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# CRS Report for Congress

## Congressional Oversight and Related Issues Concerning the Prospective Security Agreement Between the United States and Iraq

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# Congressional Oversight and Related Issues Concerning the Prospective Security Agreement Between the United States and Iraq


## Summary

On November 26, 2007, U.S. President George W. Bush and Iraqi Prime Minister Nouri Kamel Al-Maliki signed a Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America. Pursuant to this Declaration, the parties pledged to "begin as soon as possible, with the aim to achieve, before July 31, 2008, agreements between the two governments with respect to the political, cultural, economic, and security spheres." Among other things, the Declaration proclaims the parties' intention to enter an agreement that would commit the United States to provide security assurances to Iraq, arm and train Iraqi security forces, and confront Al Qaeda and other terrorist entities within Iraqi territory. Officials in the Bush Administration have subsequently stated that the agreement will not commit the United States to militarily defend Iraq. The nature and form of such a U.S.-Iraq security agreement has been a source of congressional interest, in part because of statements by General Douglas Lute, Assistant to the President for Iraq and Afghanistan, who suggested that any such agreement was unlikely to take the form of a treaty, subject to the advice and consent of the Senate, or otherwise require congressional approval.

It is not clear whether the security agreement(s) discussed in the Declaration will take the form of a treaty or some other type of international compact. Regardless of the form the agreement may take, Congress has several tools by which to exercise oversight regarding the negotiation, form, conclusion, and implementation of the arrangement by the United States. This report begins by discussing the current legal framework governing U.S. military operations in Iraq. The report then provides a general background as to the types of international agreements that are binding upon the United States, as well as considerations affecting whether they take the form of a treaty or an executive agreement. Next, the report discusses historical precedents as to the role that security agreements have taken, with specific attention paid to past agreements entered with Afghanistan, Germany, Japan, South Korea, and the Philippines. The report then discusses the oversight role that Congress plays with respect to entering and implementing international agreements involving the United States. Finally, the report describes legislation proposed in the 110th Congress to ensure congressional participation in the conclusion of a security agreement between the United States and Iraq, including S. 2426, the Congressional Oversight of Iraq Agreements Act of 2007, introduced by Senate Majority Leader Harry Reid on behalf of Senator Hillary Clinton on December 6, 2007; H.R. 4959, Iraq Strategic Agreement Review Act of 2008, introduced by Representative Rosa DeLauro on January 15, 2008; and H.R. 5128, introduced by Representative Barbara Lee on January 23, 2007.

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# Congressional Oversight and Related Issues Concerning the Prospective Security Agreement Between the United States and Iraq

On November 26, 2007, U.S. President George W. Bush and Iraqi Prime Minister Nouri Kamel Al-Maliki signed a Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America.[1] Pursuant to this Declaration, the parties pledged to "begin as soon as possible, with the aim to achieve, before July 31, 2008, agreements between the two governments with respect to the political, cultural, economic, and security spheres."[2] Among other things, the Declaration proclaims the parties' intention to negotiate a security agreement

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

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[1] The text of this agreement is available at [http://www.whitehouse.gov/news/releases /2007/11/20071126-11.html] [hereinafter "*Declaration of Principles*"]. The Declaration is rooted in an August 26, 2007 communique, signed by five top political leaders in Iraq, which called for a long-term relationship with the United States. The strategic arrangement contemplated in the Declaration is intended to ultimately replace the United Nations mandate under which the United States and allied forces are responsible for contributing to the security of Iraq. For further background on the implications of the prospective U.S.-Iraq agreement, see *The Proposed U.S. Security Commitment to Iraq: What Will Be In It and Should It Be a Treaty?: Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight & Subcomm. on the Middle East and South Asia of the House Comm. on Foreign Affairs*, January 23, 2008 (statement by CRS Specialist Kenneth Katzman). For further discussion of U.S. operations in Iraq and issues related to Iraqi governance and security, see CRS Report RL31339, *Iraq: Post-Saddam Governance and Security*, by Kenneth Katzman; CRS Report RL31701, *Iraq: U.S. Military Operations*, by Steve Bowman; and CRS Report RL33793, *Iraq: Regional Perspectives and U.S. Policy*, coordinated by Christopher Blanchard.

[2] *Declaration of Principles*, *supra* note 1.

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

The *New York Times* reported in January 2008 that the Bush Administration has crafted a draft proposal for a U.S.-Iraq security agreement which would, if agreed upon by the parties, provide the United States with broad authority to conduct military operations in Iraq, guarantee U.S. military forces and contractors immunity from Iraqi law, and provide the United States with the power to detain Iraqi prisoners.[4] The *New York Times* also reported that the draft proposal does not call for the establishment of permanent U.S. military bases in Iraq, authorize future troop levels in the country, or describe the specific security obligations of the United States should Iraq come under attack.[5] During testimony before the Senate Committee on Armed Services on February 6, 2008, Secretary of Defense Robert M. Gates stated that the prospective security agreement would not obligate the United States to militarily defend Iraq in the event of a threat to Iraqi security.[6]

It is not clear whether the agreement(s) discussed in the Declaration will take the form of a treaty or some other type of international compact. However, in a November 26, 2007 press briefing regarding the Declaration, General Douglas Lute, Assistant to the President for Iraq and Afghanistan, stated that the Administration did not foresee a prospective agreement with Iraq having "the status of a formal treaty which would then bring us to formal negotiations or formal inputs from the Congress."[7] According to a February 5, 2008 report by the *Congressional Quarterly*, the National Security Council offered to brief Congress on the nature of the prospective U.S.-Iraq security agreement.[8] In a February 13, 2008, op-ed piece for the *Washington Post*, Secretary of Defense Gates and Secretary of State Condoleezza Rice claimed that the Administration "will work closely with the appropriate committees of Congress to keep lawmakers informed and to provide complete transparency. Classified briefings have already begun, and we look forward to congressional input."[9]

Regardless of the form the agreement may take, Congress has several tools by which to exercise oversight regarding the negotiation, form, conclusion, and implementation of the arrangement by the United States. This report begins by

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[4] Thom Shanker & Steven Lee Myers, *U.S. Asking Iraq for Wide Rights in Fighting War*, N.Y. TIMES, January 25, 2008, at A1.

[5] *Id.*

[6] *Hearing Before the Sen. Comm. on Armed Services to Receive Testimony on the Defense Authorization Request for Fiscal Year 2009, the Future Years Defense Program, and the Fiscal Year 2009 Request for Operations in Iraq and Afghanistan*, February 6, 2008 (statement by Defense Sec. Robert M. Gates in response to questioning by Senator Edward Kennedy regarding a prospective U.S.-Iraq security agreement).

[7] White House Office of the Press Secretary, *Press Gaggle by Dana Perino and General Douglas Lute, Assistant to the President for Iraq and Afghanistan* , November 26, 2007, available at [http://www.whitehouse.gov/news/releases/2007/11/20071126-6.html].

[8] Adam Graham-Silverman,, *White House Backs Off From Asserting Long-Term Security Agreements with Iraq*, CONGRESSIONAL QUARTERLY, February 5, 2008 (quoting anonymous congressional aide).

[9] Condoleezza Rice and Robert Gates, *What We Need Next in Iraq*, WASH. POST, February 13, 2008, at A19.

discussing the current legal framework governing U.S. military operations in Iraq. The report then provides a general background as to the types of international agreements that are binding upon the United States, as well as considerations affecting whether they take the form of a treaty or an executive agreement. Next, the report discusses historical precedents that security agreements have taken, with specific attention paid to past agreements entered with Afghanistan, Germany, Japan, South Korea, and the Philippines. The report then discusses the oversight role that Congress plays with respect to entering and implementing international agreements involving the United States. Finally, the report describes legislation proposed in the 110th Congress to ensure congressional participation in the conclusion of a security agreement between the United States and Iraq.

# I. Current Legal Framework Governing U.S. Military Operations In Iraq

U.S. military operations in Iraq are congressionally authorized pursuant to H.J.Res. 114 (P.L. 107-243), which authorizes the President 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.

It also requires as a predicate for the exercise of that authority that the President determine that diplomatic efforts and other peaceful means will be inadequate to meet these goals and that the use of force against Iraq is consistent with the battle against terrorism.[10] H.J.Res. 114 appears to incorporate any future resolutions concerning the continuing situation in Iraq that the Security Council may adopt, as well as those adopted prior to its enactment.[11] The authority also appears to extend beyond compelling Iraq's disarmament to implementing the full range of concerns expressed in those U.N. resolutions, as well as for the broad purpose of defending "the national security of the United States against the continuing threat posed by Iraq."

The United States and Great Britain, along with a number of other countries, invaded Iraq in March of 2003, asserting the authority to enforce compliance with

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[10] In March 2003, President George W. Bush reported to Congress the determination that was required by P.L. 107-243 regarding his exercise of authority for military operations against Iraq. House Document 108-50. March 19, 2003. A report in connection with Presidential Determination under Public Law 107-243. Communication from the President of the United States transmitting a report consistent with Section 3(b) of the Authorization for Use of Military Force Against Iraq Resolution of 2002.

[11] For an historical overview of Security Council Resolutions addressing the situation in Iraq prior to 2003, see *The United Nations Security Council — Its Role in the Iraq Crisis: A Brief Overview*, CRS Report RS21323.

earlier Security Council resolutions that addressed the situation in Iraq and Kuwait.[12] Other Security Council members disagreed with this interpretation of the previous resolutions, denying that these resolutions contained a continuing authorization to use force against Iraq. Despite the initial lack of consensus regarding the legality of the invasion, the Security Council adopted subsequent resolutions recognizing the occupation of Iraq and generally supporting the coalition's plans for bringing about a democratic government in Iraq.[13]

The first of these, Resolution 1511 (October 16, 2003), recognized the Coalition Provisional Authority (CPA) and underscored the temporary nature of its obligations and authorities under international law, which it said would cease "when an internationally recognized, representative government established by the people of Iraq is sworn in and assumes the responsibilities of the [CPA]." (Para. 1). In paragraph 13, Resolution 1511 authorized

> a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme [for establishing a permanent government in Iraq] as well as to contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure.

The Security Council included in Resolution 1511 a commitment to "review the requirements and mission of the multinational force ... not later than one year from the date of this resolution." It further established that "in any case the mandate of the force shall expire upon the completion of the [electoral process outlined previously]," at which time the Security Council would be ready "to consider ... any future need for the continuation of the multinational force, taking into account the views of an internationally recognized, representative government of Iraq."

The Security Council resolutions do not provide for the immunity of coalition troops from Iraqi legal processes. No status of forces agreement (SOFA) was deemed possible prior to the recognition of a permanent government in Iraq.[14] Immunity for coalition soldiers, contract workers, and other foreign personnel in Iraq in connection with security and reconstruction was established by order of the CPA, which relied for its authority on the laws and usages of war (as consistent with relevant Security Council resolutions.) CPA Order 17, Status of the Coalition

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[12] *See* Sean Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173 (2004).

