NEGOTIATING A LONG-TERM RELATIONSHIP WITH IRAQ

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Mr. Chairman and Members of the Committee, thank you for inviting me to testify today on negotiating a long-term relationship with Iraq. It is a pleasure to be back.

I testified about the constitutionality of the Administration's proposed security arrangement on February 8 before the House Foreign Affairs Committee's Subcommittee on International Organizations, Human Rights, and Oversight, where I was asked whether a binding security commitment could constitutionally be made by the President without approval by the Senate or the Congress. My view was that the President could not make such a commitment on his own. Since then, the Administration has indicated that it does not intend to enter into a binding security commitment with Iraq. However, the Administration apparently continues to adhere to the November 26, 2007 Declaration of Principles signed by President Bush and Iraqi Prime Minister al-Maliki, and to the position that the strategic framework contemplated by that Declaration can be put in place without Senate or congressional approval. The Declaration, as you know, envisions "security assurances and commitments…to deter foreign aggression against Iraq that violates its sovereignty and integrity of its territories, waters, or airspace." The question that arises is whether, in light of the surrounding circumstances, what is now contemplated by the Declaration might still include components that should be accorded Senate or congressional approval.

Mr. Chairman, my view is that the absence of a binding, explicit security commitment to Iraq does not resolve the issue whether Senate advice and consent

is required. Even absent an explicit security commitment, an implicit security commitment can exist — and, in fact, will exist if the President proceeds to put in place the security framework arrangement that is apparently contemplated. That arrangement should therefore be presented to the Senate for its advice and consent as a treaty.

In my view, however, there is an even bigger question at stake today: *What is the source of authority is to prosecute the war in Iraq, and what will be the source of authority after the relevant Security Council resolution expires on December 31?* The harsh truth is that U.S. military action in Iraq has gone far beyond what Congress authorized in October, 2002 in the Joint Resolution on Iraq, or in the Authority to Use Military Force (AUMF) that it enacted following the September 11 attacks. I know that this Committee is primarily interested in the former question — the constitutionality of a presidential security commitment. I raise this issue, however, because the Senate cannot intelligently consider the lawfulness of a presidential security commitment to Iraq without considering at the same time what authority, if any, exists for the President to use force in Iraq. If authority to use force in Iraq does currently exist, a plausible argument can be made that, in principle, the new security arrangement with Iraq might be authorized implicitly by the same statute or statutes that authorize use of force; the President can, after all, agree to do what he is lawfully authorized to do. On the other hand, if authority to use force does not exist, or if it will not exist in the future, a new security arrangement with Iraq cannot substitute for constitutionally-required statutory authority to use force. The Administration's proposed security arrangement — whether it is entered into as an executive agreement by the President alone or whether it is accorded the advice and consent of the Senate as a treaty — cannot constitutionally serve as a source of "authority to fight." And except as force is used incident to the need to protect forces being withdrawn, the Executive cannot constitutionally continue the use of force in Iraq without renewed statutory authority. Authority that earlier existed to use force in Iraq has now expired.

I will address these use-of-force issues in a moment, but let me begin with constitutional questions posed by the proposed security framework arrangement.

The Security Framework Arrangement

The absence of a binding, explicit security commitment to Iraq does not resolve the issue whether Senate advice and consent is required. Even absent an explicit security commitment, an implicit security commitment may exist. An implicit security commitment derives from all pertinent aspects of the United States' bilateral relationship with a given country. This Committee and the Senate have long posited the belief that commitments requiring the approval of the Senate

as treaties can be inferred from a variety of contextual factors, such as the establishment of U.S. military bases. These factors pervade the proposed strategic arrangement with Iraq. I therefore believe that the arrangement should be submitted to the Senate for its advice and consent as a treaty. An elaboration follows.

The international law backdrop: tacit commitments

Contract lawyers in the United States' domestic legal system are familiar with the concept of a "contract implied in fact." A contract implied in fact, as the Supreme Court described it, is a contract "inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Baltimore & Ohio R. Co. v. United States,* 261 U.S. 592 (1923). It exists in the absence of explicit words of agreement. Agreement is deemed to be implied by the entire "course of dealing" between the parties, including non-verbal practice. "A treaty is in its nature a contract between two nations." *Foster v. Neilson,* 27 U.S. 253, 314 (U.S. 1829)

An analogous concept exists in international law. It is variously called a tacit agreement, a *de facto* agreement, a quasi-agreement or a special custom. A special custom arises, the International Court of Justice has found, when a certain practice between two states comes to generate lawful expectations, as when one state has consistently granted another a right of passage. *Right of Passage Over Indian Territory* (Port. v. India), 1960 I.C.J. 6 (Apr. 12).. Treaty law and customary international law in such circumstances conjoin. "Such special customary law may be seen as essentially the result of tacit agreement among the parties," notes the *Restatement (Third) of Foreign Relations Law of the United States.* § 102, comment *e.* Treaties are to be liberally construed, the Supreme Court has made clear. All pertinent contextual elements are to be taken into account in determining the scope of the obligations undertaken. "Like other contracts," it has said, "they are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the States thereby contracting." *Rocca v. Thompson,* 223 U.S. 317, 331-32 (U.S. 1912). The UN's International Law Commission has underscored the possibility that binding international commitments can be created by conduct rather than words. "[B]ehaviours capable of legally binding States," the Commission has noted, "may take the form of formal declarations or mere informal conduct including, in certain situations, silence, on which other States may reasonably rely." International Law Commission, *Unilateral Acts of States: Report of the Working Group* 3-4, UN Doc. A/CN.4/L.703 (Jul. 20, 2006).

Even if a textual disclaimer purported to make a commitment non-binding on a party, there is authority that violation could still be unlawful. The late legal

scholar Oscar Schachter, for example, wrote that it would be unlawful to act inconsistently with such an instrument if other parties "reasonably relied" upon it. Mere "political texts," he wrote, are still governed by the general requirement of good faith. Oscar Schachter, *International Law in Theory and Practice* 95-101 (1991). Henry Kissinger underscored this same point in referring to the Sinai Accords in 1975. "While some of the undertakings are non-binding," he said, "they are important statements of diplomatic policy and engage the good faith of the United States as long as the circumstances that gave rise to them continue." Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT'L L. 499, 511 (1999). The Reporters' Notes to the *Restatement* emphasize the potential gravity of non-binding commitments: "Parties sometimes prefer a non-binding agreement in order to avoid legal remedies. Nevertheless, the political inducements to comply with such agreements may be strong and the consequences of noncompliance may sometimes be serious." § 301, Reporters' Note 2.

In reality, therefore, there often is little practical difference in the international order between legally binding security commitments, which are normally unenforceable, and non-binding security commitments, the breach of which can lead to disastrous costs, reputational and otherwise.

