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Tacit Commitments, Constitutional Limits, and the Iraq Security Arrangement

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I. INTRODUCTION

The United States is currently finalizing the process of negotiating a set of agreements to define the long-term relationship between the United States and Iraq. This process, which began in the fall of 2007, currently envisions both a status of forces agreement and a long-term security arrangement, which the parties have termed the Strategic Framework Agreement. As of August 2008, near final drafts of both agreements had been reached, although neither had been formally approved by the Iraqi government. While recent negotiations have focused primarily on technical details of the status of forces agreement, such as basing arrangements and immunity for contractors, the Strategic Framework Agreement raises serious constitutional concerns. The Bush administration has consistently maintained that no part of the agreements currently under negotiation requires congressional approval. In this, it is mistaken.

The Administration's position misunderstands both the nature of commitments in international law and the constitutional requirement of legislative participation in such agreements. The absence of an explicitly binding security commitment to Iraq in the proposed agreement does not, as the Administration claims, resolve the issue. Even absent an explicit security commitment, an implicit security commitment can exist as a matter of international law—and, in fact, will exist—if the President proceeds to put in place the security arrangement that is currently under negotiation. International law does not strictly distinguish between formal agreements and tacit agreements, which are understandings arising from conduct that may be equally binding. Nor are the constitutional requirements of Senate advice and consent limited to agreements that are explicitly binding. Tacit commitments have been an area of long-standing concern to the Senate. Those concerns are directly applicable to the

proposed agreement with Iraq, which exhibits every one of the factors giving rise to such a commitment.

This article will examine the background and justifications for the Strategic Framework Agreement currently under negotiation. It will then explain why as a matter of international law the mere designation of an agreement as nonbinding is insufficient. Further, it will examine the Senate's history of constitutional concern with the creation of tacit commitments by the Executive and will compare this concern to the Founders' understanding of the role of the legislature in the formation of international agreements. Finally, it will conclude that the proposed Strategic Framework Agreement would create a tacit commitment to the security of Iraq and is constitutionally required to be submitted to the Senate as a treaty.

II. BACKGROUND OF THE PROPOSED AGREEMENT

The current negotiations for a security arrangement with Iraq began in the fall of 2007, as the United States was seeking an extension of the United Nations mandate for the Multinational Force in Iraq. This UN mandate, which was originally passed in 2004 as Security Council Resolution 1546,¹ provides the authorization under international law for the continued presence of U.S. forces in Iraq following the dissolution of the Coalition Provisional Authority and the formal restoration of sovereignty to the Iraqi government. The resolution has been renewed annually² and has always been passed at the request of the Iraqi government. Because the resolution has always been explicitly passed under Chapter VII of the U.N. Charter, however, Iraq's request and consent to the mandate is a political, rather than legal, requirement.

The United States was able to secure the extension of the U.N. mandate until the end of 2008 in Security Council Resolution 1790.³ The Iraqi government has made clear, however, that it would prefer the continued presences of U.S. forces to be negotiated on a bilateral basis. The December 2007 letter from Prime Minister Nuri al-Maliki to the President of the Security Council requesting an extension of the mandate for 2008 indicates that Iraq sees this extension as the final one.⁴ Resolution 1790 also indicates that the Security Council will terminate the mandate before the end of 2008 if the Iraqi government so requests, although the language used indicates

¹ S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004).

² S.C. Res. 1637, U.N. Doc. S/RES/1637 (Nov. 11, 2005); S.C. Res. 1723, U.N. Doc. S/RES/1723 (Nov. 28, 2006); S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007).

³ S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007).

⁴ S.C. Res. 1790, Annex I, U.N. Doc. S/RES/1790 (Dec. 18, 2007) ("The Government of Iraq considers this to be its final request to the Security Council for the extension of the mandate of MNF-I and expects, in future [sic], that the Security Council will be able to deal with the situation in Iraq without the need for action under Chapter VII of the Charter of the United Nations.").

that this commitment is not binding on the Security Council, nor would termination be automatic.⁵

The agreements currently under negotiation between the U.S. and Iraqi governments are thus intended to replace Resolution 1790 when it expires at the end of 2008. The agreements would also replace the current arrangement governing the status of U.S. forces. During the period of the Coalition Provisional Authority, the legal status and immunities of U.S. forces—items that would normally be included in a status of forces agreement—were provided by Coalition Provisional Authority Order Number 17 (“CPA 17”).⁶ When sovereignty was transferred to the Interim Government of Iraq in 2004, CPA 17 became part of Iraqi law under the Transitional Administrative Law of Iraq, article 26 of which provides for CPA legislation to remain in force until it is rescinded or amended by further legislation.⁷ By its own terms, however, the duration of CPA 17 is tied to the mandate of the Multinational Force.⁸