[13] For an overview of the process, see *Iraq: Post-Saddam Governance and Security*, CRS Report RL31339, by Kenneth Katzman.

[14] The United States reportedly made an effort to establish a SOFA with the Iraqi Governing Council prior to the handover of sovereignty and establishment of the Iraqi Interim Government, but Iraqi officials took the view that only a permanently established government in Iraq would have the authority to enter binding international agreements. *See* Robin Wright, *U.S. Immunity in Iraq Will Go Beyond June 30*, WASH. POST, June 24, 2004, at A01.

Provisional Authority, MNF - Iraq, Certain Missions and Personnel in Iraq,[15] established that all personnel of the multinational force (MNF) and the CPA, and all International Consultants, are immune from Iraqi legal process, which are defined to include "arrest, detention or proceedings in Iraqi courts or other Iraqi bodies, whether criminal, civil, or administrative." Such persons are nevertheless expected to respect applicable Iraqi laws, but are subject to the exclusive jurisdiction of their "Sending States." States contributing personnel to the multinational force have the right to exercise within Iraq any criminal and disciplinary jurisdiction conferred on them by their domestic law over all persons subject to their military law.[16]

In June, 2004, in anticipation of the dissolution of the CPA and handover of sovereignty to the Interim Government of Iraq, the Security Council adopted Resolution 1546, reaffirming the authorization for the multinational force in Resolution 1511 while noting that its presence in Iraq "is at the request of the incoming Interim Government of Iraq." The terms of the mandate for the MNF are expressed in paragraph 12, in which the Security Council

> Decides further that the mandate for the multinational force shall be reviewed at the request of the Government of Iraq or twelve months from the date of this resolution, and that this mandate shall expire upon the completion of the political process set out ... above, and declares that it will terminate this mandate earlier if requested by the Government of Iraq.

Resolution 1546 incorporated letters from U.S. Secretary of State Colin Powell and Prime Minister of the Interim Government of Iraq Dr. Ayad Allawi. Secretary Powell wrote:

> In order to continue to contribute to security, the MNF must continue to function under a framework that affords the force and its personnel the status that they need to accomplish their mission, and in which the contributing states have responsibility for exercising jurisdiction over their personnel and which will ensure arrangements for, and use of assets by, the MNF. The existing framework governing these matters is sufficient for these purposes. In addition, the forces that make up the MNF are and will remain committed at all times to act consistently with their obligations under the law of armed conflict, including the Geneva Conventions.

Prior to the handover of sovereignty to the interim government, Ambassador Bremer issued CPA Order 100 to revise existing CPA orders, chiefly by substituting the MNF-Iraq for the CPA and otherwise reflecting the new political situation.[17] CPA Order 100 stated, as its purpose,

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[15] Available online at [http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf]

[16] *Id.* § 4.

[17] CPA Order 100, Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority, June 28, 2004, *available at* [http://www.cpa-iraq.org/regulations/20040628_CPAORD_100_Transition_of_Laws__Regulations__Orders__and_Directives.pdf].

> to ensure that the Iraqi Interim Government and all subsequent Iraqi governments inherit full responsibility for these laws, regulations, orders, memoranda, instructions and directives so that their implementation after the transfer of full governing authority may reflect the expectations of the Iraqi people, as determined by a fully empowered and sovereign Iraqi Government.[18]

Under Article 26 of the Transitional Administrative Law of Iraq (TAL),[19] "The laws, regulations, orders, and directives issued by the Coalition Provisional Authority pursuant to its authority under international law shall remain in force until rescinded or amended by legislation duly enacted and having the force of law."

Accordingly, CPA Order 17 (as revised) survived the transfer of authority to the Iraqi Interim Government, which took no action to amend or rescind it. Iraq's permanent constitution was adopted in 2005. Article 130 of the permanent constitution continues the validity of existing laws, presumably including CPA Orders that were not rescinded by the Transitional Government.

The U.N. Security Council extended the mandate for the multinational forces until December 31, 2006,[20] and again until December 31, 2007,[21] and finally, until December 31, 2008.[22] Iraqi Prime Minister al-Maliki requested the Security Council extend the MNF mandate "one last time" until the end of December, 2008, "provided that the extension is subject to a commitment by the Security Council to end the mandate at an earlier date if the Government of Iraq so requests and that the mandate is subject to periodic review before June 2008."[23]

By its terms, CPA Order 17 remains in force for the duration of the U.N. mandate and terminates only after the departure of the final element of the MNF from Iraq, or at such time as it is rescinded or amended by duly enacted legislation having the force of law.[24] Neither it nor CPA Order 100 establishes a timetable for the departure of all MNF elements from Iraq after the U.N. mandate ends. Order 17 could be interpreted effectively to expire concomitantly with the U.N. mandate, because it defines Multinational Force with reference to the U.N. resolutions.[25] However, the order appears to have been designed to stay in force for a time after the expiration of the U.N. mandate, for a long enough period at least to allow the

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[18] *Id.* § 1.

[19] Law of Administration for the State of Iraq for the Transitional Period, 8 March 2004, *available at* [http://www.cpa-iraq.org/government/TAL.html].

[20] U.N.S.C. Res. 1637 November 11, 2005).

[21] U.N.S.C. Res. 1723 (November 28, 2006).

[22] U.N.S.C. Res. 1790 (December 18, 2007).

[23] Letter from Nuri Kamel al-Maliki, Prime Minister of the Republic of Iraq, to the Security Council, attached as Annex I to U.N.S.C. Res. 1790.

[24] CPA Order 17, *supra* note 15, § 20.

[25] *Id.* § 1 (defining MNF to mean "the force authorized under U.N. Security Council Resolutions 1511 and 1546, and any subsequent relevant U.N. Security Council resolutions").

departure of all MNF personnel. If the U.N. Security Council or the Iraqi government adopts a timetable for the departure of the MNF, it seems logical that CPA Order 17 would continue in force until the deadline for departure passes. On the other hand, if the government of Iraq invites the United States or any other coalition government to maintain troops in Iraq after the U.N. mandate terminates, it may be expedient for the Iraqi government to continue to recognize CPA Order 17 until a new agreement establishing the role and status of such troops is reached.

It bears emphasis that the foregoing is subject to the sole interpretation of the Iraqi government. Whether the immunity of coalition troops and other personnel will continue in force after the U.N. mandate expires depends on whether the Iraqi government deems them to be part of elements of the MNF that have not yet departed or military forces that have overstayed their mandate. It is not clear which branch of the Iraqi government would make that determination. Even more significantly, the Iraqi legislature could decide to repeal, amend, or possibly extend the order at any time, even before the U.N. mandate expires.

Another question regarding the status and role of U.S. forces in Iraq post-U.N. mandate is whether the congressional authorization to use military force will also end. H.J.Res. 114 does not contain explicit time requirements or call for the withdrawal of U.S. troops by any specific date or set of criteria. Presumably, continued force is authorized under the resolution only so long as Iraq poses a continuing threat to the United States and the U.S. military presence is not inconsistent with relevant U.N. resolutions. Because the specific threats posed by Iraq during Saddam Hussein's regime that were emphasized in the preamble to H.J.Res. 114 no longer exist (with the possible exception of the presence of al Qaida in Iraq), it may be argued that Iraq no longer poses a danger to the security of the United States, at least, not of the same kind that led Congress to pass H.J.Res. 114 in the first place. Once the U.N. mandate for the multinational forces in Iraq expires (and assuming that the U.N. Security Council does not adopt new language supporting a new U.S. military role in Iraq), it is arguable that the U.S. use of military force in Iraq is not necessary or appropriate to enforce U.N. Security Council resolutions regarding Iraq. Such conclusions do not necessarily support a view that U.S. troops are automatically required to be withdrawn when the U.N. mandate expires,[26] but suggest that new legislation may be necessary to support a new role for U.S. troops under a possible agreement with Iraq.

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[26] For an analysis of Congress's role in shaping the mission in Iraq, see generally *Congressional Authority to Limit U.S. Military Operations in Iraq*, CRS Report RL33837, by Jennifer K. Elsea, Michael John Garcia, and Thomas J. Nicola.

# II. International Agreements Under U.S. Law

Under the U.S. system, a legally binding international agreement can be entered into pursuant to either a treaty or an executive agreement.[27] The Constitution allocates primary responsibility for entering such agreements to the executive branch, but Congress also plays an essential role. First, in order for a treaty (but not an executive agreement) to become the "Law of the Land,"[28] the Senate must provide its advice and consent to treaty ratification by a two-thirds majority. Alternatively, Congress may authorize congressional-executive agreements. Many treaties and executive agreements are not "self-executing," meaning that in order for them to take effect domestically, implementing legislation is required to provide U.S. bodies with the authority necessary to enforce and comply with the agreements' provisions. While some executive agreements do not require congressional approval, adherence to them may nonetheless be dependent upon Congress appropriating necessary funds or authorizing the activities to be carried out (where compliance with the agreement would contravene some statutory provision).

## Treaties

Under U.S. law, a treaty is an agreement negotiated and signed[29] by the executive branch, which enters into force if it is approved by a two-thirds majority

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[27] Not every pledge, assurance, or arrangement made between the United States and a foreign party constitutes a legally binding international agreement. For discussion of criteria used to distinguish between legally binding and non-binding international commitments, see *infra* at 33. See also 22 C.F.R. § 181.2(a); State Department Office of the Legal Adviser, Guidance on Non-Binding Documents, at [http://www.state.gov/s/l/treaty/guidance/].

[28] U.S. CONST., art. VI, § 2. In this regard, it is important to distinguish "treaty" in the context of international law, in which "treaty" and "international agreement" are synonymous terms for all binding agreements, and "treaty" in the context of domestic American law, in which "treaty" more narrowly refers to a particular subcategory of binding international agreements. It should be noted, however, that the term "treaty" is not always interpreted under U.S. law to refer only to those agreements described in Article II, § 2 of the Constitution. See Weinberger v. Rossi, 456 U.S. 25 (1982) (interpreting statute barring discrimination except where permitted by "treaty" to refer to both treaties and executive agreements); B. Altman & Co. v. United States, 224 U.S. 583 (1912) (construing the term "treaty," as used in statute conferring appellate jurisdiction, to also refer to executive agreements).

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

in the Senate and is subsequently ratified following Presidential signature.[30] The Senate may, in considering a treaty, condition its consent on certain reservations,[31] declarations[32] and understandings[33] concerning treaty application. If accepted, these reservations, declarations, and understandings may limit and/or define U.S. obligations under the treaty.[34]

## Executive Agreements

The great majority of international agreements that the United States enters into are not treaties but executive agreements[35] — agreements made by the executive branch that are not submitted to the Senate for its advice and consent. There are three types of *prima facie* legal executive agreements: (1) *congressional-executive agreements*, in which Congress has previously or retroactively authorized an international agreement entered into by the Executive; (2) *executive agreements made pursuant to an earlier treaty*, in which the agreement is authorized by a ratified treaty; and (3) *sole executive agreements*, in which an agreement is made pursuant to the President's constitutional authority without further congressional authorization. The Executive's authority to promulgate the agreement is different in each case.

