

**STATUS OF FORCES AGREEMENTS AND U.N.
MANDATES: WHAT AUTHORITIES AND
PROTECTIONS DO THEY PROVIDE TO U.S.
PERSONNEL?**

HEARING

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL
ORGANIZATIONS, HUMAN RIGHTS, AND OVERSIGHT

OF THE

COMMITTEE ON FOREIGN AFFAIRS
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

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THURSDAY, FEBRUARY 28, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS,
HUMAN RIGHTS, AND OVERSIGHT,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:39 a.m. in room 2175, Rayburn House Office Building, Hon. Bill Delahunt (chairman of the subcommittee) presiding.

Mr. DELAHUNT. The subcommittee will come to order. This hearing is the fourth in a series our subcommittee has held relating to the administration's plans to negotiate a bilateral agreement between the United States and Iraq.

On November 22, 2007, a Declaration of Principles was signed by President Bush and Iraqi Prime Minister Maliki announcing their intent to negotiate an agreement which would embrace an expansive menu of issues and apparent commitments between the two nations.

A review of that document provoked serious concern among members of the public, as well as many of us here in Congress. For example, the declaration pledged that the United States would be, and these are the words of the document itself:

“Supporting the Republic of Iraq in defending its democratic system against internal and external threats;

“Providing security assurances and commitments to the Republic of Iraq to deter foreign aggression against Iraq that violates its sovereignty and integrity of its territories, waters or airspace;

“Supporting the Republic of Iraq in its efforts to combat all terrorist groups, at the forefront of which is Al-Qaeda, Saddamists and all other outlaw groups regardless of affiliation, and destroy their logistical networks and their sources of finance and defeat and uproot them from Iraq.”

What has exacerbated this concern has been the rather poor record of this administration in regards to consultation with Congress, particularly in matters involving Iraq. As Senator Hagel has observed, the Bush administration “has seen Congress as an enemy and a constitutional nuisance.” Those are Senator Hagel's words. I

can't even begin to estimate the number of times I have quoted Senator Hagel on the administration's reluctance to work with Congress.

I would also note that my friend and ranking member, Mr. Rohrabacher, spoke eloquently on the floor of the House just this week on the issue of lack of cooperation between the branches of Government.

I would note for the record that I agree in full measure with him that it is time for Congress to assert itself. He has my commitment to support his efforts to secure the consultation and the information from the administration that we need to fulfill our constitutional obligations in any and all issues.

The Declaration of Principles provides further evidence of the administration's attitude toward Congress. According to the State Department's own regulations, known as Circular 175, it is the responsibility of the administration to ensure—and again this is the language from Circular 175—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.

After 3 months of hearings by myself and Mr. Rohrabacher at which the administration declined to attend and testify and after inquiries to the leadership of the House and this committee, I can state unequivocally that there was no advising of Congress in the preparation of the Declaration of Principles, which again clearly demonstrated an intention to negotiate, and that there has been minimal consultation until recently on plans to implement the declaration through a bilateral agreement or agreements.

I challenge anyone to tell us that the apparent commitments in the declaration are not significant to American national interests.

I note that our two Congressional Research Service witnesses recently collaborated on a report that makes that point. I will use their language: "Although these regulations do not define what constitutes a significant agreement, it seems reasonable to assume that the prospective U.S.-Iraq security arrangement would constitute such a compact." Indeed.

It would appear that the New York Times has better access to the administration's plan than this committee or the leadership of this Congress. On January 25, the New York Times reported on the contents of a 15 page draft agreement prepared by United States officials for transmittal to the Iraqi Government. This news story was published on the very day that this committee was told by the administration that it had not yet put pen to paper.

Clarity and precision in definitions is a predicate to an understanding by Congress and the American people as to what the administration intends, particularly when it has become so ambitious in its purported commitments in the Declaration of Principles. Clarity and precision in definitions is lacking at present.

The administration has equated one of its potential agreements as a typical Status of Forces Agreement (SOFA), but it is my impression that gaining authority for combat from such an agreement, absent a treaty or U.N. framework, is most likely unprecedented.

Secretary of State Rice and Secretary of Defense Gates also have referenced another potential accord that they have described as a framework agreement. Now, I have looked in vain for a precedent or even a formal definition of a framework agreement. Well, maybe this panel can help us with that definition.

So we will today explore the legal implications of Status of Forces Agreements and U.N. mandates with a distinguished panel of lawyers from the American Law Division of the Congressional Research Service and from academic institutions.

In Jennifer Elsea we have CRS's ranking expert on domestic and international authorizations for the use of force in Iraq, and Chuck Mason is CRS's authority on Status of Forces Agreements. Both have written extensive legal treatments of these issues. Thank you, Jennifer and Chuck, for being here today.

We also have three professors of note to assist us. Professor Laura Dickinson of the University of Connecticut Law School is a former State Department official who has become a leading authority and author on the legal status of American private contractors in combat zones overseas.

Following a 28-year career in the State Department Office of the Legal Advisor, Mike Matheson is a professor at the George Washington University Law School and has become somewhat of a resident advisor to this subcommittee on the ins and outs of international law and State Department procedure, having already appeared twice before us during our inquiry into the Declaration of Principles.

And once again we welcome back Professor Ruth Wedgwood of Johns Hopkins University, who also brings her distinguished legal career in the executive branch, not to mention her scholarly research, to bear on our deliberations.

To the three of you, thank you for taking the time to be here to educate us. We will listen as attentively as your students are supposed to.

Now let me now turn to my friend and my valued partner in this effort, the ranking member, Mr. Rohrabacher, for his opening remarks.

Mr. ROHRABACHER. Thank you very much, Mr. Chairman, and thank you all for joining us today.

This is the fourth in a series of hearings of our subcommittee on the Status of Forces Agreements and U.N. mandates relative to the future of Iraq. To date, the United States military and Government personnel and contractors are operating in Iraq under a U.N. mandate.

We are learning all about what those legalities mean, and I have to admit that I was not fully aware and appreciative until we have had these hearings about the significance of these type of legal prerogatives, but that U.N. mandate is expected to expire at the end of this year, and Prime Minister Maliki has asked President Bush to forge ahead with a bilateral agreement that will take the mandate's place and, of course, negotiations are currently underway.

This administration will also most likely negotiate a Status of Forces Agreement to determine the rules under which United States military personnel will operate in Iraq. A Status of Forces Agreement, of course, is nothing new. The United States has Sta-

tus of Forces Agreements with 115 states according to Secretary Rice.

The issue at hand, however, is not the Status of Forces Agreement and not necessarily what the legal parameters are going to be and what is going to be in these agreements. The issue at hand is about whether or not the Congress is going to play a role in determining what that policy is and how much input should Congress have in these types of agreements and, if the executive branch expects us to approve what they have negotiated, how much cooperation they need to show us during the process.

As I have noted in previous hearings, this administration has been unfortunately less than helpful to those of us with congressional oversight responsibility. Thus, they have created an unnecessary atmosphere of distrust among our colleagues.

In this case, those who oppose the Iraq War do not trust that the administration will consult them on these future agreements, and let me say by having noted how the administration has handled itself I would say that this distrust that is being expressed by my colleagues on the other side of the aisle is not only understandable, but justified.

My speech the other night did not talk about a lack of cooperation. It talked about an arrogant and dismissive attitude by this administration. I think that in this Congress there has been a desire for cooperation. Certainly there has been a desire for cooperation on the Republican side, and I might add that even Republicans are dismayed by the lack of cooperation with the administration.

However, with this we should take as a hopeful note that General Lute, the President's advisor on the Iraq War, now says that Congress will be consulted on future agreements with Iraq.

It is also a hopeful note that Secretary Rice seems to have responded to the chairman when he made his complaints to her at a hearing of the full committee, and I think Secretary Rice, who has my respect and admiration, someone I have known for a long time, is very serious and I would say an honest member of this administration, heard the complaint, and it looks like she is trying to deal with that and try to make right, so I am looking forward to that.

By the way, I would just say that I believe that my criticism of the administration is not based on actions of Secretary Rice, but the problem I think goes much higher than that. I will leave that criticism at that point.

Today's subcommittee hearing will examine what type of negotiations must be voted on by Congress and which ones will be handled through executive power alone. I think that is a very significant question. I need a briefing on that myself, so I am glad you have arranged it, Mr. Chairman.

Whatever type of agreement is made between the United States and Iraq must follow the letter of the law, as well as the Constitution, with regards to its enactment, and I look forward to this hearing to see what the experts can tell us as to what those prerequisites are.

Thank you very much. I look forward to learning some things from all of you.

Mr. DELAHUNT. Yes. Thank you. Thank you, Mr. Rohrabacher.

I should have noted for the record too that Secretary Rice, when inquired of, immediately responded that she would ensure an appearance by an appropriate official from the State Department at our next hearing, which is next week.

Mr. ROHRABACHER. Tuesday.

Mr. DELAHUNT. Tuesday. So we are working.

Let us begin with Ms. Elsea, please.

STATEMENT OF JENNIFER K. ELSEA, ESQ., LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE

Ms. ELSEA. Good morning Chairman Delahunt, Ranking Member Rohrabacher. I am Jennifer Elsea. I am a legislative attorney with the American Law Division at the Congressional Research Service.

I thank the subcommittee for the opportunity to address the authorities and protections that Status of Forces Agreements and U.N. mandates provide for U.S. troops. I will confine my remarks to the military operations in Iraq and Afghanistan.

I ask that my written remarks be submitted for the record, and I would also invite our CRS report to be entered in. It is entitled Congressional Oversight Related Issues.

Mr. DELAHUNT. Without objection.

Ms. ELSEA. In Afghanistan, the United States is participating in two military missions. Operation Enduring Freedom (OEF) refers to the U.S. led coalition that initiated military action in 2001. The International Security Assistance Force (ISAF) is a NATO-led coalition deployed to Afghanistan under U.N. mandate after the Taliban government was ousted. I will start with ISAF.

The U.N. mandate related to ISAF is for peace enforcement for the purpose of assisting the Afghan Government in extending its authority throughout its territory and creating a secure environment for reconstruction and humanitarian efforts.

ISAF negotiated a military technical agreement with the Afghan interim authority that gives ISAF the authority to use military force to accomplish its mission. The agreement also contains arrangements regarding the status of ISAF forces. It provides that all ISAF and supporting personnel are subject to the exclusive jurisdiction of their own governments.

ISAF personnel are immune from arrest or detention by Afghan authorities and may not be turned over to any international tribunal or other entity without the express consent of the contributing nation.

Operation Enduring Freedom is the U.S.-led coalition formed to combat terrorism after 9/11. The United States and the transitional Government of Afghanistan concluded an agreement in 2002 regarding the status of United States military and DoD civilian personnel in Afghanistan. The agreement makes United States personnel immune from criminal prosecution by Afghan authorities and from civil and administrative jurisdiction for duty-related conduct.

Under the agreement, Afghanistan is not permitted to surrender United States personnel to the custody of another state or international tribunal without U.S. consent. The agreement does not cover contract personnel explicitly.

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 to combat terrorism in 2001.

While there is no explicit U.N. mandate authorizing Operation Enduring Freedom, Security Council resolutions appear to provide ample recognition, calling on the Afghan Government to cooperate with both ISAF and Operation Enduring Freedom to address the threat posed by the Taliban and al-Qaeda.

President Hamid Karzai and President Bush have issued a joint declaration similar to the one with Iraq which envisions a continued United States presence to build the security forces and to consult about appropriate measures to take in the event that Afghanistan perceives that its territorial integrity, independence or security is threatened or at risk.

Congress authorized United States military operations in Iraq as the President deems necessary to defend the national security of the United States against the continuing threat posed by Iraq and to enforce all relevant United Nations Security Council resolutions regarding Iraq.

After the regime of Saddam Hussein was removed from power, the Security Council recognized the Coalition Provisional Authority, CPA, and its role in bringing about a new government in Iraq. It also provided a mandate for coalition forces authorizing them to take all necessary measures to provide security and stability for Iraq in order to establish a new government. Subsequent resolutions have extended that mandate pursuant to requests by the Iraqi Government.

The U.N. mandate does not provide for the immunity of coalition troops, and no SOFA was deemed possible initially prior to the recognition of a permanent government in Iraq. Immunity for Coalition personnel was established by CPA Order No. 17, which gives Coalition personnel immunity from all Iraqi legal processes, including arrest, detention or proceedings in Iraqi court. Such persons are expected to respect applicable Iraqi laws, but are subject to the exclusive jurisdiction of their sending states.

At the time of the hand-over of authority to Iraq, the interim constitution came into effect which provided that CPA orders then in effect would remain in effect until rescinded by the new Iraqi Government.

CPA Order 17 remains in force for the duration of the U.N. mandate according to its terms and terminates only after the departure of the final element of the Multinational Force from Iraq, unless it is earlier rescinded or amended.

There is no timetable for the departure of the Multinational Force Coalition from Iraq after the U.N. mandate ends. Order 17 could be interpreted to expire at the same time. However, Order 17 appears to have been designed to stay in force for long enough to allow Multinational Forces to depart.

If the U.N. Security Council or Iraqi Government later adopt a timetable for the departure of the Multinational Force, it seems logical to interpret CPA Order 17 as expiring at that time. On the other hand, if the Iraqi Government invites United States forces to

remain in Iraq then CPA Order 17 could remain in effect until a new agreement is reached.

However, all of this is subject to the interpretation of the Iraqi Government. How long the immunity of the Coalition troops will continue after the U.N. mandate expires may depend on whether the Iraqi Government deems them to be part of elements of the Multinational Force that have not yet departed or military forces that have overstayed their mandate.

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 of United States forces in Iraq after the U.N. mandate is whether the congressional authorization to use military force will also end. Presumably continued force is authorized under the resolution only so long as Iraq poses a threat, a continuing threat to the United States, and the U.S. military presence is not inconsistent with U.N. resolutions.

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 authorize force in the first place.

Once the U.N. mandate expires, assuming the Security Council doesn't adopt new resolutions that support a U.S. mission, it is arguable that the United States use of force in Iraq is not necessary or appropriate to enforce U.N. Security Council resolutions regarding Iraq. Therefore, new legislation may be necessary to support a new role for United States troops under a possible agreement with Iraq.

That concludes my remarks.

[The prepared statement of Ms. Elsea follows:]



**Statement of Jennifer K. Elsea
Legislative Attorney
American Law Division
Congressional Research Service**

before

**The Subcommittee on International Organizations, Human Rights, and Oversight
of the House Foreign Affairs Committee**

**Hearing: "Status of Forces Agreements and UN Mandates: What Authorities and
Protections Do They Provide to U.S. Personnel?"**

February 28, 2008

Chairman Delahunt, Ranking Member Rohrbacher, and Distinguished Members of the House Subcommittee,

I am Jennifer Elsea, a legislative attorney in the American Law Division at the Congressional Research Service. I work on a variety of issues connected with national security and international law, and have had the opportunity to prepare analyses regarding legal aspects of the use of force abroad. I thank the subcommittee for the opportunity to address the authorities and protections that status of forces agreements and U.N. mandates provide for U.S. personnel operating overseas. I will confine my remarks to the military operations in Afghanistan and Iraq, briefly describing the effects of the relevant U.N. resolutions and international agreements, as well as the congressional mandates for these operations. I ask that my remarks be submitted into the record, along with a report CRS has prepared entitled "Congressional Oversight and Related Issues Concerning the Prospective Security Agreement Between the United States and Iraq," which addresses the issues covered by these hearings in greater detail.