To secure Iraqi support for a final extension of the UN mandate and to begin negotiations for a subsequent bilateral agreement, President Bush and Prime Minister Al-Maliki signed a “Declaration of Principles” on November 26, 2007.⁹ According to the Declaration, the subsequent agreement will “[p]rovid[e] security assurances and commitments . . . to deter foreign aggression against Iraq that violates its sovereignty and integrity of its territories, waters, or airspace.”¹⁰ Further, the agreement would

⁵ Which elements of a Security Council resolution are legally binding depends upon the language used, as member states are only required by Article 25 of the Charter to comply with “decisions of the Security Council.” U.N. Charter art. 25. The provision of Resolution 1790 which, like preceding resolutions, “declares that [the Security Council] will terminate this mandate earlier if requested by the Government of Iraq” does not use the binding language of a “decision,” although some statements made during the passage of the original resolution suggest binding intent. *See, e.g.*, U.N. SCOR, 59th Sess., 4987th mtg. at 2–3, U.N. Doc. S/PV.4987 (June 8, 2004); U.N. SCOR, 59th Sess., 4982th mtg. at 12, U.N. Doc. S/PV.4982 (June 3, 2004). However, because the resolution does not indicate that the resolution would automatically terminate upon an Iraqi request, but rather purports to require the Security Council to actively terminate the mandate, it cannot be binding. The Security Council lacks the authority under the UN Charter to bind itself to take future non-procedural actions. *See* JORGE CASTAÑEDA, LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 22–26, 31–32 (1969). The Council could have made the termination of the mandate automatic on the fact of an Iraqi request, but did not do so in this case.

⁶ Coalition Provisional Authority Order Number 17 (Revised): Status of the Coalition Provisional Authority, MNF – Iraq, Certain Missions and Personnel in Iraq, CPA/ORD/27 June 2004/17, *available at* http://www.iraqcoalition.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf.

⁷ Law of Administration for the State of Iraq for the Transitional Period, 8 March 2004, *available at* www.iraqcoalition.org/government/TAL.html.

⁸ Coalition Provisional Authority Order Number 17 (Revised), *supra* note 6, at § 20.

⁹ Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America [hereinafter “Declaration of Principles”], *available at* www.whitehouse.gov/news/releases/2007/11/20071126-11.html.

¹⁰ *Id.*

commit the United States to defend Iraq not simply against foreign aggression but “against internal and external threats,” and would commit the United States to support the Iraqi government in its effort to “defeat and uproot” “all outlaw groups” from Iraq.¹¹ The Declaration of Principles mentions no expiration date or termination provision and anticipated the completion of an agreement by July 31, 2008.

In November 2007, when the plan was announced, Lt. Gen. Douglas Lute implied that none of the provisions of the agreement would be submitted for congressional approval, declaring that: “We don’t anticipate now that these negotiations will lead to the status of a formal treaty which would then bring us to formal negotiations or formal inputs from the Congress.”¹² The Declaration of Principles and the proposed agreement were subsequently the subject of a series of congressional hearings throughout the spring of 2008 on the content of the planned Agreement and whether congressional approval would be required.¹³ During this time, the Bush Administration made clear that it was in fact seeking two agreements, a status of forces agreement and a separate Strategic Framework Agreement. The administration also made clear that despite the reference to security commitments in the Declaration of Principles—language that normally indicates a formal, binding commitment—the Strategic Framework Agreement would contain only a political, rather than legal, security assurance.¹⁴ In contrast, the status of forces agreement—a type of instrument that is normally concluded without congressional involvement—would be legally binding.

Despite these clarifications, the Bush Administration has continued to maintain that the Strategic Framework Agreement, because it would not include a legally

¹¹ *Id.*

¹² Press Gaggle by Dana Perino and General Douglas Lute, Assistant to the President for Iraq and Afghanistan (Nov. 26, 2007), *available at* www.whitehouse.gov/news/releases/2007/11/20071126-6.html.

¹³ *Negotiating a Long-Term Relationship with Iraq: Hearing Before the S. Comm. on Foreign Relations, 110th Cong. (2008)*; *Declaration of Principles: Future U.S. Commitments to Iraq: Joint Hearing Before the Subcomm. on the Middle East and South Asia and the Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs, 110th Cong. (2008)*; *The November 26 Declaration of Principles: Implications for U.N. Resolutions on Iraq and for Congressional Oversight: Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs, 110th Cong. (2008)*; *The Proposed U.S. Security Commitment to Iraq: What Will Be in It and Should It Be a Treaty?: Joint Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight and the Subcomm. on the Middle East and South Asia of the H. Comm. on Foreign Affairs, 110th Cong. (2008)*.