Long-standing Senate concern about tacit commitments

The possibility that international commitments can be created implicitly through a combination of words and conduct gives rise to domestic constitutional concerns, for the Treaty Clause prohibits the President from making a treaty without the advice and consent of two-thirds of the Senate, and the Declaration of War Clause confers upon Congress the decision to place the nation in a state of war.

As you know, the question whether the President constitutionally can make security commitments on his own, without Senate or congressional approval, is not a new issue. In fact, this Committee was the forum in which that question was debated at length in the 1960s and 70s. The Committee established a Subcommittee on United States Security Agreements and Commitments Abroad headed by Senator Stuart Symington. The Symington Subcommittee held a lengthy series of hearings on the issue, as the full Committee did later.

Those hearings, and their collective wisdom, produced a measure that has abiding relevance. It is called the "National Commitments Resolution" and was adopted by the Senate in 1969. It 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).

Looking back, the National Commitments Resolution seems a bit impressionistic. It sets out no bright lines or three-part tests. But the Senators behind it — Symington, Fulbright, Mansfield, Church, Case, Javits, and Aiken — understood the need to focus on fundamentals and, by doing that, to set the framework for debate. And the National Commitments Resolution did precisely that. The Resolution, and the thinking that animated it, laid the conceptual predicate for later efforts to rein in what many believed had become an "imperial presidency" in the realm of diplomacy. Following the Resolution's logic, this Committee led the Senate in an effort to curb unauthorized national commitments:

- In December, 1970, after it was reported by the Committee, 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, the Committee declined to report the Vienna Convention on the Law of Treaties in the belief that the rule set out in Article 46 would permit the President to commit the nation in violation of constitutional limits set out in the Treaty Clause.
- In 1972, Congress adopted the Case-Zablocki Act, Pub. L. No. 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.
- 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.

Mr. Chairman, I want to underscore the premise underpinning these steps, because that premise is directly pertinent to the proposed strategic framework with Iraq. The premise is that a national commitment can result not only from *explicit words* but can also result *implicitly* from *deeds*. The premise is that it is essential to look not only to *text* but also to the surrounding *context* — in its entirety — to determine whether a commitment in fact exists. The premise is that there is no bright line that separates commitment from non-commitment; that commitment often is subjectively created in the eye of the beneficiary state; and that all elements comprising the relevant bilateral relationship are pertinent. This Committee put it well in its report on the National Commitments Resolution: "Some foreign engagements," it said, "such as our bases agreement with Spain, form a kind of quasi-commitment, unspecified as to their exact import but, like buds in springtime, ready under the right climatic conditions, to burst into full bloom."

This was the premise that led this Committee and the Senate to urge that the base agreements with Portugal and Spain be submitted to the Senate as treaties. There was no formal, explicit, "binding" commitment by the United States to either Spain or Portugal. Rather, the Committee, and the Senate, inferred from the surrounding *context* that the presence of bases in those countries constituted — in the words of the Symington Subcommittee — *de facto* commitments. The full Committee in its 1969 report on the National Commitments Resolution noted the real-world consequences of what it called a "quasi-commitment" to Spain:

> In practice the very fact of our physical presence in Spain constitutes a quasi-commitment to the defense of the Franco regime, possibly even against internal disruptions. At some point the distinction between defending American lives and property and defending the host government would be likely to become academic, if not to disappear altogether . . . . It is not difficult to envision a situation in which the need to protect American servicemen would lead to large-scale military intervention in Spain and, as a result, to another military enterprise unauthorized by Congress.

The Symington Subcommittee listed a number of the contextual factors from which an implied commitment might reasonably be inferred: "Overseas bases, the presence of elements of United States armed forces, joint planning, joint exercises, or extensive military assistance programs represent to host governments more valid assurances of United States commitment than any treaty or executive agreement." It continued:

> [E]ach of these acts created an atmosphere in which the United States was better prepared and more inclined to undertake military action in the

> country in question; and the host government was increasingly led to believe that such actions would be taken should contingencies develop. An expectation of involvement or action was created on both sides.

The Subcommittee recognized the practical reality that the mere presence of U.S. troops in a country entailed a U.S. military response if that country were attacked. It recalled the 1968 acknowledgement of General Earle Wheeler, then Chairman of the Joint Chiefs of Staff, that "the presence of United States troops on Spanish soil represented a stronger security guarantee than anything written on paper." Thus, the Subcommittee found, "[f]aith on both sides is no longer placed primarily in the language of treaties, but in the presence of United States forces or facilities in the territory of those countries which are seeking United States protection through involvement."

Application to Iraq

Whether denominated an "implied," "tacit," "*de facto*," or "quasi" commitment, the security arrangement with Iraq, viewed, as this Committee has counseled that it must be, in light of the entire surrounding context, must reasonably be considered to constitute a national commitment of precisely the sort contemplated by the Senate in the National Commitments Resolution and its legislative progeny. Every one of the contextual factors identified by the Symington Subcommittee as giving rise to an implicit security commitment appears to present in the planned security arrangement with Iraq.

Verbal as well as non-verbal indicia of commitment support this conclusion. The 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" lays out the substance of what the United States and Iraq intend to agree upon in negotiations to be concluded before the end of this year. According to the Declaration of Principles, 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 will commit the United States to defend Iraq not simply against foreign aggression but "against internal and external threats," and will 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 will have no expiration date and no termination provision.

More important than these words, however, will be conduct. Thousands of members of the U.S. armed forces will continue to be stationed in Iraq. If attacked, those forces will no doubt become engaged in hostilities. Significant

casualties over a protracted period of time are possible, particularly if the United States becomes involved in a wider regional conflict. Substantial military bases and other facilities apparently will continue to be maintained in Iraq. Joint planning will take place with the Iraqi armed forces, police and other security elements. Joint exercises will be held. An extensive military assistance program will be carried out. Continued appropriations of public funds will unavoidable.

There can be little doubt, therefore, that whatever caveat or disclaimer the United States might formally apply in purporting to qualify its involvement, the Iraqi government might reasonably conclude that the new strategic framework constitutes a national commitment by the United States. These and other factors, taken together, constitute, in the words of Senator Symington's Subcommittee, "more valid assurances of United States commitment than any treaty or executive agreement."

Implications for the Senate's treaty power

The Framers of the Constitution believed that such a commitment should not be made unless it is accorded the advice and consent of two-thirds of the Senate as a treaty.

On some matters, it is true, the intent of the Constitution's Framers is opaque. As Justice Jackson wrote, their purposes often must be "divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh." *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 634 (1952). Here, however, their intent is luminously clear. I will focus on one, Alexander Hamilton, because he was the Framer least enthusiastic about legislative power. Hamilton wrote extensively about the treaty power. His views are therefore as significant as they are representative. Hamilton considered the treaty clause "one of the best digested and most unexceptionable parts of the plan." THE FEDERALIST NO. 75 (Alexander Hamilton). He opined that "the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them." Id. Hamilton noted that although the King of England could make treaties by himself, this power was denied to the President: "In this respect, therefore, there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can do only with the concurrence of a branch of the legislature." THE FEDERALIST NO. 69 (Alexander Hamilton). Hamilton therefore considered it "it would be utterly unsafe and improper to entrust that power to an elective magistrate of four years' duration." He concluded with a famous warning:

> The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States. THE FEDERALIST NO. 75 (Alexander Hamilton).