Afghanistan

The United States is participating in two military operations in Afghanistan, with separate (but overlapping) mandates and status of forces arrangements. Operation Enduring Freedom (OEF) refers to the U.S.-led coalition that initiated military action in Afghanistan in 2001 in response to the terrorist attacks of September 11, 2001. The International Security

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Assistance Force (ISAF) is a NATO-led coalition deployed to Afghanistan under U.N. mandate beginning with Security Council Resolution 1386.¹

ISAF. The ISAF was initially a small force led by the United Kingdom established to provide assistance to the Afghan Interim Authority for the maintenance of security in Kabul and the surrounding areas. NATO took over the mission in 2003, which has gradually expanded to cover the entire territory of Afghanistan. Its U.N. mandate is related to “peace enforcement,” which is described as assisting the Afghan government in extending its authority and creating a secure environment.² U.N.S.C. Resolution 1510 (2003) authorized the expansion of the ISAF mandate

to allow it . . . to support the Afghan Transitional Authority and its successors in the maintenance of security in areas of Afghanistan outside of Kabul and its environs, so that the Afghan Authorities as well as the personnel of the United Nations and other international civilian personnel engaged, in particular, in reconstruction and humanitarian efforts, can operate in a secure environment, and to provide security assistance for the performance of other tasks in support of the Bonn Agreement [creating an international framework for the establishment of an elected government in Afghanistan].

Under a Military Technical Agreement negotiated by ISAF and the Afghan Interim Authority, ISAF has the authority, “without interference or permission, to do all that the Commander judges necessary and proper, including the use of military force, to protect the ISAF and its Mission.”

Annexed to the Military Technical Agreement is a document entitled “Arrangements Regarding the Status of the International Security Assistance Force.” It provides that all ISAF and supporting personnel are subject to the exclusive jurisdiction of their respective national elements for criminal or disciplinary offences, no matter where such conduct takes place. In addition, 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.

In March of 2006, NATO and the Islamic Republic of Afghanistan signed a “Declaration of Afghanistan's Long Term Cooperation and Partnership with NATO” to formalize the NATO presence in Afghanistan.³ It does not expressly address the status of NATO forces in Afghanistan, but a status of forces agreement (SOFA) seems likely to be part of any final agreement.

OEF. Operation Enduring Freedom is the U.S.-led coalition formed to combat terrorism after 9/11. It does not operate under a formal U.N. mandate, although the U.N. Security Council has effectively condoned its mission, first, by implicitly recognizing that

¹ U.N.S.C. Res. 1386 (Dec. 20, 2001).

² See NATO Topics: NATO in Afghanistan Fact Sheet, [<http://www.nato.int/issues/afghanistan/040628-factsheet.htm>].

³ Available at the Ministry of Foreign Affairs website, [<http://www.mfa.gov.af/documents.asp>].

the use of force was appropriate in response to the September 11, 2001 terrorist attacks,⁴ and later, by calling upon ISAF to “work in close consultation with” Operation Enduring Freedom in carrying out its mandate.⁵ In 2007, the Security Council provided even more explicit support for OEF, 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....”⁶

The United States and the transitional government of Afghanistan concluded an agreement in 2002 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.⁷ 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 1961.⁸ 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.⁹ The Islamic Transitional Government of Afghanistan¹⁰ 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. . . .”¹¹ 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

⁴ U.N.S.C. Res. 1368 (Sep. 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”).

⁵ See U.N.S.C. Res. 1776 § 5 (Sep. 19, 2007); U.N.S.C. Res. 1707 § 4 (2007).

⁶ U.N.S.C. Res. 1746 § 25 (2007).

⁷ T.I.A.S. Exchange of notes September 26 and December 12, 2002 and May 28, 2003. Entered into force May 28, 2003.

⁸ *Id.*

⁹ Vienna Convention on Diplomatic Relations of April 18, 1961, T.I.A.S. 7502; 23 U.S.T. 3227.

¹⁰ 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.

¹¹ P.L. 107-40 (September 18, 2001); 115 Stat. 224.

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...¹² The Security Council has also called upon the ISAF to “work in close consultation with” Operation Enduring Freedom in carrying out its force mandate.¹³

On May 23, 2005, President Hamid Karzai and President Bush issued a “joint declaration” outlining a prospective future agreement between the two countries.¹⁴ 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.

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.

H.J. Res. 114 appears to incorporate future resolutions concerning Iraq that may be adopted by the Security Council as well as those adopted prior to its enactment. The authority also appears to extend beyond compelling Iraq’s disarmament to implementing the full range of concerns expressed in those U.N. resolutions in connection with the reconstruction efforts and establishment of an elected government, as well as for the broad purpose of defending “the national security of the United States against the continuing threat posed by Iraq.”

Despite the initial lack of consensus among Security Council members regarding whether its previous resolutions concerning Iraq and Kuwait authorized enforcement by military means, 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.¹⁵

The first of these, Resolution 1511 (Oct. 16, 2003), recognized the Coalition Provisional Authority (CPA) but underscored the temporary nature of its obligations and

¹² U.N.S.C. Res. 1746 § 25 (2007).

¹³ See U.N.S.C. Res. 1776 § 5 (Sep. 19, 2007); U.N.S.C. Res. 1707 § 4 (2007).

¹⁴ [<http://www.mfa.gov.af/Documents/ImportantDoc/US-Afghanistan%20Strategic%20Partnership%20Declaration.pdf>].

¹⁵ For an overview of the process, see *Iraq: Post-Saddam Governance and Security*, CRS Report RL31339, by Kenneth Katzman.

authorities under international law. In paragraph 13, Resolution 1511 provided a mandate for coalition forces, authorizing

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, and 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.” Subsequent resolutions have extended the mandate pursuant to requests by the Iraqi government.

The Security Council Resolutions do not provide for the immunity of coalition troops from Iraqi legal processes. No SOFA was deemed possible prior to the recognition of a permanent government in Iraq. 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 U.N. Security Council resolutions.) CPA Order 17, Status of the Coalition Provisional Authority, MNF - Iraq, Certain Missions and Personnel in Iraq,¹⁶ 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 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.

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, which reaffirmed and extended the authorization for the multinational force at the request of the incoming Interim 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. With respect to the status of coalition forces, 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

¹⁶ Available online at [http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf]

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-I for the CPA and otherwise reflecting the new political situation.¹⁷ CPA Order 100 stated as its purpose

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

At the time of the handover of authority, the Transitional Administrative Law of Iraq (TAL)¹⁹ came into force as the temporary constitution of Iraq. Under Article 26 of the TAL,

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 ratified in 2005. Laws in existence prior to the adoption of the permanent constitution continued in force unless expressly annulled, or subsequently repealed or amended, presumably including CPA Orders that were not rescinded by the Transitional Government.

Late last year, the U.N. Security Council extended the mandate for the multinational forces until December 31, 2008²⁰ based on Iraqi Prime Minister al-Maliki's request to extend the MNF mandate "one last time," under the proviso 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."²¹

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.²² Neither it nor CPA Order 100 establishes a timetable for the departure of all MNF elements from Iraq

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].

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. 1790 (Dec. 18, 2007).

²¹ Letter from Nuri Kamel al-Maliki, Prime Minister of the Republic of Iraq, to the Security Council, attached as Annex 1 to U.N.S.C. Res. 1790.

²² CPA Order 17, *supra* note 16, § 20.

after the U.N. mandate ends. Order 17 could be interpreted to expire concomitantly with the U.N. mandate, because it defines Multinational Force with reference to the U.N. resolutions.²³ 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 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 politically 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 may depend 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. 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 Qaeda 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 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,²⁴ but suggest that new legislation may be necessary to support a new role for U.S. troops under a possible agreement with Iraq.

²³ *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").

²⁴ 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.

Mr. DELAHUNT. Thank you, Jennifer.
Mr. Mason?

**STATEMENT R. CHUCK MASON, ESQ., LEGISLATIVE ATTORNEY,
CONGRESSIONAL RESEARCH SERVICE**

Mr. MASON. Good morning, Chairman Delahunt and Ranking Member Rohrabacher. My name is Chuck Mason. I am a legislative attorney with the American Law Division of the Congressional Research Service.

I would like to thank you for inviting me to testify today regarding Status of Forces Agreements and the authorities and protections that they provide to U.S. personnel.

Traditionally a SOFA is an executive agreement that establishes a legal framework under which U.S. military personnel operate in a foreign country. SOFAs may include many components, but the most common issue addressed is which country may exercise criminal jurisdiction over U.S. military personnel.

The United States has concluded agreements where it maintains exclusive jurisdiction over its personnel, but more often the agreement calls for shared jurisdiction with the receiving country.

A SOFA does not authorize specific exercises, activities or missions. Rather, it provides the framework for legal protections and rights while U.S. personnel are present in a country for agreed upon purposes. A SOFA is not a mutual defense agreement. A SOFA is not a security agreement. A SOFA does not impact or diminish the inherent right of self-defense.

Today I would like to provide you with a brief overview of the form and content of nonclassified SOFAs between the United States and other countries. It must be noted that there are at least 10 agreements that are classified documents. Therefore, I cannot comment on their content or the basis upon which they are classified.

With the exception of the multilateral SOFA between the U.S. and NATO countries, a SOFA is specific to an individual country and is in the form of an executive agreement. The Department of State and the Department of Defense, working together, identify the need for a SOFA with a particular country and will then negotiate the terms of the agreement. The NATO SOFA is the only SOFA that was concluded as part of a treaty.

There are no formal requirements governing the content, detail and length of a SOFA. A SOFA may address, but is not limited to, criminal and civil jurisdiction, the wearing of uniforms, taxes and fees, carrying of weapons and customs regulations. The United States has concluded SOFAs as short as one page and others in excess of 200 pages.

One issue commonly addressed in a SOFA is the legal protection that will be afforded U.S. personnel. The agreement establishes which country is able to assert criminal jurisdiction. The right to assert jurisdiction over U.S. personnel is not solely limited to when an individual is located on a military installation. It may cover individuals off the installation as well. The right to assert jurisdiction can result in complete immunity from the laws of the receiving country while the individual is present in that country.

For example, the United States entered into an agreement regarding military exchanges and visits with the Government of Mongolia. The language allows the United States to exercise all criminal and disciplinary jurisdiction over U.S. personnel conferred on them by the military laws of the United States. Any criminal offenses against the laws of Mongolia by a member of the United States forces shall be referred to appropriate United States authorities for investigation and disposition.

The NATO SOFA is an example of shared jurisdiction. Under shared jurisdiction, each of the respective countries are provided exclusive jurisdiction in specific circumstances. When an offense is only punishable by one of the country's laws, the country whose law has been offended generally has exclusive jurisdiction over the offender.

However, when the offense violates the laws of both countries concurrent jurisdiction is present and additional qualifications are used to determine which country will be allowed to assert jurisdiction over the offender.

While the NATO SOFA provides extensive language establishing jurisdiction, the United States has entered numerous SOFAs that appear to have a very basic but no less thorough jurisdictional framework. These agreements generally contain a single sentence stating that U.S. personnel be afforded a status equivalent to certain U.S. Embassy personnel in that country. Therefore, among other legal protections, they can be immune from criminal jurisdiction while in the receiving country.

SOFAs do not generally authorize specific military operations by U.S. forces. For example, in the SOFA with Belize, language states that the agreement applies to United States personnel who may be temporarily in Belize in connection with military exercises and training, counterdrug related activities, United States security assistance programs or other agreed purposes.

The United States previously entered into two different agreements with Belize related to military training and provisions of defense articles. The SOFA itself does not authorize specific operations, exercises or activities, but provides the framework for legal status and protections of the U.S. personnel while they are in Belize.

While SOFAs do not generally provide authority to fight, the inherent right of self-defense is not impacted or diminished either.

Mr. Chairman, that concludes my prepared statement.

[The prepared statement of Mr. Mason follows:]



**Statement of R. Chuck Mason
Legislative Attorney, American Law Division
Congressional Research Service**

Before

**The Committee on Foreign Affairs: Subcommittee on International Organizations,
Human Rights, and Oversight**

United States House of Representatives

February 28, 2007

on

**“Status of Forces Agreements and UN Mandates:
What Authorities and Protections Do They Provide to U.S. Personnel?”**

Chairman Delahunt, Ranking Member Rohrbacher, and Distinguished Members of the House Subcommittee,

My name is Chuck Mason, I am a Legislative Attorney with the American Law Division of the Congressional Research Service. I'd like to thank you for inviting me to testify today regarding Status of Forces Agreements (SOFAs) and the authorities and protections that they provide to U.S. Personnel.

Traditionally, a SOFA is an executive agreement that establishes the legal framework under which U.S. military personnel operate in a foreign country. SOFAs may include many components, but the most common issue addressed is which country may exercise criminal jurisdiction over U.S. personnel. The United States has concluded agreements where it maintains exclusive jurisdiction over its personnel, but more often the agreement calls for shared jurisdiction with the receiving country. A SOFA does not authorize specific exercises, activities, or missions. Rather, it provides the framework for legal protections and rights while U.S. personnel are present in a country for agreed upon purposes. A SOFA is not a mutual defense agreement. A SOFA is not a security agreement. A SOFA does not impact or diminish the inherent right of self-defense under the law of war. Today, I would like to provide you with a brief overview of the form and content of non-classified SOFAs between the United States and other countries.

With the exception of the multilateral SOFA between the U.S. and North Atlantic Treaty Organization (NATO) countries, a SOFA is specific to an individual country and is in the form of an executive agreement with that country. The Department of State and the Department of Defense, working together, identify the need for a SOFA with a particular country and will then negotiate the terms of the agreement. The NATO SOFA¹ is the only SOFA that was concluded as part of a treaty.² The Senate ratified the NATO SOFA on March 19, 1970, subject to reservations. The ratification included a statement

that nothing in the Agreement diminishes, abridges, or alters the right of the United States to safeguard its own security by excluding or removing persons whose presence in the United States is deemed prejudicial to its safety or security, and that no person whose presence in the United States is deemed prejudicial to its safety or security shall be permitted to enter or remain in the United States.³

The Senate reservations to the NATO SOFA include four conditions: (1) the criminal jurisdiction provisions contained in Article VII of the agreement do not constitute a precedent for future agreements; (2) when a servicemember is to be tried by authorities in a receiving state, the commanding officer of the U.S. armed forces in that state shall review the laws of the receiving state with reference to the procedural safeguards of the U.S. Constitution; (3) if the commanding officer believes there is danger that the servicemember will not be protected because of the absence or denial of constitutional rights the accused

¹ 4 U.S.T. 1792; T.I.A.S. 2846; 199 U.N.T.S. 67. Signed at London, June 19, 1951. Entered into force August 23, 1953.

² *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 Jun. 23, 1960.