¹⁴ *Declaration of Principles: Future U.S. Commitments to Iraq: Joint Hearing Before the Subcomm. on the Middle East and South Asia and the Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs, 110th Cong. 17 (2008)* (Statement of David Satterfield, Senior Advisor and Coord. for Iraq, U.S. Dept. of State) (“[A]t present we contemplate the Status of Forces Agreement to be a legally binding executive agreement in form. With respect to the strategic framework, we do not at this stage contemplate it as a legally binding agreement.”).

binding security commitment, does not require congressional approval.¹⁵ The Administration also continues to adhere to the Declaration of Principles, according to which the security assurance would extend to protecting the Government of Iraq from internal as well as external threats to its security. A leaked draft of the Agreement, dated March 7, 2008, expresses the U.S. intention to “contribute to the maintenance of security and stability in Iraq” and requires the United States and Iraq “to consult immediately whenever the territorial integrity or political independence of Iraq is threatened.”¹⁶ Over the course of negotiations with Iraq, the language used to describe the commitment to defend Iraq has been changed to “help[ing] Iraqi security forces to defend themselves,” apparently as part of the effort to skirt Congressional approval.¹⁷ Iraqi Foreign Minister Hoshiyar Zebari, however, declared that “the meaning is the same, almost,”¹⁸ and Iraqi negotiators have insisted that a commitment to Iraqi security was part of the promise made in the Declaration of Principles.¹⁹

Final approval of the Strategic Framework Agreement is linked to agreement on the status of forces agreement, which Iraq has insisted will require parliamentary approval.²⁰ Agreement on a draft text of the status of forces agreement was reportedly reached during Secretary of State Condoleezza Rice’s August 2008 trip to Iraq, although Iraq has since indicated that technical disagreements remain.²¹ In the U.S. Congress, bills requiring legislative approval of the agreement have been introduced in both the House and Senate, although none has yet been voted out of committee.²²

¹⁵ *Negotiating a Long-Term Relationship with Iraq: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. (2008) (Statement of David Satterfield, Senior Advisor and Coord. for Iraq, U.S. Dept. of State) (“[A]t present, we contemplate the Strategic Framework as a collection of political assurances on the character, the content of the partnership with Iraq that includes, but goes beyond, security measures, that, as such a collection of political assurances, it would not rise to the level of a legal commitment that would trigger advise-and-consent procedures.”).

¹⁶ Strategic Framework Between the United States of America and the Republic of Iraq for a Long-Term Relationship of Cooperation and Friendship, Pre-Decisional Draft, Mar. 7, 2008, available at <http://image.guardian.co.uk/sys-files/Guardian/documents/2008/07/08/USIraqframework.pdf>.

¹⁷ Karen DeYoung, *Iraqi Official: Security Pact Altered, Change Aimed at Bypassing Need for Congressional Approval*, WASH. POST, June 18, 2008 at A10.

¹⁸ *Id.*

¹⁹ Amit R. Paley & Karen DeYoung, *Iraqis Condemn American Demands: Sides Negotiating U.S. Military Role*, WASH. POST., June 11, 2008 at A01.

²⁰ Stephen Farrell, *Draft Accord With Iraq Sets Goal of 2011 Pullout*, N.Y. TIMES, Aug. 22, 2008 at A1.

²¹ Campbell Robertson and Riyadh Mohammed, *Maliki Pushes for Troop Withdrawal Date*, N.Y. TIMES, Aug. 26, 2008 at A10.

²² See Iraq Security Agreement Act of 2008, S. 3433, 110th Cong. (2008); Protect Our Troops and Our Constitution Act of 2008, H.R. 5626, 110th Cong. (2008); Congressional Oversight of Iraq Agreements Act of 2007, S. 2426, 110th Cong. (2007).

III. THE INTERNATIONAL LAW BACKDROP: TACIT COMMITMENTS

The Administration's position is that the absence of a binding, explicit security commitment to Iraq obviates the need for Senate advice and consent. This position misinterprets the requirements of the Constitution and misunderstands the nature of binding commitments under international law. Even absent an explicit security commitment, an implicit security commitment may exist as a matter of international law. An implicit security commitment derives from all pertinent aspects of the United States' bilateral relationship with a given country. The United States Senate has long posited the belief that a tacit or implied international commitment can be inferred from conduct and contextual factors, such as the establishment of U.S. military bases. The position of the Senate, expressed in the National Commitments Resolution, is that agreements involving the armed forces of the United States that could be interpreted to contain an implicit security commitment require the advice and consent of the Senate.²³

The concept of an implicit security commitment stems from the fact that binding commitments in international law can arise from conduct and the context of an agreement, as well as its text. Such a commitment is analogous to the concept of a "contract implied in fact" in the U.S. domestic legal system. A contract implied in fact, as the Supreme Court has described it, is a contract "inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."²⁴ It exists in the absence of explicit words of agreement. Agreement is deemed to be implied by the entire "course of dealing" between the parties, including non-verbal practice. As the Court has noted, "[a] treaty is in its nature a contract between two nations."²⁵

