U.S. SECURITY COMMITMENTS TO IRAQ

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before the

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

The proposed Agreement

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

Summary

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

Analysis

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

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

the outset which would be which, or that the Administration believed that whether a certain provision would be binding will itself be a subject of negotiation.

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

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

4. *The President does not have authority under the Constitution, without Senate or congressional approval, to make a binding international agreement that would constitute a security commitment to Iraq.* The concept of a "security

commitment" was defined by President George H.W. Bush in a report to Congress in 1992. The report said that a "security commitment," as understood by the Executive, is an "obligation, binding under international law, of the United States to act in common defense in the event of an armed attack on that country." The report proceeded to list U.S. security commitments, none of which was concluded by the President acting alone. All these security commitments were approved either by the Senate as treaties or by both houses of the Congress as congressional-executive agreements. The State Department web site maintains a current list of "U.S. collective defense arrangements." Each of the arrangements listed was, likewise, approved by the Senate as a treaty.

The practice of the Executive's concluding security commitments only with Senate or congressional approval did not arise through political accident or historical happenstance but rather reflects constitutional requirements. Absent an emergency created by a sudden attack or the threat of one, it is evident from the constitutional text, the intent of the Framers, Supreme Court case law, and subsequent custom and practice that the Constitution places the decision to put the nation in a state of war in the hands of the Congress. Moreover, the same constitutional sources suggest that, as the Senate Foreign Relations Committee stated in its report on the Panama Canal Treaties, "[t]he Treaty Clause requires that, normally, significant international commitments be made with the advice and consent of the Senate." It is difficult to imagine an international commitment more significant than one that might place the nation at war. Hence the *Restatement* concludes that "some agreements, such as...the North Atlantic Treaty, are of sufficient formality, dignity, and importance that, in the unlikely event that the President attempted to make such an agreement on his own authority, his lack of authority might be regarded as manifest." (§ 311, Comment *c*.)

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

his commander-in-chief powers, these sole powers include the authority to negotiate and conclude cease-fires, to recognize and de-recognize foreign states and governments, and to grant pardons. The Declaration of Principles indicates that some of the provisions of the proposed Agreement would address matters that traditionally fall within a SOFA.

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

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

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

ample, requires a party to intervene militarily to protect one of the 21 Latin American member governments from a military coup.

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

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

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

- In January, 1969, the Senate Foreign Relations Committee created a Subcommittee on U.S. Security Agreements and Commitments Abroad. The Subcommittee developed significant new information about hitherto secret security arrangements entered into by the Executive with a number of countries.
- In June, 1969, the Senate adopted the National Commitments Resolution, a sense-of-the-Senate resolution that warned that a national commitment "results only from affirmative action taken by the executive and legislative branches of the U.S. Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment." S. Res. 85, 91st Cong., 1st Sess. (1969).

- In December, 1970, the Senate adopted S. Res. 469, 91st Cong., 2nd Sess. (1970), expressing the sense of the Senate that nothing in an executive bases agreement with Spain should be deemed to be a national commitment by the United States.
- In March, 1972, The Senate adopted S. Res 214, 92nd Cong., 2nd Sess. (1972), expressing the sense of the Senate that "any agreement with Portugal or Bahrain for military bases or foreign assistance should be submitted as a treaty to the Senate for advice and consent."
- In 1972, Congress adopted the Case-Zablocki Act, P.L. 92-403 (1972), requiring that the President to transmit to Congress the text of any international agreement other than a treaty as soon as practicable but no later than 60 days after it entered into force.
- In 1976, the House International Relations Committee held six days of hearings on, but did not report, H.R. 4438, 94th Cong., 1st Sess. (1976), which would have subjected unauthorized military commitments to a legislative veto.
- On May 15, 1978, the Senate Foreign Relations Committee reported a measure (section 502 of S. 3076, 95th Cong., 2nd Sess. (1978)) that would have subjected an unauthorized agreement to a point-of-order procedure that would have cut off funds for the implementation of the agreement in question, but the measure was rejected by the full Senate. (Section 502 incorporated the "Treaty Powers Resolution," S. Res. 24, 95th Cong., 2nd Sess. (1978)).
- In September, 1978, the Senate adopted S. Res. 536, 95th Cong., 2nd Sess. (1978), stating the sense of the Senate that in determining whether a particular international agreement should be submitted as a treaty, the President should have the timely advice of the Committee on Foreign Relations through agreed procedures established with the Secretary of State.

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

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

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

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

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

Conclusion

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