Although executive agreements are not specifically discussed in the Constitution, they nonetheless have been considered valid international compacts under Supreme Court jurisprudence and as a matter of historical practice.[36] Starting

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

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

[32] Declarations are "statements expressing the Senate's position or opinion on matters relating to issues raised by the treaty rather than to specific provisions." TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 31, at 11.

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

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

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

[36] E.g., American Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003) ("our cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate...this power having been exercised since

(continued...)

in the World War II era, reliance on executive agreements has grown significantly.[37] Whereas 27 executive agreements (compared to 60 treaties) were concluded by the United States during the first 50 years of the Republic, between 1939 and 2004 the United States concluded 15,522 executive agreements (compared to 1,035 treaties).[38]

Although some have argued that certain agreements may only be concluded as treaties, subject to the advice and consent of the Senate,[39] this view has generally been rejected by scholarly opinion.[40] Adjudication of the propriety of executive agreements has been rare, in significant part because plaintiffs often cannot demonstrate that they have suffered a redressable injury giving them standing to

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[36] (...continued)
the early years of the Republic"); United States v. Belmont, 301 U.S. 324, 330 ("an international compact...is not always a treaty which requires the participation of the Senate").

[37] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 31, at 38-40.

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

[39] E.g., Edwin Borchard, *Treaties and Executive Agreements: A Reply*, 54 YALE L. J. 616 (1945) (arguing that the congressional-executive agreement is not a constitutionally permissible alternative to a treaty, and that sole executive agreements are permissible in limited circumstances); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995) (arguing that the Treaty Clause is the exclusive means for Congress to approve significant international agreements); John C. Yoo, *Laws as Treaties?: the Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757 (2001) (arguing that treaties are the constitutionally required form for congressional approval of an international agreement concerning action lying outside of Congress's constitutional powers, including matters with respect to human rights, political/military alliances, and arms control, but are not required for agreements concerning action falling within Congress's powers under Art. I of the Constitution, such as agreements concerning international commerce).

[40] RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 303 n.8 (1987) ("At one time it was argued that some agreements can be made only as treaties, by the procedure designated in the Constitution.... Scholarly opinion has rejected that view."); HENKIN, *supra* note 35, at 217 ("Whatever their theoretical merits, it is now widely accepted that the Congressional-Executive agreement is available for wide use, even general use, and is a complete alternative to a treaty..."); Yoo, *supra* note 39, at 759 (noting that "a broad intellectual consensus exists that congressional-executive agreements may serve as full substitutes for treaties"). Cf. Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799 (1995) (arguing that developments in the World War II era altered historical understanding of the Constitution's allocation of power between government branches so as to make congressional-executive agreement a complete alternative to a treaty); Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (parts I and II), 54 YALE L. J. 181, 534 (1945) (arguing that historical practice supports the interchangeability of congressional-executive agreements and treaties).

challenge an agreement,[41] or fail to make a justiciable claim. In 2001, the Eleventh Circuit Court of Appeals held that the issue of whether the North American Free Trade Agreement (NAFTA) was a treaty requiring approval by two-thirds of the Senate presented a nonjusticiable political question.[42] It does not appear that an executive agreement has ever been held invalid by the courts on the grounds that it was in contravention of the Treaty Clause.[43] Nonetheless, as a matter of historical practice, some types of agreements have been concluded as treaties, while others have been concluded as executive agreements.[44]

**Congressional-Executive Agreements.** In the case of congressional-executive agreements, the "constitutionality...seems well established."[45] Unlike treaties, where only the Senate plays a role in authorization, both Houses of Congress are involved in the authorizing process for congressional-executive agreements. Congressional authorization takes the form of a statute passed by a majority of both Houses of Congress. Historically, congressional-executive agreements cover a wide variety of topics, ranging from postal conventions to bilateral trade to military assistance.[46] NAFTA and the General Agreement on Tariffs and Trade (GATT) are notable examples of congressional-executive agreements.

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[41] RESTATEMENT, *supra* note 40, at § 302, n. 5; HENKIN, *supra* note 35, at 142-148. See also Greater Tampa Chamber of Commerce v. Goldschmidt, 627 F.2d 258 (D.C. Cir. 1980) (finding that plaintiffs lacked standing to challenge the propriety of the form taken by an international agreement between the United States and United Kingdom). Executive agreements dealing with matters having no direct impact upon private interests in the United States (e.g., agreements concerning military matters or foreign relations) are rarely the subject of domestic litigation, in part because persons typically cannot demonstrate that they have suffered an actual, redressable injury and therefore lack standing to challenge such agreements. RESTATEMENT, *supra* note 40, at § 303, n. 11.

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

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

[44] See Yoo, *supra* note 39 (discussing the kinds of agreements historically taking the form of treaties in contrast to those taking the form of executive agreements). See also *infra* at 16-23 (discussing form that different types of U.S. security agreements have historically taken).

[45] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supr*a note 31, at 5. See also HENKIN, *supra* note 35, at 215-18.

[46] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 31, at 5. Reciprocal trade agreements which were once concluded as treaties now typically take the form of congressional-executive agreements. RESTATEMENT, *supra* note 40, at § 303, n. 9. See also 19 U.S.C. § 2111 (conditionally authorizing the President to enter trade agreements with other nations); CRS Report 97-896, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather than as Treaties*, by Jeanne Grimmett.

Congressional-executive agreements also may take different forms. Congress may enact legislation authorizing the Executive to negotiate and enter agreements with other countries on a specific matter.[47] A congressional-executive agreement may also take the form of a statute passed following the negotiation of an agreement which incorporates the terms or requirements of the agreement into U.S. law.[48] Such authorization may be either explicit or implied by the terms of the congressional enactment.[49]

**Executive Agreements Made Pursuant to Treaties.** The legitimacy of agreements made pursuant to treaties is also well established, though controversy occasionally arises as to whether the agreement was actually imputed by the treaty in question.[50] Since the earlier treaty is the "Law of the Land,"[51] the power to enter into an agreement required or contemplated by the treaty lies fairly clearly within the President's executive function. However, the Senate occasionally conditions its approval of a treaty upon a requirement that any subsequent agreement made pursuant to the treaty also be submitted to the Senate as a treaty.[52]

**Sole Executive Agreements.** Sole executive agreements rely on neither treaty nor congressional authority for their legal basis. There are a number of provisions in the Constitution that may confer limited authority upon the President to promulgate such agreements on the basis of his power to conduct foreign affairs.[53] The Litvinov Assignment, under which the Soviet Union assigned to the United States its claims against American nationals, is an example of a sole executive agreement.

If the President enters into an executive agreement pursuant to and dealing with an area where he has clear, exclusive constitutional authority — such as an agreement to recognize a particular State for diplomatic purposes — the agreement is legally

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

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

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

[50] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 31, at 5.

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

[52] See RESTATEMENT, *supra* note 40, § 303 cmt. d.

[53] U.S. CONST. art. II, § 1 ("The executive power shall be vested in a President of the United States of America..."), § 2 ("The President shall be commander in chief of the Army and Navy of the United States..."), § 3 ("he shall receive ambassadors and other public ministers..."). Courts have recognized foreign affairs as an area of very strong executive authority. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

permissible regardless of Congress's opinion on the matter.[54] If, however, the President enters into an agreement and his constitutional authority over the subject matter is unclear, or if Congress also has constitutional authority over the subject matter, a reviewing court may consider Congress's position in determining whether the agreement is enforceable as U.S. law.[55] If Congress has given implicit approval to the President to enter into the agreement, or is silent on the matter, it is more likely that the agreement will be deemed valid. When Congress opposes the agreement and the President's constitutional authority to enter the agreement is ambiguous, it is unclear if or under what circumstances a court would recognize such an agreement as controlling.

Because sole executive agreements do not rely on treaty or congressional authority to support their legality, they do not require congressional approval to become binding, at least as a matter of international law. Courts have recognized, however, that if a sole executive agreement conflicts with pre-existing federal law, the earlier law will remain controlling in most circumstances.[56]

Even if a sole executive agreement does not conflict with prior federal law, Congress may still act to limit the agreement's effect through a subsequent legislative enactment, so long as it has constitutional authority to regulate the matter covered by the agreement.[57] In the security context, Congress has clear constitutional authority to enact measures that would limit the effect of sole executive agreements involving

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[54] See RESTATEMENT, *supra* note 40, § 303 (4).

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

[56] Executive agreements have been held to be inferior to conflicting federal law when the agreement concerns matters expressly within the constitutional authority of Congress. See, e.g., United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953) (finding that executive agreement contravening provisions of import statute was unenforceable); RESTATEMENT, *supra* note 40, § 115, n.5. However, an executive agreement might trump pre-existing federal law if it concerns an enumerated or inherent executive power under the Constitution, or if Congress has historically acquiesced to the President entering agreements in the relevant area. See *id.*; United States v. Pink, 315 U.S. 203, 230 (1942) ("[a]ll Constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature") (quoting THE FEDERALIST NO. 64 (John Jay)); *Dames & Moore*, 453 U.S. at 654 (upholding sole executive agreement concerning the handling of Iranian assets in the United States, despite the existence of a potentially conflicting statute, given Congress's historical acquiescence to these types of agreements).

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

military commitments. Article I, § 8 of the Constitution accords Congress the power "To lay and collect Taxes ... to ... pay the Debts and provide for the common Defence,""To raise and support Armies," "To provide and maintain a Navy," "To make Rules for the Government and Regulation of the land and naval Forces," and "To declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," as well as "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions" and "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."[58] Further, Congress is empowered "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers ..." as well as "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[59]

In addition to the constitutional provisions that provide Congress with authority to legislate on matters concerning military affairs,[60] Congress also has virtual plenary power over appropriations — authority not qualified with reference to Congress's enumerated powers under Article I, § 8. The Appropriations Clause provides that "[n]o money can be paid out of the Treasury unless it has been appropriated by an act of Congress."[61] Accordingly, adherence to pledges made in sole executive agreements may be dependent upon the availability of appropriations authorized by Congress. Congress may specify the terms and conditions under which appropriations may be used, so long as it does not impose unconstitutional conditions upon the use of appropriated funds.[62]

## Choosing Between a Treaty and Executive Agreement

A recurring concern for the executive and legislative branches is whether an international commitment should be entered into as a treaty or an executive agreement. The Senate may prefer that significant international commitments be entered as treaties, and fear that reliance on executive agreements will lead to an erosion of the treaty power. The House may want an international compact to take

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[58] U.S. CONST. art. I, § 8.