³ 32 C.F.R. § 151.6

would receive in the United States, the commanding officer shall request that the receiving state waive its jurisdiction; and, (4) a representative of the United States be appointed to attend the trial of any servicemember being tried by the receiving state and act to protect the constitutional rights of the servicemember.⁴

Department of Defense Directive 5525.1 provides policy and information specific to SOFAs.⁵ The Department of Defense policy is “to protect, to the maximum extent possible, the rights of U.S. personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons.”⁶ The directive addresses the Senate reservations to the NATO SOFA by stating even though the reservations accompanying the NATO SOFA ratification only apply to countries where it is applicable, comparable reservations shall be applied to future SOFAs. Specifically, the policy states that “the same procedures for safeguarding the interests of U.S. personnel subject to foreign jurisdiction” be applied when practicable in overseas areas where U.S. forces are stationed.⁷

There are not formal requirements governing the content, detail, and length of a SOFA. A SOFA may address, but is not limited to, criminal and civil jurisdiction, the wearing of uniforms, taxes and fees, carrying of weapons, use of radio frequencies, licenses, and customs regulations. The United States has concluded SOFAs as short as one page and others in excess of 200 pages. For example, the United States and Bangladesh exchanged notes⁸ providing for the status of U.S. armed forces in advance of a joint exercise in 1998.⁹ The agreement is specific to one activity/exercise, consists of 5 clauses, and is contained in one page. The United States and Botswana exchanged notes providing for the status of forces “who may be temporarily present in Botswana in conjunction with exercises, training, humanitarian assistance, or other activities which may be agreed upon by our two governments.”¹⁰ The agreement is similar in its scope to the agreement with Bangladesh and is contained in one page. In contrast, in documents exceeding 200 pages, the United States and Germany entered into a supplemental agreement to the NATO SOFA,¹¹ as well as additional agreements and exchange of notes related to specific issues.¹²

⁴ *Id.*

⁵ Available at [<http://www.dtic.mil/whs/directives/corres/pdf/552501p.pdf>].

⁶ *Id.*

⁷ *Id.*

⁸ Diplomatic notes are used for correspondence between the U.S. Government and a foreign government. The Secretary of State corresponds with the diplomatic representatives of foreign governments in Washington, DC, and foreign offices or ministries abroad. See [<http://foia.state.gov/masterdocs/05fah01/CH0610.pdf>]

⁹ T.I.A.S. Exchange of notes at Dhaka, August 10 and 24, 1998. Entered into force August 24, 1998. (Providing U.S. armed forces status equivalent to Administrative and Technical Staff of the U.S. Embassy).

¹⁰ T.I.A.S. Exchange of notes at Gaborone, January 22 and February 13, 2001. Entered into force February 13, 2001. (Providing U.S. forces status equivalent to Administrative and Technical Staff of the U.S. Embassy).

¹¹ 14 U.S.T. 531; T.I.A.S. 5351. Signed at Bonn, August 3, 1959. Entered into force July 1, 1963.

¹² 14 U.S.T. 689; T.I.A.S. 5352; 490 U.N.T.S. 30. Signed at Bonn, August 3, 1959. Entered into
(continued...)

Criminal Jurisdiction

The issue commonly addressed in a SOFA is the legal protection that will be afforded U.S. personnel. The agreement establishes which party to the agreement is able to assert criminal and/or civil jurisdiction. The United States has entered agreements where it maintains exclusive jurisdiction; but the more common agreement results in shared jurisdiction between the United States and the country signing the agreement. The right to exert jurisdiction over U.S. personnel is not solely limited to when an individual is located on a military installation. It may cover individuals off the installation as well. The right to exert jurisdiction can result in complete immunity from the laws of the receiving country while the individual is present in that country.

Example of Exclusive Jurisdiction

The United States entered into an agreement regarding military exchanges and visits with the Government of Mongolia.¹³ As part of the agreement, Article X addresses criminal jurisdiction of U.S. personnel located in Mongolia. The language of the agreement provides, “United States military authorities shall have the right to exercise within Mongolia all criminal and disciplinary jurisdiction over United States [p]ersonnel conferred on them by the military laws of the United States. Any criminal offenses against the laws of Mongolia committed by a member of the U.S. forces shall be referred to appropriate United States authorities for investigation and disposition.”¹⁴ The agreement allows the government of Mongolia to request the United States waive its jurisdiction in cases of alleged criminal behavior unrelated to official duty.¹⁵ There is no requirement for the United States to waive jurisdiction, only to give “sympathetic consideration” of any such request.¹⁶

Example of Shared Jurisdiction

The NATO SOFA, applicable to all member countries of NATO, is an example of shared jurisdiction. Article VII of SOFA provides the jurisdictional framework for the member countries.¹⁷ The SOFA allows for a country not entitled to primary jurisdiction to

¹² (...continued)
force July 1, 1963.

¹³ T.I.A.S., *Agreement on Military Exchanges and Visits Between The Government of the United States of America and The Government of Mongolia*, agreement dated June 26, 1996.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 4 U.S.T. 1792; T.I.A.S. 2846; 199 U.N.T.S. 67. Article VII:

“1. Subject to the provisions of this Article,

(a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;

(b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offenses committed within the territory of the receiving State and punishable by the law of that State.

(continued...)

request the country with primary jurisdiction waive its right to jurisdiction. There is no requirement for the country to waive jurisdiction, only that it gives “sympathetic consideration” of the request.¹⁸ Under the shared jurisdiction framework, each of the respective countries is provided exclusive jurisdiction in specific circumstances, generally when an offense is only punishable by one of the country’s laws.¹⁹ In that case, the country whose law has been offended has exclusive jurisdiction over the offender. When the offense violates the laws of both countries, concurrent jurisdiction is present and additional qualifications are used to determine which country will be allowed to assert jurisdiction over the offender.²⁰

Status Determinations

While the NATO SOFA provides extensive language establishing jurisdiction, the United States has entered numerous SOFAs that appear to have a very basic, but no less

¹⁷ (...continued)

2. -- (a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offenses, including offenses relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.

(b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian components and their dependents with respect to offenses, including offenses relating to the security of that State, punishable by its law but not by the law of the sending State.

(c) For the purposes of this paragraph and of paragraph 3 of this Article a security offense against a State shall include

(i) treason against the State;

(ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defense of that State.

3. In cases where the right to exercise jurisdiction is concurrent, the following rules shall apply:

(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to

(i) offenses solely against the property or security of that State, or offenses solely against the person or property of another member of the force or civilian component of that State or of a dependent;

(ii) offenses arising out of any act or omission in the performance of official duty.

(b) In the case of any other offense the authorities of the receiving State shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

4. The foregoing provisions of this Article shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State.”

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

thorough, jurisdictional determination. These agreements generally contain a single sentence stating that U.S. personnel be afforded a status equivalent to that accorded to the administrative and technical staff of the U.S. Embassy in that country. The Vienna Convention on Diplomatic Relations of April 18, 1961 establishes classes of personnel, each with varying levels of legal protections.²¹ Administrative and technical staff receive, among other legal protections, “immunity from the criminal jurisdiction of the receiving State.”²² Therefore, a SOFA which treats U.S. personnel as administrative and technical staff confers immunity from criminal jurisdiction while in the receiving country.

Authority to Fight

SOFAs do not generally authorize specific military operations by U.S. forces. There is often language defining the scope of the agreement. In the SOFA with Belize, language states that the agreement applies to U.S. personnel “who may be temporarily in Belize in connection with military exercises and training, counter-drug related activities, United States security assistance programs, or other agreed purposes.”²³ The United States had previously entered into two different agreements with Belize related to military training and provisions of defense articles.²⁴ The SOFA itself does not authorize specific operations, exercises, or activities, but provides a framework for legal status and protections of U.S. personnel while in Belize. Under the terms of the agreement, U.S. personnel are provided legal protections as if they were administrative and technical staff of the U.S. Embassy.²⁵ While SOFAs do not generally provide authority to fight, the inherent right of self-defense is not impacted or diminished either. U.S. personnel always have a right to defend themselves, if attacked and/or threatened, and a SOFA does not take away that right.²⁶

Common SOFAs

The NATO SOFA is a multilateral agreement that has applicability among all the member countries of NATO. As of June 2007, 26 countries, including the United States, have either ratified the agreement or acceded to it by their accession into NATO.²⁷ Additionally, another 21 countries are subject to the NATO SOFA through their participation

²¹ 23 U.S.T. 3227; T.I.A.S. 7502. Signed April 18, 1961. Entered into force December 13, 1972. For background see, CRS Report RL33147, *Immunities Accorded to Foreign Diplomats, Consular Officers, and Employees of International Organizations Under U.S. Law*, by Michael John Garcia.

²² *Id.* at art. 37(2), citing art. 31(1).

²³ T.I.A.S. Exchange of notes at Belize City September 4, 2001 and April 24, 2002. Entered into force April 24, 2002.

²⁴ 34 U.S.T. 23; T.I.A.S. 10334. Exchange of notes at Belize and Belmopan December 8, 1981 and January 15, 1982. Entered into force January 15, 1982. T.I.A.S. 11743; 2202 U.N.T.S. 141. Exchange of notes at Belize and Belmopan August 6 and 23, 1990. Entered into force August 23, 1990.

²⁵ T.I.A.S. Exchange of notes at Belize City September 4, 2001 and April 24, 2002. Entered into force April 24, 2002.

²⁶ See CJCSI 3121.01B, Standing Rules of Engagement for US Forces (U), June 13, 2005. (The SROE is a classified document, but portions are unclassified).

²⁷ See [<http://www.state.gov/documents/organization/85630.pdf>].

in the NATO Partnership for Peace (PfP) program.²⁸ The program consists of bilateral cooperation between individual countries and NATO in order to increase stability, diminish threats to peace and build strengthened security relationships.²⁹ The individual countries that participate in PfP agree to adhere to the terms of the NATO SOFA.³⁰ Through the NATO SOFA and those countries participating in the PfP, the United States has a common SOFA with approximately 58 countries. Secretary Rice and Secretary Gates stated that the United States has agreements in more than 115 countries around the world.³¹ The NATO SOFA and NATO PfP SOFA account for roughly half of the SOFAs to which the United States is party.

Classified SOFAs

In any discussion of SOFAs, it must be noted that there are at least 10 agreements that are classified documents. The agreements are classified for national security reasons. Therefore, we cannot comment on their content or the basis upon which they are classified.

²⁸ See [<http://www.nato.int/issues/pfp/index.html>].

²⁹ *Id.*

³⁰ See [<http://www.nato.int/docu/basicxt/b950619a.htm>].

³¹ *What We Need In Iraq*, By Condoleeza Rice and Robert Gates, February 13, 2008, available at [<http://www.washingtonpost.com/wp-dyn/content/article/2008/02/12/AR2008021202001.html>]

Mr. DELAHUNT. Thank you, Chuck.
Professor Matheson?

STATEMENT MICHAEL J. MATHESON, ESQ., VISITING RESEARCH PROFESSOR OF LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. MATHESON. Thank you very much, Mr. Chairman. I have submitted a written statement, and as usual I would suggest it be included in the record and that I give an oral summary at this point.

Mr. DELAHUNT. No objection.

Mr. MATHESON. You have already heard two excellent presentations, and you have a good deal of excellent technical material in the written statements that have been submitted for the record. I won't try to go through that material in detail again.

Let me just try and hit a few general points. First of all, when military forces deploy into a foreign country there are two basic sets of legal issues that arise. The first is the mandate of the force; that is to say its purpose, its mission, the scope of its permissible action. The second is the status of the force; that is to say its standing under the foreign law, its privileges and its immunities.

Now, first of all with respect to the mandate of the force, a U.S. deployment may be under U.N. authority either as part of a force under U.N. command or as part of a force under some separate command, such as a regional organization or coalition, which is the more typical way in which U.S. forces have been deployed.

In either case, the mandate of the force is typically set forth in resolutions of the Security Council, and that may be very broad, as was the case in the Gulf War, or it may be more detailed and restrictive.

Or, if the deployment is not under U.N. authority it may be done pursuant to consent of the state in which the force is being deployed. In that case the mandate is typically governed by a separate agreement between the U.S. and the foreign country, or it may be by a joint declaration or some other kind of political document.

Or, there may be a hostile intervention without the agreement of the host country in which case the mandate is defined by international law, specifically the law of self-defense, the law of belligerent occupation.

Now, the Status of Forces that are deployed. Of course, where U.S. forces are deployed for a significant period in a foreign country the United States will usually want to have in place some agreement or other instrument which defines their status and which gives them appropriate privileges and immunities from local law and local jurisdiction.

This may take the form of an agreement with the host country either directly with the United States or with the U.N. or the regional organization or coalition in which U.S. forces are taking part, or if it is a hostile operation where there is no agreement with the host country then this may take the form of an order under the occupying authority.

As you have already heard, there is no uniform model or format for these SOFAs. The NATO SOFA took the form of a treaty. There are several others which took the form of agreements implementing

mutual defense treaties. There are also a large number which were done as executive agreements pursuant to the President's own authority.

Some of these are very brief and general. I brought along a three-page one with East Timor. Some are much more complicated and detailed. Here is the Korea package with all of its agreed understandings and other documents, which runs more than 150 pages.

As you have heard, some are shorter and some are longer than that, but they typically have certain common objectives to guarantee the force the right to enter, to move about and carry out its mandate, exemptions from local taxes and charges in whole or in part, exemptions from local criminal and civil jurisdiction in whole or in part. Of course, the specific terms will vary depending upon the circumstances and the priorities and demands of the host country.

Now, how does that apply to the two cases you have asked us to address? Afghanistan. As you have heard, the situation is complicated there because in fact there are two forces operating in the country in which U.S. personnel are part.

The first is the so-called International Security Assistance Force or ISAF, which is a Multinational Force under NATO command which was authorized by the Security Council. The ISAF, as you have heard, has a mandate from the Council to do various things, including protecting international personnel, providing security assistance to the Afghan Government and, most important, assisting and providing security throughout the entire country.

The status of the ISAF personnel is governed by a so-called military technical agreement which was concluded between the ISAF and the Afghan Government, and it authorizes ISAF freedom of movement and the right to conduct military operations and gives immunity to ISAF personnel for various purposes, including from Afghan criminal jurisdiction and taxation.

The second force in Afghanistan is the so-called Operation Enduring Freedom force, which is a force under U.S. command that originally came into the country shortly after 9/11 and which since then has been fighting against Taliban and al-Qaeda forces.

That force is governed by separate instruments. One is the so-called Joint Declaration of the U.S.-Afghanistan Strategic Partnership, which was signed by Presidents Bush and Karzai. Among other things, it says what the United States forces will: Train and equip Afghan forces; conduct counterterrorism operations; and again, it says that there will be freedom of action for United States forces to conduct appropriate military operations.

That is the mandate of the force. The status of the force and its U.S. personnel is governed by an agreement that was concluded by an exchange of notes, which does the typical things that a SOFA will do, including providing the exemption from criminal jurisdiction and providing authority for contracting and entry and exit, and contracts, and the like.

Iraq, in contrast, the U.S. forces there are part of the Multinational Force authorized by the Security Council under Chapter 7. The Security Council authorized that force to take all necessary measures to maintain security and stability and to conduct oper-

ations against terrorists and hostile groups and to assist in reconstruction and humanitarian missions.

That is the mandate of the force. The status of its personnel is governed by in this case an order issued by the Coalition Provisional Authority, the occupying authority, in 2004 known as CPA 17. That has been maintained in force after the end of the occupation by the Iraqi Constitution for the duration of the Multinational Force mandate.

As you have heard, CPA 17 does the various things that a SOFA will do, granting immunity from criminal and civil jurisdiction, providing for contracts, claims and so on. In addition, CPA 17 differs from a typical SOFA in that it also grants immunity to civilian contractor personnel.

