Committee on Foreign Affairs

Subcommittee on International Organizations, Human Rights, and Oversight

and

Subcommittee on the Middle East and South Asia

Memorandum

January 22, 2008

TO: Members, Committee on Foreign Affairs

FROM: Bill Delahunt, Chairman
Subcommittee on International Organizations, Human Rights, and Oversight

Gary L. Ackerman, Chairman
Subcommittee on the Middle East and South Asia

SUBJECT: Hearing on **"The Proposed U.S. Security Commitment to Iraq: What Will Be In It and Should It Be a Treaty?"**
Wednesday, January 23, 2008 at 10am

The United Nations Security Council on December 18, 2007, renewed until December 31, 2008, the UN Mandate that authorizes the United States to maintain troops and engage in combat in Iraq. At present there are 162,000 U.S. troops in Iraq, and an additional 12,000 foreign forces under U.S. command operating under the UN Mandate.

The Subcommittee on International Organizations, Human Rights, and Oversight held a hearing on December 19, 2007, titled "*The Extension of the United Nations Mandate for Iraq: Is the Iraqi Parliament Being Ignored?*" Testimony at the hearing revealed that the renewal of the UN Mandate was requested by Prime Minister al-Maliki and the Iraqi executive branch over the opposition of a majority of the Iraqi Council of Representatives, or parliament. The parliamentarians signed a letter and passed legislation stating that the Iraqi Constitution required parliamentary approval of "international treaties and agreements" of this nature, and calling for the inclusion of a timetable for the withdrawal of U.S. troops. Testimony also demonstrated that the Maliki Government repeatedly stated its intention to seek parliamentary approval of the request for an extension of the UN Mandate, but failed to do so.

On November 26, 2007, President Bush and Prime Minister Maliki signed a Declaration of Principles pledging to negotiate by July 2008 a series of bilateral commitments that would replace the UN Mandate when it expires at the end of 2008, as well as terminate other obligations placed on Iraq by the UN Security Council since 1990. Those obligations relate primarily to the control of weapons programs and imports, but also include a continuing deduction of five percent of Iraqi oil revenues to fund the UN Compensation Commission for victims of the Iraqi invasion and occupation of Kuwait.

These planned commitments will be analyzed in the January 23, 2008, joint hearing of the Foreign Affairs Subcommittees on International Organizations, Human Rights, and Oversight, and the Middle East and South Asia, titled: *"The Proposed U.S. Security Commitment to Iraq: What Will Be in it and Should it Be a Treaty?"*

Contents and Implications of the Bush-Maliki Declaration of Principles

The Declaration of Principles signed by the two executive branches, provided in full below, envisions a wide-ranging set of commitments covering political, economic, and security spheres. Key excerpts from the Declaration that imply a U.S. commitment to engage in combat on behalf of the Iraqi Government against foreign and internal enemies, as well as against a coup, include:

"Supporting the Republic of Iraq in defending its democratic system against internal and external threats."

"Respecting and upholding the Constitution as the expression of the will of the Iraqi people and standing against any attempt to impede, suspend, or violate it."

"Providing security assurances and commitments to the Republic of Iraq to deter foreign aggression against Iraq that violates its sovereignty and integrity of its territories, waters, or airspace."

"Supporting the Republic of Iraq in its efforts to combat all terrorist groups, at the forefront of which is Al-Qaeda, Saddamists, and all other outlaw groups regardless of affiliation, and destroy their logistical networks and their sources of finance, and defeat and uproot them from Iraq."

"Supporting the Republic of Iraq in training, equipping, and arming the Iraqi Security Forces to enable them to protect Iraq and all its peoples…"

In addition the Declaration includes U.S. undertakings in the economic sphere, such as **"Facilitating and encouraging the flow of foreign investments to Iraq, especially American investments, to contribute to the reconstruction and rebuilding of Iraq."**

Finally, the Declaration calls for an end to the UN Mandate and UN controls:

"...following the expiration of the above mentioned extension, Iraq's status under Chapter VII and its designation as a threat to international peace and security will end, and Iraq will return to the legal and international standing it enjoyed prior to the issuance of U.N. Security Council Resolution No. 661 (August, 1990)..."

The length of the security commitments by the United States under the coming agreement is unclear. According to a New York Times interview with the Iraqi Defense Minister Abdul Qadir published January 15, 2008, Iraq will need U.S. military support against internal insurgents until 2012 and against foreign attack until at least 2018. President Bush's special Deputy National Security Advisor for Iraq and Afghanistan General Douglas Lute has addressed such issues as length of commitment and U.S. bases in this way:

What we expect this to do is set a bilateral mandate for the continued presence and missions performed by U.S. troops, and other coalition troops, as well, outside of the U.N. Security Council mandate. So what U.S. troops are doing, how many troops are required to do that, are bases required, which partners will join them -- all these things are on the negotiating table.

Q And permanent bases?

GENERAL LUTE: Likewise. That's another dimension of continuing U.S. support to the government of Iraq, and will certainly be a key item for negotiation next year.

Role of the Iraqi Parliament in Approving the Bilateral Commitments

The Iraqi Constitution requires approval by two-thirds of the parliament of "international treaties and agreements." The Iraqi executive branch has repeatedly stated that it will submit to the Parliament the bilateral commitments negotiated pursuant to the Declaration of Principles.

As noted above, however, similar statements were made by the Iraqi executive branch concerning its intent to submit to the Parliament the 2007

request for an extension of the UN Mandate, and these statements were not fulfilled.

Role of the U.S. Congress in Approving the Bilateral Commitments

The Subcommittees have requested testimony at the hearing from General Lute, Undersecretary of Defense for Policy Eric S. Edelman, State Department Legal Advisor John Bellinger, III, and State Department Special Coordinator for Iraq David Satterfield. General Lute and Undersecretary Edelman have both declined the invitation. As of 1 p.m. on January 22, 2008, neither of the invited State Department witnesses had responded. A key question that the Subcommittees had hoped these witnesses would address is the form that future U.S. commitments to Iraq will take. According to a memorandum prepared for Chairman Delahunt by Michael John Garcia of the American Law Division of the Congressional Research Service (provided in full below), the form may be that of a treaty requiring ratification by two-thirds of the Senate, a congressional-executive agreement requiring the enactment of implementing legislation, or a sole-executive agreement requiring no congressional action:

Under the U.S. system, a legally-binding international agreement can be entered into pursuant to either a treaty or an executive agreement. The Constitution allocates primary responsibility for entering into such agreements to the executive branch, but Congress also plays an essential role. First, in order for a treaty (but not an executive agreement) to become the "Law of the Land," the Senate must provide its advice and consent to treaty ratification by a two-thirds majority. Congress may authorize congressional-executive agreements. Many treaties and executive agreements are not self-executing, meaning that in order for them to take effect domestically, implementing legislation is required to provide U.S. bodies with the authority necessary to enforce and comply with the agreements' provisions. While some executive agreements do not require congressional approval, adherence to them may nonetheless be dependent upon Congress appropriating necessary funds or authorizing the activities to be carried out (where compliance with the agreement would contravene some statutory provision).

To date, the only authoritative public statement on the administration's thinking on the congressional role in the commitments has come from a press conference with General Lute:

Q General, will the White House seek any congressional input on this?