In international law, such an implicit commitment is variously termed a tacit agreement, a *de facto* agreement, a quasi-agreement, or a special custom. A special custom arises when the practice of two states comes to generate lawful expectations.²⁶ This may occur in such circumstances as when one state has consistently granted another a right of passage.²⁷ Treaty law and customary international law in such circumstances conjoin. "Such special customary law may be seen as essentially the result of tacit agreement among the parties."²⁸

A special custom or tacit commitment may exist independently or in conjunction with a written agreement. When a formal treaty exists, U.S. practice has made clear that treaties are to be liberally construed. All pertinent contextual elements are to be taken into account in determining the scope of the obligations undertaken. "Like other contracts, [treaties] are to be read in the light of the conditions and

²³ S. Res. 85, 91st Cong., 1st Sess. (1969).

²⁴ *Baltimore & Ohio R. Co. v. United States*, 261 U.S. 592, 597 (1923).

²⁵ *Foster v. Neilson*, 27 U.S. 253, 314 (1829) *overruled in part by* *United States v. Percheman*, 32 U.S. 52, 89 (1833).

²⁶ *See* *Right of Passage Over Indian Territory (Port. v. India)*, 1960 I.C.J. 6 (Apr. 12).

²⁷ *Id.*

²⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. e (1987).

circumstances existing at the time they were entered into, with a view to effecting the objects and purposes of the states thereby contracting.”²⁹ When no written agreement exists, the U.N.’s International Law Commission has underscored the possibility that binding international commitments can be created by conduct alone: “behaviours capable of legally binding States may take the form of formal declarations or mere informal conduct including, in certain situations, silence, on which other States may reasonably rely.”³⁰

Even a textual disclaimer purporting to make an agreement non-binding does not eliminate the possibility of creating a implicitly binding commitment. The late legal scholar Oscar Schachter wrote that it would be unlawful to act inconsistently with such an instrument if other parties “reasonably relied” upon it. Mere “political texts,” he wrote, are still governed by the general requirement of good faith.³¹ Henry Kissinger underscored this same point in referring to the Sinai Accords in 1975. “While some of the undertakings are non-binding,” he said, “they are important statements of diplomatic policy and engage the good faith of the United States as long as the circumstances that gave rise to them continue.”³²

Conduct and context, therefore, are capable of translating a nominally non-binding security assurance into a commitment binding as a matter of international law. Even if they do not, however, there often is little practical difference in the international order between legally binding security commitments, which are normally unenforceable, and non-binding security assurances, the breach of which can lead to disastrous costs, reputational and otherwise. The potential gravity of non-binding agreements should not be underestimated. In the words of the Restatement: “Parties sometimes prefer a nonbinding agreement in order to avoid legal remedies. Nevertheless, the political inducements to comply with such agreements may be strong and the consequences of noncompliance may sometimes be serious.”³³

IV. LONG-STANDING SENATE CONCERN ABOUT TACIT COMMITMENTS

The possibility that international commitments can be created implicitly through a combination of words and conduct gives rise to domestic constitutional concerns and has long been a matter of concern for the Senate. The need for certain agreements or commitments to receive the advice and consent of Senate pursuant to the Treaty Clause, or the approval of the Congress, cannot be circumvented by creating such agreements through tacit, rather than formal, means. Security agreements that risk involving the United States in armed conflict raise particular concerns, as the

²⁹ *Rocca v. Thompson*, 223 U.S. 317, 331–32 (1912).

³⁰ International Law Commission, *Unilateral Acts of States: Report of the Working Group 3*, U.N. Doc. A/CN.4/L.703 (July 20, 2006).

³¹ OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 99–101 (1991).

³² Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT’L L. 499, 511 (1999).

³³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 301 Reporters’ Note 2 (1987).

Declaration of War Clause confers upon Congress the decision to place the nation in a state of war.

In the 1960s and 1970s, the issue of tacit commitments was debated at length in the Senate Foreign Relations Committee. The Committee established a Subcommittee on United States Security Agreements and Commitments Abroad headed by Senator Stuart Symington, which held a lengthy series of hearings on the issue, as the full Committee did later. The product of those hearings was the National Commitments Resolution, adopted by the Senate in 1969.³⁴ The resolution defined a “national commitment” as “the use of the Armed Forces of the United States on foreign territory, or a promise to assist a foreign country, government, or people by the use of the Armed Forces . . . either immediately or upon the happening of certain events.”³⁵ The broad scope of this definition extends beyond formal agreements to include promises and tacit agreements that might arise purely from conduct. Such commitments, the Resolution warned, can result “only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment.”³⁶

In retrospect, the National Commitments Resolution seems impressionistic: it sets out no bright lines or three-part tests, nor was it designed to function on its own without the continued involvement of the Senate. Nevertheless, the Resolution, along with the collective wisdom of the hearings that produced it, has abiding relevance. The Senators behind it—Symington, Fulbright, Mansfield, Church, Case, Javits, and Aiken—understood the need to focus on fundamentals and, by doing that, to set the framework for debate. The Resolution laid the conceptual predicate for later efforts to rein in what many believed had become an “imperial presidency” in the realm of diplomacy.