As you have heard, CPA 17 only applies to U.S. forces in their role as members of the Multinational Force authorized by the U.N. The current mandate, of course, extends to the end of this year.

If a follow on SOFA were not concluded by then then probably it would be prudent to extend the current protections of CPA 17 in some way. That could be done by the Security Council to extend the mandate of the force for a temporary period, or it could be done by some agreement between the United States and the Iraqi Government, such as a diplomatic exchange of notes.

The question then arises as to whether any other agreement which might be contemplated by the November 2007 Declaration of Principles is going to be defining either the status or the future mission of U.S. forces perhaps in a way similar to the U.S.-Afghan Joint Declaration that we have been talking about.

As you noted, Secretary Rice and Gates have already suggested that there in fact will be some kind of elaboration of what they call the basic parameters of the future U.S. presence, although they have given various assurances that nothing in it will mandate combat missions, that there will be no security commitments, that there will be no authorization for permanent bases.

But no doubt the committee will want to ask administration witnesses exactly what is intended either in terms of the follow on SOFA or in terms of any other agreement, framework agreement or whatever it may be called, that would determine future missions and their status.

Mr. Chairman, that concludes my oral comments. Of course, I would be glad to answer questions.

[The prepared statement of Mr. Matheson follows:]

PREPARED STATEMENT OF MICHAEL J. MATHESON, ESQ., VISITING RESEARCH
PROFESSOR OF LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

I have been asked to provide a description of the authorities and protections provided to U.S. personnel by status of forces agreements and UN mandates. I have also been asked to comment specifically on the role and content of the instruments that govern the status of U.S. forces in Afghanistan and Iraq.

In general, U.S. forces have sometimes been deployed pursuant to a UN mandate; but more often they have been deployed either by agreement of the state concerned, or without such agreement in the exercise of U.S. rights under international law. Wherever possible, the United States will typically wish to have some form of agreement or other instrument in place regulating the status of its forces when deployed for a significant period in foreign countries, so as to ensure that they have appropriate privileges and immunities from foreign law and jurisdiction.

UN MANDATES

Two different types of armed forces are deployed under UN authority. First are peacekeeping forces under direct UN command, consisting of national units contributed by UN member states. Such forces may be authorized by decision of the Security Council under Chapter VI of the UN Charter, which requires the consent of the state or states into which the force is deployed; or this may be done under Chapter VII of the Charter, pursuant to a decision by the Council that there is a threat to the peace, in which case the consent of the states concerned is not technically required.¹ According to the UN, there are currently 17 such peacekeeping operations.²

In the alternative, the Council may act under Chapter VII to authorize states, coalitions or regional organizations to deploy forces under their own command to deal with a threat to the peace. This, for example, was done in the case of the 1990–91 Gulf War, the 1992–93 intervention in Somalia, and the 1994 intervention in Haiti. The UN might exercise little or no control over such an operation once it is authorized.³

In either case, when the Security Council authorizes the operation, it will set forth the mandate of the force being authorized. In some cases, this mandate is general and open-ended; for example, the mandate for the Gulf War coalition was “to use all necessary means to uphold and implement” the Council’s previous resolutions on Iraq and to “restore international peace and security in the area.”⁴ In other cases, the mandate may be more detailed and restrictive.

Typically, however, the UN mandate will not attempt to spell out the status, privileges and immunities of the force authorized with respect to the law and jurisdiction of the state or states to which it is deployed. That is typically left to separate agreement with the state or states in question, or in the case of a hostile operation where such agreement is not possible, to the international law of belligerent occupation.

STATUS OF FORCES AGREEMENTS

When U.S. forces are deployed to a foreign country for a significant period—whether under UN authority or not—the United States will typically wish to have in place an instrument making clear the status of U.S. forces and the extent of their immunity from the law and jurisdiction of the state in which they are operating. If the U.S. is acting as an occupying power, this may take the form of an occupation order; otherwise, it will take the form of an agreement with the state in question, either concluded by the U.S. government itself or by the multinational force or coalition of which it is a part. According to the Administration, the United States has such agreements with more than 115 countries.⁵

Although these agreements are generically referred to as Status of Forces Agreements or SOFAs, there is no uniform model or format. The NATO SOFA took the form of a treaty;⁶ some SOFAs have been agreements implementing prior mutual defense treaties;⁷ but a great many take the form of executive agreements concluded under the President’s own Constitutional authority. If the agreement is limited to giving U.S. forces and personnel exemption from foreign law, the President may conclude it without further Congressional approval.

SOFAs typically have certain common objectives: to give U.S. forces the right to enter, leave and move about the country, wear their uniforms and use their vehicles; to exempt U.S. forces and personnel from some or all taxes and charges of the host country; to regulate claims and contracts; and to exempt U.S. personnel from local criminal and civil jurisdiction in whole or in part. This may be stated in brief and general terms, or it may be complex and detailed. For example, the SOFA concluded

¹In the early years of the UN, forces were sometimes deployed pursuant to authorization by the UN General Assembly (under the so-called Uniting for Peace Resolution), but this practice has long since fallen into disuse, and all peacekeeping forces in recent decades have been authorized by the Security Council. See M. Matheson, *Council Unbound: The Growth of UN Decision Making on Conflict and Postconflict Issues after the Cold War* (2006), Chapter 4.

²See <http://www.un.org/Depts/dpko/dpko/bnote.htm>.

³See M. Matheson, *Council Unbound*, note 1 above, Chapter 5.

⁴UN Security Council Resolution 678 (1990).

⁵Condoleezza Rice and Robert Gates, “What We Need Next in Iraq,” *Washington Post*, February 12, 2008.

⁶North Atlantic Treaty Status of Forces Agreement, 4 UST 1792, June 19, 1951. Since this agreement granted exceptions and immunities from U.S. law to foreign NATO personnel, it had to be done as either a treaty or pursuant to act of Congress.

⁷For example, the Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, TIAS 6127, July 9, 1966.

in 2002 with East Timor was less than three pages in length, while the Korea SOFA ran to more than 150 pages and was accompanied by a series of agreed understandings.

The terms of these agreements may vary, depending on the needs of the situation and the attitude and demands of the foreign government in question. For example, on the question of foreign criminal jurisdiction over U.S. personnel, some SOFAs allocate criminal jurisdiction between the United States and the host country, depending on whether or not the offenses alleged were committed against other U.S. personnel or in the course of official duty; while other SOFAs give U.S. personnel complete exemption from foreign criminal jurisdiction.

Often the SOFA is only one of a series of agreements with the host country that define and facilitate the overall U.S. security relationship with that country. There may, for example, be agreements for military assistance, arms sales, bases, economic assistance and other matters. There may also be joint declarations or other political documents that describe the overall relationship and the foreign policy objectives of the two countries.

AFGHANISTAN

The current situation in Afghanistan is complicated by the fact that two separate forces are operating in the country: the International Security Assistance Force (ISAF), a multinational force under NATO command authorized by the Security Council under Chapter VII; and the Operation Enduring Freedom force under U.S. command that has conducted military operations against Taliban and Al Qaeda elements since the initial U.S. intervention after 9/11.

ISAF was authorized by the Security Council in 2001 with the mandate “to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment.”⁸ This mandate was later expanded to the maintenance of security in other areas of Afghanistan, to the protection of other international civilian personnel, and to providing security assistance to the Afghan government.⁹ ISAF was directed to work in close consultation with the Operation Enduring Freedom coalition in the implementation of this mandate.¹⁰

The status of ISAF and its personnel is governed by a Military Technical Agreement concluded between ISAF and the Afghan government. Among other things, it authorizes ISAF “to do all that the [ISAF] Commander judges necessary and proper, including the use of military force” to protect ISAF and its mission, and guarantees ISAF “complete and unimpeded freedom of movement throughout the territory and airspace of Afghanistan.” Attached to the agreement is an annex that functions as a SOFA for ISAF and, among other things, provides ISAF personnel immunity from Afghan arrest, criminal jurisdiction and taxation.¹¹

The Operation Enduring Freedom force is governed by separate instruments. In 2005, Presidents Bush and Karzai signed a Joint Declaration of the United States-Afghanistan Strategic Partnership which describes the overall purposes and goals of the two countries. Among other things, it says that the United States will: “help organize, train, equip and sustain Afghan security forces”; “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”; and “continue to conduct counter-terrorism operations in cooperation with Afghan forces.” It states that “in order to achieve the objectives contained herein,” U.S. forces are to have access to various Afghan facilities and “are to continue to have the freedom of action required to conduct appropriate military operations based on consultations and pre-agreed procedures.”¹²

The status and immunities of this force are governed by an Agreement regarding the Status of United States Military and Civilian Personnel of the U.S. Department of Defense Present in Afghanistan, concluded by an exchange of notes in 2003. Among other things, it gives U.S. personnel the status of administrative and technical staff of the U.S. Embassy (which exempts them from Afghan criminal jurisdiction), and regulates exit and entry, uniforms and driving licenses, fees and inspections, contracts and claims. This agreement says that it is “without prejudice to the conduct of ongoing military operations by the United States,” language which does not actually authorize U.S. forces to conduct such operations, but may suggest the context in which the parties understood those forces would be operating.

⁸ UN Security Council Resolution 1386 (2001).

⁹ UN Security Council Resolution 1510 (2003).

¹⁰ UN Security Council Resolution 1563 (2004).

¹¹ See <http://www.operations.mod.uk/isafmta.pdf>.

¹² See <http://www.whitehouse.gov/news/releases/2005/05/print/20050523-2.html>.

IRAQ

U.S. forces are present in Iraq as part of the Multinational Force (MNF) authorized by the Security Council under Chapter VII. Security Council Resolution 1511 in October 2003 authorized that force “to take all necessary measures to contribute to the maintenance of security and stability in Iraq,” including the security of UN and Iraqi operations and “key humanitarian and economic infrastructure.” This “all necessary measures” language is understood to include freedom of movement and the right to use necessary force to carry out the MNF mission. Subsequent resolutions referred also to “preventing and deterring terrorism and protecting the territory of Iraq,” combat operations against violent groups and internment of their members, humanitarian assistance, civil affairs support, and relief and reconstruction.¹³

This authorization and mandate has been periodically renewed by the Council. In December 2007, the Council extended the mandate until December 31, 2008. It declared that it would terminate that mandate earlier if requested by the Iraqi Government, and noted that Iraq had advised that it would not request a further extension of that mandate.¹⁴ (Of course, the Council still retains the right to extend the mandate if it should wish to do so, and any early termination of the mandate would still require affirmative Council action.)

The status, privileges and immunities of U.S. forces in Iraq are still governed by an order issued in June 2004 by the Coalition Provisional Authority as the occupying authority during the initial period of U.S. operations in Iraq. That order, known as Coalition Provision Authority Order Number 17 or CPA 17, grants immunity to all MNF personnel from Iraqi arrest and criminal jurisdiction, and regulates other matters usually covered by SOFAs, such as contracting, travel, taxes and fees. It differs from typical SOFAs in one significant respect, in that it grants such immunity to civilian contractors with respect to acts performed under their contracts.¹⁵

Article 126 of the Iraqi Constitution states that “existing laws shall remain in force, unless annulled or amended in accordance with the provisions of the Constitution,” which is apparently understood to mean, among other things, that CPA 17 will continue in force unless specifically rescinded or amended by the Iraqi Parliament. However, CPA 17 does not provide a clear basis for the status of U.S. forces after the termination of the MNF mandate. It only covers U.S. forces as part of the MNF, and it states that it will remain in force for the duration of the MNF mandate under Council resolutions “and shall not terminate until the departure of the final element of the MNF from Iraq.”

While this language might give some room for the continuation of immunities for any U.S. forces that may temporarily remain in Iraq as part of the MNF after December 31, 2008, it would, if possible, be better to clarify the matter in a definitive way. In the event a permanent SOFA is not agreed by that date (which the Administration evidently intends to do), it would seem prudent to take some affirmative step to continue the CPA 17 provisions for a further period while negotiations continue. This might, for example, be done by a temporary extension of the MNF mandate by the Security Council, an exchange of notes between the United States and Iraq temporarily extending CPA 17, or an act of the Iraqi parliament.

Finally, the question arises as to whether any other agreement to be negotiated pursuant to the November 2007 Joint Declaration would in any way define or affect the future mission or status of U.S. forces, perhaps in a way similar to the provisions of the U.S.-Afghan Joint Declaration mentioned above. Secretaries Rice and Gates have stated that the coming negotiations with Iraq will “set the basic parameters for the U.S. presence in Iraq, including the appropriate authorities and jurisdiction necessary to operate effectively and to carry out essential missions” but that nothing to be negotiated will mandate combat missions, set troop levels, provide security commitments or authorize permanent bases in Iraq.¹⁶ It may be worthwhile to clarify what is intended along these lines, and in particular whether anything is intended that would go beyond the traditional scope of SOFAs as described above.

Mr. DELAHUNT. Thank you, Mike.
Professor Dickinson?

¹³ See UN Security Council Resolution 1546 (2004) and letters incorporated by reference.

¹⁴ UN Security Council Resolution 1790 (2007).

¹⁵ See

20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf. <http://www.cpa-iraq.org/regulations/>

¹⁶ See note 5 above.

**STATEMENT LAURA DICKINSON, ESQ., PROFESSOR OF LAW,
UNIVERSITY OF CONNECTICUT SCHOOL OF LAW**

Ms. DICKINSON. Mr. Chairman, ranking member of the committee, thank you very much for this opportunity to testify on this important topic.

I have been asked to comment on immunity as it pertains to private contractors in Iraq and Afghanistan. The appropriate reach of Status of Forces Agreements and in particular the question of whether such agreements should immunize civilian contractors from host nation judicial proceedings are issues that cannot be understood apart from the context in which civilian contractors are now operating in Iraq, Afghanistan and other contingency operations.

While most contractors have performed admirably and have filled vital roles, and more than 1,000 of them have died in Iraq alone, some have committed serious abuses without being held accountable.

Probably the most notable recent case is the Blackwater incident of last year when security guards working under an agreement with the Department of State fired into a crowd in Nisour Square in Baghdad, killing 17 people. Subsequent reports concluded that at least 14 and perhaps all of the killings were unjustified.

Of course, the abuses at Abu Ghraib, which implicated civilian contractors, are also well known. There is a recent Human Rights First report that suggests that these are just the tip of the iceberg. Recent testimony by CIA Director Michael Hayden indicates that civilian contractors may have been involved in waterboarding.

But the key point here is that there have only been two instances in which United States authorities have criminally prosecuted a contractor for violent crimes against a third party in Iraq and Afghanistan and so we are left with the conclusion that the use of these contractors, particularly security contractors and interrogators, threatens very core values, including respect for human dignity and human rights, limits on the use of force and a commitment to transparency and accountability.

So what does this mean for the negotiation of Status of Forces Agreements particularly in Afghanistan and Iraq? I would argue that until we can improve our system of holding contractors criminally accountable when they commit serious abuses, as well as take significant steps to improve oversight to prevent those abuses from occurring, immunizing contractors from host nation legal process will remain extremely problematic.

So I am just very briefly going to describe how and why our current system of accountability isn't working. First, criminal responsibility in cases of serious abuse. The current regime is very seriously flawed. Of course, the House recently passed the Military Extraterritorial Jurisdiction Act Expansion and Enforcement Act of 2007. If passed in the Senate, it would close very important loopholes in the Federal court's jurisdiction over contractors who commit crimes overseas.

