STATEMENT OF PROFESSOR OONA A. HATHAWAY
YALE LAW SCHOOL

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

February 8, 2008

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

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

The Constitutional Limits on Sole Executive Agreements

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

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

---

[1] U.S. CONST. Art. II, § 2.

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

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

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

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

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

The Iraq Agreement

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

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

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

---

[5] U.[5] U.S. CONST. Art. I, § 8, cl.11.

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

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

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

[9] The United States is currently party to eight collective defense arrangements. Seven have been concluded as treaties (with the North Atlantic Treaty Organization (1949); Australia and New Zealand (1951); Philippine (1951); Southeast Asia (1954); Japan (1960); the Republic of Korea (1953); and the

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

Third, it is arguably beyond the authority of the President to conclude a sole executive agreement that includes a wide array of economic, political, and military terms that establish a broad and deep long-term commitment of friendship by the United States to the government of Iraq. Agreements of this kind (originally termed treaties of "friendship, commerce, and navigation") have always been concluded by treaty or congressional executive agreement.[11] That is largely because these agreements establish the foundation for commercial relations with other nations, including implicit if not explicit commitments regarding commerce between the two nations—a prerogative once again granted in the Constitution to Congress.[12]

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

---

American States (in the "Rio Treaty" of 1947)), and one as a congressional-executive agreement with express congressional approval (with the Republic of the Marshall Islands and the Federated States of Micronesia, embodied in the Compacts of Free Association (1986)).

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

[11] *See, e.g.*, Treaty of Amity, Commerce and Navigation, U.S.-U.K., Nov. 19, 1794, 8 Stat. 116, T.S. No. 105; Treaty of Friendship and Cooperation with Spain, Jan. 24, 1976, United States-Spain, 27 UST 3005, TIAS No. 8630. Though typically concluded as treaties, there were some agreements establishing friendship and commercial relations concluded pursuant to specific congressional legislation in the early 1800s with Samoa, Fiji, Sulu, Tahiti, and Hawaii. *See* Hathaway, *supra* note 6, at n. 141.

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

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

customs duties, immigration, and similar laws of the foreign jurisdiction. Because they generally have a limited purpose—connected directly to the President's authority as commander-in-chief—all but a small number of the United States' status of forces agreements have been concluded as executive agreements, usually without the express approval of Congress.[14]

A typical status of forces agreement would not, however, include a mutual defense guarantee. Such a guarantee would, as I have already said, reach beyond the President's own constitutional power and, hence, would mean that the agreement would have to be approved by Congress. A typical status of forces agreement would also not include an exemption of civilian contractors from prosecution under Iraqi laws.[15] If those civilian contractors are not "supporting the mission of the Department of Defense overseas,"[16] then it is almost certainly beyond the President's commander-in-chief power to unilaterally conclude an immunity agreement on their behalf.

It would also be permissible for the President to make individual agreements with Iraq that draw on authority already granted by Congress in earlier legislation. For example, the Declaration of Principles states that the United States will "assist Iraq in its

---

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

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

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

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

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

Why the President Might Seek Congressional Approval, Even if it is Not Required

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

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

---

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

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

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

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

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

President's authority is markedly strengthened when his or her actions have the approval of Congress.

This is as true in international lawmaking as it is in domestic lawmaking. Sole executive agreements are concluded by the President alone and hence carry force only so long as they are not inconsistent with federal law. In a clash between ordinary federal legislation and a sole executive agreement, federal legislation has primacy.[22] An executive agreement that is approved by Congress, on the other hand, automatically has the force of federal law. That means that if it conflicts with an earlier statute, the later in time agreement will take precedence.[23]

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

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

Recommended Form of Congressional Approval

There remains the question as to what form any congressional approval of an agreement between the United States and Iraq ought to take. It would be legally permissible for congressional approval to be given either through the Article II Treaty Clause or through the approval of a congressional-executive agreement by both houses of Congress. There are a variety of reasons, however, that a congressional-executive agreement might be preferable. In particular, the legislation approving a congressional-executive agreement could be fashioned to include any appropriations necessary to carry out the agreement, thereby rendering separate implementing legislation unnecessary. A congressional-executive agreement also includes the House of Representatives directly in the international lawmaking process. Particularly for an issue that has been at the center

---

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

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

of political debate in the country, that has significant democratic advantages. And, finally, depending on how the legislation is fashioned, a congressional-executive agreement could create more durable commitments than a treaty.[24]

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