Following the Resolution’s logic, the Foreign Relations Committee led the Senate in an effort to curb unauthorized national commitments. In 1970, the Senate adopted a resolution declaring that nothing in an existing executive bases agreement with Spain should be considered to be a national commitment by the United States.³⁷ In 1972, a similar resolution expressed the sense of the Senate that contemplated basing agreements with Portugal and Bahrain should be submitted to the Senate as a treaty.³⁸ Following the same logic, the Congress adopted the Case-Zablocki Act, which required the President to transmit to Congress the text of any international agreement other than a treaty.³⁹ The Senate also adopted a resolution stating the sense of the Senate that in determining whether an international agreement should be submitted as

³⁴ S. Res. 85, 91st Cong., 1st Sess. (1969).

³⁵ *Id.*

³⁶ *Id.*

³⁷ S. Res. 469, 91st Cong., 2nd Sess. (1970).

³⁸ S. Res 214, 92nd Cong., 2nd Sess. (1972) (“[A]ny agreement with Portugal or Bahrain for military bases or foreign assistance should be submitted as a treaty to the Senate for advice and consent.”).

³⁹ Pub. L. No. 92-403, 86 Stat. 619 (1972) (codified in 1 U.S.C. § 112b).

a treaty, “the President should have the timely advice of the Committee on Foreign Relations through agreed procedures established with the Secretary of State.”⁴⁰ Senate concern over unauthorized commitments was significant enough that in 1972, the Foreign Relations Committee declined to report the Vienna Convention on the Law of Treaties, in the belief that the rule set out in Article 46 would permit the President to commit the nation in violation of constitutional limits set out in the Treaty Clause.

The logical culmination of these efforts would have been to make the response to an unauthorized agreement automatic through a Treaty Powers Resolution. Such a measure was proposed in 1978.⁴¹ Unlike the Case-Zablocki Act, which only required agreements other than treaties to be transmitted to the Congress after the fact, and unlike the Senate resolutions on particular agreements, which required individual action, the Treaty Powers Resolution would have subjected an unauthorized agreement to a point-of-order procedure that would have cut off funds for the implementation of the agreement in question. The measure was reported by the Foreign Relations Committee, but was not adopted by the full Senate.⁴² The failure to establish an automatic mechanism does not, however, remove the Senate’s legitimate constitutional concerns with particular unauthorized national commitments.

The premise that underpinned these Senate actions bears underscoring and is directly pertinent to the proposed Strategic Framework Agreement with Iraq. The premise is that a national commitment can result not only from *explicit words* but can also result *implicitly* from *deeds*. The premise is that it is essential to look not only to *text* but also to the surrounding *context*, in its entirety, in order to determine whether a commitment in fact exists. The premise is that there is no bright line that separates commitment from non-commitment; that commitment often is subjectively created in the eye of the beneficiary state; and that all elements comprising the relevant bilateral relationship are pertinent. As the Foreign Relations Committee declared in its report on the National Commitments Resolution: “Some foreign engagements, such as our bases agreement with Spain, form a kind of quasi-commitment, unspecified as to their exact import but, like buds in springtime, ready, under the right climatic conditions, to burst into full bloom.”⁴³

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

⁴⁰ S. Res. 536, 95th Cong., 2nd Sess. (1978).

⁴¹ S. Res. 24, 95th Cong., 2nd Sess. (1978).

⁴² S. Res. 3076, 95th Cong., 2nd Sess. § 502 (1978).