Most notably, the Act would clarify ambiguity over whether U.S. Federal courts would have jurisdiction to try contractors who are not employed by the Department of Defense and extend that jurisdiction to all contractors and not merely those, as the current law

provides, whose work relates to “supporting the mission of the Department of Defense overseas.”

But I think it is critical to note that this accountability problem is not only a problem of law on the books, but also a problem of law in action so I think a plausible argument can be made that the existing version of MEJA would cover even State Department contractors in Iraq and Afghanistan because they could be said to be supporting a very broad Department of Defense mission.

Moreover, the Special Maritime and Territorial Jurisdiction, which extends Federal criminal jurisdiction to crimes committed by or against U.S. nationals overseas in certain facilities, should have covered the abuses at Abu Ghraib.

The War Crimes Act and the Torture Act could also provide jurisdiction in some cases, but these statutes are very rarely used. Congress recently extended the Uniform Code of Military Justice to allow contractors to be tried in military courts, but no prosecutions have taken place yet there.

So the issue is not only closing gaps in the existing law, but strengthening enforcement. To that end, the Department of Justice should be required to establish a dedicated office within the Criminal Division to investigate and prosecute contractor crime, and that office should be staffed with experienced prosecutors, investigators and other support staff.

We have to have FBI agents on the ground in Afghanistan and Iraq as well, as the MEJA bill would require, so that they can be on the scene and cooperate with military investigators and civilian authorities to conduct investigations in a timely way. If no prosecutions take place in the civilian system then prosecution of security contractors or interrogators in military courts under the UCMJ would be an option.

The other piece of the accountability framework is oversight to prevent abuses, and that system is broken as well. I have some recommendations in my written testimony as to what I think Congress could do to improve that and what the agencies could do to improve that, but I won't repeat them here.

I just want to say that it is against this background of a broken accountability and oversight regime that negotiating immunity for contractors serving in a contingency operation is particularly problematic. Iraqi authorities have expressed deep concern that there seems to be a law free zone for contractors.

They have criticized the reach of the Coalition Provisional Authority Order 17, which immunizes contractors from legal process in Iraq, and the legal authority of which is ongoing in part because there is no meaningful alternative means to hold those contractors accountable when they do commit abuses.

The criminal courts of Iraq, Afghanistan and other host nation countries may not in some cases have the capacity to try contractors employed by the United States, but until Congress and the agencies improve accountability and oversight, extending the immunity of contractors in host nations will remain problematic.

With troops we have our military justice system under the UCMJ, and contractors, although in theory they could be tried there, are not being tried there. Thus, I would recommend that Congress take steps to improve accountability in these areas.

To that end, in addition to any legislation that Congress passes I would say that the work of the new Commission on Wartime Contracting in Iraq and Afghanistan established by the Defense Authorization Act will provide a very important forum for further consideration of these issues.

Thank you very much for the opportunity to address you.
[The prepared statement of Ms. Dickinson follows:]

PREPARED STATEMENT OF LAURA DICKINSON, ESQ., PROFESSOR OF LAW, UNIVERSITY OF CONNECTICUT SCHOOL OF LAW

Thank you for the opportunity to address you here today on this important topic. The appropriate reach of Status of Forces Agreements, and, in particular, the question whether such agreements should immunize civilian contractors from host nation judicial proceedings, are issues that cannot be understood apart from the context in which civilian contractors are now operating, in Iraq, Afghanistan, and elsewhere. I should note that the basis of my remarks stems from both my own scholarly research,¹ as well as findings from a series of meetings I helped to organize and which were sponsored by Princeton University's Program in Law and Public Affairs. In these meetings, which have included governmental officials, contractors, uniformed military personnel, NGO representatives, and academics,² experts have reached a surprising degree of consensus on some critical issues. I have also participated in a Swiss government initiative to improve government contracting standards.³

As members of this Committee are no doubt aware, both our military and our foreign policy agencies are now employing private contractors to an unprecedented degree. For example, current estimates suggest that there are almost as many contractors as troops in Iraq.⁴ These contractors are serving meals, building facilities, transporting goods, and providing a broad range of logistical support to troops. They are training Iraqi police and performing other tasks to help build democracy in Iraq. And, in some cases, they are interrogating detainees and providing security to governmental officials, sites, and convoys. We don't know precisely how many security contractors are operating in Iraq, though estimates suggest there may be as many as 30,000.⁵ Indeed, we are forced to rely on rough estimates because neither the State Department nor the Department of Defense, nor any other arm of government,

¹Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 383 (2006).

²See *Summary of Meeting*, PRINCETON PROBLEM-SOLVING WORKSHOP SERIES IN LAW AND SECURITY: A NEW LEGAL FRAMEWORK FOR MILITARY CONTRACTORS (Jan. 8 2007) [hereinafter Princeton Report], available at <http://lapa.princeton.edu/conferences/military07/MilCon-Workshop-Summary.pdf>.

³See International Committee of the Red Cross, *Privatisation of War: The Growing Use of Private Military and Security Companies*, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/privatisation-war>.

⁴See, e.g., Statement of Gordon England, Deputy Secretary of Defense, before the House Budget Committee, July 31, 2007 (citing the results of the U.S. Central Command CENTCOM Contractor Census, which counted about 129,000 contractor in Iraq as of April 2007, but did not include contractors from the U.S. Department of State or the U.S. Agency for International Development (USAID)); see also T. Christian Miller, *Contractors Outnumber Troops in Iraq*, L.A. TIMES, July 4, 2007, at 1. USAID estimated that 53,300 contractors worked for the agency in Iraq, with more than 53,000 of them Iraqis, and the State Department could not estimate the number of contractors. See Miller, *supra*. A more recent news article suggests that during the last quarter of 2007, there were 150,000 defense department contractors in Iraq, compared to 155,000 troops. See David Ivanovich, *Contractor Deaths up 17 Percent in Iraq in 2007*, HOUSTON CHRON., Feb. 10, 2008, at A1.

⁵This figure is the industry estimate. See *id.* Gary Motsek, Assistant Deputy Undersecretary of Defense for Program Support, who serves as the principal advisor to the Office of the Secretary of Defense leadership on policy and program support, see Dep't of Defense, Program Support, at <http://www.acq.osd.mil/log/PS/bio.htm>, estimates that the number of Defense Department Security contractors totaled only 6,000 as of July 2007, but others have put the figure closer to 10,000. Miller, *supra* note 1. A memorandum from the House Committee on Government Oversight and Reform indicated that the 2006 agreement between the State Department and Blackwater provided for 1,020 Blackwater employees to operate in Iraq, but this figure does not include the numbers of employees for Triple Canopy and Dyncorp, the other companies that have entered into security contracts with the State Department. House Comm. on Gov't Oversight and Reform, Memorandum, *Additional Information about Blackwater USA*, Oct. 1, 2007, at 4.

keeps sufficient track.⁶ And some reports suggest that even on-the-ground military commanders in Iraq may not know whether private security contractors are operating in their territory.⁷

While most contractors have performed admirably and filled vital roles—and more than 1,100 contractors have died in Iraq while doing so⁸—some have committed serious abuses without being held accountable. Perhaps the most notable recent case is the incident from September 16 of last year, when Blackwater security guards employed by the Department of State fired into a crowd in Baghdad’s Nisour Square, killing seventeen people.⁹ Subsequent reports by the Department of Justice and the military have concluded that at least 14, and possibly all, of the killings were unprovoked.¹⁰ Yet no one has yet been indicted for the killings. In a similarly high-profile incident, contract interrogators and translators joined troops in sexually humiliating and brutally abusing detainees at the Abu Ghraib Prison in Iraq in 2003. Indeed, General Fay reported that the contractors, many of whom lacked training, were actually supervising uniformed military personnel at the prison.¹¹ Yet while twelve uniformed soldiers have faced punishment for their role in the abuse,¹² no contractors have been charged. A recent report from Human Rights First suggest that these incidents are just the tip of the iceberg and that there are many more cases in which security contractors or contract interrogators may have used excessive force.¹³ In fact, CIA director Michael Hayden has testified that he believes that CIA contract interrogators have engaged in waterboarding.¹⁴ But again there has been so far only one instance—the case of the CIA contract interrogator David Passaro—in which U.S. authorities have criminally prosecuted a contractor for violent crimes against a third party.¹⁵

We are left with the unmistakable conclusion that the use of private security contractors and interrogators potentially threatens core values embodied in our legal system, including (1) respect for human dignity and limits on the use of force and (2) a commitment to transparency and accountability.

What does this mean for the negotiation of Status of Forces Agreements, particularly in Afghanistan and Iraq? I would argue that until we can improve our system of holding contractors criminally accountable when they commit serious abuses, as well as take significant steps to improve oversight to prevent abuses from occurring, immunizing contractors from host nation legal process will remain problematic. Currently, neither system is working.

(1) CRIMINAL RESPONSIBILITY IN CASES OF SERIOUS ABUSE

As the lack of criminal prosecutions in the Abu Ghraib and September 16, 2007 Blackwater incident make clear, our accountability regime is seriously flawed. Congress will undoubtedly need to institute more effective measures to punish contrac-

⁶In the 2007 Supplemental Appropriations Act, Congress required the Department of Defense to count the number of Defense Department Contractors in Iraq. U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Pub. L. 110–28 (May 5, 2007), § 3305. The Department gathers this information from the U.S. Central Command (CENTCOM) Contractor Census. Statement of Gordon England, Deputy Secretary of Defense, before the House Budget Committee, July 31, 2007. But this tally does not include contractors from the U.S. Department of State or USAID. See Miller, *supra* note 1.

⁷See, e.g., PATRICK KENNEDY ET AL., REPORT OF THE SECRETARY OF STATE’S PANEL ON PERSONAL PROTECTIVE SERVICES IN IRAQ, at 6 (Oct. 2007) [hereinafter “Kennedy Report”].

⁸Ivanovich, *supra* note 4 (reporting that 1,123 contractors have died in Iraq since 2003).

⁹David Johnston & John M. Broder, *FBI Says Guards killed 14 without cause*, N.Y. TIMES, Nov. 14, 2007.

¹⁰Johnson & Broder, *supra* note 9.

¹¹Maj. Gen. George R. Fay, AR–15–6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE (2004), at 51–52 available at <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf> [hereinafter Fay Report].

¹²Julian Barnes, *CIA Contractor Guilty in Beating of Detainee*, L.A. TIMES, Aug. 18, 2006, at 18. The cases include those of Sabrina Harman, Santos A. Cardona, Shawn Martin, Megan Ambuhl, Ivan Frederick, Roman Krol, Javal Davis, Armin Cruz, Jeremy Sivitz, Charles Graner, Lynndie England, and Michael Smith. See also Laura A. Dickinson, Abu Ghraib, *The Battle Over Institutional Culture and Respect for International Law within the U.S. Military*, in INTERNATIONAL LAW STORIES, at 405, 417 (2007).

¹³Human Rights First, PRIVATE SECURITY CONTRACTORS AT WAR, ENDING THE CULTURE OF IMPUNITY (2008), available at <http://www.humanrightsfirst.info/pdf/08115-uslsc-psc-final.pdf>.

¹⁴See Siobhan Gorman, *CIA Likely Let Contractors Perform Waterboarding*, WALL ST. J., Feb. 8, 2008 (reporting that, when asked whether CIA contractors engaged in waterboarding: “I’m not sure of the specifics . . . I’ll give you a tentative answer: I believe so.”).

¹⁵See Scott Shane, *C.I.A. Contractor Guilty in Beating of Afghan Who Later Died*, N.Y. TIMES, Aug. 18, 2006, at A8.

tors if they commit abuses. The Military Extraterritorial Jurisdiction Act (MEJA) Expansion and Enforcement Act of 2007,¹⁶ which has already passed in the House of Representatives and which is pending in the Senate, would close important loopholes in the federal courts' jurisdiction over contractors who commit crimes overseas. Most notably, the Act would clarify ambiguity over whether U.S. federal courts would have jurisdiction to try contractors who are not employed by the Department of Defense, extending jurisdiction to all contractors and not merely those, as current law provides, whose work relates to "supporting the mission of the Department of Defense overseas."¹⁷

The criminal accountability problem is not only a problem of law on the books, however, but also a problem of the law in action. A plausible argument can be made that the existing version of MEJA would cover even State Department contractors in Iraq and Afghanistan, because they could be said to be supporting a broad DOD mission. Moreover, the Special Maritime and Territorial Jurisdiction,¹⁸ which extends federal criminal jurisdiction to crimes committed by or against U.S. nationals overseas in certain facilities, should have covered the Abu Ghraib cases. The War Crimes Act¹⁹ and Torture Act²⁰ also could provide jurisdiction in some cases, though these statutes are rarely used. Congress recently extended the Uniform Code of Military Justice to allow contractors to be tried in military courts, but no such prosecutions have taken place.

Thus, the issue is not only closing gaps in existing law, but strengthening enforcement. To that end, DOJ should be required to establish a dedicated office within the criminal division to investigate and prosecute contractor crime. That office should be staffed with experienced prosecutors, investigators, and other support staff. In addition, the FBI should have investigators on the ground in Iraq and Afghanistan, as the MEJA expansion bill would require, so that they can be on the scene, and cooperate with military investigators and civilian authorities to conduct investigations in a timely way. If no prosecutions take place in the civilian system, prosecution of security contractors or interrogators in military courts under the UCMJ, could be an option.

(2) BETTER CONTRACT OVERSIGHT TO PREVENT ABUSES

These types of back-end enforcement measures, while important, are only half of the picture. Front-end measures to improve oversight and control are also critical. I propose five steps Congress can take to improve contracting practices, oversight, and monitoring so as to better prevent abuses *before* they occur.

(i) *Establish minimum standards for contractual terms*

Every one of the private security contractors operating on our behalf overseas is there because the company entered into a contract with the federal government. The existence of such contracts gives the federal government significant power to dictate the terms under which contractors operate, if only such power were actually exercised. Thus, I recommend that Congress establish a set of minimum standards to guide the drafting of private security, interrogation, and other contracts. These minimum standards would explicitly make contractors subject to clear, consistent rules regarding the use of force, and establish specific requirements for training and recruitment. The Department of State and Defense have made significant progress in this area in the past few months, but they could do much more.

With respect to the use of force in particular, these rules should be both specific and consistent across governmental departments. Indeed, the Department of Defense and the Department of State rules have sometimes differed from each other. For example, according to Patrick Kennedy's report following the September 16 Blackwater incident, while the Defense Department has required its security contractors to fire aimed shots when responding to a threat, the Department of State in the past did not.²¹ In addition, rules have often been vague or non-existent. The eleven work orders for the CACI interrogators did not expressly require that the private contractor interrogators comply with specific international human rights or humanitarian law rules such as those contained in the Torture Convention or the Ge-

¹⁶MEJA Expansion and Enforcement Act of 2007, H.R. 2740, Passed in the House, Oct. 4, 2007.

¹⁷18 U.S.C. § 3267.

¹⁸18 U.S.C. § 7 (9)(a) (2001).

¹⁹18 U.S.C. § 2241 (a) (2006).

²⁰18 U.S.C. § 2340.

²¹Kennedy Report, *supra* note 7, at 9.

neva Conventions.²² A congressional mandate that contracts should include such provisions is an easy and obvious reform.