GENERAL LUTE: In the course of negotiations like this, it's not -- it is typical that there will be a dialogue between congressional leaders at the negotiating table, which will be run out of the Department of State. ***We don't anticipate now that these negotiations will lead to the status of a formal***

treaty which would then bring us to formal negotiations or formal inputs from the Congress.

Q Is the purpose of avoiding the treaty avoiding congressional input?

GENERAL LUTE: No, as I said, ***we have about a hundred agreements similar to the one envisioned for the U.S. and Iraq already in place, and the vast majority of those are below the level of a treaty.***

In contrast to General Lute's analysis, CRS' legal analysis notes that all seven current U.S. agreements that provide for military action in defense of external threats have risen to the level of a treaty, including the three (NATO, Japan, South Korea) in which, as in Iraq, the United States invaded and occupied the countries in question:

The State Department currently lists the United States as being party to seven collective defense agreements, under which members are obligated to assist in the defense of a party to the agreement in the event of an attack upon it: the Inter-American Treaty of Reciprocal Assistance; the North Atlantic Treaty; the Australia, New Zealand, and United States Security Treaty; the Southeast Asian Treaty; and bilateral security treaties with Japan, the Philippines, and South Korea. All seven agreements take the form of treaties that were ratified by the United States between 1947 and 1960. It is important to note that each of these agreements, with the exception of the Inter-American Treaty of Reciprocal Assistance (the first of the treaties to be ratified by the United States), includes a provision specifying that the agreement's requirements are to be carried out in accordance with the parties' respective constitutional processes. These provisions were included to assuage congressional concerns these agreements could be interpreted as sanctioning the President to engage in military hostilities in defense of treaty parties without further congressional authorization (i.e., a declaration of war or resolution authorizing the use of military force).

In addition, none of those seven treaties commits the United States to defend a government from internal threats, as the Declaration of Principles proposes. CRS also notes that State Department procedures such as Circular 175, which implements the Case-Zablocki law on congressional oversight of international agreements, require the Department to consult with Congress both on the possible content of negotiations and the possible form of the potential agreement:

The State Department's Circular 175 procedure also contemplates that Congress will be notified of developments in the negotiation of "significant" international agreements. Specifically, Department regulations provide:

With the advice and assistance of the Assistant Secretary for Legislative Affairs, the appropriate congressional leaders and committees are advised of the intention to negotiate significant new international agreements, consulted concerning such agreements, and kept informed of developments affecting them, including especially whether any legislation is considered necessary or desirable for the implementation of the new treaty or agreement.

State Department regulations prescribing the process for coordination and approval of international agreements (commonly known as the Circular 175 procedure) include criteria for determining whether an international agreement should take the form of a treaty or an executive agreement. Congressional preference is one of several factors considered when determining the form that an international agreement should take. According to State Department regulations

In determining a question as to the procedure which should be followed for any particular international agreement, due consideration is given to the following factors:
(1) The extent to which the agreement involves commitments or risks affecting the nation as a whole;
(2) Whether the agreement is intended to affect state laws;
(3) Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
(4) Past U.S. practice as to similar agreements;
(5) The preference of the Congress as to a particular type of agreement;
(6) The degree of formality desired for an agreement;
(7) The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
(8) The general international practice as to similar agreements.

Key Excerpts from General Lute's November 26, 2007, Press Conference

GENERAL LUTE: And then in the course of 2008, the two countries, the United States and Iraq, will codify formally our bilateral relationship with, as we're calling it, the strategic framework agreement. Today's declaration outlines the main parts of what we expect that emerging agreement to contain. There should be a political-diplomatic segment; there will be a segment dealing with economic affairs, and then a security segment.

Q And permanent bases?

GENERAL LUTE: Likewise. That's another dimension of continuing U.S. support to the government of Iraq, and will certainly be a key item for negotiation next year.

Q Is there any precedent for this in history? I mean, there wasn't anything like this after Korea or Vietnam or any other kind of American engagement.

GENERAL LUTE: Well, in fact, we do have a long-term bilateral with Korea. There are about a hundred countries around the world with which we have bilateral defense or security cooperation agreements. You should think about the one that's emerging here with Iraq as one in that same sort of setting.

Q How can any nation make a deal under occupation and not feel coerced? And anyway, they don't really have a sort of government there at all.

GENERAL LUTE: Well, let me just push back on that a bit. First of all, all major national leaders of the existing Iraqi government initialed off on this. So this was not done between the United States and Prime Minister Maliki alone, but rather between the United States and Maliki as he represents the presidency council and other national leaders inside Iraq.

Yesterday the exact text of this document was read before the council of representatives. It was discussed. And while we didn't expect and the Iraqis didn't ask for a formal vote on this -- it doesn't rise to that level of negotiated document -- there was general agreement and there is general agreement among all the key national leaders in Iraq that this is a positive step forward.

What we expect this to do is set a bilateral mandate for the continued presence and missions performed by U.S. troops, and other coalition troops, as well, outside of the U.N. Security Council mandate. So what U.S. troops are doing, how many troops are required to do that, are bases required, which partners will join them -- all these things are on the negotiating table.

Q General, will the White House seek any congressional input on this?

GENERAL LUTE: In the course of negotiations like this, it's not -- it is typical that there will be a dialogue between congressional leaders at the negotiating table, which will be run out of the Department of State. We don't anticipate now that these negotiations will lead to the status of a formal treaty which would then bring us to formal negotiations or formal inputs from the Congress.

Q Is the purpose of avoiding the treaty avoiding congressional input?

GENERAL LUTE: No, as I said, we have about a hundred agreements similar to the one envisioned for the U.S. and Iraq already in place, and the vast majority of those are below the level of a treaty.

Congressional Research Service

Memorandum January 15, 2008

TO: Hon. Bill Delahunt
Attention: Caleb Rossiter

FROM: Michael John Garcia
Legislative Attorney
American Law Division

SUBJECT: Congressional Oversight Concerning Prospective Cooperative Agreement between the United States and Iraq

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This memorandum responds to your request for an explanation of the role that Congress may play in the oversight of a prospective cooperative agreement between the United States and Iraq, with a focus on the security components of such an arrangement. On November 26, 2007, U.S. President George W. Bush and Iraqi Prime Minister Nouri Kamel Al-Maliki signed a Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America.[1] Pursuant to this Declaration, the parties pledged to "begin as soon as possible, with the aim to achieve, before July 31, 2008, agreements between the two governments with respect to the political, cultural, economic, and security spheres."[2] Among other things, the Declaration proclaims the parties' intention to negotiate a security agreement

> To support the Iraqi government in training, equipping, and arming the Iraqi Security Forces so they can provide security and stability to all Iraqis; support the Iraqi government in contributing to the international fight against terrorism by confronting terrorists such as Al-Qaeda, its affiliates, other terrorist groups, as well as all other outlaw groups, such as criminal remnants of the former regime; and to provide security assurances to the Iraqi Government to deter any external aggression and to ensure the integrity of Iraq's territory.[3]

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[1] The text of this agreement is available at [http://www.whitehouse.gov/news/releases/2007/11/20071126-11.html].