[59] *Id.*

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

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

[62] See United States v. Klein, 80 U.S. (8 Wall.) 128 (1872) (holding invalid an appropriations proviso that effectively nullified some effects of a presidential pardon and that appeared to prescribe a rule of decision in court cases); United States v. Lovett, 328 U.S. 303 (1946)(invalidating as a bill of attainder an appropriations provision denying money to pay salaries of named officials). For further discussion of Congress's ability to use its appropriations power to limit the deployment or use of U.S. military forces, see CRS Report RL33837, *supra* note 26, at 29-35, 41-49.

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

State Department regulations prescribing the process for coordination and approval of international agreements (commonly known as the "Circular 175 procedure"[63]) include criteria for determining whether an international agreement should take the form of a treaty or an executive agreement. Congressional preference is one of several factors considered when determining the form that an international agreement should take. According to State Department regulations,

> In determining a question as to the procedure which should be followed for any particular international agreement, due consideration is given to the following factors []:
> (1) The extent to which the agreement involves commitments or risks affecting the nation as a whole;
> (2) Whether the agreement is intended to affect state laws;
> (3) Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
> (4) Past U.S. practice as to similar agreements;
> (5) The preference of the Congress as to a particular type of agreement;
> (6) The degree of formality desired for an agreement;
> (7) The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
> (8) The general international practice as to similar agreements.
>
> In determining whether any international agreement should be brought into force as a treaty or as an international agreement other than a treaty, the utmost care is to be exercised to avoid any invasion or compromise of the constitutional powers of the President, the Senate, and the Congress as a whole.[64]

In 1978, the Senate passed a resolution expressing its sense that the President seek the advice of the Senate Committee on Foreign Relations in determining whether an international agreement should be submitted as a treaty.[65] The State Department subsequently modified the Circular 175 procedure to provide for consultation with appropriate congressional leaders and committees concerning

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

[64] 11 F.A.M. § 723.3 (2006).

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

significant international agreements.[66] Consultations are to be held "as appropriate."[67] Congressional consultation on the substance and form of international agreements is discussed in more detail later in this report.[68]

# II. Historical Practice Regarding Security Agreements

The Bush Administration has characterized the proposed security arrangement with Iraq as being of a kind commonly entered by the United States, and has stated that "[t]he U.S. has security relationships with over 100 countries around the world, including recent agreements with nations such as Afghanistan and former Soviet bloc countries."[69] Some U.S. security relationships take the form of legally binding treaties or executive agreements, whereas others involve non-binding assurances or pledges. Whereas some security agreements are publicly available, others remain classified. Though the Bush Administration and Maliki government have issued a Declaration of Principles setting the parameters for a future security arrangement between the United States and Iraq, it is not yet clear whether the arrangement will be governed by treaty, executive agreement, non-binding pledges, or some combination of the three.

## Categories of Legally Binding Security Agreements

The following sections provide a general overview of the categories of security agreements entered into by the United States of a legally binding nature. Such categories of security agreements predominantly take the form of a treaty, while others typically take the form of an executive agreement.

Although some categories of security agreements have historically been concluded as treaties and others as executive agreements, this does not necessarily mean that future arrangements must follow the same pattern. An arrangement that has typically been entered into as a treaty might instead be concluded as a congressional-executive agreement, and vice versa.[70] Similarly, while some security arrangements have historically been entered as sole executive agreements, Congress might effectively limit such agreements in the future via statutory enactment[71] — e.g.,

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[66] 11 F.A.M. § 724.4(b)-(c) (2006).

[67] *Id.* at § 724.4(c).

[68] See *infra* at 35.

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

[70] But see Yoo, *supra* note 39, at 830 (arguing the military commitments like NATO can only be effectuated by treaty, and not a congressional-executive agreement).

[71] Legislation proposing to limit the usage of sole executive agreements has periodically been introduced, but thus far no bill has been enacted. See, e.g., S.Res. 85, 91st Cong. (1969) (non-binding resolution passed by the Senate expressing its sense that national commitments should be entered pursuant to treaty or executive agreement specifically

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limiting the availability of appropriations to carry out commitments made in a sole executive agreement.[72]

**Collective Defense Agreements/"Security Commitments".** The State Department currently lists the United States as being party to seven collective defense agreements, under which members are obligated to assist in the defense of a party to the agreement in the event of an attack upon it: the Inter-American Treaty of Reciprocal Assistance; the North Atlantic Treaty; the Australia, New Zealand, and United States Security Treaty; the Southeast Asian Treaty; and bilateral security treaties with Japan, the Philippines, and South Korea.[73] All seven agreements take the form of treaties that were ratified by the United States between 1947 and 1960.[74] It is important to note that each of these agreements, with the exception of the Inter-American Treaty of Reciprocal Assistance (the first to be ratified by the United States), includes a provision specifying that the agreement's requirements are to be carried out in accordance with the parties' respective constitutional processes. These provisions were included to assuage congressional concerns these agreements could be interpreted as sanctioning the President to engage in military hostilities in defense of treaty parties without further congressional authorization (i.e., a declaration of war or resolution authorizing the use of military force).[75]

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[71] (...continued)
authorized by Congress); H.R. 4438, 94th Cong. (1976) (proposing to require the President to transmit any agreement involving a national commitment to Congress, and allowing the agreement to take effect only if Congress did not pass a measure disapproving it within 60 days).

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

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

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

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

In addition to these defense treaties, the United States has also adopted security commitments with respect to several former territories and possessions,[76] including pursuant to congressional-executive agreement. Congress has approved compacts changing the status of certain territories to Freely Associated States (FAS), while also imposing upon the United States the "the obligation to defend the [FAS]...from attack or threats thereof as the United States and its citizens are defended."[77] Arguably, these security commitments are distinct from other international defense arrangements, as they concern commitments to newly sovereign entities over whom the United States formerly exercised extensive and long-standing control.[78]

**Consultation Requirements/"Security Arrangements".** The United States also has established security arrangements with other countries in which the U.S. pledges to take some action in the event that the other country's security is threatened. In a 1992 report to Congress listing U.S. security commitments and arrangements, President George H.W. Bush claimed that unlike "security commitments," which oblige the United States to act in the common defense of a country in case of an armed attack, "security arrangements" generally

> oblige the United States to consult with a country in the event of a threat to its security. They may appear in legally binding agreements, such as treaties or executive agreements, or in political documents, such as policy declarations by the President, Secretary of State or Secretary of Defense.[79]

Most legally binding "security arrangements" listed in the President's report constituted sole executive agreements, including agreements with Israel, Egypt, Pakistan, and Liberia.[80] Only one arrangement, committing the United States to the

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[76] For example, the Panama Canal treaties provided that the United States and Panama would, in accordance with their respective constitutional processes, defend the Canal from attack. Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, with Annexes and Protocol, 33 U.S.T. 1, entered into force October 1, 1979.

[77] Act Approving Compacts of Free Association with the Republic of the Marshall Islands and the Federated States of Micronesia, P.L. 99-329, § 311 (1986). See also Act approving Compact of Free Association between the United States and the Government of Palau, P.L. 99-658, § 352 (1986) (recognizing an attack on Palau as a danger to the United States, and pledging that the United States "would take action to meet the danger to the United States and Palau in accordance with its constitutional processes").

[78] Some have argued that these agreements are "more akin to the Texas and Hawaii annexation resolutions than to international defense arrangements," given the historical status of the FAS. Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961, n. 184 (2001).

[79] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 31, at 248 (quoting A REPORT ON UNITED STATES SECURITY ARRANGEMENTS AND COMMITMENTS WITH OTHER NATIONS, SUBMITTED TO THE CONGRESS IN ACCORDANCE WITH SECTION 1457 OF PUBLIC LAW 101-510, THE NATIONAL DEFENSE AUTHORIZATION ACT OF 1991, August 17, 1992).

[80] *Id.* See also Memorandum of Agreement Between the Governments of Israel and the United States Concerning Assurances, Consultations, and United States Policy on Middle East Peace, 32 U.S.T. 2160, entered into force February 27, 1976; Agreement Between the

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establishment of the Multinational Force and Observers in the Sinai, could clearly be described as a congressional-executive agreement.[81]

Although some scholars and government officials have characterized the terms "security commitment" and "security arrangement" as having distinct and particular meanings, this practice is by no means uniform. Indeed, the question of what constitutes a "security commitment" has long been a subject of dialogue and dispute by the executive and legislative branches.[82]

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

- military basing agreements, permitting the United States to build or use permanent facilities, station forces, and conduct certain military activities within a host country;[83]
- access and pre-positioning agreements, permitting the stationing of equipment in a host country and the improvement and use of the country's military or civilian facilities, without establishing a permanent military presence;[84]

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[80] (...continued)
United States and Egypt Concerning Implementation of the Egyptian-Israeli Peace Treaty of March 26, 1979, 32 U.S.T. 2148, entered into force March 26, 1979; Agreement of Cooperation Between the Government of the United States of America and the Government of Pakistan, 10 U.S.T. 317, entered into force May 19, 1959; Agreement of Cooperation Between the Government of the United States of America and the Government of Liberia, 10 U.S.T. 1598, entered into force July 8, 1959.

[81] TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 31, at 248. See also Multinational Force and Observers Participation Resolution, P.L. 97-132 (1981).

[82] See *The Proposed U.S. Security Commitment to Iraq: What Will Be In It and Should It Be a Treaty?: Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight & Subcomm. on the Middle East and South Asia of the House Comm. on Foreign Affairs*, January 23, 2008 (statement by Prof. Michael J. Matheson) (recognizing distinction between "security commitment" and "security arrangement," while acknowledging that the "question of what constitutes a 'security commitment'...has been the subject of dialogue between the executive branch and Congress for decades"). See also TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 31, at 213-215, 247-250 (discussing legislation considered and enacted by Congress in response to concerns that the Executive had entered agreements imposing national commitments upon the United States without congressional notification or approval).

[83] See, e.g., Agreement Between the United States of America and the Kingdom of Greece Concerning Military Facilities, 4 U.S.T. 2189, entered into force October 12, 1953.

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

- status of forces agreements (SOFAs), defining the legal status of U.S. forces within a host country and typically according them with certain privileges and immunities from the host country's jurisdiction;[85]
- burden-sharing agreements, permitting a host country to assume some of the financial obligations incurred by the stationing of U.S. forces within its territory;[86] and
- agreements providing for arms transfers, military training, and joint military exercises.[87]

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

**Agreements Granting the Right to Military Intervention.** Besides the categories of agreements described above, the United States has, on occasion, entered into long-term agreements that grant the United States the legal right to intervene militarily within the territory of another party to defend it against internal or external threats. Unlike collective defense agreements, these security agreements provide the United States with the right, but not the duty, to militarily intervene when the security of the other country is threatened. Such agreements may also be distinguished from the authority to intervene recognized under the United Nations Charter. Whereas military intervention agreements discussed below provide the United States with the *positive* legal right to intervene in a country, the U.N. Charter merely provides that its provisions do not "*impair* the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[88]

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

[86] See, e.g., Memorandum of Agreement Between The Ministry of National Defense Republic of Korea and the United States Forces in Korea Regarding The Construction of Facilities at 2nd ID USA To Improve Combined Defense Capabilities, 34 U.S.T. 125, entered into force February 2, 1982.