The institutional virtues of the Presidency famously identified by Hamilton — unity, secrecy and dispatch — have no relevance to the conclusion of a strategic arrangement with Iraq. No emergency exists: the Administration has known since last year that the government of Iraq wishes to enter into a bilateral arrangement with the United States to replace the governing UN Security Council resolution, which expires at the end of this year. If the process of negotiating a new security arrangement, or approving it as a treaty, necessarily extends beyond the end of this year, there is no reason why the Security Council resolution itself cannot be extended, as was in fact done before. Extension of the resolution would, indeed, have the salutary effect of involving the next administration in the process of formulating the terms of the security arrangement, which seems fitting inasmuch as it is, after all, the next administration that will be called upon to execute it.

The unity and secrecy of the Executive are similarly more vice than virtue in the making of a security arrangement with Iraq. The approval process will be strengthened by the expression of diverse views. Executive officials normally are chosen for their support of an administration's policies. When the spread of opinion voiced in the decision-making process is overly narrow, its legitimacy suffers. The Senate, on the other hand, is a clearinghouse for multiple opinions. Deputy assistant secretaries of state do not fly home regularly to Indianapolis or Wilmington or Hartford to get an earful of constituent opinion about taxes, combat deaths, and war costs. Senators do. The sense that their viewpoints have been heard and considered gives divergent constituencies a sense of participation in policymaking that is crucial to a policy's legitimacy. Public deliberation in considering those views is a further element that is essential for legitimacy; the Senate was, of course, designed for deliberation. Anonymous staffers of the National Security Council who meet in secret, however great their expertise, cannot confer the needed measure of legitimacy on a policy. In short, the policy outcome is strengthened if the process is seen by the public as "regular," as having produced a decision as a matter of right. This is perhaps why the Supreme Court has emphasized the importance of free and open debate to the proper operation of separated powers. It said:

> That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous and open debate of the great issues

> affecting the people and to provide avenues for the operation of checks on the exercise of governmental power. *Bowsher v. Synar*, 106 S. Ct. 3181, 3187 (1986).

An executive decision-making process removed from the full panoply of public or at least congressional opinion easily falls prey to the peculiar distortions of groupthink, to the pressures that cause the myopia of the quick fix to substitute for insight of statesmanship. Diversity of viewpoint is thus a crucial means of avoiding error and of achieving consensus. The greater the number of viewpoints heard, the greater the likelihood that the resulting policy will reflect accurately the common interests of the whole.

An open treaty-making process of the sort contemplated by the Framers injects productive new ideas into policy. It is no secret that the United States has no national strategy in Iraq. The "surge" is not a strategy. A funding cutoff is not a strategy. The United States has yet to develop a national consensus in answering the over-arching question: *What long-term support should the United States provide Iraq as the United States seeks to promote stability in the Middle East?* The American people have a huge and obvious stake in their government's answer to that question. That answer ought not be worked out behind closed doors, solely between negotiators for Iraq and the current Administration — an Administration that will be in office for less than three weeks after the new arrangement takes effect. It is entirely conceivable that open, robust debate in the Senate could generate a national consensus around a genuine strategy for supporting long-term regional stability. Potentially new and different options could emerge from Senate debate, concerning, perhaps, broadening the negotiating process to include states other than just Iraq and developing a genuine *collective* regional security arrangement. Perhaps the Senate would insist upon an Iraqi commitment to movement towards political reconciliation as a condition for any U.S. commitment to Iraq. There are many possibilities. In any case, the United States needs a national strategy for dealing with Iraq in the coming years. The Senate is not only the logical place to develop that strategy—it is the constitutionally required place to do so.

Open Senate consideration of the security arrangement as a treaty would also ensure that the United States and Iraq share the same understanding of what the arrangement means. It imputes no ill intent to the Executive to observe that the Administration has an understandable incentive to overstate the scope of the security arrangement in its communications with the Iraqis and to understate the scope of the arrangement in its communication with the Congress. It is essential that the Congress not be led to believe that there is no security commitment if there is one. It is also essential that the Iraqis not be led to believe that there is a security commitment if there is not one. When it comes to the role of the United

States in Iraq's future security, Congress and Iraq must be on the same page. If they are not, the consequences could be catastrophic, both internationally and domestically.

Why not include the House of Representatives? All are familiar with George Washington's famous suggestion that the Senate was to be the proverbial saucer where hot ideas from the cup of the House cooled. There is, in fact, continuing truth in the metaphor. A six-year term does provide a measure of insulation from sometimes excessive popular pressure. Long-term national security strategy should weigh public opinion heavily, but cannot be automatically be dictated by it. With two-thirds of the Senate not facing immediate re-election, Senators are better situated institutionally to formulate prudent policies that reflect the nation's long-term interests. In any event, while it is surely true that many international agreements are in this day and age approved as "congressional-executive agreements" — *i.e.*, authorized by majority votes in both the House and Senate — there are sound interpretive reasons for construing the Constitution as not viewing these as interchangeable with treaties. The view that the President is constitutionally free to designate any agreement a congressional-executive agreement, and thereby to lower the Senate's required approval margin from two-thirds to one-half, would altogether eliminate a key check on the President's power that the Framers placed purposefully and explicitly in the constitutional text. Some international arrangements, constitutionally, *must* be concluded as treaties. The President cannot, as the late Philip Kurland put it, *call* a treaty something other than a treaty and thereby dispense with the obligation to secure Senate approval. Philip Kurland, *The Impotence of Reticence*, 1968 DUKE L. J. 619, 626. That would also seem to be the view of the United States Supreme Court, which in the famous case of *Missouri v. Holland*, 252 U.S. 416 (1920), emphasized that the treaty power is broader than the legislative power, implying that treaties and executive agreements are not interchangeable instruments.

If some agreements must be concluded as treaties, it makes sense to think that the most important agreements must be so concluded. It was for these reasons that this Committee has said that "[t]he Treaty Clause requires that, normally, significant international commitments be made with the concurrence of two-thirds of the Senate. Acting on the basis of his sole constitutional power, the President would be without the power to enter into such an agreement." Exec. Rept. No. 95-12, 95th Cong., 2nd Sess. (Panama Canal Treaties). It would be hard to conceive of an international agreement more significant than the new security arrangement being negotiated with Iraq. The proverbial Martian stepping off a flying saucer could only react with bewilderment in comparing the proposed security arrangement to the international agreements that this Administration has submitted to the Senate for its advice and consent as treaties. Among them are an agreement to control anti-fouling systems on ships, an agreement against doping in sports, an

agreement governing the international registration of industrial designs, and a treaty to govern port privileges for tuna ships. It is hard to understand how the United States Constitution could seriously require Senate advice and consent to the regulation of steroids, bilge pumps and tuna boats but not to a *de facto* commitment to use armed force to defend another government — from its own people.