[2] *Id.*

[3] White House Office of the Press Secretary, *Fact Sheet: U.S.-Iraq Declaration of Principles for Friendship and Cooperation*, Nov. 26, 2007, available at [http://www.whitehouse.gov/news/releases/2007/11/20071126-1.html].

It is not clear whether the agreement(s) discussed in the Declaration will take the form of a treaty or some other type of international compact. Regardless of the form the agreement may take, Congress has several tools by which to exercise oversight regarding the negotiation, form, conclusion, and implementation of the arrangement by the United States.

This memorandum begins by providing a general background as to the types of international agreements that are binding upon the United States, as well as considerations affecting whether they take the form of a treaty or an executive agreement. Next, the memorandum briefly discusses historical precedents with respect to the form that security agreements have taken. Finally, the memorandum discusses the oversight role that Congress plays with respect to entering and implementing international agreements involving the United States.

I. International Agreements Under U.S. Law

Under the U.S. system, a legally-binding international agreement can be entered into pursuant to either a treaty or an executive agreement.[4] The Constitution allocates primary responsibility for entering such agreements to the executive branch, but Congress also plays an essential role. First, in order for a treaty (but not an executive agreement) to become the "Law of the Land,"[5] the Senate must provide its advice and consent to treaty ratification by a two-thirds majority. Congress may authorize congressional-executive agreements. Many treaties and executive agreements are not self-executing, meaning that in order for them to take effect domestically, implementing legislation is required to provide U.S. bodies with the authority necessary to enforce and comply with the agreements' provisions. While some executive agreements do not require congressional approval, adherence to them may nonetheless be dependent upon Congress appropriating necessary funds or authorizing the activities to be carried out (where compliance with the agreement would contravene some statutory provision).

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[4] Not every pledge, assurance, or arrangement made between the United States and a foreign party constitutes a legally-binding international agreement. For discussion of criteria used to distinguish between legally-binding and non-binding international commitments, see *infra* at 12-13; 22 C.F.R. § 181.2(a); State Department Office of the Legal Advisor, Guidance on Non-Binding Documents, at [http://www.state.gov/s/l/treaty/guidance/].

[5] U.S. CONST., art. VI, § 2. In this regard, it is important to distinguish "treaty" in the context of international law, in which "treaty" and "international agreement" are synonymous terms for all binding agreements, and "treaty" in the context of domestic American law, in which "treaty" more narrowly refers to a particular subcategory of binding international agreements.

Treaties

Under U.S. law, a treaty is an agreement negotiated and signed[6] by the executive branch, which enters into force if it is approved by a two-thirds majority in the Senate and is subsequently ratified following Presidential signature.[7] The Senate may, in considering a treaty, condition its consent on certain reservations,[8] declarations[9] and understandings[10] concerning treaty application. If accepted, these reservations, declarations, and understandings may limit and/or define U.S. obligations under the treaty.[11]

Executive Agreements

The great majority of international agreements that the United States enters into are not treaties but executive agreements[12] — agreements made by the Executive branch that are not submitted to the Senate for its advice and consent. Although executive agreements are not specifically discussed in the Constitution, they nonetheless have been considered valid international compacts under Supreme Court jurisprudence and as a matter of historical

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[6] Under international law, States that have signed but not ratified treaties have the obligation to refrain from acts that would defeat the object or purpose of the treaty. Vienna Convention on the Law of Treaties, entered into force Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter "Vienna Convention"], art. 18. Although the United States has not ratified the Vienna Convention, it recognizes it as generally expressing customary international law. *See, e.g.*, Fujitsu Ltd. v. Federal Exp. Corp., 247 F.3d 423, 433 (2nd Cir. 2001) ("we rely upon the Vienna Convention here as an authoritative guide to the customary international law of treaties...[b]ecause the United States recognizes the Vienna Convention as a codification of customary international law...and [it] acknowledges the Vienna Convention as, in large part, the authoritative guide to current treaty law and practice") (internal citations omitted).

[7] Oftentimes, a bilateral treaty will only come into effect after the parties exchange instruments of ratification. In the case of multilateral treaties, ratification typically occurs only after the treaty's instruments of ratification are submitted to the appropriate body in accordance with the terms of the agreement.

[8] A "reservation" is "a unilateral statement... made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Vienna Convention, art.2(1)(d). In practice, "[r]eservations change U.S. obligations without necessarily changing the text, and they require the acceptance of the other party." CONGRESSIONAL RESEARCH SERVICE, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, A STUDY PREPARED FOR THE SENATE COMM. ON FOREIGN RELATIONS 11 (Comm. Print 2001); Vienna Convention, arts. 19-23.

[9] Declarations are "statements expressing the Senate's position or opinion on matters relating to issues raised by the treaty rather than to specific provisions." TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 11.

[10] Understandings are "interpretive statements that clarify or elaborate provisions but do not alter them." *Id.*

[11] As a matter of customary international law, States are "obliged to refrain from acts which would defeat the object and purpose of a treaty," including entering reservations that are incompatible with a treaty's purposes. Vienna Convention, arts. 18-19.

[12] LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 215 (2nd ed. 1996).

practice.[13] Starting in the World War II era, reliance on executive agreements has grown significantly.[14] Whereas 27 executive agreements (compared to 60 treaties) were concluded by the United States during the first 50 years of the Republic, between 1939 and 2004 the United States concluded 15,522 executive agreements (compared to 1,035 treaties).[15]

Although some have argued that certain agreements may only be concluded as treaties, subject to the advice and consent of the Senate,[16] this view has generally been rejected by scholarly opinion.[17] Indeed, it does not appear that an executive agreement has ever been held invalid by the courts on the grounds that it was in contravention of the Treaty Clause.[18] In 2001, the Eleventh Circuit Court of Appeals held that the issue of whether an international agreement such as the North American Free Trade Agreement (NAFTA) is a treaty requiring approval by two-thirds of the Senate presented a nonjusticiable political question.[19]

There are three types of *prima facie* legal executive agreements: (1) *congressional-executive agreements*, in which Congress has previously or retroactively authorized an international agreement entered into by the Executive; (2) *executive agreements made pursuant to an earlier treaty*, in which the agreement is authorized by a ratified treaty; and (3) *sole executive agreements*, in which an agreement is made pursuant to the President's constitutional authority without further congressional authorization. The Executive's authority to promulgate the agreement is different in each case.

Congressional-Executive Agreements. In the case of congressional-executive agreements, the "constitutionality...seems well established."[20] Unlike treaties, where only the

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[13] *E.g.*, American Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003) ("our cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate...this power having been exercised since the early years of the Republic"); United States v. Belmont, 301 U.S. 324, 330 ("an international compact...is not always a treaty which requires the participation of the Senate").

[14] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 38-40.

[15] WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 376 (5th ed. 2007). Between 1789 and 2004, the United States entered 1,834 treaties and 16,704 executive agreements, meaning that roughly 10% of agreements concluded by the United States have taken the form of treaties. *Id.*

[16] *E.g.,* Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L. J. 664 (1944); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

[17] RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 303 n.8 (1987) ("At one time it was argued that some agreements can be made only as treaties, by the procedure designated in the Constitution.... Scholarly opinion has rejected that view.").