Likewise, Congress could mandate more stringent requirements that contractor-employees receive training in the applicable limits on the use of force, including training in international human rights and humanitarian law. Experts have asserted that training is insufficient.²³ Thus, it is not surprising that an Army Inspector General report on the conditions that led to the Abu Ghraib scandal concluded that 35 percent of CACI's Iraqi interrogators did not even have any "formal training in military interrogation policies and techniques," let alone education in international law norms.²⁴ Nor is it surprising that Patrick Kennedy concluded that the State Department security contractors had not received sufficient guidance in how to apply the rules regarding the use of force, and in particular, the use of deadly force.²⁵

The Defense Department's recently proposed rule, that certain security contractors should receive training by military lawyers, is a strong measure that would be a significant improvement.²⁶ Yet, I would argue that Congress should legislatively require such training, rather than leaving it up to agency discretion, as the agencies have differed in their practices on this question.

Congressionally mandated standard contractual terms should also include consistent recruiting and vetting requirements for contractor employees. To give one example of the problems that remain, Blackwater fired an employee working as a security guard under its agreement with the State Department when that employee allegedly shot and killed an Iraqi security guard on December 24, 2006.²⁷ Yet subsequently, a Defense Department contractor hired the man as an employee, and the company was unaware of the prior incident.²⁸

Vetting is even more critical—and more difficult—as the number of non-citizen contract employees rises. By some estimates, 80 percent of contract laborers in Iraq are not U.S. citizens.²⁹ And while it is unclear whether the percentage of non-U.S. security contractors and interrogators is that high, there are reports that security contractors have hired third country nationals from South Africa, Colombia, Fiji, and Nepal.³⁰ In this context, training is not sufficient; vetting is necessary to ensure that the employees have not, for example, participated in human rights abuses as actors within repressive regimes.

Finally, in the increasingly global market for labor, recruiting practices are particularly important. Some reports have surfaced that contract employees have come to Iraq under false pretenses, and that some employers may have withheld passports.³¹ The Defense Department has improved its standard contractual terms regarding vetting and recruiting. Nonetheless, Congress should mandate terms to insure consistency and a firm minimum standard that would prohibit such practices.

(ii) *Encourage inter-agency coordination*

Government officials from the multiple agencies that have hired security contractors (and interrogators) do not communicate well with each other in the field or in Washington, contributing to a climate of confusion that can contribute to abuse. As discussed above, some military commanders do not know when security contractors

²² Work Orders Nos. 000035/0004, 000036/0004, 000037/0004, 000038/0004, 000064/0004, 000067/0004, 000070/0004, 000071/0004, 000072/0004, 000073/0004, & 000080/0004, issued under DOI-CACI, available at <<http://publicintegrity.org/wow/docs/CACI-ordersAll.pdf>>.

²³ Princeton Report, *supra* note 2, at 6–7.

²⁴ U.S. Department of the Army, Inspector General, "Detainee Operations Inspection" (2004), pp. 87–89, available at <<http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/DAIG%20Detainee%20Operations%20Inspection%20Report.pdf>>. See also Fay Report, *supra* note 11, at 19 (noting that that "contractors without training, qualifications, and certification created ineffective interrogation teams and the potential for non-compliance with applicable laws").

²⁵ Kennedy Report, *supra* note 7, at 6.

²⁶ Defense Federal Acquisition Regulations Supplement; DOD Law of War Program (DFARS Case 2006–D035), 73 Fed. Reg. 1853 (Jan. 10, 2008), proposed amendment to 48 C.F.R. 252 (proposing requirement that contractor personnel accompanying the Armed Forces outside the United States must receive "basic training" in the law of war at a military-run training center or approved web-based source; and that some contractor personnel must receive "advanced training, commensurate with their duties and responsibilities" to be "conducted by Service Judge Advocates," and which "which will be coordinated with the servicing legal advisor in the operational chain of command, within the appropriate geographic combatant command").

²⁷ *Contractor Involved in Iraq Shooting Got Job In Kuwait*, CNN, Oct. 4, 2007, available at <http://www.cnn.com/2007/POLITICS/10/04/blackwater.contractor/index.html>.

²⁸ *Id.*

²⁹ See, e.g., Miller, *supra* note 4.

³⁰ See Paul Salopek, *South Africa's Silent War in Iraq*, CHICAGO TRIB., Oct. 7, 2007, at A1.

³¹ See Princeton Report, *supra* note 2, at 13.

hired by other agencies pass through their area, because there has been no clear system in place to communicate that information to them. And, also as mentioned above, the agencies do not have a unified system even for counting, let alone keeping track of contractors. Furthermore, in investigating abuses, multiple agencies' officials are on the scene, though the precise jurisdiction of each agency is unclear, leading to further confusion. In the case of the Blackwater September 16 incident, for example, in addition to the multiple inquiries that the State Department conducted, the FBI and military authorities also conducted investigations. Indeed, the fact that the State Department officials may have granted immunity to some contractors has complicated the criminal investigations.³²

Moreover, in some cases, the lines of authority and communication are so unclear that contractors are actually supervising governmental personnel, instead of the other way around. In addition to the Abu Ghraib case discussed above, an incident from Najaf in 2004 is instructive. Blackwater guards charged with defending a Coalition Provisional Authority site fought alongside a marine who appears to have asked the Blackwater guards for advice about whether or not to fire into a menacing crowd.³³

For this reason, one of the clearest and strongest recommendations from the Princeton group was to improve inter-agency coordination of contractors, both on the ground and in Washington.³⁴ The memorandum of agreement between the State Department and the Defense Department to establish better inter-agency control of security contractors is an important step.³⁵ Yet this agreement only addresses two agencies and could go further. I would argue that Congress should encourage the National Security Council or some other entity to establish an inter-agency working group to set common standards for security contractors, to design uniform systems for keeping track of contractors, and for improving communication and clarifying lines of authority.

(iii) *Expand the contract monitoring regime*

Even when useful language is written into a contract, enforcement is lax because the agencies have not devoted enough resources to contract monitoring. An effective contractual regime must include sufficient numbers of trained and experienced governmental contract monitors. Recently the government has moved in precisely the wrong direction, however, by dramatically *reducing* its acquisitions workforce.³⁶ Moreover, even the personnel who are on the payroll do not have adequate incentives to work in Iraq and other conflict zones.³⁷ For these reasons, scholars and commentators, including the GAO, have been warning of a contract oversight crisis.

The problems caused by the sheer low numbers of personnel are exacerbated by a lack of expertise in the particular issues raised by security contractors and interrogators. Many of the contract personnel were trained in another era and did not learn how to manage service contracts, let alone service contracts that raise the specific concerns of security and interrogation. Few contract monitors, for example, are trained in international human rights and humanitarian law standards, or in the rules regarding the use of force.

Congress, therefore, should mandate that the agencies increase the number of monitoring and oversight personnel, ensure that they specialize in the types of tasks they are overseeing, and require that they, in turn, receive specific training in rules regarding the use of force and international humanitarian and human rights law. Furthermore, Congress should allocate the funding so that the agencies have sufficient resources to fulfill this mandate.

Thus, Congress must provide more resources for contractor oversight personnel. Moreover, these monitors must be trained not only to root out fraud and corruption, but also to apply rules regarding the use of force and other important human rights and humanitarian law norms. Finally, government monitors should, as much as possible, be embedded with contractors authorized to use force, such as PSCs. This would allow some on-the-ground oversight, analogous to the role that JAG Corps

³² See Johnston & Broder, *supra* note 9.

³³ See *Contractors in Combat: Firefight from a rooftop in Iraq*, VIRGINIAN PILOT, July 25, 2006; JEREMY SCAHILL, BLACKWATER 123 (2007).

³⁴ Princeton Report, *supra* note 2, at 13–15.

³⁵ See Karen DeYoung, *State Department Contractors in Iraq Are Reined In*, WASH. POST, Dec. 6, 2007, at A24.

³⁶ See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, DOD NEEDS TO EXERT MANAGEMENT AND OVERSIGHT TO BETTER CONTROL ACQUISITION OF SERVICES (Jan. 17 2007). For a detailed discussion of the depletion of the acquisition workforce, see Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL. REV. 16 (2005).

³⁷ See Princeton Report, *supra* note 2, at 16.

lawyers play in advising military personnel on legal issues surrounding military operations.

(iv) Require regular reporting to Congress

One of the factors that is creating the oversight challenge is a lack of information, combined with the piecemeal way that much information about contractors comes to Congress (and to the public at large). Agency officials do testify periodically and provide information, but the information (such as details about the number of contractors and their functions) does not flow to Congress in a systematic way. Part of the difficulty stems from the multiplicity of agencies entering into agreements with contractors.

Recent legislation, and bills in the pipeline, would improve the situation, but do not go far enough. Thus, the provision of the MEJA Expansion Act that would require reporting to Congress on the number of cases investigated is an important step, but it focuses only on the Department of Justice.³⁸ Similarly, recent provisions in the Defense Authorization Act of 2008 enhance reporting requirements, but are insufficient because they do not require each agency to provide both quantitative and qualitative information about contractor abuses.³⁹

Congress should require each agency to report to Congress quarterly, or every six months. Moreover, these reports should not only identify the number of contractors and oversight personnel, but it should also provide information about the number of incidents in which security contractors fire their weapons and qualitative assessments about whether these incidents raised concerns. Furthermore, the reports should provide information about the follow-up: whether there was an investigation, what the conclusion was, and what happened subsequent to the investigation. If the State Department can report annually on the human rights conditions in all of the countries around the world,⁴⁰ the agencies should be able to provide Congress with minimal information about their own security contractors.

(v) Accreditation/licensing

Finally, Congress should encourage the creation of third-party monitoring, accreditation, and certification entities and then consider requiring such third-party approval as part of the contract. At least one industry organization, the International Peace Operations Association (IPOA), has launched this sort of accreditation system,⁴¹ and independent organizations without industry ties could establish a rating system as well.

On this score, the domestic context provides a particularly rich set of models as to how an accreditation scheme might work. For example, in the healthcare field, state laws or contractual terms often specify that health maintenance organizations (HMOs) must receive accreditation by the National Committee for Quality Assurance (NCQA), an independent, non-profit organization, before receiving public funding.⁴² NCQA rates HMOs along various benchmarks of quality. Until recently, NCQA certification was primarily voluntary, offering HMOs an advantage when competing for contracts.⁴³ When states became managed care purchasers, however, they adopted NCQA certification as a requirement for receiving public funding.⁴⁴ Accreditation by an independent organization would be the best approach, but no such organization yet exists. Congress might encourage the creation of such an organization by providing funding. Or, alternatively, Congress might, as it has done in the health care context, give agencies the authority to “deem” ratings by such an independent entity as sufficient to satisfy congressionally mandated standards.

CONCLUSION

It is against this background of a broken accountability and oversight regime that negotiating immunity for contractors serving in contingency operations is particu-

³⁸H.R. 2740, *supra* note 16, at § 2.

³⁹National Defense Authorization Act for Fiscal Year 2008, H.R. 4986, passed in the House, Jan. 16, 2008, passed in the Senate, Jan. 22, 2008, signed by the President, Jan. 28, 2008.

⁴⁰*See, e.g.*, U.S. DEPT OF STATE, 2006 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2007), available at <http://www.state.gov/g/drl/rls/hrrpt/2006/>.

⁴¹*See, e.g.*, International Peace Operations Association Code of Conduct, available at <http://www.ipoaonline.org/conduct/>.

⁴²*See, e.g.*, National Committee for Quality Assurance, available at <http://www.ncqa.org/>.

⁴³Although NCQA’s accreditation program is voluntary, almost half the HMOs in the nation, covering three quarters of all HMO enrollees, are currently involved in the NCQA Accreditation process. Significantly, employers increasingly require or request NCQA accreditation of the plans with which they do business. *See* National Comm. for Quality Assurance, NCQA: Overview, available at <http://www.ncqa.org/Communications/Publications/overviewncqa.pdf>.

⁴⁴For an extended discussion of NCQA, see Dickinson, *supra* note 16.

larly problematic. Iraqis have criticized the reach of Coalition Provisional Authority Order 17, which immunizes contractors from legal process in Iraq, and the legal authority of which is ongoing, in part because there is no meaningful alternative means of holding contractors accountable when they do commit abuses. The criminal courts of Iraq, Afghanistan, and other host nation countries may not have the capacity to try contractors employed by the United States. But until Congress and the agencies improve accountability and oversight, extending the immunity of contractors in host nations will remain problematic. Thus, I would recommend that Congress take steps to improve accountability in these areas. To that end, in addition to any legislation arising from this Committee, the work of the new Commission on Wartime Contracting in Iraq and Afghanistan, established in the Defense Authorization Act,⁴⁵ will provide an important forum for further consideration of these issues. Thank you very much for the opportunity to address these matters with you today.

Mr. DELAHUNT. Thank you, Laura.
Professor Wedgwood?

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Ms. WEDGWOOD. Thank you very much, Mr. Chairman, and I apologize for my little mishap in getting here. I was at the back of the line getting in, and the guard wouldn't jump me up.

Mr. DELAHUNT. Believe me, we understand.

Ms. WEDGWOOD. I should have left time.

Mr. DELAHUNT. We are pleased that you are here.

Ms. WEDGWOOD. As my mother would say, I should have left more time. I am sorry. Next time I will be on time.

Thank you very much for having me back and for the continuation of the very interesting hearing that we had last time. I will just address a few things because my colleagues have been very comprehensive.

First just to note that the interesting problem of what happens when a country becomes independent—fully independent, fully sovereign, anew—may not be unique to Iraq. We have the phenomenon that when the U.N. mandate ends the Prime Minister of Iraq is quite eager to have his country reassume its pre-1990 status as a full and equal member of the community of nations, but you may have interesting similar problems in Kosova.

So this is not I think an idiosyncratic problem. It is going to be a question of adjustment of status of a multilateral, multinational force—either in the case of Kosovo a NATO force in which we participate without a renewed U.N. mandate or, in this case, an invitational force at the instance of the Iraqi Government. So this is a problem that will occur and will be worthy of address.

Secondly, let me take Congress's point of view, in which ever since Harry Truman and the Korean War the Congress has taken the view that a U.N. Security Council mandate by itself is either not sufficient or not necessarily sufficient to settle all issues of use of force.

The argument that Korea was a U.N. police action and that Harry Truman hadn't gone to Congress to get authorization,

⁴⁵ See H.R. 4986, *supra* note 39 at § 841.

though actually he probably had consulted senior leadership, but passing that historical technicality, he hadn't actually got a vote from Congress for the United States intervention in Korea in 1950.

I think the Congress in general has taken the view that even if you do have a Security Council mandate it still wants to be asked about the potential for use of force. That is what the old Lodge Reservations to the League of Nations Covenant were about back when, and I think it was very foolish myself when Woodrow Wilson did disregard Congress's understandable interest in having a say in the basic framework commitments on the use of force.

So I think in part when we are looking at U.N. mandates and Status of Forces Agreements, those are not necessarily determinative of the issue of when do you have to go to Congress for authorization for use of force. How broadly do you read prior authorizations that Congress may have given? When they are extended it is a slightly different or very different circumstance so I think you have a different bearing on constitutional issues.