The argument will no doubt be heard that submission of the Iraq security arrangement as a treaty would complicate United States-Iraqi relations or somehow delay the implementation of needed initiatives. But it would be useful to remember, as Justice Brandeis reminded us, that the Constitution's separation of powers doctrine is designed not to promote efficiency but to save the people from autocracy. One of the key structural safeguards in that design is the check on executive power provided by the requirement that two-thirds of the Senate approve treaties. It is perilous to disregard such checks in the cause of administrative convenience. This Committee put it well in its 1979 report on treaty termination:

> The constitutional role of the Congress has too often been short-circuited because it was viewed—in the executive branch and even by some members of Congress—as an impediment to the expeditious adoption of substantive policies commanding the support of a majority. Thus, when in our recent history the substance of those policies lost that support, the procedures once available as checks had atrophied, and Congress was forced to struggle to reclaim its powers. The lesson was learned the hard way: procedural requirements prescribed by the Constitution must not be disregarded in the name of efficiency, and the substance of a policy, however attractive, can never justify circumventing the procedure required by the Constitution for its adoption. S. REP. NO. 96-119 at 5-6 (1979).

Conclusion

For these reasons, Mr. Chairman, I believe that new security framework arrangement with Iraq should be submitted to the Senate for its advice and consent as a treaty. I have not yet addressed constitutional requirements that govern the use of force within that framework, or whether constitutional requirements governing use of force are now being met in Iraq or will be met when the current Security Council resolution, Res. 1790, expires on December 31. If the constitutional requirements are being met, it is arguable that the same authorities that permit use of force also permit conclusion of the new security arrangement without a need for further authorization. It is to these crucial questions that I now turn.

Authority for Use of Force in Iraq

The Administration has cited a number of potential sources of authority for use of force in Iraq. In a February 13, 2008 opinion piece in the *Washington Post*, Secretary of State Condoleezza Rice and Secretary of Defense Robert Gates wrote that the new security arrangement with Iraq would include a provision that, in their words, confers "authority to fight." In a March 5, 2008 letter to Rep. Gary Ackerman, Jeffrey T. Bergner, Assistant Secretary for Legislative Affairs of the Department of State, transmitted a paper from Ambassador David M. Satterfield, dated March 4, 2008, responding to Rep. Ackerman's question whether the Administration believes it has constitutional authority to continue combat operations in Iraq beyond the end of this year absent explicit additional authorization from Congress. He answered in the affirmative. The President's authority, Ambassador Satterfield wrote, would derive from four sources:

> (1) his constitutional authority as commander-in-chief;
> (2) the Joint Resolution to Authorize the Use of United States Armed Forces Against Iraq, P. L. 107-243, enacted October 2, 2002;
> (3) the Authority for Use of Military Force (AUMF), P.L. 107-40, enacted September 18, 2001; and
> (4) the fact that "Congress has repeatedly provided funding for the Iraq war, both in regular appropriations cycles and in supplemental appropriations."

In my opinion, authority to use force in Iraq will not be conferred after December 31, and is not currently conferred, by any of those sources. To summarize my view, an executive agreement cannot confer authority to use force. A statute can confer such authority, but the Constitution prohibits use of force that exceeds statutorily authorized limits. Force now being used in Iraq exceeds the limits imposed by both the 2002 Joint Resolution and the AUMF. The 2002 Joint Resolution authorizes use of force against Iraq for two purposes: to "defend the national security of the United States against the continuing threat posed by Iraq," as its resolution put it, and to "enforce all relevant United Nations Security Council resolutions regarding Iraq." The first purpose has been fulfilled: the "continuing threat" posed by Iraq was seen as stemming from the government of Iraq — principally the regime of Saddam Hussein, and that regime is gone. The second purpose also has been fulfilled: "all relevant United Nations Security Council resolutions" referred to resolutions in effect at the time of enactment of the 2002 Joint Resolution, and, to the extent that they are still relevant, the current Iraqi government is now in compliance with them. A contrary interpretation would raise serious delegation, presentment and appointments problems under the Constitution and should therefore be avoided. As to the AUMF, while it does permit the use of force against "organizations" that "planned, authorized,

committed, or aided the terrorist attacks that occurred on September 11, 2001," and while force currently is being used against Al Qaeda in Iraq, it is doubtful whether Al Qaeda in Iraq is the same organization that engaged in the 2001 attacks, and in any event force is being used in Iraq against persons and entities not related to Al Qaeda in Iraq. Authority to use force cannot lawfully be inferred from either of these two ambiguous statutes, or from subsequent appropriations statutes; such an inference is prohibited under the section 8(a)(1) of the War Powers Resolution, which requires that use of force be specifically authorized. An elaboration follows.

The President's commander-in-chief power as authority to use force in a limited or "imperfect" war

The starting point must be the Constitution. In its earliest cases, the Supreme Court recognized a president's obligation to respect congressional restrictions when Congress has authorized "imperfect war" — a war fought for limited purposes. In an imperfect war, Justice Bushrod Washington said in *Bas v. Tingy*, 4 U.S. 37, 41 (1800), those "who are authorized to commit hostilities . . . can go no farther than to the extent of their commission." The following year, in *Talbot v. Seeman*, 5 U.S. 1, 27 (1801), Chief Justice John Marshall wrote that "[t]he whole powers of war being, by the Constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides in this enquiry." In the 2001 AUMF and in the 2002 Joint Resolution on Iraq, Congress in effect authorized limited or "imperfect" war. The President is therefore constitutionally required to respect the limits imposed in those two laws; Congress has implicitly prohibited any use of force not authorized therein, and the President's authority is at its "lowest ebb" — lower than it might have been had Congress been silent. This is the critical lesson imparted by Justice Jackson's famous concurring opinion in the *Steel Seizure Case*, 343 U.S. 579 (1952), which has since been adopted by the Supreme Court as the governing analytic framework.

An executive agreement as authority to use force

Ambassador Satterfield did not, in his March 4 paper, refer to the February 13, 2008 opinion by Secretary of State Condoleezza Rice and Secretary of Defense Robert Gates suggesting that the new arrangement will confer "authority to fight." In any case, whatever the import of such a provision under international law,* under U.S. domestic law, authority for the President to use force —

*Under international law, police activities, enforcement action and other uses of force by one state within the territory of another state are permitted if the government of that state consents. Provisions such as those in question could constitute consent by the

"authority to fight" — in Iraq must come from either the Constitution or the Congress. The arrangement with Iraq, if entered into as a sole executive agreement, therefore could not serve as a source of such authority. The question whether a sole executive agreement can provide authority to use force was put to the State Department during the administration of President Gerald Ford. In connection with the appearance of Secretary of State Henry Kissinger appearance before the Senate Foreign Relations Committee on November 19, 1975, Senator Dick Clark submitted the following written question to the Department of State: "Does any executive agreement authorize the introduction of U.S. armed forces into hostilities, or into situations wherein imminent involvement in hostilities is clearly indicated by the circumstances?" Assistant Secretary of State Robert J. McCloskey responded as follows on March 1, 1976 in a letter to Senator Clark:

> The answer is "no." Under our Constitution, a President may not, by mere executive agreement, confer authority on himself in addition to authority granted by Congress or the Constitution. The existence of an executive agreement with another country does not create additional power. Similarly, no branch of the Government can enlarge its power at the expense of another branch simply by unilaterally asserting enlarged authority….