[18] In 1997, a federal district court in Texas ruled petitioner was not extraditable pursuant to a federal statute implementing an executive agreement, and held that extradition requires an extradition treaty ratified by the President and approved by two-thirds of the Senate. *In re* Surrender of Ntakirutimana, 988 F.Supp. 1038 (S.D.Tex. 1997). The Fifth Circuit Court of Appeals overturned the district court's finding and held that a person could be extradited by statute rather than treaty. Ntakirutimana v. Reno, 184 F.3d 419 (5th Cir. 1999).

[19] Made in the USA Foundation v. United States, 242 F.3d 1300 (11th Cir. 2001).

[20] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 5. *See also* CRS Report 97-

(continued...)

Senate plays a role in authorization, both Houses of Congress are involved in the authorizing process for congressional-executive agreements. Congressional authorization takes the form of a statute passed by a majority of both houses of Congress. Historically, congressional-executive agreements cover a wide variety of topics, ranging from postal conventions to bilateral trade to military assistance.[21] NAFTA and the General Agreement on Tariffs and Trade (GATT) are notable examples of congressional-executive agreements.

Congressional-executive agreements also may take different forms. Congress may enact legislation authorizing the Executive to negotiate and enter agreements with other countries on a specific matter.[22] A congressional-executive agreement may also take the form of a statute passed following the negotiation of an agreement, incorporating the terms or requirements of the agreement into U.S. law.[23] Such authorization may be either explicit or implied by the terms of the congressional enactment.[24]

Executive Agreements Made Pursuant to Treaties. The legitimacy of agreements made pursuant to treaties is also well-established, though controversy occasionally arises as to whether the agreement was actually imputed by the treaty in question.[25] Since the earlier treaty is the "Law of the Land,"[26] the power to enter into an agreement required or contemplated by the treaty lies fairly clearly within the President's executive function. However, the Senate occasionally conditions its approval of a treaty upon a requirement that any subsequent agreement made pursuant to the treaty also be submitted to the Senate as a treaty.[27]

Sole Executive Agreements. Sole executive agreements rely on neither treaty nor congressional authority for their legal basis. There are a number of provisions in the Constitution that may confer limited authority upon the President to promulgate such agreements on the basis of his power to conduct foreign affairs.[28] The Atlantic Charter,

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[20] (...continued)
896, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather than as Treaties*; HENKIN, *supra* note 12, at 215-18.

[21] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 5.

[22] *See, e.g.,* 16 U.S.C. § 1822(a) (authorizing the Secretary of State to negotiate international fishery agreements); 22 U.S.C.§ 6445(c) (authorizing the President to enter binding agreements with other nations pledging to end practices violating religious freedom).

[23] *See, e.g.,* 19 U.S.C. § 3511 (approving agreements resulting from the Uruguay Round of multilateral trade negotiations under the auspices of GATT).

[24] *See, e.g.,* 19 U.S.C. § 3471 (authorizing U.S. participation in and appropriations for Commission on Labor Cooperation, established by a supplemental NAFTA agreement not expressly approved by Congress).

[25] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 5.

[26] U.S. CONST. art. VI, § 2 ("the laws of the United States...[and] all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land").

[27] *See* RESTATEMENT, *supra* note 17, § 303 cmt. d.

[28] U.S. CONST. art. II, § 1 ("The executive power shall be vested in a President of the United States of America..."), § 2 ("The President shall be commander in chief of the Army and Navy of the United States..."), § 3 ("he shall receive ambassadors and other public ministers..."). Courts have (continued...)

which President Franklin Roosevelt and British Prime Minister Winston Churchill agreed to in 1941 to delineate Anglo-American war aims, is an example of a sole executive agreement.[29]

If the President enters into an executive agreement pursuant to and dealing with an area where he has clear, exclusive constitutional authority — such as an agreement to recognize a particular State for diplomatic purposes — the agreement is legally permissible regardless of Congress's opinion on the matter.[30] If, however, the President enters into an agreement and his constitutional authority over the subject matter is unclear, or if Congress also has constitutional authority over the subject matter, a reviewing court may consider Congress's position in determining whether the agreement is enforceable as U.S. law.[31] If Congress has given its implicit approval to the President entering the agreement, or is silent on the matter, it is more likely that the agreement will be deemed valid. When Congress opposes the agreement and the President's constitutional authority to enter the agreement is ambiguous, it is unclear if or under what circumstances a court would recognize such an agreement as controlling.

Because sole executive agreements do not rely on treaty or congressional authority to support their legality, they do not require congressional approval to become binding, at least as a matter of international law. Courts have recognized, however, that if a sole executive agreement conflicts with pre-existing federal law, the earlier law will remain controlling in most circumstances.[32]

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[28] (...continued)
recognized foreign affairs as an area of very strong executive authority. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

[29] Atlantic Charter, 55 Stat. 1603, entered into force Aug. 14, 1941.

[30] *See* RESTATEMENT, *supra* note 17, § 303 (4).

[31] *See* Dames & Moore v. Regan, 453 U.S. 654 (1981) (establishing that Congress's implicit approval of executive action, such as a historical practice of yielding authority in a particular area, may legitimize an agreement); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) ("When the President acts pursuant to an express or implied authorization of Congress, his powers are at their maximum.... Congressional inertia, indifference or quiescence may... invite, measures of independent Presidential responsibility.... When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.") (Jackson, J., concurring).

[32] Executive agreements have been held to be inferior to conflicting federal law when the agreement concerns matters expressly within the constitutional authority of Congress. *See, e.g.,* United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953) (finding that executive agreement contravening provisions of import statute was unenforceable); RESTATEMENT, *supra* note 17, § 115, n.5. However, an executive agreement may trump pre-existing federal law if it concerns an enumerated or inherent executive power under the Constitution, or if Congress has historically acquiesced to the President entering agreements in the relevant area. *See* United States v. Pink, 315 U.S. 203, 230 (1942) ("[a]ll Constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature") (quoting THE FEDERALIST NO. 64 (John Jay)); *Dames & Moore*, 453 U.S. at 654 (upholding sole executive agreement concerning the handling of Iranian assets in the United States, despite the existence of a potentially conflicting statute, given Congress's historical acquiescence to these types of
(continued...)

Even if a sole executive agreement does not conflict with prior federal law, Congress may still act to limit the agreement's effect through a subsequent legislative enactment, so long as it has constitutional authority to regulate the matter covered by the agreement.[33] In the security context, Congress has clear constitutional authority to enact measures that would limit the effect of sole executive agreements involving military commitments. Article I, § 8 of the Constitution accords Congress the power "To lay and collect Taxes ... to ... pay the Debts and provide for the common Defence,""To raise and support Armies," "To provide and maintain a Navy," "To make Rules for the Government and Regulation of the land and naval Forces," and "To declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," as well as "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" and "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."[34] Further, Congress is empowered "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers ..." as well as "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[35]

In addition to the constitutional provisions that provide Congress with authority to legislate on matters concerning military affairs,[36] Congress also has virtually plenary power over appropriations — authority not qualified with reference to Congress's enumerated powers under Article I, § 8. The Appropriations Clause provides that "[n]o money can be paid out of the Treasury unless it has been appropriated by an act of Congress."[37] Accordingly, adherence to pledges made in sole executive agreements may be dependent upon the availability of appropriations authorized by Congress. Congress may specify the terms and conditions under which appropriations may be used, so long as it does not impose unconstitutional conditions upon the use of appropriated funds.[38]

Choosing Between a Treaty and Executive Agreement

A recurring concern for the executive and legislative branches is whether an international commitment be entered into as a treaty or an executive agreement. The Senate may prefer that significant international commitments be entered as treaties, and fear that

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[32] (...continued)
agreements).

