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The Proposed Agreement on the Future U.S. Presence in Iraq

On January 23 I testified here on the subject of U.S. security commitments to Iraq. Among other things, I suggested that the agreement or agreements contemplated by the November 2007 U.S.-Iraq Declaration of Principles might or might not require Congressional action, depending on their specific content and their relationship to applicable statutory restrictions. In particular, I suggested that Congressional action would be needed if the agreements included a security commitment to use U.S. forces in the defense of Iraq, or a commitment to build bases for a permanent U.S. military presence in Iraq, or an exemption from U.S. laws for Iraqi personnel. On the other hand, I said that a simple pledge to consult in the event of a security threat to Iraq or an exemption from Iraqi laws for U.S. forces and personnel might be done by means of an executive agreement without Congressional authorization.

I also commented on the part of the Declaration that seemed to call for the end of Iraq's status under Chapter VII of the UN Charter and its return to the legal position prior to August 1990, when the Security Council began its series of resolutions on Iraq. I pointed out that, if this literally meant that the Council's Chapter VII resolutions on Iraq would be terminated, this would raise several issues of possible significance to the United States. In particular, those resolutions provide for a continuing deduction from Iraqi oil export revenues to pay compensation awarded by the UN Compensation Commission to those suffering loss from the Iraqi invasion and occupation of Kuwait (including American claimants); and those resolutions continue to impose constraints on the acquisition and possession by Iraq of various items that might be used in a program for biological, chemical or nuclear weapons. I suggested that these questions merited policy consideration, so as not to result in unintended consequences.

For this morning's hearing, I have been asked to focus on the mechanics of how the Executive Branch makes international agreements, with particular emphasis on the determination of what form the agreement will take and the procedures followed for consultation with Congress. The U.S. process for the making of international agreements is in fact one that is carefully regulated and subject to definite legal and policy requirements, which I will try to describe.

Authorization of Negotiations

It is of course the Constitutional responsibility of the Executive Branch to negotiate international agreements. The process for doing so is governed by the regulations of the State Department that are commonly known as the "Circular 175 procedure".[1] The procedure is designed "to confirm that the making of treaties and other international agreements by the United States is carried out within constitutional and other legal limitations, with due consideration of the agreement's foreign policy implications, and with appropriate involvement by the State Department."[2] It is also designed to ensure "that timely and appropriate consultation is had with congressional leaders and committees" on such agreements and that the requirements of U.S. law on the transmission of such agreements to Congress are complied with.[3]

The Circular 175 regulations state that:

> Negotiation of treaties, or other "significant" international agreements, or for their extension or revision, are not to be undertaken, nor any exploratory discussions undertaken with representatives of another government or international organization, until authorized in writing by the Secretary [of State] or an officer specifically authorized by the Secretary for that purpose.[4]

A request for such authorization takes the form of a memorandum to the Secretary of State, or to another principal officer to whom such authority has been delegated (such as an Undersecretary of State), cleared by the Office of

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[1] The Circular 175 procedure originated in Department Circular No. 175 of December 13, 1955. It is currently codified in the State Department's Foreign Affairs Manual at 11 FAM 720-25 and 22 CFR 181.4.
[2] *See* the explanation of the Circular 175 procedure given by the Office of the Legal Adviser of the State Department at www.state.gov/s/l/treaty/c175.
[3] 11 FAM 722 .
[4] 11 FAM 724.1.

the Legal Adviser, the Office of the Assistant Secretary of State for Legislative Affairs, and other bureaus or agencies that may have a substantial interest in the matter. These requirements apply whether the agreement is to be concluded in the name of the U.S. Government or in the name of a particular U.S. agency. [5]

According to the Department, this memorandum "will generally address, where applicable" the following issues:

-- The proposed agreement's principal features, indicating any special problems that may be encountered and, if possible, the contemplated solution to those problems;

-- The policy benefits to the United States, as well as potential risks;

-- Whether congressional consultations on the agreement have been or will be undertaken;

-- The funding sources that will be committed by execution of the proposed agreement;

-- Whether the proposed agreement reasonably could be expected to have a significant regulatory impact on domestic entities or persons; and

-- The environmental impact that may arise as a result of the agreement.

The memorandum is to be accompanied by any texts to be negotiated. [6]

Also accompanying this memorandum is a memorandum of law prepared by the Office of the Legal Adviser. According to the Department, that memorandum of law will generally include:

-- A discussion and justification of the designation given to the proposed agreement (treaty vs. executive agreement);

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[5] 11 FAM 724.3.
[6] *See* www.state.gov/s/l/treaty/c175.

> -- An explanation of the legal authority for negotiating and/or concluding the proposed agreement, including an analysis of the Constitutional powers relied upon as well as any pertinent legislation;
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> -- An analysis of the issues surrounding the agreement's implementation as a matter of domestic law (e.g., whether the agreement is self-executing, whether domestic implementing legislation or regulations will be necessary before or after the agreement's execution). . . . [7]

On the specific question of the form of the agreement – whether a treaty to be given advice and consent of the Senate, an agreement authorized or approved by act of Congress, or a sole executive agreement – the Circular 175 regulations say that this matter is to be brought to the attention, in the first instance, of the Legal Adviser's Office and, if the matter is not resolved after consultation with the affected bureaus, it is to be referred to the Secretary of State (or his designee) for a decision. [8]

The office or officer to whom the task of negotiating the agreement is entrusted is reminded by the Circular 175 procedure that "no proposal is made or position is agreed to beyond the original authorization without appropriate clearance" and that the Secretary of State or other principal officer is to be "kept informed in writing of important policy decisions and developments" in the negotiation. [9] Any substantive changes in the original draft text are to be cleared with the Legal Adviser's Office and the other bureaus involved.

