Now another difference that I have noticed actually is an article that in English it speaks with the past tense. It speaks about how the U.S. President has been protecting Iraq assets from United States judicial legal cases. But in the Arabic one it is in the future tense. It says the U.S. President will be protecting Iraq's assets. This seems like they are committing what the next President will be saying.

I was told by a number of congressional staffers who contacted the State Department directly that the last stage of any agreement that is multilingual, it is called certificate of translation. That

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stage has not been done for this agreement. So that is really shocking to know that this is an agreement that will decide the future of Iraq and the United States for the next few years and that this certificate of translation has not been done for that by the State Department.

I am sure there are other, smaller differences, maybe a word missing here or there that will end up creating huge differences.

Let me end this by saying there is a very good example in the Arab world and the Middle East in one of the United Nations' resolutions in the late '40s that asked Israel to withdraw from occupied territories in one version and then in the other the occupied territories. So the word "there"——

Ms. JACKSON LEE. Made a difference.

Mr. JARRAR. Causing a conflict in the Middle East for the last 50 years. Imagine how many "theres" are missing from this one.

Ms. JACKSON LEE. I think you have framed both the elephant and the donkey in the room from both sides. There should be the raising of hair.

I just need a yes or no, Mr. Matheson. Is that correct about the certification from the State Department? You worked there. Can you just——

Mr. MATHESON. Yes, this is an important element of concluding any treaty, to make sure that the two texts read the same.

Ms. JACKSON LEE. Thank you.

Mr. MATHESON. I would be very surprised if somebody didn't do that.

Ms. JACKSON LEE. Thank you very much.

On that note, I want to conclude by thanking both Professor Matheson and is it Professor Donnelly—and you will take the title—and Mr. Jarrar, Professor Hathaway.

Let me conclude and add the second layer of appreciation, but also this quantitative, this qualified, this hair-raising question. I think Mr. Jarrar sort of captured it in the 50 years of horror that we might see 50 years from now. But I will go back just far enough to 2002, which is that we are in the crux of a problem based upon the limited understanding of 2002 resolution. And that resolution, of course, indicated that most people thought was to go to the U.N., to engage, but the administration continued to remind us to use almost any means necessary if things did not work.

Who was the subjective decider that it did not work at the U.N.? I might have been the kind of person that says let's keep talking for months at the U.N. to discuss our status with Saddam Hussein at that time or the way we worked through the Iraqi question. Viewing the fact that most of the Iraqi people wanted peace, they wanted to go to work, they wanted education for their children, and they wanted to be left alone as it related to any kind of war-like activities or the use of nuclear power.

So to know that there are fine lines of distinction, Professor Hathaway, that are still unclear, whether it is the Arabic interpretation or the quixoticness of English is a problem. And it is a problem that we are somewhat unclear of how much power the new administration would have to draw down, to question, to reconstruct.

And then, lastly, let me hold up symbolically this Constitution that emphasizes checks and balances and the remorse that many

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Members of Congress have for the limited time that we had to analyze the 2002 resolution and the language so that there could not have been a more effective deliberative assessment of that document and, to add insult to injury, whether or not we needed to move as quickly as we moved and whether or not we could have had then-Secretary Powell go back to the U.N. on one occasion, two occasions, three occasions and discuss this and deliberate and maybe would have had the kind of either legislative action or Presidential action that we could be proud of that would have been effective.

I think the 4,000-plus lives, I think the enormous loss of lives of the Iraqi people, which I hope, Mr. Jarrar, we will get that number so we can effectively offer our deepest sympathy, because those numbers, I think, are very unclear, then we would have had a better stance to be able to reflect on what did happen. Because we would have said we were deliberative, we were thoughtful, we understood the language. We couldn't do anything else. There were no options.

Now we have an agreement which we don't know whether we are protecting assets, not protecting assets, drawing down, not drawing down, and a number of other issues that require thoughtfulness that I don't think are answered. Here we go again.

And I think it is a shame on the administration for suggesting that there was no other way to handle this. And I would, without arrogance—without arrogance, give counsel to the Iraqi parliamentarians, without arrogance. I have no sovereign standing whatsoever, but I would also offer to them the déjà vu of the fall of 2002. And since this is a plan for the future of their children and their children's children, I would caution and offer counsel to be deliberative, to not be held to a timetable, to allow us as their counterparts in the United States Congress, although we have our sovereign jurisdiction, to likewise have a chance for review and, most of all, to give credibility to the amazing victory and win in changing formational, transformational act that took place on November 4, 2008, to take place.

So I thank you for giving us this insight.

Again, I think Chairman Delahunt and maybe, as words are given, as they are transcribed, maybe some of us, maybe the world, maybe Iraq, maybe this Nation will listen to the words that were cast in this room and we do better and be better for it.

So thank you and I thank Chairman Delahunt for this hearing. The hearing is now adjourned.

[Whereupon, at 1 o'clock p.m., the subcommittee was adjourned.]

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