Third, and I am just being repetitive from last time, but I do think that the issue, as Mike Matheson said, of the Status of Forces Agreement is being pushed on the calendar by indeed this possibility that the Iraqi Government will want to end the U.N. Security Council mandate under Resolution 1790 certainly by December 31, 2008, and earlier if they insist upon it. I do think the Security Council and the U.S. would be very hard put to forbid them to do that, when we have already recognized in Resolution 1790 that we regard this as their call.

I take it that one can take secretaries of the cabinet at their word, and Secretary Rice and Secretary Gates have said that there will be no combat missions, no permanent bases, no commitment to join in a war against other countries and no security commitment as such—certainly it is not there in the Joint Declaration of Principles that you have before you—and that they have no intention of seeking that.

So I guess the comparison I would make for this Iraq declaration that we discussed last time and this time is indeed to the joint declaration of the U.S.-Afghan Strategic Partnership. It may be that diplomats don't do quite what lawyers do. Lawyers always pick up the same language from an old document if it worked before and they just use it again because there is no controversy.

Here it may well be the case that if in the November 2007 Joint Declaration on Iraq if they had not used the words that they did—they said, "provid[e] security assurances and commitments to the Republic of Iraq"—whereas in the Afghan declaration—I think a lawyer must have got to this one earlier—they said, "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," so it is more like NATO language. It is more like—

Mr. DELAHUNT. Maybe they should have used the same lawyer, Professor.

Ms. WEDGWOOD. Sometimes we lawyers are useful. To avoid small, little carbuncles.

But I would nonetheless myself read them as meaning the same thing because it just wouldn't make sense to have two different

kinds of frameworks at hand here. Indeed, in the Afghan framework too it says that they will “continue to conduct counter-terrorism operations in cooperation with Afghan forces.”

I myself, and the chairman is free to disagree, but I read this document from last November as a statement of political intention, a statement of good faith to pursue these things, but not as an enforceable treaty.

I think if I had to guess, because I was not privy to any of these inward deliberations, but if I had to guess I think the rate-limiting step that was pushing it and might even have hurried it up without that full lawyerly exegesis was the fear that the mandate would expire, that you had to get Iraq’s consent to its renewal and therefore that it was really not something you wanted to pursue, but I take it really in intention to be the same kind of document.

I have my statement if I may submit it for the record. Thank you very much.

[The prepared statement of Ms. Wedgwood follows:]

PREPARED STATEMENT OF RUTH WEDGWOOD, ESQ., EDWARD B. BURLING PROFESSOR OF INTERNATIONAL LAW AND DIPLOMACY, DIRECTOR OF THE INTERNATIONAL LAW AND ORGANIZATIONS PROGRAM, THE PAUL H. NITZE SCHOOL OF ADVANCED INTERNATIONAL STUDIES, JOHNS HOPKINS UNIVERSITY

I appreciate the invitation by the distinguished acting chairman of this Subcommittee to comment briefly on so-called “Status of Forces Agreements”—in particular, their nature and purposes.

The role of “status of forces agreements” is a matter of importance to all American service members and their families, as well as to political leaders interested in the posture and protection of American armed forces around the globe.

Recent headlines concerning events on the Japanese island of Okinawa highlight the importance of providing safeguards both to American forces stationed abroad and to the civilian populations with whom they come in contact. So, too, the decision by the United States to recognize Kosovo as a newly independent nation, separate from Serbia, may pose the question of how to assure appropriate status and legal protections to American service members who will be stationed in Kosovo as part of NATO peacekeeping forces.

As this hearing suggests, the topic of Status of Forces Agreements is equally of interest in the context of the Subcommittee’s ongoing examination of a document entitled a “Declaration of Principles”—which was announced on November 26, 2007, by President George W. Bush and Iraqi Prime Minister Nouri Kamel Al-Maliki.

The Declaration of Principles was not styled as a binding legal agreement. But it is a declaration of independence and aspiration, addressing issues of principle taken seriously by any free and democratic country.

The Declaration of Principles was apparently designed to articulate various aspirations concerning the future relationship between the United States and the independent Republic of Iraq. The document cites a broad range of matters, including issues that the United States and Iraq could not effectively address without the cooperation of many other countries, such as enhancing the position of Iraq in regional and international organizations and helping Iraq to obtain debt forgiveness.

But perhaps most importantly, the Declaration of Principles records Iraq’s assertion that it will soon return to “full sovereignty”—in particular, the independent status it enjoyed before Saddam Hussein chose to invade neighboring Kuwait and embroiled the world community in a difficult conflict. In the language of the Declaration, this would include “sovereignty . . . over its territories, waters and airspace, and its control over its forces and the administration of its affairs.”

STATUS OF FORCE AGREEMENTS AND SOVEREIGNTY

A status of forces agreement is, in fact, a manifestation of the full sovereignty of the state on whose territory it applies. In particular, this kind of agreement serves to structure the relationship between a sovereign host (often called a “receiving” state) and one or more so-called “sending” states whose forces are permitted to visit or be stationed on foreign territory.

Status of forces agreements (sometimes called “SOFAs”) are widely used in modern international relations. Status of forces agreements govern the working relation-

ship between states in the NATO alliance, as well as member states of the Partnership for Peace. Status of forces agreements govern and protect United Nations forces dispatched on peacekeeping and peace enforcement missions around the globe. Status of forces agreements also serve to structure bilateral relationships between states, where the two parties conclude there is a common interest in permitting the location of a military force, or a monitoring station, or a pre-positioning of supplies, or indeed, any other anticipated military function or presence. Even a joint military exercise may be governed by a status of forces agreement, where there is any presence on foreign territory.

In a United Nations peacekeeping operation, the status of forces will typically be based on a model U.N. status of forces agreement. However, in a Chapter 7 peace enforcement operation, the status of forces will not necessarily depend upon the consent of the state where they are deployed, since Chapter 7 resolutions have coercive power. For its part, the United States has attempted to assure that in United Nations mandates for peacekeeping and peace enforcement, there is an assurance that U.S. forces will not be subject to any assertion of international jurisdiction by a treaty court to which it has not assented.

Status of forces agreements can serve several purposes. In many respects, SOFA's are the military equivalent of diplomatic or consular immunity agreements. Status of forces agreements may describe the method of entry and departure of international troops. They may describe the division of legal authority in regard to any alleged misconduct. Typically, primary criminal and civil jurisdiction over any act of misconduct committed in the course of the performance of "official acts" is reserved to the so-called sending state, while jurisdiction over private acts of misconduct can be assumed by the receiving state. There may, however, be instances in which the sending state is primarily or exclusively responsible for both spheres.

A SOFA agreement often has procedures for handling any commercial claims that arise from the presence or activities of international troops. The provision of buildings and grounds, the applicability or inapplicability of local taxes, customs issues, foreign exchange regulations, and the hiring of local workers, are also typical features. Alongside its substantive provisions, a SOFA will typically provide a standing structure for consultation and settlement of any disputes between the state parties. The relationship between the receiving and sending states may also be structured by a basing agreement concerning any approved installations, improvements, training activities, permissions for overflight, communications, and services.

For the further work of the Subcommittee, I should note the detailed examination of the history and structure of SOFA agreements available in a collaborative study organized by a German international law scholar, Dieter Fleck, entitled *THE HANDBOOK OF THE LAW OF VISITING FORCES* (Cambridge University Press 2001). The issues that arise in overseas deployments are also addressed by John Woodliffe, a British scholar, in *THE PEACETIME USE OF FOREIGN MILITARY INSTALLATIONS UNDER MODERN INTERNATIONAL LAW* (Martinus Nijhoff 1992). And finally, Professor Kent Caldar, my colleague at Johns Hopkins University, has recently finished an important work entitled *EMBATTLED GARRISONS: COMPARATIVE BASE POLITICS AND AMERICAN GLOBALISM* (Princeton University Press 2007).

THE NOVEMBER 2007 DECLARATION OF PRINCIPLES AND THE NEED FOR A STATUS OF FORCES AGREEMENT

Finally, and perhaps most importantly, I should note that the setting in which the November 2007 Declaration of Principles was reached makes clear that the negotiation of a Status of Forces agreement with the independent government of Iraq cannot be delayed into the indefinite future.

In particular, the Declaration notes Iraq's intention to "request to extend the mandate of the Multi-National Force-Iraq (MNF-I) under Chapter VII of the United Nations Charter *for a final time*." (Emphasis added). This Iraqi request for extension of the mandate was indeed forthcoming, and was the prelude to the Security Council's vote in Security Council Resolution 1790, on December 18, 2007, for a final extension of the multi-national force mandate, until December 31, 2008.

However, Iraq's consent to this extension was carefully framed. The text of Security Council Resolution 1790 states in its operative language, at paragraph 1, that "the presence of the multinational force in Iraq is at the request of the Government of Iraq." Resolution 1790 also declares, in its operative paragraph 2, that "the mandate for the multinational forces shall be reviewed *at the request of the Government of Iraq or no later than 15 June 2008*" (emphasis added) and that the Security Council "will terminate this mandate if requested by the Government of Iraq."

This undertaking by the Council means that, in principle, the availability of Chapter 7 authority for U.S. and allied operations in Iraq could be terminated at any time. Though the United States retains a veto on the Security Council, the Council's solemn promise to terminate the multinational mandate at the request of Iraq could not be easily disregarded.

Thus, the issue of governance and legal authority for any United States forces in Iraq may become urgent and immediate. The negotiation of a SOFA agreement with the government of Iraq is thus not, in my judgment, a matter that can be delayed for any substantial length of time.

Thank you for your attention, and I welcome any questions.

Mr. DELAHUNT. Thank you, Professor. You used the word "guess." You were detained earlier. I don't want to use the word detain in any sense other than you were slowed down.

Ms. WEDGWOOD. I was queued up.

Mr. DELAHUNT. You were queued up, though you used the word "guess."

In my opening remarks I noted that lack of consultation has been the pattern unfortunately of this administration not just in terms of this issue, but a myriad of other matters that are of concern to Congress and of concern to the American people.

We have been left in a state of guessing, and I don't think that it is appropriate to keep Congress guessing as to the intent. That is why we have had these hearings, and that is why we are having another hearing, as Mr. Rohrabacher noted, on Tuesday, and I am sure there will be subsequent hearings, because these issues are just simply too important.

You know, the American people have paid a dear price in terms of our sons and daughters and clearly, to our national treasury as far as dollars and cents are concerned, so the time for guessing is over and the time for transparency has arrived.

I just want to note the presence—we have been joined by the gentleman from Arizona, our good friend, Mr. Jeff Flake.

Let me pose this question to the panel. I think this is implicit. Actually, I think he stated it in the observation by Mr. Rohrabacher. If the U.N. mandate does expire in December what authorization will exist for United States troops to be engaged in combat in Iraq?

Mr. Matheson?

Mr. MATHESON. Well, I don't know whether you are talking about U.S. constitutional authorization or international law authorization. The latter is the easier one to talk about.

If the U.N. Security Council mandate lapses then presumably United States forces could only continue with the consent of the Iraqi Government, and that could take various forms. Evidently the administration intends to have some kind of framework agreement which might fill that role, or it could be done more informally.

If you are asking about U.S. constitutional authority that is a more difficult and historic proposition, and I don't know that there are any definitive answers for this. There is the famous statement that the Constitution in the area of foreign affairs is an invitation to the political branches to struggle, and obviously the executive branch has certain constitutional authorities and the Congress has certain constitutional authorities.

It is obviously much better if the two work together, and U.S. military deployment is supported both by adequate executive authority and adequate congressional authorization. That was done,

for example, in the Gulf War where you had both the Security Council authorization and separate congressional authorization.

Now, the technical question is the one posed already, which is whether the existing authorization from Congress in 2002, I think it was, would continue. Obviously it was originally designed for different purposes, the overthrow of the Saddam regime and the implementation of the Council resolution of that time.

The question would be whether other forms of congressional action such as the periodic appropriations and authorizations of funds for the current military operations would in some way suffice for the same purpose.

Whereas I don't think one can give a definitive blackletter constitutional answer, I think it probably would be appropriate for Congress to engage in defining the scope of authority going forward, which obviously will be somewhat different from the past mission.

Mr. DELAHUNT. Could you repeat that last sentence? It would be appropriate for Congress to define the scope.

Mr. MATHESON. Certainly to participate in that process.

Mr. DELAHUNT. To be a partner in defining the scope as we look forward.

When I hear or read the administration talk about Status of Forces Agreements and I listen to your testimony, I think there has been a confusion, if you will. I am not suggesting it is intentional, but it seems to be a conflating of a Status of Forces Agreement with a whole series of other actions, mandates if you will, missions if you will, as opposed to status.

I think Professor Matheson's distinction in terms of the definition is a good beginning. There are missions, and then during the course of those missions what is the status?

I see nothing in any Status of Forces Agreement as is customarily understood or commonly understood that would authorize combat missions by American military personnel. It has to do, as you say. I mean, are taxes imposed? Is there criminal responsibility in certain situations? Who has criminal jurisdiction?

I think it is unfortunate that representatives of the administration have used Status of Forces Agreements in a context that I don't think the Status of Forces Agreements embraces, if you will, or would embrace far more than all of the other Status of Forces Agreements that I am aware of.

A comment from anyone? Mr. Mason? Ms. Elsea?

Mr. MASON. Sir, I would say that based on the nonclassified agreements that I have been able to review, the majority of those agreements do include things that I previously said, which is your day-to-day minutia of status of your forces being in a country irrespective of what the mission might be or the exercises that we are undertaking. It is the legal protections that are afforded your forces while they are there.

Mr. DELAHUNT. For example, when General Lute indicates in response to a question by the press that this will not amount to an agreement that requires inputs from Congress, if he is referring to what I would call the garden variety Status of Forces Agreement I don't have any disagreement.

But then we are getting further afield when we examine the Declaration of Principles. I am not suggesting, and I tried to make this clear earlier, that this is an agreement, but it clearly is indicative that there is an intention to negotiate around those particular principles.

And if one looks at those principles and the authorities that are reflected it is far beyond anything that I have ever seen incorporated in a typical Status of Forces Agreement and from where I sit here in Congress requires congressional action.

Any response? Professor?

Ms. WEDGWOOD. Well, I certainly agree with you, Mr. Chairman, that the reason that Status of Forces Agreements are kind of a technical subject and don't get taught much in law schools is they are quite *sui generis*. I mean, they are designed to look at who gets to try crimes and what happens on customs and taxes and motor vehicles and luggage.

You may have separate basing agreements, which are often quite distinct from Status of Forces Agreements. Yes, a Status of Forces Agreement is itself I think relatively routine, which is probably why Congress has never particularly cared to insist upon seeing them.

I do agree with Mike Matheson that Supreme Court Justice Robert Jackson doomed us all to the chiaroscuro of constitutional twilight in the sense that if you are separating off the international law questions, then yes, you can use invitation by the Iraqi Government. You can use a Security Council mandate. You can do self-defense, collective or individual, as your basis for an intervention.

Mr. DELAHUNT. Professor?

Ms. WEDGWOOD. Yes?

Mr. DELAHUNT. Let me interrupt on that point. If there is a role for the Congress in terms of the authorization to commit American troops in combat situations, irrespective of international agreements or invitation from foreign governments, these are decisions to be made here as we look forward, if you will, in terms of this point go from this point on in terms of the use of our forces, our men and women going into combat.

With all due respect, and I am sure that will provoke or would provoke a vigorous debate among us, but I think we have to come back to what is the role of Congress in terms of those decisions?