The memorandum seeking authorization to negotiate may also request authorization to sign the agreement when the negotiations are concluded. Otherwise, the responsible officer must come back with a separate request for authority to sign the agreement, which has to include all the information described above. [10] When the agreement is signed, the responsible officer must transmit the completed text to the Legal Adviser's Office, together

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[7] *Id.*
[8] 11 FAM 723.4.
[9] 11 FAM 725.1.
[10] 11 FAM 724.3.

with all accompanying papers, such as agreed minutes or exchanges of notes. [11]

All of these requirements will of course apply to the negotiation of the agreement or agreements contemplated by the Declaration of Principles. Given the obvious importance of these agreements for U.S. foreign policy and national security interests, they are certainly "significant" in the sense that this term is used in the Circular 175 procedure.

Involvement of Congress

The Circular 175 procedure clearly contemplates the involvement of Congress in the negotiation of significant agreements. This is true even if the agreement is to be concluded as an executive agreement without formal Congressional authorization or approval. Specifically, the "appropriate congressional leaders and committees" are to be "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." (Also, according to the Circular 175 regulation, the interest of the public is "to be taken into account" and, where in the opinion of the Secretary of State or his or her designee the circumstances permit, the public is to be given an opportunity to comment.) [12]

Consultation with Congress is to cover both the substance and form of the proposed agreement. In particular, with respect to whether an agreement should be concluded as a treaty or in some other form, "consultations on such questions will be held with congressional leaders and committees as may be appropriate." Arrangements for these consultations are to be made by the Assistant Secretary of State for Legislative Affairs. [13]

The regulations do not specify precisely when consultations must take place. However, as noted above, the memorandum seeking authorization to negotiate is to say whether congressional consultations on the agreement have been or will be undertaken, and Congress is to be informed of the intention to negotiate such an agreement – obviously before the negotiation

[11] 11 FAM 725.7.
[12] 11 FAM 725.1.
[13] 11 FAM 723.4.

occurs. If such consultations are to be meaningful, they should logically start in sufficient time that Congressional views can be taken seriously into account in the negotiation. No sensible negotiator would do otherwise, particularly in a case where the implementation of the agreement will ultimately depend on Congressional appropriations, implementing legislation or political support from the Congress.

If the agreement is to be concluded in the form of a treaty, then it must be signed subject to ratification, which of course can only occur after the Senate gives its advice and consent. If some other form of Congressional action is required and has not been obtained in advance, it would normally be sensible to condition the agreement on obtaining that Congressional action or hold it in abeyance until Congress acts.

Once the agreement is concluded, it must be reported to Congress. The 1972 Case-Zablocki Act requires that the Secretary of State transmit to Congress the text of any international agreement other than a treaty "as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than sixty days thereafter." [14] It also requires that the Secretary put such agreements on the Department's website and maintain an annual compilation of all treaties and other international agreements which have entered into force during the previous year. [15]

UN Resolutions

Once again, the November 2007 Declaration says that, after a one-year extension of the mandate of the current multinational force, "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) . . . ." As I noted in my previous testimony, this raises the question of whether it is contemplated that the existing series of Chapter VII resolutions will be terminated or modified in some way. If so, this would raise several issues, including the continuation of deductions from Iraqi oil export revenues to pay compensation for damage suffered during the invasion and occupation of Kuwait, the continuation of restrictions on Iraqi acquisition of items that might be used for weapons of

[14] 1 USC 112b.
[15] 1 USC 112a.

mass destruction, and the guarantee of the border demarcation between Iraq and Kuwait.

If the agreement or agreements to be negotiated with Iraq do contemplate such changes to the Security Council's resolutions, then of course the United States and Iraq could not accomplish this on their own, and at most the agreement could only commit the United States to pursue such changes with other members of the Council. While it would be within the authority of the President to pursue such a course of action, the Congress would of course have a legitimate interest in being consulted on such changes and their effect on the interests of the United States and its nationals. Once again, the language of the Declaration on this point seems to focus on the termination of the mandate of the multinational force, so it is not clear whether the Administration actually has in mind any other changes in the Council's resolutions.

Conclusion

The requirements contained in the Circular 175 procedure have served the Executive branch well over the years as a means of regularizing the process of negotiating and concluding international agreements in a way that respects legal requirements, the role of the State Department in directing and conducting international negotiations, and the role of Congress in the process. It also provides a practical means whereby U.S. negotiators can be sure that they have the legal authority, policy coordination and political support that they need to carry out their responsibilities effectively. Those who will be charged with responsibility for negotiation of the proposed agreement or agreements with Iraq would do well to follow these procedures carefully.