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

[88] Charter of the United Nations, 59 Stat. 1031, entered into force October 24, 1945, art. 51 (italics added).

In the early part of the 20th Century, the United States entered into legal agreements with several Latin American countries under which the United States was granted the right to use military force either to defend those countries from external threat or to preserve domestic tranquility.[89] All of these agreements were concluded as treaties. In 1903, following the Spanish-American War, the United States concluded a treaty with the newly independent Republic of Cuba under which the United States was expressly given "the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty."[90] Similarly, in the aftermath of the U.S. invasion and occupation of Haiti in 1915, a treaty between the two countries was concluded that provided the United States with the right to intervene in Haiti when the United States deemed it necessary.[91] In 1904, the United States ratified a treaty with Panama that provided the United States "the right, at all times and in its discretion" to employ its armed forces for the safety and protection of the Panama Canal and the shipping occurring therein.[92] In 1907, the United States concluded a treaty with the Dominican Republic establishing plans for the financial rehabilitation of that country, and authorizing the United States to use military force necessary to effectuate the carrying out of those plans.[93]

There have been numerous instances where a country has permitted or invited the United States to use military force within its territory,[94] but authority to intervene

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[89] See generally CHARLES HENRY HYDE, 1 INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 27-36 (1922).

[90] Treaty on Relations Between the United States and Cuba, May 22, 1903, 33 Stat. 2248, at art. III. In 1906, acting pursuant to this authority, the United States intervened in Cuba following serious revolutionary activity in order to establish a stable government there.

[91] Treaty on Administration of Haiti: Finances and Development, entered into force November 15, 1915, T.S. 623 1915 U.S.T. LEXIS 29, at art. XIV (providing that "The high contracting parties shall have authority to take such steps as may be necessary to insure the complete attainment of any of the objects comprehended in this treaty; and, should the necessity occur, the United States will lend an efficient aid for the preservation of Haitian Independence and the maintenance of a government adequate for the protection of life, property and individual liberty.").

[92] Isthmian Canal Convention with the Republic of Panama, entered into force February 26, 1904, 33 Stat. 2234, at art. XXIII. More generally, the agreement provided that the United States "guarantees and will maintain the independence of Panama." *Id.* at art. I. The agreement also provided the United States with authority to ensure public order in the cities of Panama City and Colon if, in the opinion of the United States, the government of Panama was unable to maintain order. *Id.* at art. VII.

[93] Treaty Between the United States and Dominican Republic Concerning the Collection and Application of Dominican Customs Revenues, proclaimed July 25, 1907, 35 Stat. 1880.

[94] For example, in 1958, President Dwight Eisenhower deployed U.S. troops to Lebanon at the invitation of its government to help protect against a threatened insurrection. Congress had passed legislation in 1957 that authorized such action. See P.L. 85-7 (1957). Specifically, the legislation permitted the President to "undertake, in the general area of the Middle East, military assistance programs with any nation or group of nations of that area desiring such assistance." The enactment further provided that "if the President determines

(continued...)

has not been given via treaty. When the Senate initially opted not to approve a treaty authorizing U.S. military and financial involvement in the Dominican Republic, President Theodore Roosevelt entered a temporary "*modus vivendi*" executive agreement adopting similar policies as the unapproved treaty. This agreement, which elicited significant opposition from many Members of Congress as an unconstitutional usurpation of the Senate's treaty power, was terminated following Senate approval of a modified version of the treaty in 1907.[95] Another example of a significant security agreement taking a form other than treaty occurred in 1941 when, prior to the United States entering World War II, President Franklin D. Roosevelt concluded sole executive agreements concerning the stationing of U.S. troops in Iceland and Greenland to protect those territories from attack.[96]

For the most part, however, it appears that bilateral arrangements authorizing U.S. military intervention, when not concluded as treaties, have not taken the form of a legally binding, permanent agreement.[97] Instead, in non-treaty arrangements authorizing U.S. intervention, the host country generally appears to retain full discretion as to the degree and duration of U.S. presence within its territory. The Executive's authority to enter such arrangements, and, more broadly, to engage in military operations in other countries without congressional approval has been the subject of long-standing dispute between the Congress and the Executive.[98]

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[94] (...continued)
the necessity thereof, the United States is prepared to use armed forces to assist any such nation or group of such nations requesting assistance against armed aggression from any country controlled by international communism: *Provided*, that such employment shall be consonant with the treaty obligations of the United States and with the Constitution of the United States."

[95] For further discussion, see W. STULL HOLT, TREATIES DEFEATED BY THE SENATE 212-229 (1933) (discussing events leading to the ratification of the 1907 treaty with the Dominican Republic). In his autobiography, Roosevelt suggested that a treaty was preferable to the executive agreement he entered with the Dominican Republic, because "a treaty..was the law of the land and not merely...a direction of the Chief Executive which would lapse when that particular executive left office." Ackerman & Golove, *supra* note 40, at 819 (italics omitted) (quoting THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 510 (1920)).

[96] Agreement Between the United States and Denmark Concerning the Defense of Greenland, signed April 9, 1941, 55 Stat. 1245; Agreement Concerning Defense of Iceland By United States Forces, July 1, 1941, 55 Stat . 1547.

[97] See *supra* note 94 (discussing U.S. intervention in Lebanon in 1958) In 1962, for instance, U.S. Secretary of State Dean Rusk and Thai Foreign Minister Thanat Khoman issued a joint declaration in which Secretary Rusk expressed "the firm intention of the United States to aid Thailand, its ally and historic friend, in resisting Communist aggression and subversion." The United States thereafter deployed armed forces to Thailand to assist the government in combating communist forces. For text of the joint declaration, see DEPT. OF STATE, AMERICAN FOREIGN POLICY: CURRENT DOCUMENTS, 1962, pp. 1091-1093.

[98] See S. Rep. 91-129 (1969) (Senate Committee on Foreign Relations report in favor of the National Commitments Resolution, S. 85, criticizing the undertaking of "national commitments" by the Executive, either through international agreements or unilateral pledges to other countries, without congressional involvement). The vast majority of U.S. military interventions in other countries have been to protect U.S. persons, property, or (continued...)

Although publicly available agreements expressly granting the United States the legal right to intervene militarily in another country have generally taken the form of a treaty, this report does not discuss whether any classified agreements have taken another form.

## Examples of Bilateral Security Agreements

The following sections discuss in greater detail the form, nature, and content of bilateral security agreements made by the United States with Afghanistan, Germany, Japan, South Korea, and the Philippines.

**Afghanistan.** The Foreign Assistance Act of 1961 is "an act to promote the foreign policy, security, and general welfare of the United States by assisting peoples of the world in their efforts toward economic development and internal and external security , and for other purposes."[99] Part I of the act, addressing international development, established policy "to make assistance available, upon request, under this part in scope and on a basis of long-range continuity essential to the creation of an environment in which the energies of the peoples of the world can be devoted to constructive purposes, free of pressure and erosion by the adversaries of freedom."[100] Part II of the act, addressing international peace and security, authorizes "measures in the common defense against internal and external aggression, including the furnishing of military assistance, upon request, to friendly countries and international organizations."[101] The act authorizes the President "to furnish military assistance on such terms and conditions as he may determine, to any friendly country or international organization, the assisting of which the President finds will strengthen the security of the United States and promote world peace and which is otherwise eligible to receive such assistance ..."[102] The authorization to provide defense articles and services, noncombatant personnel, and the transfer of funds is codified at 22 U.S.C. § 2311. While this authorization permits the President to provide military assistance, it limits it to "assigning or detailing members of the Armed Forces of the United States and other personnel of the Department of Defense to perform *duties of a noncombatant nature*." [103]

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[98] (...continued)
interests. See CRS Report RL32170, *Instances of Use of United States Armed Forces Abroad, 1798-2007*, by Richard F. Grimmett. The Executive has historically claimed broad authority to deploy armed forces to protect these interests, even in the absence of clear congressional authorization. See, e.g., Dept. of Justice, Office of Legal Counsel, 4A U.S. OP. OFF. LEGAL COUNSEL 185, *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization* (1980) (alleging presidential authority to deploy forces to protect, and retaliate for injuries suffered by, U.S. persons and property).

[99] 75 Stat. 424.

[100] *Id.* at 425.

[101] *Id.* at 434.

[102] *Id.* at 435.

[103] 22 U.S.C. § 2311(a)(2) (italics added).

In 2002, the United States and Afghanistan, by an exchange of notes,[104] entered into an agreement regarding economic grants under the Foreign Assistance Act of 1961,[105] as amended, and for the furnishing of defense articles, defense services and related training, including pursuant to the United States International Military and Education Training Program (IMET),[106] from the United States to the Afghanistan Interim Administration.

An agreement exists regarding the status of U.S. military and civilian personnel of the U.S. Department of Defense present in Afghanistan in connection with cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other activities.[107] Such personnel are to be accorded "a status equivalent to that accorded to the administrative and technical staff" of the U.S. Embassy under the Vienna Convention on Diplomatic Relations of 1961.[108] Accordingly, U.S. personnel are immune from criminal prosecution by Afghan authorities, and are immune from civil and administrative jurisdiction except with respect to acts performed outside the course of their duties.[109] In the agreement, the Islamic Transitional Government of Afghanistan[110] explicitly authorized the U.S. government to exercise criminal jurisdiction over U.S. personnel, and the government of Afghanistan is not permitted to surrender U.S. personnel to the custody of another state, international tribunal, or any other entity without consent of the U.S. government. The agreement does not appear to provide immunity for contract personnel.

The agreement with Afghanistan does not expressly authorize the United States to carry out military operations within Afghanistan, but it recognizes that such operations are "ongoing." Congress authorized the use of military force there (and elsewhere) by joint resolution in 2001, for targeting "those nations, organizations, or persons [who] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001...."[111] The U.N. Security Council implicitly recognized that the use of force was appropriate in response to the September 11,

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[104] Exchange of notes at Kabul April 6 and 13, 2002. Entered into force April 13, 2002. Not printed in *Treaties and Other International Acts Series (T.I.A.S.).*

[105] P.L. 87-195, 75 Stat. 424 (September 4 1961).

[106] 22 U.S.C. § 2347 *et seq.*

[107] T.I.A.S. Exchange of notes September 26 and December 12, 2002 and May 28, 2003. Entered into force May 28, 2003.

[108] *Id*.

[109] Vienna Convention on Diplomatic Relations of April 18, 1961, T.I.A.S. 7502; 23 U.S.T. 3227.