[33] The "last in time" rule establishes that a more recent statute trumps an earlier, inconsistent international agreement, while a more recent self-executing agreement may trump an earlier, inconsistent statute. Whitney v. Robertson, 124 U.S. 190 (1888).

[34] U.S. CONST. art. I, § 8.

[35] *Id.*

[36] For additional discussion, see CRS Report RL33837, Congressional Authority to Limit U.S. Military Operations in Iraq, by Jennifer K. Elsea, Michael John Garcia, and Thomas J. Nicola.

[37] *Id.* at art. I, § 9. Congress may specify the terms and conditions under which appropriations may be used, so long as it does not impose unconstitutional conditions on the use of appropriated funds.

[38] *See* United States v. Klein, 80 U.S. (8 Wall.) 128 (1872) (holding invalid an appropriations proviso that effectively nullified some effects of a presidential pardon and that appeared to prescribe a rule of decision in court cases); United States v. Lovett, 328 U.S. 303 (1946)(invalidating as a bill of attainder an appropriations provision denying money to pay salaries of named officials).

reliance on executive agreements will lead to an erosion of the treaty power. The House may want an international compact to take the form of congressional-executive agreement, so that it may play a greater role in the consideration. In cases where congressional action is necessary for an agreement to be implemented, the Executive may prefer to submit an international compact as a congressional-executive agreement, so that approval of the agreement and necessary implementing legislation may be accomplished in a single step. The Executive's preference as to whether an international compact takes the form of a treaty or executive agreement may also be influenced by the agreement's prospects for approval by a two-thirds majority of the Senate or a simple majority of both Houses.

State Department regulations prescribing the process for coordination and approval of international agreements (commonly known as the "Circular 175 procedure"[39]) include criteria for determining whether an international agreement should take the form of a treaty or an executive agreement. Congressional preference is one of several factors considered when determining the form that an international agreement should take. According to State Department regulations

> In determining a question as to the procedure which should be followed for any particular international agreement, due consideration is given to the following factors []:
> (1) The extent to which the agreement involves commitments or risks affecting the nation as a whole;
> (2) Whether the agreement is intended to affect state laws;
> (3) Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
> (4) Past U.S. practice as to similar agreements;
> (5) The preference of the Congress as to a particular type of agreement;
> (6) The degree of formality desired for an agreement;
> (7) The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
> (8) The general international practice as to similar agreements.
>
> In determining whether any international agreement should be brought into force as a treaty or as an international agreement other than a treaty, the utmost care is to be exercised to avoid any invasion or compromise of the constitutional powers of the President, the Senate, and the Congress as a whole.[40]

In 1978, the Senate passed a resolution expressing its sense that the President seek the advice of the Senate Committee on Foreign Relations in determining whether an international agreement should be submitted as a treaty.[41] The State Department subsequently modified the Circular 175 procedure to provide for consultation with appropriate congressional leaders and committees concerning significant international

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[39] Circular 175 initially referred to a 1955 Department of State Circular which established a process for the coordination and approval of international agreements. These procedures, as modified, are now found in 22 CFR part 181 and 11 F.A.M. chapter 720.

[40] 11 F.A.M. § 723.3 (2006).

[41] S. Res. 536, S. Rep. 95-1171, 95th Cong. (1977).

agreements.[42] Consultations are to be held "as appropriate."[43] Congressional consultation on the substance and forms of international agreements is discussed in more detail later in this memorandum.[44]

II. Historical Practice Regarding Security Agreements

The Bush Administration has characterized the proposed security arrangement with Iraq as being of a kind commonly entered by the United States, and has stated that "[t]he U.S. has security relationships with over 100 countries around the world, including recent agreements with nations such as Afghanistan and former Soviet bloc countries."[45] Some U.S. security relationships take the form of legally-binding treaties or executive agreements, whereas others involve non-binding assurances or pledges. Whereas some security agreements are publicly available, others remain classified. Though the Bush Administration and Maliki government have issued a Declaration of Principles setting the parameters for a future security arrangement between the United States and Iraq, it is not yet clear whether the arrangement will be governed by treaty, executive agreement, non-binding pledges, or some combination of the three.

The State Department currently lists the United States as being party to seven collective defense agreements, under which members are obligated to assist in the defense of a party to the agreement in the event of an attack upon it: the Inter-American Treaty of Reciprocal Assistance; the North Atlantic Treaty; the Australia, New Zealand, and United States Security Treaty; the Southeast Asian Treaty; and bilateral security treaties with Japan, the Philippines, and South Korea.[46] All seven agreements take the form of treaties that were ratified by the United States between 1947 and 1960.[47] It is important to note that each of these agreements, with the exception of the Inter-American Treaty of Reciprocal Assistance (the first of the treaties to be ratified by the United States), includes a provision specifying that the agreement's requirements are to be carried out in accordance with the parties' respective constitutional processes. These provisions were included to assuage congressional concerns these agreements could be interpreted as sanctioning the President to engage in

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[42] 11 F.A.M. § 724.4(b)-(c) (2006).

[43] *Id.* at § 724.4(c).

[44] *See infra* at 14.

[45] *Fact Sheet*, *supra* note 3.

[46] State Department, Office of the Legal Advisor, *U.S. Collective Defense Arrangements*, at [http://www.state.gov/s/l/treaty/collectivedefense/].

[47] Inter-American Treaty of Reciprocal Assistance, 62 Stat. 1681, entered into force Dec. 3, 1948; North Atlantic Treaty, 63 Stat. 2241, entered into force Aug. 24, 1949; Security Treaty Between Australia, New Zealand and the United States of America, 3 UST 3420, entered into force Apr. 29, 1952; Mutual Defense Treaty Between the United States of America and the Republic of the Philippines, 3 UST 3947, entered into force Aug. 27, 1952; Mutual Defense Treaty Between the United States of America and the Republic of Korea, 5 UST 2368, entered into force Nov. 17, 1954; Southeast Asia Collective Defense Treaty, 6 UST 81, entered into force Feb. 19, 1955; Treaty of Mutual Cooperation and Security Between the United States of America and Japan, 11 UST 1632, entered into force Jun. 23, 1960 (replacing Security Treaty Between the United States of America and Japan, 3 UST 3329, entered into force Apr. 28, 1952). In 1954, the United States entered a mutual defense treaty with the Republic of China (Taiwan), 6 UST 433, but this agreement was terminated by President Carter in 1979.

military hostilities in defense of treaty parties with out further congressional authorization (*i.e.*, a declaration of war or resolution authorizing the use of military force).[48]

Beyond collective defense agreements, the United States also has established security arrangements with other countries in which the U.S. pledges to take some action in the event that the other country's security is threatened. In a 1992 report to Congress listing U.S. security commitments, President George H.W. Bush claimed that these security arrangements

