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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.

### (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."

[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.

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

[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).

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.

### (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.)