⁴³ S. REP. NO. 91-129, at 28 (1969)

In practice the very fact of our physical presence in Spain constitutes a quasi-commitment to the defense of the Franco regime, possibly even against internal disruptions. At some point the distinction between defending American lives and property and defending the host government would be likely to become academic, if not to disappear altogether. . . . It is not difficult to envision a situation in which the need to protect American servicemen would lead to large-scale military intervention in Spain and, as a result, to another military enterprise unauthorized by Congress.⁴⁴

The Symington Subcommittee listed a number of the contextual factors from which an implied commitment might reasonably be inferred: “Overseas bases, the presence of elements of United States armed forces, joint planning, joint exercises, or extensive military assistance programs represent to host governments more valid assurances of United States commitment than any treaty or agreement.”⁴⁵ It continued:

[E]ach of these acts created an atmosphere in which the United States was better prepared and more inclined to undertake military action in the country in question; and the host government was increasingly led to believe that such actions would be taken should contingencies develop. An expectation of involvement or action was created on both sides.⁴⁶

The Subcommittee recognized the practical reality that the mere presence of U.S. troops in a country entailed a U.S. military response if that country were attacked. It recalled the 1968 acknowledgement of General Earle Wheeler, then Chairman of the Joint Chiefs of Staff, that “the presence of United States troops on Spanish soil represented a stronger security guarantee than anything written on paper.”⁴⁷ Thus, the Subcommittee found, “[f]aith on both sides is no longer placed primarily in the language of treaties, but in the presence of United States forces or facilities in the territory of those countries which are seeking United States protection through involvement.”⁴⁸

Application to Iraq

Whether denominated an “implied,” “tacit,” “*de facto*,” or “quasi” commitment, the proposed Strategic Framework Agreement with Iraq, viewed in light of the entire

⁴⁴ *Id.* at 29.

⁴⁵ SUBCOMM. ON SECURITY AGREEMENTS AND COMMITMENTS ABROAD, 91ST CONG., SECURITY AGREEMENTS AND COMMITMENTS ABROAD 20 (Comm. Print 1970).

⁴⁶ *Id.* at 21.

⁴⁷ *Id.*

⁴⁸ *Id.*

surrounding context, must reasonably be considered to constitute a national commitment of precisely the sort contemplated by the Senate in the National Commitments Resolution. Every one of the contextual factors identified by the Symington Subcommittee as giving rise to an implicit security commitment appears to be present in the planned security arrangement with Iraq.

Verbal as well as non-verbal indicia of commitment support this conclusion. The Declaration of Principles explicitly refers to “security assurances and commitments . . . to deter foreign aggression against Iraq that violates its sovereignty and integrity of its territories, waters, or airspace.”⁴⁹ Iraqi officials have indicated that they believe such a commitment to exist.⁵⁰ More important than these words, however, will be conduct. Thousands of members of the U.S. armed forces will continue to be stationed in Iraq. If attacked, those forces will no doubt become engaged in hostilities. Significant casualties over a protracted period of time are possible, particularly if the United States becomes involved in a wider regional conflict. Substantial military bases and other facilities apparently will continue to be maintained in Iraq. Joint planning will take place with the Iraqi armed forces, police, and other security elements. Joint exercises will be held. An extensive military assistance program will be carried out. Continued appropriations of public funds will be unavoidable.

There can be little doubt, therefore, that whatever caveat or disclaimer the United States might formally apply in purporting to qualify its involvement, the Iraqi government might reasonably conclude that the new strategic framework constitutes a national commitment by the United States. These and other factors, taken together, constitute, in the words of Senator Symington’s Subcommittee, “more valid assurances of United States commitment than any treaty or agreement.”⁵¹

V. THE SENATE’S TREATY POWER: OPEN AND PARTICIPATORY

The Framers of the Constitution believed that a commitment such as the agreement currently be negotiated with Iraq should not be made unless it is accorded the advice and consent of two-thirds of the Senate as a treaty. The Senate’s concern with such agreements, therefore, is not an aberration, but lies squarely within the constitutional history of the treaty power. The Constitution demands an open process in the approval of international agreements not for reasons of convenience, but rather for the concrete benefits that accrue from broad consultation in the formation of national policy.

On some matters the intent of the Constitution’s Framers is opaque. As Justice Jackson wrote, their purposes often must be “divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”⁵² Here, however, their intent is luminously clear. Of the Framers, Alexander Hamilton was

⁴⁹ Declaration of Principles, *supra* note 9.

⁵⁰ Paley & DeYoung, *supra* note 19.

⁵¹ SUBCOMM. ON SECURITY AGREEMENTS AND COMMITMENTS ABROAD, 91ST CONG., SECURITY AGREEMENTS AND COMMITMENTS ABROAD 20 (Comm. Print 1970).