> typically oblige the United States to consult with a country in the event of a threat to its security. They may appear in legally binding agreements, such as treaties or executive agreements, or in political documents, such as policy declarations by the President, Secretary of State or Secretary of Defense.[49]

Most legally-binding security arrangements listed in the President's report constituted sole executive agreements, including agreements with Israel, Egypt, Pakistan, and Liberia.[50] Only one security arrangement, committing the United States to the establishment of the Multinational Force and Observers in the Sinai, could clearly be described as a congressional-executive agreement.[51]

The United States is also a party to a significant number of defense agreements that do not obligate the United States to take action when another country is attacked, but nonetheless involve military affairs. Categories of such agreements include:

- military basing agreements, permitting the United States to build or use permanent facilities, station forces, and conduct certain military activities within a host country;[52]
- access and pre-positioning agreements, permitting the stationing of equipment in a host country and the improvement and use of the country's

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[48] For background, see S. Rep. 797, 90th Cong., at 14-15 (1967) (describing ratification history of North Atlantic Treaty); LOUIS FISHER, PRESIDENTIAL WAR POWER 92-97 (1995) (describing Senate deliberations on North Atlantic Treaty).

[49] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 248 (quoting A REPORT ON UNITED STATES SECURITY ARRANGEMENTS AND COMMITMENTS WITH OTHER NATIONS, SUBMITTED TO THE CONGRESS IN ACCORDANCE WITH SECTION 1457 OF PUBLIC LAW 101-510, THE NATIONAL DEFENSE AUTHORIZATION ACT OF 1991, Aug. 17, 1992).

[50] *Id.*, *see also* Memorandum of Agreement Between the Governments of Israel and the United States Concerning Assurances, Consultations, and United States Policy on Middle East Peace, 32 UST 2160, entered into force Feb. 27, 1976; Agreement Between the United States and Egypt Concerning Implementation of the Egyptian-Israeli Peace Treaty of March 26, 1979, 32 UST 2148, entered into force Mar. 26, 1979; Agreement of Cooperation Between the Government of the United States of America and the Government of Pakistan, 10 UST 317, entered into force May 19, 1959; Agreement of Cooperation Between the Government of the United States of America and the Government of Liberia, 10 UST 1598, entered into force Jul. 8, 1959.

[51] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 8, at 248. *See also* Multinational Force and Observers Participation Resolution, P.L. 97-132 (1981).

[52] *See, e.g.*, Agreement Between the United States of America and the Kingdom of Greece Concerning Military Facilities, 4 UST 2189, entered into force Oct. 12, 1953.

military or civilian facilities, without establishing a permanent military presence;[53]

- status of force agreements (SOFAs), defining the legal status of U.S. forces within a host country and typically according them with certain privileges and immunities from the host country's jurisdiction;[54]
- burden-sharing agreements, permitting a host country to assume some of the financial obligations incurred by the stationing of U.S. forces within its territory;[55] and
- agreements providing for arms transfers, military training, and joint military exercises.[56]

Historically, almost all such arrangements have taken a form other than treaty. Sometimes these arrangements have been concluded as sole executive agreements, while others could be deemed executive agreements pursuant to treaty (e.g., military stationing agreements concluded with other NATO parties), while still others have been explicitly or implicitly authorized by statute and may be considered congressional-executive agreements.

Although some categories of security arrangements have historically been concluded as treaties and others as executive agreements, this does not necessarily mean that future arrangements must follow the same pattern. An arrangement that has typically been entered into as a treaty could instead be concluded as a congressional-executive agreement, and vice versa. Similarly, while some security arrangements have historically been entered as sole executive agreements, Congress might effectively limit such agreements in the future via

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[53] An example of such an agreement is the 2005 memorandum of understanding between the United States and Norway, discussed in more detail at American Forces Press Service, *Rumsfeld Signs Pre-positioning Agreement With Norway*, Jun. 8, 2005, at [http://www.defenselink.mil/news/newsarticle.aspx?id=16458].

[54] *See, e.g.*, Agreement under Article VI of the Treaty of Mutual Cooperation and Security Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, 11 UST 1652, entered into force Jun. 23, 1960. The only SOFA agreement to which the United States is a party that was concluded as a treaty is the North Atlantic Treaty Status of Forces Agreement (NATO SOFA), 4 UST 1792, entered into force Aug. 23, 1953. Almost all supplementary agreements to the NATO SOFA have been executive agreements.

[55] *See, e.g.*, Memorandum of Agreement Between The Ministry of National Defense ROK and the United States Forces in Korea Regarding The Construction of Facilities at 2nd ID USA To Improve Combined Defense Capabilities, 34 UST 125, entered into force Feb. 2, 1982.

[56] *See, e.g.*, Agreement for Cooperation on Defense and Economy Between the Governments of the United States of America and of the Republic of Turkey in Accordance with Articles II and III of the North Atlantic Treaty, 32 UST 3323, entered into force Dec. 18, 1980.

statutory enactment[57] — *e.g.*, limiting the availability of appropriations to carry out commitments made in a sole executive agreement.[58]

III. Congressional Oversight

While it appears that a prospective U.S.-Iraqi security arrangement will impose legal obligations upon the parties, it is not yet clear whether the agreement(s) will be in the form of a treaty or executive agreement. Nonetheless, it appears that Congress has several tools by which to exercise oversight regarding the negotiation, conclusion, and implementation of any such agreement.

Notification

One manner in which Congress exercises oversight over the entering of international agreements is via notification requirements. Obviously, in cases where an agreement requires action from one or both Houses of Congress to take effect, notification is a requisite. Before a treaty may become binding U.S. law, the President must submit it to the Senate for its advice and consent. Likewise, the Executive will need to inform Congress when it seeks to conclude an executive agreement that requires congressional authorization and/or implementing legislation to become U.S. law, so that appropriate legislation may be enacted.

While constitutional considerations necessitate congressional notification in many circumstances, it has historically been more difficult for Congress to keep informed regarding international agreements or pledges made by the Executive that did not require additional legislative action to take effect — *i.e.*, sole executive agreements and executive agreements made pursuant to a treaty. Additionally, even in cases where congressional action is necessary for an agreement to take effect, the Executive may opt not to inform Congress about an agreement until it has already been drafted and signed by the parties. In response to these concerns, Congress has enacted legislation and the State Department has implemented regulations to ensure that Congress is informed of the conclusion (and in some cases, the negotiation) of legally-binding international agreements.

Notification Pursuant to the Case Zablocki Act. The Case Zablocki Act, enacted in 1972 in response to congressional concern that a number of secret agreements had been entered by the Executive imposing significant commitments upon the United States,[59] is the primary statutory mechanism used to ensure that Congress is informed of international agreements entered by the United States. Pursuant to the Act, all executive agreements are

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[57] Legislation proposing to limit the usage of sole executive agreements has periodically been introduced, but thus far no bill has been enacted. *See, e.g.*, S. Res. 85, 91st Cong. (1969) (resolution expressing sense of Senate that national commitments should be entered pursuant to treaty or executive agreement specifically authorized by Congress); H.R. 4438, 94th Cong. (1976) (proposing to require the President to transmit any agreement involving a national commitment to Congress, and allowing the agreement to take effect only if Congress did not pass a measure disapproving it within 60 days).