[110] The transitional government has since been replaced by the fully elected Government of the Islamic Republic of Afghanistan. For information about the political development of Afghanistan since 2001, see *Afghanistan: Government Formation and Performance*, CRS Report RS21922, by Kenneth Katzman.

[111] P.L. 107-40 (September 18, 2001); 115 Stat. 224.

2001 terrorist attacks,[112] and subsequently authorized the deployment of an International Security Assistance Force (ISAF) to Afghanistan.[113] Later U.N. Security Council resolutions provide a continuing mandate for the ISAF (NATO peacekeeping force),[114] calling upon it to "work in close consultation with" Operation Enduring Freedom (OEF — the U.S.-led coalition conducting military operations in Afghanistan) in carrying out the mandate.[115] While there is no explicit U.N. mandate authorizing the OEF, Security Council resolutions appear to provide ample recognition of the legitimacy of its operations, most recently by calling upon the Afghan Government, "with the assistance of the international community, including the International Security Assistance Force and Operation Enduring Freedom coalition, in accordance with their respective designated responsibilities as they evolve, to continue to address the threat to the security and stability of Afghanistan posed by the Taliban, Al-Qaida, other extremist groups and criminal activities...."[116]

The United States and Afghanistan entered an acquisition and cross-servicing agreement, with annexes, in 2004.[117] An acquisition and cross-servicing agreement (ACSA) is an agreement providing logistic support, supplies, and services to foreign militaries on a cash-reimbursement, replacement-in-kind, or exchange of equal value basis.[118] After consultation with the Secretary of State, the Secretary of Defense is authorized to enter into an ACSA with a government of a NATO country, a subsidiary body of NATO, or the United Nations Organization or any regional international organization of which the United States is a member.[119] Additionally, the Secretary of Defense may enter into an ACSA with a country not included in the above categories, if after consultation with the Secretary of State, a determination is made that it is in the best interests of the national security of the United States.[120] If the country is not a member of NATO, the Secretary of Defense must submit notice, at least 30 days prior to designation, to the Committee on Armed Services and the Committee on Foreign Relations of the Senate and the Committee on Armed

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[112] U.N.S.C. Res. 1368 (September 12, 2001) ("Recognizing the inherent right of individual or collective self-defence in accordance with the [UN] Charter," and expressing its "readiness to take all necessary steps to respond to the terrorist attacks").

[113] U.N.S.C. Res. 1386 (December 20, 2001).

[114] The ISAF has its own status of forces agreement with the Afghan government in the form of an annex to a Military Technical Agreement entitled "Arrangements Regarding the Status of the International Security Assistance Force." The agreement provides that all ISAF and supporting personnel are subject to the exclusive jurisdiction of their respective national elements for criminal or disciplinary matters, and that such personnel are immune from arrest or detention by Afghan authorities and may not be turned over to any international tribunal or any other entity or State without the express consent of the contributing nation.

[115] See U.N.S.C. Res. 1776 § 5 (September 19, 2007); U.N.S.C. Res. 1707 § 4 (2007).

[116] U.N.S.C. Res. 1746 § 25 (2007).

[117] T.I.A.S. Signed at Doha and Kabul January 22 and February 16, 2004. Entered into force February 16, 2004.

[118] 10 U.S.C. §§ 2341-2350.

[119] *Id.* at § 2342(a)(1).

[120] *Id.* at § 2342(b)(1).

Services and the Committee on International Relations of the House of Representatives.[121]

On May 23, 2005, President Hamid Karzai and President Bush issued a "joint declaration" outlining a prospective future agreement between the two countries.[122] It envisions a role for U.S. military troops in Afghanistan to "help organize, train, equip, and sustain Afghan security forces" until Afghanistan has developed its own capacity, and to "consult with respect to taking appropriate measures in the event that Afghanistan perceives that its territorial integrity, independence, or security is threatened or at risk." The declaration does not mention the status of U.S. forces in Afghanistan, but a status of forces agreement can be expected to be part of the final arrangement.

**Germany.** In 1951, the United States and Germany entered into an agreement[123] related to the assurances required under the Mutual Security Act of 1951.[124] This act is "an act to maintain the security and promote the foreign policy and provide for the general welfare of the United States by furnishing [material] assistance to friendly nations in the interest of international peace and security."[125] Specifically, the agreement references the "statement of purpose contained in Section 2 of the Mutual Security Act of 1951, and reaffirms that....it [Germany] is firmly committed to join in promoting international understanding and good will and in maintaining world peace and to take such action as may be mutually agreed upon to eliminate causes of international tension."[126] The statement of purpose in Section 2 of the act is

> to maintain the security and to promote the foreign policy of the United States by authorizing military, economic, and technical assistance to friendly countries to strengthen the mutual security and individual and collective defense of the free world, to develop their resources in the interest of their security and independence and the national interest of the United States and to facilitate the effective participation of those countries in the United Nations system for collective security.[127]

In 1955, the United States and Germany, both parties to the North Atlantic Treaty, entered into an agreement on mutual defense assistance,[128] obligating the

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[121] *Id.* at § 2342(b)(2).

[122] [http://www.mfa.gov.af/Documents/ImportantDoc/US-Afghanistan%20Strategic%20Partnership%20Declaration.pdf].

[123] 3 U.S.T. 4564; T.I.A.S. 2607; 181 U.N.T.S. 45. Exchange of letters at Bonn December 19 and 28, 1951.

[124] P.L. 82-165, 65 Stat. 373 (October 10, 1951).

[125] *Id.*

[126] 3 U.S.T. 4564; T.I.A.S. 2607; 181 U.N.T.S. 45.

[127] 65 Stat. 373.

[128] 6 U.S.T. 5999; T.I.A.S. 3443; 240 U.N.T.S. 47. Signed at Bonn June 30, 1955. Entered (continued...)

United States to provide for "such equipment, materials, services, or other assistance as may be agreed" to Germany.[129] The agreement reflected the

> desire to foster international peace and security through measures which further the ability of nation dedicated to the purposes and principles of the Charter of the United Nations to participate effectively in arrangements for collective self-defense in support of those purposes and principles, and conscious of the determination to give their full cooperation to United Nations collective security arrangements and measures and efforts to obtain agreement on universal regulation of armaments under adequate guarantees against violation or evasion; [and] considering the support which the Government of the United States of America has brought to these principles by enacting the Mutual Security Act of 1954,[130] which authorizes the furnishing of military assistance to certain nations[.][131]

Germany guarantees that it "will not use such assistance for any act inconsistent with the strictly defensive character of the North Atlantic Treaty, or, without the prior consent of the [United States], for any other purpose.[132] The mutual defense assistance agreement is the basis for numerous subsequent agreements between the United States and Germany.[133]

In 1959, the counties entered into an agreement implementing the NATO SOFA of 1953.[134] The agreement provided additional supplemental agreements, beyond those contained in the NATO SOFA, specific to the relationship between the United States and Germany.

**Japan.** In 1954, the United States and Japan entered into a mutual defense assistance agreement with annexes.[135] The agreement was amended on April 18 and June 23, 2006. The agreement references the Treaty of Peace signed between the

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[128] (...continued)
into force December 27, 1955.

[129] *Id.*

[130] P.L. 83-665, 68 Stat. 832 (August 26, 1954).

[131] 6 U.S.T. 5999; T.I.A.S. 3443; 240 U.N.T.S. 47.

[132] *Id.*

[133] See, e.g., Mutual Defense Assistance: Disposition of Military Equipment and Materials. 6 U.S.T. 6005; T.I.A.S. 3444; 240 U.N.T.S. 69. Exchange of notes at Bonn June 30, 1955. Entered into force December 27, 1955. Mutual Defense Assistance: Purchase of Certain Military Equipment, Materials, and Services. 7 U.S.T. 2787; T.I.A.S. 3660; 278 U.N.T.S. 9. Exchange of notes at Washington October 8, 1956. Entered into force December 12, 1956. Defense: Training of German Army Personnel. 8 U.S.T. 149; T.I.A.S. 3753; 280 U.N.T.S. 63. Exchange of notes at Bonn December 12, 1956. Entered into force December 12, 1956.

[134] 14 U.S.T. 689; T.I.A.S. 5352; 490 U.N.T.S. 30. Signed at Bonn August 3, 1959. Entered into force July 1, 1963.

[135] 5 U.S.T. 661; T.I.A.S. 2957; 232 U.N.T.S. 169. Signed at Tokyo March 8, 1954. Entered into force May 1, 1954.

countries in San Francisco, California in 1951.[136] The Mutual Defense Assistance Act of 1949[137] and the Mutual Security Act of 1951[138] are also referenced in the agreement as they provide for the furnishing of defense assistance by the United States.[139] The agreement provides that the United States and Japan "will make available to the other and to such other governments as the two Governments signatory to the present Agreement may in each case agree upon, such equipment, materials, services, or other assistance as the Government furnishing such assistance may authorize" subject to the conditions and provisions of the Mutual Defense Assistance Act of 1949, the Mutual Security Act of 1951, and appropriation acts which may affect the furnishing of assistance.[140]

The countries, in 1960, entered into the Treaty of Mutual Cooperation and Security Between the United States of America and Japan.[141] The treaty was amended on December 26, 1990.[142] Article III of the Treaty provides that the countries, "individually and in cooperation with each other, by means of continuous and effective self-help and mutual aid will maintain and develop, subject to their constitutional provisions, their capacities to resist armed attack.[143] Article V provides that the countries recognize "that an armed attack against either party in the territories under the administration of Japan would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional provisions and processes."[144] Under Article VI of the Treaty, the United States is granted "the use by its land, air and naval forces of facilities and areas in Japan" in order to contribute "to the security of Japan and maintenance of international peace and security in the Far East[.]"[145] Article VI provides further that the use of facilities and the status of U.S. armed forces will be governed under a separate agreement.[146]

The countries, under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, entered into a SOFA in

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[136] 3 U.S.T. 3169; T.I.A.S. 2490. Signed at San Francisco September, 8, 1951. Entered into force April 28, 1952.

[137] 63 Stat. 714.

[138] 65 Stat. 373.

[139] 5 U.S.T. 661; T.I.A.S. 2957; 232 U.N.T.S. 169.

[140] *Id.*

[141] 11 U.S.T. 1632; T.I.A.S. 4509; 373 U.N.T.S. 186. Signed at Washington January 19, 1960. Entered into force June 23, 1960.

[142] T.I.A.S. 12335.

[143] 11 U.S.T. 1632; T.I.A.S. 4509; 373 U.N.T.S. 186.