⁵² *Youngstown Sheet & Tube Co. v. Sawyer* (Steel Seizure), 343 U.S. 579, 634 (1952).

perhaps the least enthusiastic about legislative power, and wrote extensively about the treaty power. His views are therefore as significant as they are representative. Hamilton considered the treaty clause “one of the best digested and most unexceptionable parts of the plan.”⁵³ He opined that “the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole, or a portion, of the legislative body in the office of making them.”⁵⁴ Hamilton noted that although the King of England could make treaties by himself, this power was denied to the President: “In this respect, therefore, there is no comparison between the intended power of the president and the actual power of the British sovereign. The one can perform alone what the other can do only with the concurrence of a branch of the legislature.”⁵⁵ Hamilton therefore considered it “it would be utterly unsafe and improper to entrust that power to an elective magistrate of four years duration.”⁵⁶ He concluded with a famous warning:

The history of human conduct does not warrant that exalted opinion of human virtue, which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a president of the United States.⁵⁷

The institutional virtues of the Presidency famously identified by Hamilton—unity, secrecy, and dispatch—have no relevance to the conclusion of a strategic arrangement with Iraq. No emergency exists: if the process of negotiating a new security arrangement, or approving it as a treaty, necessarily extends beyond the end of this year, there is no reason why the Security Council resolution itself cannot be extended, as has been done before. Extension of the resolution would, indeed, have the salutary effect of involving the next administration in the process of formulating the terms of the security arrangement, which seems fitting inasmuch as it is, after all, the next administration that will be called upon to execute it.

The unity and secrecy of the Executive are similarly more vice than virtue in the making of a security arrangement with Iraq. The approval process will be strengthened by the expression of diverse views. Executive officials normally are chosen for their support of an administration’s policies. When the spread of opinion voiced in the decision-making process is overly narrow, its legitimacy suffers. The Senate, on the other hand, is a clearinghouse for multiple opinions. Deputy assistant secretaries of state do not fly home regularly to Indianapolis or Wilmington or Hartford to get an earful of constituent opinion about taxes, combat deaths, and war costs. Senators do. The sense that their viewpoints have been heard and considered

⁵³ THE FEDERALIST NO. 75, at 413 (Alexander Hamilton) (Robert A. Ferguson ed., 2006).

⁵⁴ *Id.* at 414.

⁵⁵ THE FEDERALIST NO. 69, at 384 (Alexander Hamilton) (Robert A. Ferguson ed., 2006).

⁵⁶ THE FEDERALIST NO. 75, at 414 (Alexander Hamilton) (Robert A. Ferguson ed., 2006).

⁵⁷ *Id.* at 415.

gives divergent constituencies a sense of participation in policymaking that is crucial to its legitimacy. Public deliberation adds to the legitimacy of such consultation. Anonymous staffers of the National Security Council who meet in secret, however great their expertise, cannot confer the needed measure of legitimacy on a policy. In short, the policy outcome is strengthened if the process is seen by the public as “regular”—as having produced a decision as a matter of right. This is perhaps why the Supreme Court has emphasized the importance of free and open debate to the proper operation of separated powers. It said:

That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate of the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.⁵⁸

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

The open treaty-making process contemplated by the Framers and required by the Constitution injects productive new ideas into policy. It is entirely conceivable that open, robust debate in the Senate could generate a national consensus around a genuine strategy for supporting long-term regional stability. Potentially new and different options could emerge from Senate debate, concerning, perhaps, broadening the negotiating process to include states other than just Iraq and developing a genuine *collective* regional security arrangement. Perhaps the Senate would insist upon an Iraqi commitment to movement towards political reconciliation as a condition for any U.S. commitment to Iraq. There are many possibilities. In any case, the United States needs a national strategy for dealing with Iraq in the coming years. The Senate is not only the logical place to develop that strategy; it is the constitutionally required place to do so.

Implicit in the constitutional scheme is the worth of public deliberation in the process of shaping long-term commitments. It is no secret that the United States has no national strategy in Iraq. The “surge” is not a strategy. A funding cutoff is not a strategy. A truly national strategy requires a national consensus, which the United States has yet to develop in answering the over-arching question: *What long-term support should the United States provide Iraq as the United States seeks to promote stability in the Middle East?* The American people have a huge and obvious stake in their government’s answer to that question. The agreements and long-term commitments that the United States now makes with Iraq will be a vital part of that answer. That answer ought not

⁵⁸ *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

be worked out behind closed doors, solely between negotiators for Iraq and the current Administration—an Administration which will be in office for less than three weeks after the new arrangement takes effect.

Open Senate consideration of the Strategic Framework Agreement as a treaty would also ensure that the United States and Iraq share the same understanding of what the arrangement means. It imputes no ill intent to the Executive to observe that the Administration has an understandable incentive to overstate the scope of the security arrangement in its communications with the Iraqis and to understate the scope of the arrangement in its communication with the Congress in the interest of securing speedy passage. Such differing perceptions are on display in the ongoing negotiation of the status of forces agreement, where the Administration has assured Congress that no permanent bases in Iraq are anticipated, but Iraqi officials complain of U.S. demands for indefinite control over more than 50 bases.⁵⁹ With regard to the Strategic Framework Agreement, it is essential that the Congress not be led to believe that there is no security commitment if there is one. It is also essential that the Iraqis not be led to believe that there is a security commitment if there is not one. When it comes to the role of the United States in Iraq's future security, Congress and Iraq must be on the same page. If they are not, the consequences could be catastrophic, both internationally and domestically.