[58] The Constitution provides that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. CONST., art. I, § 9, cl. 7.

[59] *See* H. Rep. No. 92-1301, 92nd Cong. (1972).

required to be transmitted to Congress within 60 days of their *entry into force*.[60] If the President deems the immediate public disclosure of an agreement to be prejudicial to national security, the agreement may instead be transmitted to the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations. The President is also required to annually submit a report regarding international agreements that were transmitted after the expiration of the 60-day period, describing the reasons for the delay.[61]

Although the Case-Zablocki Act originally only imposed reporting requirements with respect to executive agreements that had *entered into force*, the Act was amended in 2004 to ensure that Congress was regularly notified regarding the status of *proposed* agreements, as well. The Secretary of State is required to annually report to Congress a list of executive agreements that have not yet entered into force, which (1) have not been published in the United States Treaties and Other International Agreements compilation and (2) the United States has "signed, proclaimed, or with reference to which any other final formality has been executed, or that has been extended or otherwise modified, during the preceding calendar year."[62]

The Case Zablocki Act does not define what sort of arrangements constitute "international agreements" falling under its purview. In its implementing regulations, the State Department has established criteria for determining whether an arrangement constitutes a legally-binding "international agreement" requiring congressional notification. These include:

- the identity of the parties, and whether they intended to create a legally-binding agreement;
- the significance of the agreed-upon arrangement, with "[m]inor or trivial undertakings, even if couched in legal language and form," not considered to fall under the purview of the Case Zablocki Act;
- the specificity of the arrangement;
- the necessity that the arrangement constitute an agreement by two or more parties; and
- the form of the arrangement, to the extent that it helps to determine whether the parties intended to enter a legally-binding agreement.[63]

Notification Pursuant to Circular 175 Procedures. The State Department's Circular 175 procedure also contemplates that Congress will be notified of developments in the *negotiation* of "significant" international agreements. Specifically, Department regulations provide that

> With the advice and assistance of the Assistant Secretary for Legislative Affairs, the appropriate congressional leaders and committees are advised of the intention to negotiate significant new international agreements, consulted concerning such agreements, and kept informed of developments affecting them, including especially whether any legislation

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[60] 1 U.S.C. § 112b(a).

[61] *Id.* at §112b(b).

[62] *Id.* at § 112b(d).

[63] 22 C.F.R. § 181.2(a).

is considered necessary or desirable for the implementation of the new treaty or agreement.[64]

Annual Reporting of Security Arrangements Required by the National Defense Authorization Act of 1991. In addition to the Case Zablocki Act, Congress has enacted legislation designed to ensure that it remains informed about existing U.S. security arrangements. Section 1457 of the National Defense Authorization Act of 1991 (P.L. 101-510) requires the President to submit an annual report to specified congressional committees regarding "United States security arrangements with, and commitments to, other nations."[65] The report, produced in classified and unclassified form, is to be submitted by February 1 each year to the Committee on Armed Services and the Committee on Foreign Relations of the Senate, and the Committee on Armed Services and the Committee on Foreign Affairs of the House of Representatives.[66] In addition to legally-binding security arrangements or commitments (e.g., mutual defense treaties and pre-positioning agreements), the report must describe non-binding commitments, such as expressed U.S. policy formulated by the executive branch. The report must also include, among other things, "[a]n assessment of the need to continue, modify, or discontinue each of those arrangements and commitments in view of the changing international security situation."[67]

Although an initial report was submitted in 1992 pursuant to this statutory requirement, CRS has been unable to determine whether any subsequent reports have been issued. CRS made an inquiry to the document officers and clerks of several of the designated committees, but they have been unable to find a record of any subsequent report being received.

Consultation

State Department regulations requiring consultation with Congress regarding significant international agreements may provide a means for congressional oversight as to the negotiation of a security arrangement with Iraq. One of the stated objectives of the Circular 175 procedure is to ensure that "timely and appropriate consultation is had with congressional leaders and committees on treaties and other international agreements."[68] To that end, State Department regulations contemplate congressional consultation regarding the conduct of negotiations to secure significant international agreements.[69] Although these regulations do not define what constitutes a "significant" agreement, it may be reasonable to assume that the prospective U.S.-Iraqi security arrangement would constitute such a compact, as the agreement would (at least as envisioned in the U.S.-Iraqi Declaration of Principles) commit the United States to provide security assurances to Iraq, arm and train

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[64] 11 F.A.M. § 725.1(5).

[65] 50 U.S.C. § 404c(a).

[66] *Id.* at § 404c(c)-(d).

[67] *Id.*

[68] 11 F.A.M. § 722(4).

[69] *Id.* at § 725.1(5).

Iraqi security forces, and confront Al Qaeda and other terrorist entities within Iraqi territory.[70] Such an agreement appears to call for a more significant commitment of U.S. resources than is required under most international agreements to which the United States is a party.

Circular 175 procedures may also provide for congressional consultation concerning the form that a legally-binding international agreement should take. When there is question as to whether an international agreement should be concluded as a treaty or an executive agreement, the matter is first brought to the attention of the State Department's Legal Adviser for Treaty Affairs. If the Assistant Legal Adviser for Treaty Affairs believes the issue to be "a serious one that may warrant formal congressional consultation,"[71] consultations are to be held with appropriate congressional leaders and committees. State Department regulations specify that "Every practicable effort will be made to identify such questions at the earliest possible date so that consultations may be completed in sufficient time to avoid last minute consideration."[72]

Approval, Rejection, or Conditional Approval of International Agreements

Perhaps the clearest example of congressional oversight in the agreement-making context is through its consideration of treaties and congressional-executive agreements. For a treaty to become binding U.S. law, it must first be approved by a two-thirds majority in the Senate. The Senate may, in considering a treaty, condition its consent on certain reservations, declarations and understandings concerning treaty application. For example, it may make its acceptance contingent upon the treaty being interpreted as requiring implementing legislation to take effect, or condition approval on an amended version of the treaty being accepted by other treaty parties. If accepted, these reservations, declarations, and understandings may limit and/or define U.S. obligations under the treaty.

As previously discussed, a congressional-executive agreement requires congressional authorization via a statute passed by both houses of Congress. Here, too, approval may be conditional. Congress may opt to authorize only certain types of agreements, or may choose to approve only some provisions of a particular agreement. In authorizing an agreement, Congress may impose additional statutory requirements upon the Executive (e.g., reporting requirements). Congress may also include a statutory deadline for its authorization of an agreement to begin or expire.

Because sole executive agreements do not require congressional authorization to take effect, they need not be approved by Congress to become binding, at least as a matter of international law. Nonetheless, as discussed earlier, Congress may limit a sole executive

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[70] *Fact Sheet*, *supra* note 3.

[71] 11 F.A.M. § 724.4(b)-(c).