The State Department's 1976 conclusion was correct. The President cannot confer upon himself authority to use force. So obvious is this principle that, when Congress made clear in 1973 in the War Powers Resolution (in section 8(a)(2)) that no treaty may be construed as conferring implied authority to use force, it

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government of Iraq for use of force by the United States within the territory of Iraq. Of course, any relevant limitations or restrictions imposed by humanitarian law (concerning, for example, requirements of humane treatment, proportionality, or the need to distinguish between combatants and non-combatants) would apply to any use of force by the United States. There is authority that a government cannot, under international law, lawfully consent to military intervention by another state if significant areas of its country or substantial parts of its population are under the control of an organized insurgency — *i.e.*, if the country is in a civil war. The theory is that principles of self-determination require that the people of a state be permitted to determine their own destiny free from outside interference. According to this theory, intervention in a civil war is impermissible whether that intervention occurs on behalf of the sitting government or on behalf of insurgents — unless another state has intervened unlawfully on behalf of either, in which case "counter-intervention" is permitted on behalf of the other side. These rules have been violated so many times by so many states in so many conflicts, however, that it is in my opinion doubtful whether they now constitute binding international law. As a question of fact it is, moreover, doubtful whether the insurgency in Iraq has risen to a level that would constitute a civil war for international law purposes, although that could of course change over the period within which any security arrangement is in effect.

made no reference to executive agreements. Congress no doubt deemed it unnecessary to affirm that if a treaty approved by two-thirds of the Senate cannot provide such authority, *a fortiori* a sole executive agreement cannot.

A treaty as authority to use force

Even if the new security arrangement were accorded the Senate's advice and consent as a treaty, it could not constitutionally authorize the use of force. Authority to use force would have to be conferred by implementing legislation, the enactment of which would of course include participation by the House of Representatives.

"A treaty may not declare war," the Senate Foreign Relations Committee said in its report on the Panama Canal Treaties, "because the unique legislative history of the declaration-of-war clause…clearly indicates that that power was intended to reside jointly in the House of Representatives and the Senate." S. EXEC. DOC. NO. 95-12, at 65 (1978). The events to which the Committee alluded are recorded in Madison's notes of the Constitutional Convention. The Convention considered a proposal that would have permitted the President to make war by and with the advice and consent of the Senate, and the plan was rejected. The plan was rejected in the face of arguments that both Houses of Congress should participate in the decision to go to war. Accordingly, the United States has never entered into a treaty that would have placed the nation in a state of war. The Covenant of the League of Nations was rejected by the Senate in part because of concern that it would oblige the United States to use force if so required by the League's Assembly. In each of its post-World War II mutual security treaties, the United States has therefore made clear that none of those treaties imposes an automatic obligation upon the United States to use force.

The 2002 Joint Resolution as authority to use force

Section 3 of the 2002 Joint Resolution provides as follows:

> (a) Authorization.--The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to--
>
> (1) defend the national security of the United States against the continuing threat posed by Iraq; and
>
> (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

The resolution provided no automatic termination date and remains in effect until these objectives are accomplished. Each of the two "prongs" will be examined in turn.

The first prong: a "continuing threat posed by Iraq"?

The first question is whether the Joint Resolution continues to authorize use of force on the basis of its first prong — defense against "the continuing threat posed by Iraq." A review of the Resolution's text and legislative history reveals that it does not. The "continuing threat" referred to the danger posed in 2002 and earlier by the government of Iraq. That threat was seen to flow from the regime's pursuit and possession of weapons of mass destruction. Iraq, the Joint Resolution noted, "attempted to thwart the efforts of weapons inspectors to identify and destroy" these weapons. The Joint Resolution found that Iraq continued "to possess and develop a significant chemical and biological weapons capability," actively sought a nuclear capability, and supported and harbored terrorist organizations. The threat, the resolution found, was that "the current Iraqi regime" would either employ weapons of mass destruction in a surprise attack against the United States or "provide them to international terrorists who would do so."

That threat is gone. Saddam Hussein's regime is history, and the threat posed by it is gone. Hussein is dead. A different government is in place. It does not possess or seek weapons of mass destruction. It does not support or harbor terrorists. There are, of course, terrorists present in Iraq today who pose a threat to American troops there. They may someday pose a threat to the general U.S. population. But Congress in 2002 authorized use of force against the old Iraqi government, not against groups unaffiliated with Saddam Hussein's regime (many of which actually opposed it).

Our starting point is of course the text of the Joint Resolution. In and of itself, the text of the first prong says little about the scope of the "continuing threat posed by Iraq." Two aspects of the wording are significant, however. First, the text refers to the continuing threat posed "*by* Iraq" — not a continuing threat *from* Iraq. The Joint Resolution is not, and was not intended to be, an open-ended authorization to use force against any future threat arising from a group within the territory of Iraq. Its sponsors had in mind a particular "continuing threat" — one emanating in some way from the Iraqi government. Second, the threat in question was "continuing," *i.e.*, it is one that existed *before* the Joint Resolution was adopted and would continue to exist afterwards, until it could be eliminated with the use of force. Threats that emerged after the enactment of the Joint Resolution therefore would not be *continuing* threats — they would not have continued from

the period before use of force was authorized. Whatever threat may be posed today by entities that were not operating within Iraq before enactment of the Joint Resolution — such as, for example, Al Qaeda in Iraq — these are not among the entities against which the Joint Resolution authorizes the use of force.

During the debate over this authorization and the decision to go to war, the most cited threat posed by Iraq was that arising from Iraq's programs to develop weapons of mass destruction. Nevertheless, based on the legislative history of the resolution, it is not possible to construe the authorization as limited to the threat posed by Iraqi weapons of mass destruction. Nor was the authorization limited to the WMD threat posed by the regime of Saddam Hussein. Several amendments offered in the House and the Senate that would have imposed such restrictions were rejected. In the House Committee on International Relations, Representative Smith proposed an amendment that would have substituted the words "the current Iraqi regime" for "Iraq." The amendment was rejected by Committee. H.R. REP. NO. 107-721, at 38 (2002). In the Senate, Senator Durbin proposed an amendment that would have replaced the words "the continuing threat posed by Iraq" with "an imminent threat posed by Iraq's weapons of mass destruction." 148 CONG. REC. S10229 (daily ed. Oct. 9, 2002) (text of Amend. 4865). That amendment was rejected by the Senate. 148 CONG. REC. S10272 (daily ed. Oct. 10, 2002) (Rollcall Vote No. 236 Leg.).