The Role of the House of Representatives

The conclusion that legislative approval of the Iraq Strategic Framework Agreement is constitutionally required still leaves the question of whether the House of Representatives should be involved. As a practical matter, the longer terms of the Senate provide a measure of insulation from sometimes excessive popular pressure and allow policies to reflect the nation's long-term interests. Long-term national security strategy should weigh public opinion heavily, but cannot be automatically be dictated by it. While it is surely true that many international agreements are now approved as "congressional-executive agreements"—*i.e.*, authorized by majority votes in both the House and Senate—there are sound interpretive reasons for construing the Constitution as not considering these as interchangeable with treaties. The view that the President is constitutionally free to designate any agreement a congressional-executive agreement, and thereby to lower the Senate's required approval margin from two-thirds to one-half, would altogether eliminate a key check on the President's power that the Framers placed purposefully and explicitly in the constitutional text. Some international arrangements, constitutionally, *must* be concluded as treaties. The President cannot *call* a treaty something other than a treaty and thereby dispense with the obligation to secure Senate approval.⁶⁰ That would also seem to be the view of the United States Supreme Court, which in the famous case of *Missouri v. Holland*, 252

⁵⁹ Compare *Iraq After the Surge: What Next?: Hearing Before the S. Comm. on Foreign Relations*, 110th Cong. (2008) (Statement of Ambassador Ryan C. Crocker) with Paley & DeYoung, *supra* note 19.

⁶⁰ See Philip Kurland, *The Impotence of Reticence*, 1968 DUKE L. J. 619, 626.

U.S. 416 (1920) emphasized that the treaty power is broader than the legislative power, implying that treaties and executive agreements are not interchangeable instruments.

If some agreements must be concluded as treaties, it makes sense to think that the most important agreements must be so concluded. It was for these reasons that the Foreign Relations Committee has said that “[t]he Treaty Clause requires that, normally, significant international commitments be made with the concurrence of two-thirds of the Senate. Acting on the basis of his sole constitutional power, the President would be without the power to enter into such an agreement.”⁶¹ It would be hard to conceive of an international agreement more significant than the new security arrangement being negotiated with Iraq. The proverbial Martian stepping off a flying saucer could only react with bewilderment in comparing the proposed security arrangement to the international agreements that this Administration has submitted to the Senate for its advice and consent as treaties. Among them are an agreement to control anti-fouling systems on ships, an agreement against doping in sports, an agreement governing the international registration of industrial designs, and a treaty to govern port privileges for tuna ships. It is hard to understand how the United States Constitution could seriously require Senate advice and consent to the regulation of steroids, bilge pumps, and tuna boats but not to a *de facto* commitment to use armed force to defend another government, potentially from its own people.

VI. CONCLUSION

The Administration’s proposed Strategic Framework Agreement concerns the long-term nature of the United States’ relationship with Iraq. As a matter of international law, it would create a tacit commitment to the security of Iraq effectively as strong as a more explicit commitment. Whether to make a long-term security commitment to Iraq is a question that is constitutionally committed to the President and the Senate by the Treaty Clause. It is an issue that requires the approval of the legislative branch, and which the Executive alone is not empowered to decide.

The argument will no doubt be heard that submission of the Iraq security arrangement as a treaty would complicate United States-Iraqi relations or somehow delay the implementation of needed initiatives. But it would be useful to remember, as Justice Brandeis reminded us, that the Constitution’s separation of powers doctrine is designed not to promote efficiency but to save the people from autocracy.⁶² One of the key structural safeguards in that design is the check on executive power provided by the requirement that two-thirds of the Senate approve treaties. It is perilous to disregard such checks in the cause of administrative convenience. In the words of the Senate Foreign Relations Committee:

⁶¹ EXEC. REP. NO. 95-12 (1978) (Panama Canal Treaties).

⁶² *Myers v. United States*, 272 U.S. 52, 85 (1926) (Brandeis, J., dissenting).

The constitutional role of the Congress has too often been short-circuited because it was viewed—in the executive branch and even by some Members of Congress—as an impediment to the expeditious adoption of substantive policies commanding the support of a majority. Thus, when in our recent history the substance of those policies lost that support, the procedures once available as checks had atrophied, and the Congress was forced to struggle to reclaim its powers. The lesson was learned the hard way: procedural requirements prescribed by the Constitution must not be disregarded in the name of efficiency, and the substance of a policy, however attractive, can never justify circumventing the procedure required by the Constitution for its adoption.⁶³

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⁶³ S. REP. NO. 96-119 at 5–6 (1979).