[144] *Id.*

[145] *Id.*

[146] *Id.*

1960. [147] The SOFA addresses the use of facilities by the U.S. armed forces, as well as the status of U.S. forces in Japan. The agreement has been modified at least four times since the original agreement.[148]

**South Korea.** In 1948, the United States and South Korea entered into an agreement related to the transfer of authority to the Government of South Korea and the withdrawal of U.S. occupation forces.[149] Shortly after the initial agreement, the United States and Korea entered into a second agreement concerning interim military and security matters during a transitional period.[150] This executive agreement was between the President of the Republic of Korea and the Commanding General, U.S. Army Forces in Korea.[151] The agreement calls for the "Commanding General, United States Army Forces in Korea, pursuant to directives from his government and within his capabilities" to "organize, train and equip the Security forces of the Republic of Korea" with the obligation to train and equip ceasing "upon the completion of withdrawal from Korea of forces under his command."[152] The agreement also requires the Commanding General, U.S. Army Forces in Korea, to retain authority to exercise over-all operational control of security forces of Korea until withdrawal, as contemplated by Resolution No. II passed by the United Nations General Assembly on November 14, 1948.[153]

Article III of the Agreement contains provisions related to the status of U.S. forces during the transition period. The Commanding General, U.S. Army Forces in Korea, "shall retain exclusive jurisdiction over the personnel of his command, both military and civilian, including their dependents, whose conduct as individuals shall be in keeping with pertinent laws of the Republic of Korea."[154] The agreement provides that any individuals under the jurisdiction of the Commanding General who is apprehended by law enforcement agencies of South Korea shall be immediately turned over to the custody and control of the Commanding General; individuals not under jurisdiction of the Commanding General, but apprehended in acts detrimental

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[147] 11 U.S.T. 1652; T.I.A.S. 4510; 373 U.N.T.S. 248. Signed at Washington January 19, 1960. Entered into force June 23, 1960.

[148] Agreements concerning new special measures relating to Article XXIV (related to costs of maintenance of U.S. forces in Japan and furnishment of of rights of way related to facilities used by U.S. forces in Japan) of the agreement of January 19, 1960, have been signed in 1991, 1995, 2000, and 2006.

[149] Exchange of letters at Seoul August 9 and 11, 1948. Entered into force August 11, 1948.

[150] 62 Stat. 3817; T.I.A.S. 1918; 9 Bevans 477; 79 U.N.T.S. 57. Signed at Seoul August 24, 1948. Entered into force August 24, 1948.

[151] *Id.*

[152] 62 Stat. 3818.

[153] *Id.*

[154] *Id.* at 3819.

to the security of personnel or property under his jurisdiction, shall be turned over to the custody and control of the government of South Korea.[155]

The countries, in 1950, entered into a mutual defense assistance agreement.[156] The mutual defense agreement references the Military Defense Act of 1949, [157] which provides for the furnishing of military assistance by the United States to South Korea. The mutual defense assistance agreement provides that each country "will make or continue to make available to the other, and to other Governments, such equipment, materials, services, or other military assistance" in support of economic recovery that is essential to international peace and security.[158]

The United States and South Korea entered into a mutual security agreement in 1952.[159] The mutual security agreement references the Mutual Security Act of 1951,[160] which provides for military, economic, and technical assistance in order to strengthen the mutual security of the free world. The mutual security agreement provides that South Korea agrees to promote international understanding and good will and to take action, that is mutually agreed upon, to eliminate causes of international tensions.[161]

In 1954 the countries entered into a mutual defense treaty.[162] As part of the treaty the countries agree to attempt to settle international disputes peacefully, consult whenever the political independence or security of either party is threatened by external armed attack, and that either party would act to meet the common danger in accordance with their respective constitutional processes.[163] Article IV of the treaty grants the United States "the right to dispose....land, air and sea forces in and about the territory" of South Korea.[164] Pursuant to the treaty, specifically Article IV, the countries entered into a SOFA with agreed minutes and an exchange of notes[165] in 1966; it was subsequently amended January 18, 2001.

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[155] *Id.*

[156] 1 U.S.T. 137; T.I.A.S. 2019; 80 U.N.T.S. 205. Signed at Seoul January 26, 1950. Entered into force January 26, 1950.

[157] P.L. 81-329, 63 Stat. 714 (October 6, 1949).

[158] 1 U.S.T. 137; T.I.A.S. 2019; 80 U.N.T.S. 205.

[159] 3 U.S.T. 4619; T.I.A.S. 2612; 179 U.N.T.S. 105. Exchange of notes at Pusan January 4 and 7, 1952. Entered into force January 7, 1952.

[160] P.L. 82-165, 65 Stat. 373 (October 10, 1951).

[161] 3 U.S.T. 4619; T.I.A.S. 2612; 179 U.N.T.S. 105.

[162] 5 U.S.T. 2368; T.I.A.S. 3097; 238 U.N.T.S. 199. Signed at Washington October 1, 1953. Entered into force November 17, 1954.

[163] *Id.*

[164] *Id.*

[165] 17 U.S.T. 1677; T.I.A.S. 6127; 674 U.N.T.S. 163. Signed at Seoul July 9, 1966. Entered into force February 9, 1967.

**Philippines.** In 1947 the United States and the Republic of the Philippines entered into an agreement on military assistance.[166] The agreement was for a term of five years, starting July 4, 1946, and provided that the United States would furnish military assistance to the Philippines for the training and development of armed forces. The agreement further created an advisory group to provide advice and assistance to the Philippines as had been authorized by the U.S. Congress.[167] The agreement was extended, and amended, for an additional five years in 1953.[168]

A mutual defense treaty was entered into by the United States and the Philippines in 1951.[169] The treaty publicly declares "their sense of unity and their common determination to defend themselves against external armed attack, so that no potential aggressor could be under the illusion that either of them stands alone in the Pacific Area[.]"[170] The Treaty does not address or provide for a SOFA.

The countries entered into a mutual security agreement in 1952,[171] as related to the assurances required by the Mutual Security Act of 1951. The assurances required under the Mutual Security Act of 1951 included a commitment to accounting procedures for monies, equipment and materials furnished by the United States to the Philippines.[172]

In 1993, the countries entered into a SOFA.[173] The agreement was subsequently extended on September 19, 1994, April 28, 1995, and November 29, December 1 and 8, 1995. The countries entered into an agreement regarding the treatment of U.S. armed forces visiting the Philippines in 1998.[174] This agreement was amended on April 11 and 12, 2006. The distinction between this agreement and the SOFA originally entered into in 1993 is that this agreement applies to U.S. armed forces visiting, not stationed in the Philippines. The countries also entered into an agreement regarding the treatment of Republic of Philippines personnel visiting the United States.[175]

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[166] 61 Stat. 3283; T.I.A.S. 1662. Signed at Manila March 21, 1947. Entered into force March 21, 1947.

[167] 61 Stat. 3284.

[168] 4 U.S.T. 1682; T.I.A.S. 2834; 2163 U.N.T.S. 77. Exchange of notes at Manila June 26, 1953. Entered into force July 5, 1953.

[169] 3 U.S.T. 3947; T.I.A.S. 2529; 177 U.N.T.S. 133. Signed at Washington August 30, 1951. Entered into force August 27, 1952.

[170] *Id.*

[171] 3 U.S.T. 4644; T.I.A.S. 2617; 179 U.N.T.S. 193. Exchange of notes at Manila January 4 and 7, 1952. Entered into force January 7, 1952.

[172] *Id.*

[173] T.I.A.S. Exchange of notes at Manila April 2, June 11 and 21, 1993. Entered into force June 21, 1993.

[174] T.I.A.S. Signed at Manila February 10, 1998. Entered into force June 1, 1999.

[175] T.I.A.S. Signed at Manila October 9, 1998. Entered into force June 1, 1999.

# III. Congressional Oversight

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

## Notification

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

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

**Notification Pursuant to the Case-Zablocki Act.** The Case-Zablocki Act was enacted in 1972 in response to congressional concern that a number of secret agreements had been entered by the Executive imposing significant commitments upon the United States.[176] It is the primary statutory mechanism used to ensure that Congress is informed of international agreements entered by the United States. Pursuant to the act, all executive agreements are required to be transmitted to Congress within 60 days of their *entry into force*.[177] If the President deems the immediate public disclosure of an agreement to be prejudicial to national security, the agreement may instead be transmitted to the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations. The President is also required to annually submit a report regarding international agreements that were transmitted after the expiration of the 60-day period, describing the reasons for the delay.[178]

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[176] See H. REP. 92-1301, 92nd Cong. (1972).

[177] 1 U.S.C. § 112b(a).

[178] *Id.* at §112b(b).

Although the Case-Zablocki Act originally only imposed reporting requirements with respect to executive agreements that had *entered into force*, the act was amended in 2004 to ensure that Congress was regularly notified regarding the status of *proposed* agreements, as well. The Secretary of State is required to annually report to Congress a list of executive agreements that have not yet entered into force, which (1) have not been published in the United States Treaties and Other International Agreements compilation and (2) the United States has "signed, proclaimed, or with reference to which any other final formality has been executed, or that has been extended or otherwise modified, during the preceding calendar year."[179]

The Case-Zablocki Act does not define what sort of arrangements constitute "international agreements" falling under its purview, though the legislative history suggests that Congress "did not want to be inundated with trivia...[but wished] to have transmitted all agreements of any significance."[180] In its implementing regulations, the State Department has established criteria for determining whether an arrangement constitutes a legally binding "international agreement" requiring congressional notification. These include

- the identity of the parties, and whether they intended to create a legally binding agreement;
- the significance of the agreed-upon arrangement, with "[m]inor or trivial undertakings, even if couched in legal language and form," not considered to fall under the purview of the Case-Zablocki Act;
- the specificity of the arrangement;
- the necessity that the arrangement constitute an agreement by two or more parties; and
- the form of the arrangement, to the extent that it helps to determine whether the parties intended to enter a legally binding agreement.[181]

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

> With the advice and assistance of the Assistant Secretary for Legislative Affairs, the appropriate congressional leaders and committees are advised of the intention to negotiate significant new international agreements, consulted concerning such agreements, and kept informed of developments affecting them, including especially whether any legislation is considered necessary or desirable for the implementation of the new treaty or agreement.[182]

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[179] *Id.* at § 112b(d).

[180] H. REP. 92-1301, 92nd Cong. (1972).

[181] 22 C.F.R. § 181.2(a).

[182] 11 F.A.M. § 725.1(5).