[72] *Id.* at § 724.4(b).

agreement through subsequent legislative agreement or through the conditioning of appropriations necessary for the agreement's commitment to be implemented.[73]

Implementation of an Agreement That Is Not Self-Executing

Congress may exercise oversight of international agreements via legislation implementing the agreements' requirements. Certain international treaties or executive agreements are considered "self-executing," meaning that they have the force of law without the need for subsequent congressional action.[74] However, many other treaties and agreements are not considered self-executing, and are understood to require implementing legislation to take effect, as enforcing U.S. agencies otherwise lack authority to conduct the actions required to ensure compliance with the international agreement.[75]

Treaties and executive agreements have been found to be non-self-executing for at least three reasons: (1) implementing legislation is constitutionally required; (2) the Senate, in giving consent to a treaty, or Congress, by resolution, requires implementing legislation for the agreement to be given force;[76] or (3) the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation.[77]

Until implementing legislation is enacted, existing domestic law concerning a matter covered by an international agreement that is not self-executing remains unchanged and controlling law in the United States. However, when a treaty is ratified or an executive agreement is entered, the United States acquires obligations under international law and may be in default of those obligations unless implementing legislation is enacted.[78] Although it is unclear what form the U.S.-Iraqi security agreement will take, it is possible that at least some provisions will require implementing legislation.

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[73] *See supra* at 6-7. In the 110th Congress, legislation has been introduced that would prohibit appropriations from being used to carry out any U.S.-Iraqi security agreement that was not approved by the Senate as a treaty or authorized by legislation passed by both Houses of Congress. S. 2426 (conditioning appropriations to carry out any U.S.-Iraqi security agreement upon the agreement being approved as a treaty or a congressional-executive agreement); H.R. 4959 (conditioning appropriations for the agreement upon it being approved as a treaty).

[74] For purposes of domestic law, a self-executing agreement may be superceded by a subsequently-enacted statute or self-executing agreement. *Id.*

[75] *See generally* RESTATEMENT, *supra* note 17, § 111(4)(a) & cmt. h.

[76] For example, in the case of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984), the Senate gave advice and consent subject to a declaration that the treaty was not self-executing. U.S. Reservations, Declarations, and Understandings to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 136 CONG. REC. S17486-01 (daily ed., Oct. 27, 1990).

[77] RESTATEMENT, *supra* note 17, § 111(4)(a), n. 5-6.

[78] *See id.*, § 111, cmt. h.

Continuing Oversight

After an international agreement has taken effect, Congress may still exercise oversight over Executive implementation of the agreement. It may require the Executive to submit information to Congress or congressional committees regarding U.S. implementation of its international commitments. It may enact new legislation that modifies or repudiates U.S. adherence or implementation of an international agreement. It may limit or prohibit appropriations necessary for the Executive to implement the provisions of the agreement, or condition such appropriations upon the Executive implementing the agreement in a particular manner.

THE WHITE HOUSE
PRESIDENT
GEORGE W. BUSH

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For Immediate Release
Office of the Press Secretary
November 26, 2007

Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America

In Focus: Iraq

White House News

As Iraqi leaders confirmed in their Communiqué signed on August 26, 2007, and endorsed by President Bush, the Governments of Iraq and the United States are committed to developing a long-term relationship of cooperation and friendship as two fully sovereign and independent states with common interests. This relationship will serve the interest of coming generations based on the heroic sacrifices made by the Iraqi people and the American people for the sake of a free, democratic, pluralistic, federal, and unified Iraq.

The relationship of cooperation envisioned by the Republic of Iraq and the United States includes a range of issues, foremost of which is cooperation in the political, economic, cultural, and security fields, taking account of the following principles:

First: The Political, Diplomatic, and Cultural Spheres

1. Supporting the Republic of Iraq in defending its democratic system against internal and external threats.

2. Respecting and upholding the Constitution as the expression of the will of the Iraqi people and standing against any attempt to impede, suspend, or violate it.

3. Supporting the efforts of the Republic of Iraq to achieve national reconciliation including as envisioned in the Communiqué of August 26.

4. Supporting the Republic of Iraq's efforts to enhance its position in regional and international organizations and institutions so that it may play a positive and constructive role in the region and the world.

5. Cooperating jointly with the states of the region on the basis of mutual respect, non-intervention in internal affairs, rejection of the use of violence in resolving disputes, and adoption of constructive dialogue in resolving outstanding problems among the various states of the region.

6. Promoting political efforts to establish positive relationships between the states of the region and the world, which serve the common goals of all relevant parties in a manner that enhances the security and stability of the region, and the prosperity of its peoples.

7. Encouraging cultural, educational, and scientific exchanges between the two countries.

Second: The Economic Sphere

1. Supporting Iraq's development in various economic fields, including its productive capabilities, and aiding its transition to a market economy.

2. Encouraging all parties to abide by their commitments as stipulated in the International Compact with Iraq.

3. Supporting the building of Iraq's economic institutions and infrastructure with the provision of financial and technical assistance to train and develop competencies and capacities of vital Iraqi institutions.

4. Supporting Iraq's further integration into regional and international financial and economic organizations.

5. Facilitating and encouraging the flow of foreign investments to Iraq, especially American investments, to contribute to the reconstruction and rebuilding of Iraq.

6. Assisting Iraq in recovering illegally exported funds and properties, especially those smuggled by the family of Saddam Hussein and his regime's associates, as well as antiquities and items of cultural heritage, smuggled before and after April 9, 2003.

7. Helping the Republic of Iraq to obtain forgiveness of its debts and compensation for the wars waged by the former regime.

8. Supporting the Republic of Iraq to obtain positive and preferential trading conditions for Iraq within the global marketplace including accession to the World Trade Organization and most favored nation status with the United States.

Third: The Security Sphere

1. Providing security assurances and commitments to the Republic of Iraq to deter foreign aggression against Iraq that violates its sovereignty and integrity of its territories, waters, or airspace.

2. Supporting the Republic of Iraq in its efforts to combat all terrorist groups, at the forefront of which is Al-Qaeda, Saddamists, and all other outlaw groups regardless of affiliation, and destroy their logistical networks and their sources of finance, and defeat and uproot them from Iraq. This support will be provided consistent with mechanisms and arrangements to be established in the bilateral cooperation agreements mentioned herein. 3. Supporting the Republic of Iraq in training, equipping, and arming the Iraqi Security Forces to enable them to protect Iraq and all its peoples, and completing the building of its administrative systems, in accordance with the request of the Iraqi government.

The Iraqi Government in confirmation of its resolute rights under existing Security Council resolutions will request to extend the mandate of the Multi-National Force-Iraq (MNF-I) under Chapter VII of the United Nations Charter for a final time. As a condition for this request, following the expiration of the above mentioned extension, Iraq's status under Chapter VII and its designation as a threat to international peace and security will end, and Iraq will return to the legal and international standing it enjoyed prior to the issuance of U.N. Security Council Resolution No. 661 (August, 1990), thus enhancing the recognition and confirming the full sovereignty of Iraq over its territories, waters, and airspace, and its control over its forces and the administration of its affairs.

Taking into account the principles discussed above, bilateral negotiations between the Republic of Iraq and the United States shall begin as soon as possible, with the aim to achieve, before July 31, 2008, agreements between the two governments with respect to the political, cultural, economic, and security spheres.

President of the United States of America
George W. Bush

Prime Minister of the Republic of Iraq
Nouri Kamel Al-Maliki

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