The House committee report likewise confirms that the "continuing threat posed by Iraq" was not limited to the primary threat of Iraq's weapons of mass destruction, though it does focus on the Iraqi government in power at the time. The report's description of "The Current Threat in Perspective" mentions the threat posed by the Iraqi government's aid to and harboring of terrorist organizations. H.R. REP NO. 107-721, at 6-8 (2002). The Report declares that:

> The *current Iraqi government's* demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself. H.R. REP. NO. 107-721, at 7 (2002)(emphasis added).

Nevertheless, the House committee report repeatedly uses the "Iraqi regime" as a code word for "the Baathist government of Iraq led by Saddam Hussein." The report traces the history of Iraqi aggression and obstinacy in the face of international demands for transparence and compliance with human rights law and international standards for inspection and monitoring of its WMD-capable facilities. The report notes specifically:

> Iraq both poses a continuing threat to the national security of the United States and international peace and security in the Persian Gulf region and remains in material and unacceptable breach of its international obligations by, among other things, continuing to possess and develop a significant chemical and biological weapons capability, actively seeking a nuclear weapons capability, and supporting and harboring terrorist organizations. *The continuing threat posed by Iraq is the motivation for the Committee's favorable action on H.J.Res. 114*.

The report highlights repeated Iraqi renunciations of its obligations under U.N. Security Council Resolutions, "brutal repression of its civilian population," Iraqi "capability and willingness" to use WMD externally and internally (against Iran and its own Kurdish citizens), and continuous hostile acts towards the U.S., including the attempt to assassinate former President G.H.W. Bush in 1993. The report cites Iraqi attacks on U.S. and coalition aircraft enforcing the unilaterally-imposed no-fly zones over northern and southern Iraq.

These are the sorts of "continuing threats" that Congress had in mind.

It is thus clear from the House committee report, the floor debate, and the text of the Joint Resolution itself that the authorization's supporters were concerned about the continuing threat posed *by* the government of Iraq, not a threat from terrorist groups operating *in* Iraq or *from* Iraq. Numerous members of the House saw the "continuing threat" as stemming from the then-existing Iraqi government.

The same was true in the Senate. This interpretation is supported specifically by discussion in the Senate surrounding an amendment proposed by Senator Bob Graham that would have added authorization to "defend the national security of the United States against the threat posed by the following terrorist organizations: (A) The Abu Nidal Organization. (B) HAMAS. (C) Hizballah. (D) Palestine Islamic Jihad. (E) Palestine Liberation Front." 148 CONG. REC. S10088 (daily ed. Oct. 8, 2002) (text of Amend. 4857). In opposing the amendment, Senator Joseph Lieberman, one of the original co-sponsors of the Senate version of the text that became H.R.J. Res 114 (2002), argued that this would "open up new territory," 148 CONG. REC. S10159 (daily ed. Oct 9, 2002), and would likely be opposed by Senate Democrats, but he did not suggest that the authority to use force against terrorist organizations was already contained in the underlying resolution. Rather, he characterized the Authorization as follows:

> [I]n responding to the threat to our national security *posed by Iraq under the leadership of Saddam Hussein*, it represents our best effort to find common ground to dispatch our constitutional responsibility and to

> provide an opportunity for the broadest bipartisan group of Senators to come together and express their support of action to enforce the United Nations resolutions that Saddam Hussein has constantly violated…. 148 CONG. REC. S10159 (daily ed. Oct 9, 2002)(emphasis added).

To conclude, both the text and legislative history of the Joint Resolution indicate that the authorization to use force in Iraq was limited to the continuing threat posed by the government of Iraq, in particular, but not limited to, the regime of Saddam Hussein and the threat of weapons of mass destruction. At present, U.S. forces in Iraq are engaged in the joint use of force with Iraqi forces and President Bush has praised the leadership of Iraqi Prime Minister Nouri al-Maliki. It is hard to see how any "continuing threat" — a threat that has continued since before 2002 — is still posed by that government.

The most sensible conclusion, therefore, is that the first prong of the 2002 Joint Resolution is no longer available as a source of authority to use force in Iraq.

The second prong: "enforce all relevant Security Council resolutions"?

The second prong of the 2002 Joint Resolution further authorizes the use of force to "enforce all relevant United Nations Security Council resolutions regarding Iraq." To the extent that any resolutions adopted before enactment of the 2002 Joint Resolution are still applicable, all have been honored by the Iraqi government; the United States surely is not contemplating the use of force to enforce them against that government. The question, therefore, is the meaning of "relevant": does the term, as used in the second prong, refer to *future* United Nations Security Council resolutions — resolutions relevant to Iraq that might at some point in the future be adopted by the Security Council? The Joint Resolution, it is worth noting, does not set a pertinent time period; if it were construed as authorizing force to enforce a future Security Council resolution, there would be no reason, in other words, to believe that that authority would not continue indefinitely into the future, until the 2002 Joint Resolution is formally repealed.

The text of the second prong is ambiguous. The legislative history, however, is not. Congress appears clearly to have intended to authorize the enforcement of those Security Council resolutions outstanding at the time of the enactment and, at most, a limited set of potential future Security Council resolutions directed at implementing the outstanding resolutions. This set of future resolutions would not include Resolution 1790, which provides the current mandate for the Multinational Force in Iraq.

The second prong of the Authorization is not the only reference to "all relevant Security Council resolutions" in the 2002 Joint Resolution. 107 Pub. L. No. 243 § 2(2) (2002). The immediately preceding section expresses Congressional support for U.S. diplomatic initiatives regarding Iraq using the same language regarding Security Council resolutions. In addressing this provision, the House committee report specified exactly what constitutes a relevant Security Council resolution for these purposes:

> This section states that Congress supports the efforts of President Bush to strictly enforce, through the United Nations Security Council, *all Security Council resolutions adopted prior* to the enactment of this Act addressing the threats posed by Iraq, *or adopted afterward to further enforce the earlier resolutions*. H.R. REP. NO. 107-721, at 41 (2002) (emphasis added).

The use of the same language in the subsequent section authorizing the use of the Armed Forces implicitly includes the same set of Security Council resolutions.