As stated earlier, Bush Administration officials have stated that Administration "will work closely with the appropriate committees of Congress to keep lawmakers informed" about the prospective U.S.-Iraq agreement, and classified briefings on the agreement have also begun.[183]

**Annual Reporting of Security Arrangements Required by the National Defense Authorization Act of 1991.** In addition to the Case-Zablocki Act, Congress has enacted legislation designed to ensure that it remains informed about existing U.S. security arrangements. Section 1457 of the National Defense Authorization Act for FY1991 (P.L. 101-510) requires the President to submit an annual report to specified congressional committees regarding "United States security arrangements with, and commitments to, other nations."[184] The report, produced in classified and unclassified form, is to be submitted by February 1 each year to the Committee on Armed Services and the Committee on Foreign Relations of the Senate, and the Committee on Armed Services and the Committee on Foreign Affairs of the House of Representatives.[185] In addition to legally binding security arrangements or commitments (e.g., mutual defense treaties and pre-positioning agreements), the report must describe non-binding commitments, such as expressed U.S. policy formulated by the executive branch. The report must also include, among other things, "[a]n assessment of the need to continue, modify, or discontinue each of those arrangements and commitments in view of the changing international security situation."[186]

Although reports were submitted to the appropriate committees pursuant to this statutory requirement in 1991 and 1992, CRS has been unable to determine whether any subsequent reports have been issued. In January 2008, CRS made an inquiry to the document officers and clerks of several of the designated committees, but they have been unable to find a record of any subsequent report being received. The Federal Reports Elimination and Sunset Act of 1995 (Sunset Act, P.L. 104-66) terminated most reporting requirements existing prior to its enactment. The act eliminated or modified several specific reporting requirements, and also generally terminated any reporting requirement that had been listed in House Doc. 103-7, unless such a requirement was specifically exempted. The reporting requirement contained in § 1457 of the FY1991 National Defense Authorization Act was neither specifically terminated by the Sunset Act nor listed in House Doc. 103-7. Accordingly, it does not appear that this requirement has been terminated.

## Consultation

State Department regulations requiring consultation with Congress regarding significant international agreements may provide a means for congressional oversight as to the negotiation of a security arrangement with Iraq. One of the stated objectives of the Circular 175 procedure is to ensure that "timely and appropriate consultation

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[183] Rice and Gates, *supra* note 9.

[184] 50 U.S.C. § 404c(a).

[185] *Id.* at § 404c(c)-(d).

[186] *Id.*

is had with congressional leaders and committees on treaties and other international agreements."[187] To that end, State Department regulations contemplate congressional consultation regarding the conduct of negotiations to secure significant international agreements.[188] Although these regulations do not define what constitutes a "significant" agreement, it seems reasonable to assume that the prospective U.S.-Iraqi security arrangement would constitute such a compact, as the agreement would (at least as envisioned in the U.S.-Iraqi Declaration of Principles) commit the United States to provide security assurances to Iraq, arm and train Iraqi security forces, and confront Al Qaeda and other terrorist entities within Iraqi territory.[189] Such an agreement appears to call for a more significant commitment of U.S. resources than is required under most international agreements to which the United States is a party.

Circular 175 procedures may also provide for congressional consultation concerning the form that a legally binding international agreement should take. When there is question as to whether an international agreement should be concluded as a treaty or an executive agreement, the matter is first brought to the attention of the State Department's Legal Adviser for Treaty Affairs. If the Assistant Legal Adviser for Treaty Affairs believes the issue to be "a serious one that may warrant formal congressional consultation,"[190] consultations are to be held with appropriate congressional leaders and committees. State Department regulations specify that "Every practicable effort will be made to identify such questions at the earliest possible date so that consultations may be completed in sufficient time to avoid last minute consideration."[191]

## Approval, Rejection, or Conditional Approval of International Agreements

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

As previously discussed, a congressional-executive agreement requires congressional authorization via a statute passed by both Houses of Congress. Here, too, approval may be conditional. Congress may opt to authorize only certain types

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[187] 11 F.A.M. § 722(4).

[188] *Id.* at § 725.1(5).

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

[190] 11 F.A.M. § 724.4(b)-(c).

[191] *Id.* at § 724.4(b).

of agreements, or may choose to approve only some provisions of a particular agreement. In authorizing an agreement, Congress may impose additional statutory requirements upon the Executive (e.g., reporting requirements). Congress may also include a statutory deadline for its authorization of an agreement to begin or expire.

Because sole executive agreements do not require congressional authorization to take effect, they need not be approved by Congress to become binding, at least as a matter of international law. Nonetheless, as discussed earlier, Congress may limit a sole executive agreement through a subsequent legislative agreement or through the conditioning of appropriations necessary for the agreement's commitment to be implemented.[192]

## Implementation of an Agreement That Is Not Self-Executing

Congress may exercise oversight of international agreements via legislation implementing the agreements' requirements. Certain international treaties or executive agreements are considered "self-executing," meaning that they have the force of law without the need for subsequent congressional action.[193] However, many other treaties and agreements are not considered self-executing, and are understood to require implementing legislation to take effect, as enforcing U.S. agencies otherwise lack authority to conduct the actions required to ensure compliance with the international agreement.[194]

Treaties and executive agreements have, in part or in whole, been found to be non-self-executing for at least three reasons: (1) implementing legislation is constitutionally required; (2) the Senate, in giving consent to a treaty, or Congress, by resolution, requires implementing legislation for the agreement to be given force;[195] or (3) the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation.[196]

Until implementing legislation is enacted, existing domestic law concerning a matter covered by an international agreement that is not self-executing remains

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[192] See *supra* at 12-15. In the 110th Congress, legislation has been introduced that would prohibit appropriations from being used to carry out any U.S.-Iraqi security agreement that was not approved by the Senate as a treaty or authorized by legislation passed by both Houses of Congress. See *infra* at 38-39.

[193] For purposes of domestic law, a self-executing agreement may be superceded by either a subsequently enacted statute or a new self-executing agreement. *Whitney*, 124 U.S. At 194

[194] See generally RESTATEMENT, *supra* note 40, § 111(4)(a) & cmt. h.

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

[196] RESTATEMENT, *supra* note 40, § 111(4)(a) & n. 5-6.

unchanged and is controlling law in the United States. However, when a treaty is ratified or an executive agreement is entered, the United States acquires obligations under international law and may be in default of those obligations unless implementing legislation is enacted.[197] Perhaps for this reason, Congress typically appropriates funds necessary to carry out U.S. obligations under international agreements.[198]

Although it is unclear what form the U.S.-Iraqi security agreement will take, it is possible that at least some provisions will require implementing legislation. The Department of Defense Appropriations Act FY2008 (P.L. 110-116), the Consolidated Appropriations Act FY2008 (P.L. 110-161), and the National Defense Authorization Act FY2008 (P.L. 110-181), for example, barred funds from being used to establish permanent military bases in Iraq.[199] The Consolidated Appropriations Act also includes a measure intended to prevent the United States from entering an agreement with Iraq that would make members of the U.S. Armed Forces subject to punishment under Iraqi law.[200]

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[197] See *id.*, § 111, cmt. h.

[198] See TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 31, at 166-170 (discussing congressional use of the appropriations power to influence the implementation of international agreements by the United States).

[199] In signing the National Defense Authorization Act FY2008 into law, President Bush issued a statement that § 1222 of the act, which barred the funds the act made available from being used to establish any permanent U.S. military installation in Iraq,

> purport[s] to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief. The executive branch shall construe [this provision] in a manner consistent with the constitutional authority of the President.

President George W. Bush, *Signing Statement for H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008*, January 28, 2008, available at [http://www.whitehouse.gov/news/releases/2008/01/20080128-10.html]. In signing the Consolidated Appropriations Act FY2008 into law, President Bush issued a more general statement that provisions of the act would not be construed in a manner "inconsistent with [the Executive's] Constitutional responsibilities." President George W. Bush, *Signing Statement for H.R. 2764, the Consolidated Appropriations Act for Fiscal Year 2008*, December 26, 2007, available at [http://www.whitehouse.gov/news/releases/2007/12/20071226-1.html]. Although a signing statement was issued by the President with respect to the interpretation of specific provisions of the Department of Defense Appropriations Act FY2008, this statement did not reference § 8113 of the act, which prohibits funds appropriated under *any* congressional act from being used to construct permanent military bases in Iraq. President George W. Bush, *Signing Statement for H.R. 3222, the Department of Defense Appropriations Act, 2008*, November 13, 2007, available at [http://www.whitehouse.gov/news/releases/2007/11/20071113-8.html]. For background on the legal implications of presidential signing statements, see CRS Report RL33667, *Presidential Signing Statements: Constitutional and Institutional Implications*, by T. J. Halstead.

[200] Section 612, Division L of the Consolidated Appropriations Act (P.L. 101-161) provides that no funds made available under that division may be used to enter into "an agreement with the Government of Iraq that would subject members of the Armed Forces of the United

(continued...)

## Continuing Oversight

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

# IV. Legislative Activity

Legislation has been introduced in the 110th Congress to ensure congressional participation in the entering of any agreement emerging from the Declaration of Principles between the United States and Iraq — including S. 2426, the Congressional Oversight of Iraq Agreements Act of 2007, introduced by Senate Majority Leader Harry Reid on behalf of Senator Hillary Clinton on December 6, 2007; H.R. 4959, Iraq Strategic Agreement Review Act of 2008, introduced by Representative Rosa DeLauro on January 15, 2008; and H.R. 5128, introduced by Representative Barbara Lee on January 23, 2007.

All three bills would bar funds from being made available or appropriated to implement certain types of formal agreements emerging from the U.S-Iraq Declaration of Principles. S. 2426 would deny funds to implement any U.S.-Iraq agreement involving "commitments or risks affecting the nation as a whole," including a SOFA agreement, unless the agreement was approved by the Senate as a treaty or by Congress through legislation. H.R. 4959, in contrast, would condition appropriations to implement any agreement emerging from the Declaration of Principles upon that agreement being approved as a treaty by the Senate, while H.R. 5128 would condition appropriations for the implementation of such an agreement upon it being approved by an act of Congress.

H.R. 5128 also includes a provision stating that an agreement between the United States and Iraq must be approved by an act of Congress in order to have legal

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[200] (...continued)
States to the jurisdiction of Iraq criminal courts or punishment under Iraq law." While Congress has occasionally barred funds from being used by the Executive to negotiate international agreements, some have argued that this practice is unconstitutional, given the President's authority to "make" treaties and his significant authority in foreign affairs. See, e.g., Charles J. Cooper et al., *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 200 (1988) (section written by Sen. Orrin Hatch, arguing that Congress may not deny funds from being used by the President to receive ambassadors, negotiate treaties, and deliver foreign policy addresses); J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1211 (arguing the Congress may not use its appropriations power to limit the President's ability to negotiate international agreements).

effect. This provision may raise serious legal concerns given the Constitution's specification that treaties approved by the Senate have status as the "Law of the Land." H.R. 4959 and S. 2426 include provisions expressing the sense of Congress that a prospective U.S.-Iraq agreement should take a particular form in order to have legal effect, but these provisions appear to raise less significant constitutional concerns given their non-binding nature.

With respect to consultation, H.R. 4959 includes a provision requiring that specified members of the executive branch consult with congressional committees and leadership on any potential long-term security, economic, or political agreement between the United States and Iraq. S. 2426 does not include a consultation requirement, but instead requires the Legal Adviser to the Secretary of State to submit a report to Congress justifying any decision by the Executive not to consult with Congress before concluding a security arrangement with Iraq in the form of a sole executive agreement.