Further support for this interpretation is provided by statements made during the House and Senate floor debates by Representative Richard Gephardt and Senator Lieberman, the original co-sponsor and sponsor of the House and Senate versions of the bill, respectively, who played a significant role in managing the debate over H.R.J. Res. 114. In the House, Representative Gephardt stated:

> The resolution and its accompanying report define the threat posed by Iraq as consisting primarily of its weapons of mass destruction programs and its support for international terrorism. They also note that we should continue to press for Iraqi compliance with *all outstanding U.N. resolutions*, but suggest that we *only contemplate using force to implement those that are relevant to our nation's security*.
>
> As for the duration of this authorization, this resolution confines it to the continuing threat posed by Iraq; that is, its current and ongoing weapons programs and support for terrorists. We do not want Congress to provide this or subsequent Presidents with open-ended authority to use force against any future threats that Iraq might pose to the United States that are not related to its current weapons of mass destruction programs and support for international terrorism. The President would need to seek a new authorization from Congress to respond to any such future threats. 148 CONG. REC. H7779 (daily ed. Oct. 10, 2002) (emphasis added).

In the Senate, Senator Lieberman emphasized that the two prongs of the Authorization are linked and that relevant resolutions are those relating to the continuing threat by Iraq:

> It seems to me *these two parts have to be read in totality as modifying each other*. The resolutions that are *relevant* in the U.N. Security Council are to be enforced particularly in relationship *to the extent to which they threaten the national security of the United States*. In doing this, we are expressing our understanding that the President is unlikely to go to war to enforce a resolution of the United Nations that does not significantly affect the national security of the United States. 148 CONG. REC. S10269 (daily ed. Oct 10, 2002) (emphasis added).

The legislative history thus conclusively reveals that the second prong of the 2002 Joint Resolution was intended to authorize (1) the enforcement of pre-existing Security Council Resolutions and (2) at most, future Security Council resolutions that were aimed at implementing the earlier resolutions and were related to "the continuing threat posed by Iraq." Security Council Resolution 1790 — the current UN authorization for the Multinational Force — does not fall within the scope of either class.

Neither Resolution 1790 nor preceding resolutions passed to authorize the Multinational Force in Iraq can be construed as resolutions aimed at implementing resolutions that were active at the time H.R.J. Res. 114 was passed. Security Council Resolution 1790 renews the mandate of Security Council Resolution 1546 (2004). During the period in which the Coalition Provisional Authority exercised sovereign control over Iraq, the Multinational Force was authorized by Security Council Resolution 1511 (2003). Not one of these resolutions makes any reference, even in preambular language, to Security Council Resolution 687 or any other resolution relating to Iraq that was in force when the 2002 Joint Resolution was passed. Nothing in Resolution 1790 suggests that it was adopted to implement or enforce resolutions that were outstanding in October, 2002 when Congress's Joint Resolution was enacted.

If the 2002 Joint Resolution were to be interpreted as authorizing the enforcement of an unlimited set of future resolutions regarding Iraq that the Security Council might pass, three potentially serious constitutional problems would arise.

The first concerns the delegation of legislative power. The doctrinal specifics of constitutional jurisprudence governing the delegation of power to international organizations are amorphous; however, the constitutional principle that restricts the domestic delegation of legislative power — the principle that no delegated powers can be further delegated (*delegate potestas non potest delegari*) — would seemingly apply equally to international delegations. Among the domestic branches of the U.S. government, the delegation doctrine precludes Congress from delegating power without providing an "intelligible principle" to

guide its application. *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) Internationally, an open-ended grant of power to the UN Security Council to determine — within U.S. domestic law — the time, place, manner and objectives of U.S. use of force in Iraq would squarely raise such concerns. Although not expressed in explicit constitutional terms, the statements by a number of Senators who opposed the Levin amendment reflected the same concern. The Levin amendment would have made Congress's authorization contingent upon a resolution from the UN Security Council authorizing the use of force; a number of Senators were concerned that its adoption would give the Security Council a veto over U.S. security policy in Iraq. President Bush himself expressed similar concerns in signing the U.S.-India Peaceful Atomic Energy Cooperation Act. The law as enacted prohibits the transfer of nuclear material to India in violation of guidelines set by the Nuclear Suppliers Group, a consortium of 40 nuclear-fuel-producing nations that includes the United States. The President's December 8, 2006 signing statement said that "a serious question would exist as to whether the provision unconstitutionally delegated legislative power to an international body," and that to "avoid this constitutional question" his Administration would interpret the provision "as advisory." To construe the Joint Resolution as delegating to the UN Security Council power to determine whether authority to use force is available in U.S. domestic law would raise the same constitutional question. The Constitution permits only 535 members of Congress to place the United States in a state of war — not the UN ambassadors of Belgium, Croatia and Indonesia.

A second constitutional problem is posed by construing the second prong as applying to future Security Council resolutions. That problem concerns the Constitution's Appointments Clause. Article II gives the President the power to appoint "officers of the United States" only with the advice and consent of the Senate, and permits Congress to permit the appointment of "inferior officers" by the President, the courts, or department heads. The Supreme Court has made clear that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' and must, therefore, be appointed in the manner prescribed " by the Clause. The question arises whether the UN representative of a state that is a member of the Security Council would be exercising "significant authority pursuant to the laws of the United States" if that individual were permitted, in casting a vote within the Security Council, to give the resulting resolution force and effect within the domestic law of the United States. It is one thing to incorporate by reference into existing federal law Security Council resolutions that already exist; their terms are set and known to Congress when they are incorporated. It is be quite another, however, to so incorporate any and all Security Council resolutions that may be adopted at any point in the future — whatever their purposes, whatever their terms, and whatever

their justification — with no time or subject matter limitations beyond the vague requirement of "relevance."

Construing the second prong as applying to future Security Council resolutions creates a third constitutional problem, concerning presentment. In *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), the United States Supreme Court made clear that Congress cannot give a measure the force and effect of law unless it is presented to the President for his signature or veto. Yet that would be precisely the effect of a future-looking construction of the second prong: it would give a future Security Council resolution the force of federal law without presentation to the President for his signature or veto.

That these three problems attend a future-looking interpretation of the term "relevant" counsels that that interpretation should be avoided. It is a settled canon of statutory construction that interpretations that raise constitutional doubts are to be avoided. As the Supreme Court made clear in *Crowell v. Benson*, 285 U.S. 22, 62 (1932), "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." This is the canon on which President Bush relied in his signing statement on the U.S.-India nuclear law.

When President Bush signed the 2002 authorization, he said that "Iraq will either comply with all U.N. resolutions, rid itself of weapons of mass destruction, and end its support for terrorists, or it will be compelled to do so." He, too, seemed to believe that "relevant" referred to past resolutions, not future ones. Weighing all the evidence, it is reasonable to conclude that the second prong of the 2002 Joint Resolution also is no longer available as a source of authority to use force in Iraq.

The AUMF as authority to use force

The pertinent provision of the AUMF reads as follows:

> [T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. Pub. L. No. 107-40 §2(a) (2001).

For two reasons, the AUMF ought not be construed as providing authority for the use of force in Iraq.

First, the AUMF requires some nexus between the organization or entity in question and the 2001 attacks on the Pentagon and World Trade Center. It is not clear that "Al Qaeda in Iraq" is properly considered to be the same organization that engaged in those attacks. The mere fact that both organizations share the same name is not legally sufficient to bring the Iraqi entity within the scope of the AUMF. As I understand it, a serious question exists whether Al Qaeda cells operating within Iraq are in a "command and control" relationship with the Al Qaeda leaders who were present in Afghanistan at the time of the 2001 terrorist attacks. A thorough examination of this question probably would require a closed session of the Committee. Suffice it to note, however, that one would have to scrutinize very closely the comparative leadership structure, personnel, weaponry, strategic objectives, tactical targets, recruiting methods, physical facilities, theaters of operation and other aspects of the two organizations before concluding that they are in fact one and the same.

Second, even if the AUMF were applicable to Al Qaeda in Iraq, force is being used by the United States in Iraq against persons and entities not related to Al Qaeda in Iraq. As I understand it, fewer than twenty or twenty-five percent of U.S. casualties in Iraq can be attributed to Al Qaeda in Iraq. Military operations directed at insurgents responsible for the remaining seventy-five or eighty percent of U.S. casualties are not authorized by the AUMF. Perhaps for this reason, as recently as January, 2007 the Administration did not rely upon the AUMF as a source of authority for U.S. military operations in Iraq. In response to a written question concerning sources of authority that was put to Secretary Rice by Senator Biden following her oral testimony, Secretary Rice cited only the 2002 Joint Resolution and the President's constitutional authority, not the AUMF. *Securing America's Interest in Iraq: The Remaining Topics:* Hearings Before the Committee on Foreign Relations, United States Senate, 110th Cong., 1st Sess. 161 (2007).

The War Powers Resolution's "clear statement" rule: no implicit authority, from appropriations or elsewhere

At most, it is debatable whether authority to continue to use force in Iraq is provided by the 2002 Joint Resolution. At most, it is debatable whether such authority is provided by the AUMF. (It is not even debatable whether such authority is provided implicitly from appropriations or other sources — it is not.) The War Powers Resolution establishes as a rule of law that, when it comes to the monumental question whether a statute confers authority to use force, debatable authority is not enough. The War Powers Resolution requires that such authority

be *specific.* Section 8(a)(1) provides not only that the statute in question must explicitly refer to the Resolution; it provides that it must *specifically* authorize the use of force. That section provides as follows:

> Sec. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—
>
> (1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution….

Because serious ambiguities are present in both the 2002 Joint Resolution and the AUMF if they are construed as authorizing the use of force in Iraq, it cannot be said that either statute "specifically" does so.

This section also undercuts Ambassador Satterfield's claim that authority may be inferred from the fact that "Congress has repeatedly provided funding for the Iraq war, both in regular appropriations cycles and in supplemental appropriations." The section explicitly provides that authority to introduce the armed forces into hostilities "shall not be inferred…from any provision of law…, including any provision contained in any appropriation Act," unless those two conditions are met. No appropriations act meets either condition.

Accordingly, the War Powers Resolution precludes inferring authority to use force in Iraq from the 2002 Joint Resolution, from the AUMF, or from any appropriations legislation.

Conclusion

The Administration's proposed strategic framework agreement concerns the long-term nature of the U.S. relationship with Iraq; renewed authorization for the use of force concerns the role of our armed forces in that relationship. These are two-sides of the same coin. Both matters lie at the core of our long-term relationship with Iraq. Both raise issues that the Executive alone is not empowered to decide. Both require the involvement of the legislative branch of this government: Whether to make a long-term security commitment to Iraq is a question that is constitutionally committed to the President and the Senate by the Treaty Clause; whether force should be used to carry out that commitment is a question that is constitutionally committed to the Congress by the Declaration of War Clause. Neither issue can be addressed in isolation. Both must be addressed

if either is to be resolved. The Constitution specifies how they must be addressed. Setting long-term strategy in a security arrangement is the task of the Senate and President as treaty-makers; authorizing use of force to carry out that strategy is the task of Congress. This is the process that the Constitution mandates.

In contemplating that process, it is useful to recall the words of this Committee, written 39 years ago in its report on the National Commitments Resolution:

> Foreign policy is not an end in itself. We do not have a foreign policy because it is interesting or fun, or because it satisfies some basic human need; we conduct foreign policy for a purpose external to itself, the purpose of securing democratic values in our own country. These values are largely expressed in *processes* — in the *way* in which we pass laws, the *way* in which we administer justice, and the *way* in which government deals with individuals. The means of a democracy *are* its ends; when we set aside democratic procedures in making our foreign policy, we are undermining the purpose of that policy. It is always dangerous to sacrifice means to ostensible ends, but when an instrument such as foreign policy is treated as an end in itself, and when the processes by which it is made — whose preservation is the very objective of foreign policy — are then sacrificed to it, it is the end that is being sacrificed to the means. Such a foreign policy is not only inefficient but positively destructive of the purposes it is meant to serve. S. REP. NO. 91-129 (1969).

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Biographical Note

Michael J. Glennon is Professor of International Law at the Fletcher School of Law and Diplomacy, Tufts University, in Medford, Massachusetts. Prior to going into teaching, he was Legal Counsel to the Senate Foreign Relations Committee (1977-1980) and Assistant Counsel in the Office of the Legislative Counsel of the United States Senate (1973-1977). In 1998 he was Fulbright Distinguished Professor of International and Constitutional Law, Vytautus Magnus University School of Law, Kaunas, Lithuania. During the 2001-2002 academic year he was a Fellow at the Woodrow Wilson International Center for Scholars in Washington, DC. In 2005 he was Thomas Hawkins Johnson Visiting Scholar at the United States Military Academy, West Point. In 2006 he was Director of Studies at the Hague Academy of International Law. He has been *professor invité* at the University of Paris II (Panthéon-Assas) since 2006. Professor Glennon has served as a consultant to various congressional committees, the U.S. State Department, and the International Atomic Energy Agency. He is a member of the American Law Institute and the Council on Foreign Relations.

Professor Glennon is the author of numerous articles on constitutional and international law as well as several books. These include *Limits of Law, Prerogatives of Power: Interventionism after Kosovo* (Palgrave: 2001); *United States Foreign Relations and National Security Law*, 3rd ed. (with Thomas M. Franck and Sean Murphy; West Publishing Company: 2008); *When No Majority Rules*, (Congressional Quarterly Press (1992)); *Constitutional Diplomacy* (Princeton University Press: 1990); and *Foreign Affairs and the U.S. Constitution* (co-edited with Louis Henkin and William D. Rogers; Transnational Publishers: 1990). He served on the Board of Editors of the *American Journal of International Law* from 1986 to 1999.

Professor Glennon has testified before the International Court of Justice and numerous congressional committees. A frequent commentator on public affairs, he has spoken widely within the United States and abroad and appeared on Nightline, the Today Show, NPR's All Things Considered and other national news programs. His op-ed pieces have appeared in the *New York Times, Washington Post, Los Angeles Times, International Herald-Tribune, Financial Times,* and *Frankfurt Allgemeine Zeitung.*