I guess maybe I am looking for some assistance. Would any agreement that is a sole executive agreement according to the customary definition of sole executive agreement suffice, or is there a role for Congress?

Mr. MATHESON. Could I separate that into the technical legal answer and to the broader question of policy and relations between the branches?

Mr. DELAHUNT. Sure.

Mr. MATHESON. As a technical legal matter, this is of course something we discussed in earlier hearings.

The joint declaration has some language in it that suggests that things might have been done which would require congressional action such as a security commitment or an authorization for permanent basis.

The administration has now backed off from that and indicated that is not going to be part of the package so that if we take that at its word it may very well be that these things could legally be done as executive agreements.

But that is not the end of the issue because it seems to me there is also the broader issue of the proper role of Congress and the executive branch in deciding on issues that could be extremely significant for U.S. foreign policy and U.S. welfare and so if you will forgive me for venturing into the nonlegal area, it seems to me that Congress does need to be involved in these broader questions, even though theoretically the President could decide them as a matter of executive agreement, assuming he doesn't transgress these red lines.

Mr. DELAHUNT. Professor Wedgwood?

Ms. WEDGWOOD. Just two points, Mr. Chairman. One is that we have been down this road before. John Hart Ely, who was an old Yale law professor—Stanford, Harvard, a venerable man—wrote a book on the Vietnam War where he hoped to show the war was illegal.

To his dismay and I think chagrin, midlife chagrin, he discovered that Congress actually had in a series of resolutions provided budgetary funds and authorization, and whatever one thinks of the Tonkin Gulf Resolution then or now, that there has been such a pattern of acquiescence, that Congress in some sense could be said to have authorized was a conclusion he reached reluctantly.

But on the really interesting issue you raise about when do you have to vote a new authorization, it is hard. I think we are going to face something of the same pickle in Kosovo because again, Kosovo is changing from Congress's point of view. Kosovo is changing status.

Any authorization for use of force with the Congress was largely looking toward the completion of the U.N. mandate from the 1999 intervention through KFOR and UNMIK, but now you are into a European Union/NATO role, so how much can you tail off the authorization?

It is going to be a tricky issue where I think at times one might regret taking too Calvinistic a stand. I can give you what I would expect the argument would be. I am just channeling here, although I might agree with him.

Mr. DELAHUNT. Who are you channeling?

Ms. WEDGWOOD. I am not saying, but my imagination of what one would argue, which is that if indeed you have congressional authorization to go into Iraq to overthrow Saddam Hussein and restore the government that that has a natural set of similar step-down functions which even when Iraq returns to full independence are kind of inherent in the initial overthrow of the government, just like you have to reconstruct Germany after you overthrow Adolf Hitler.

Therefore, if the Congressional Research Service were doing this one I think they might look at past instances of reconstruction and post reconstruction, the informal presence, to see how many times Congress felt it should assert itself.

I still do take your point, Mr. Chairman, though that if folks want to have money, at a minimum it makes sense to explain what

you want the money for and try to get your funders to agree with the purpose.

Mr. DELAHUNT. The gentleman from Arizona? Do you mind?

Mr. FLAKE. Just a quick question. This is a little beyond the scope here of the hearing, but part of our goal is to help Iraq with WTO ascension and most favored nation status here.

What does the current environment there with regard to the U.N. issues and whatnot allow, and how easy will it be for Iraq to ascend to the WTO? Where will the opposition to that come from?

Anybody? Mr. Matheson?

Mr. MATHESON. I can't claim to be an expert on WTO and what the current situation would be for Iraq. Sorry.

Mr. FLAKE. Anybody have any thoughts on that? It is well beyond this hearing then.

Ms. WEDGWOOD. I am more shameless since I often have to fill in in the classroom, but I would think that you have to commit yourself to free trade.

Mr. FLAKE. Right.

Ms. WEDGWOOD. If it was the case that Iraq felt it had to do import substitution to get its economy going again it would have a tough time joining the WTO.

With all the multilateral assistance pouring in, I think the international community would be very supportive of trying to make it a full partner.

Mr. FLAKE. Thanks.

Mr. DELAHUNT. Mr. Rohrabacher?

Mr. ROHRABACHER. Thank you very much, Mr. Chairman. I have to admit that as this hearing has been going on I just was surprised because I just never knew that it would take so many lawyers in order to fight a war.

One has to imagine that if we would have had the same mandate for lawyer participation I wonder how many wars of ours would have been successful. Yes.

We are talking about rule of law. I would think that quite often when you realize that what war is, which is the organized slaughter of other human beings, that that usually is the first casualty of war, and usually it is societies that are at war understand this and realize that there are certain parameters, of course, certain boundaries of what civilized behavior will be even in war, but that the rule of law is not the same in the time of war.

In fact, Abraham Lincoln, in order to preserve this union during his time of war, immediately suspended rights and took all kinds of actions that were totally unconstitutional in a time of peace.

Would it be better for us to have slavery today, or would it be better for us to have had a division in our country and not have had the Civil War? I can tell you right now with the lawyers at work under the same rules that we are talking about today we would not have a United States of America. It would have divided at that time. Lincoln would not have and the union troops certainly would not have the right to conduct the war as they conducted it.

Let me note that we saved Europe a number of times, World War I and II, but to take one example, the invasion of Normandy, the lead-up to the invasion of Normandy. In that lead-up we were basically having to bomb the supplies and to have the bombardment

necessary for our troops to land. More Frenchmen were killed than had lost their lives due to the Nazis up until that time. Those were not Frenchmen who were in uniform. These were civilians.

Today, you know, we have lawyers kibitzing our defenders trying to decide whether in Baghdad we send men out to protect our diplomats and to try to do what is right for our country, and then when they get fired upon from a crowd we end up with criminal charges against them rather than realizing that they are being fired upon by people who are standing behind civilians intentionally.

You know, could we have won the Civil War? Would we have won World War II? Will we be successful in this engagement? If we aren't, what are the consequences of us not being successful in this engagement?

Are the consequences what some of us believe, which is the enemies of the United States would be emboldened and that we would begin losing large numbers of our own people here due to terrorist attacks and other type of attacks on our people due to the emboldening of our enemies?

You know, we live in a time—we are at war. Someone has declared war on us. Radical Islam has declared war on the United States. Three thousand of our people were slaughtered in front of our eyes.

There are numerous other attacks that would have happened in which thousands of others, if not tens of thousands of other Americans, would have been slaughtered if it was not for the activities that were taking place, including the activities of where we were intercepting messages and communications between those people, who would slaughter American citizens.

Now, the fact that we haven't had another 9/11 isn't just a happenstance. Now, these are issues: Should the United States Government have the powers that it has during war? And this war? Should there be a permanent increase in the authority of the government?

I will tell you that is one of the things that I have been upset with this administration about is they have tried to establish permanent precedence or permanent expansions of power in the name of fighting this war.

Now, I happen to believe that, for example, I voted for the first PATRIOT Act because it had sunsets in it, and then this administration came back to renew the PATRIOT Act and took the sunsets out. Their proposal was to take the sunsets out. That is where I draw the line in terms of making a permanent change.

It would be as if Abraham Lincoln permanently decided there would be no more habeas corpus in the United States. That wasn't Abraham Lincoln's assertion, and it is up to us to make sure that when the administration or anybody else during war tries to make things go beyond things that make it permanent that we step up.

In terms of the actual fighting of the war, it would seem to me that Congress—and this is where the chairman and I disagree—as Dr. Wedgwood suggested, that there are numerous ways that Congress has to exercise its authority if the President has not reached the threshold that they require for their support of Congress.

We can. We have it within our ability at any moment, and during the Vietnam War we had it as well, to pass legislation appropriating money that prohibits any of the money in this appropriation to be used for this conflict.

That is a pretty damn powerful position to have. Congress has its right, the power of the purse, to fund or not fund a military action overseas. If it does not fund it and the President uses those funds for that purpose, he is then violating the Constitution. That is our constitutional authority.

Now, at what point will we exercise that power? We haven't done it in this war, with the war with radical Islam. We didn't do it in the Vietnam War. But at what point will we do that? That is why the Presidents of the United States need to consult with Congress and to talk with us about what is going on and enlist us as someone who has some powers and authorities.

I do not believe that as ranking member, and we will discuss this I am sure over the months to come, that that authority of Congress needs to be expanded. I am afraid that if we expand and try to get into the position of sending boatloads of lawyers overseas with our troops, parachuting the lawyers into the battle zones to watch very carefully—

Mr. DELAHUNT. Some would suggest it would be a positive development to send lawyers into a combat zone.

Mr. ROHRABACHER. You know, come to think of it.

Mr. DELAHUNT. I say, as a lawyer myself.

Mr. ROHRABACHER. Come to think of it. With all due respect to Ms. Dickinson, when the guns start going off and you can't hear anything and there are explosions that are happening all around you and people are shooting at you, these people who went in with Blackwater, they had every intention of what? They didn't have any intention of shooting into a crowd.

Even this one incident that you referred to in your testimony, do you think these people are murderers? Our guys are just pathological nut cases that we have sent over there?

No. What these people are were people who, by the way, have a track record—Blackwater—of knowing that they were protected. No one has ever been murdered in these combat zones. Thank God they are there because we would have no diplomatic chance of solving any problems if our diplomats were being just systematically wiped out by the enemy.

So we know that they need protection. The Blackwater people are generally people with 20 years of experience. A lot of them are retired Special Forces as compared if they sent a Marine unit there, which guys right out of boot camp then would be faced with that type of situation. I happen to know in the incident that you described that the Blackwater car, you know, for some reason it had bullet holes coming into the car, so someone was shooting at them.

It seems to me that, yes, it is real easy for lawyers to sit back and say well, let us judge that person now where that person is under fire, has someone they have to protect, a diplomat they have to protect. They are under fire, and we are going to legally kibitz them. If we determine that they have not done exactly the right de-

cision in the middle of that crisis we are going to throw criminal charges at them.

Well, if you want to set out a formula for defeat and for the murder of our diplomats that is the formula to do it; just like saying down at the border that we are going to put Ramos and Compean in prison for a split second decision of shooting at a drug dealer who had just had a physical altercation with them and whether that drug dealer was armed or not as he turned as he ran away.

Yes. Do you want a formula for loss of control of the border? That is the formula. Make sure that anybody controlling the border knows that that is the type of thing that is going to happen.

We need to decide whether we are going to war, and at some point during the war we are going to have to determine at what point is Congress no longer going to be supporting that effort because in the organized slaughter things have gotten out of hand or whatever.

By the way, I don't know any war where the slaughter hasn't gotten out of hand because the union psyche in the middle of chaos and confusion and blood letting is a horrible thing, yet if we say oh, we are not going to be part of that, we can rest assured that our people will be slaughtered because there are forces at play on this planet and among human beings that are evil forces.

For example, I would hope the United States stands for a better way that we enrage those evil forces by the fact that we are standing for certain standards. Whether it is the right of women to fully participate in our society, whether it is our belief that people's religious convictions should be respected even if they have no religious convictions. They should even be able to speak about atheism in our society.

This is what enrages radical Islam about the United States, and unless we are willing to defend ourselves we will have further 9/11's.

I found the testimony to be enlightening. Again, I am not a lawyer. In fact, when I ran for Congress that was my most effective slogan: Vote for Dana. At least he is not a lawyer.

With that said, I think again let me just note about successes and not successes. I have been with the chairman and his demand for consultation and open discussion policy. I am with him 100 percent on that.

I would note that the Treaty of Versailles as negotiated by Wilson after another time of slaughter that was going on in human history, that Woodrow Wilson was not successful. He was not successful in making sure that the United States fully participated in the process at the end of that war, which would have perhaps ensured a greater peace. He wasn't successful because he did not consult with Congress during the process of the Treaty of Versailles.

It is not just for our own prerogative, which we believe, as Members of Congress, it is not right to set the precedent that the administration does not have to answer questions. I think they do have to answer questions under oath about policy decisions, but it is also just a bad strategy, political strategy, on top of that.

If you want to achieve a goal in a democratic society you go in and you consult and you have open dialogue. Woodrow Wilson did not do that, and that set us back. That set the world back.

I would hope that the administration does have, and I was very happy, as I said in my opening statement, that Secretary Rice, who I have always respected, when she was asked about this immediately took steps to try to correct the situation. Maybe we will have to see that at our hearing.

Ms. Dickinson, I did launch a little bit of an attack on what you said. You are welcome to have your retort if you would like.

Ms. DICKINSON. Well, thank you. I think it is an important point that many contractors are really risking their lives in a very dangerous setting to protect our diplomats. As the killings of the Blackwater contractors at Fallujah and other places make clear, they have made tremendous sacrifices for our country.

The problem is that the contractors are not being held to the same standard that troops are. If troops commit an egregious abuse they will be held accountable under our military justice system. Contractors under the current system don't have to live up to the same standards that our troops do.

I understand from troops and commanders, many of them are very concerned about that and that that is impeding our ability to fight in Iraq, and that is why we need a better system for holding those contractors accountable when serious abuses occur. Not for the majority of cases, but when those serious abuses occur.

Mr. ROHRABACHER. Well, you mentioned one case in particular, and let me—

Ms. DICKINSON. Yes.

Mr. ROHRABACHER [continuing]. Ask you about the standard you believe the United States should have.

A group of American contractors or troops, whatever, have an assignment. They are protecting a diplomat. The diplomat comes under fire. Their convoy comes under fire from a group of people who are hiding behind Iraqi civilians. This is what happened.

They can deny all they want. You can have all these Iraqis or people who are against the way suggesting, "Oh, no. They just shot into this crowd because they are pathological murderers that we have hired who really like shooting into crowds of innocent people." That is not the case. They were being shot at.

Do you think people who then returned fire into a crowd, knowing that civilians are going to get killed, do you think that is a crime?

Ms. DICKINSON. Well, I don't think we can answer that. I do know we have a report of military investigators that preliminarily indicates that the killings were unjustified, but of course all the facts are not out at this point.

We also know that the State Department and the Defense Department imposed different rules on contractors regarding the use of force in a threat situation, and while the Defense Department at the time required its security contractors to take aimed shots in the direction of the threat, the State Department rules did not require that.

So the failure may have been on the governmental side. Patrick Kennedy's report on the security contractors working for the State Department in the wake of the Blackwater incident indicated that this rule in the State Department was that they were not required to take aimed shots, so we don't—

Mr. ROHRABACHER. But what you are explaining to me exactly underscores my point of why you don't want to make legal kibitzing part of the strategy of winning a war.

I will tell you, obviously if anybody goes out and intentionally is killing a bunch of civilians, obviously you are going to say we are going to make sure that doesn't happen, okay?

I don't believe our people on the ground there are pathological murderers, nor are the people who oversee the operations, but they are also people who are there who have been under fire, people who understand when explosions happen and chaos is happening that bad things happen.

Mr. DELAHUNT. If my friend would yield for a moment?

Mr. ROHRABACHER. Just one moment. Let me throw out this one thing.

The example I gave you of World War II is very similar. We had the Nazis in control of Europe hiding behind the French people, right? They were embedded there, the troops. The Nazi troops were embedded right there with the French people.

Do you think that there was something wrong with the bombardment of Normandy prior to our invasion? Because to me it sounds like an exact equivocal situation. You have terrorists who are intentionally hiding among populations and then being able to forcefully shoot at us.

Now, the Nazis are there. We should not have a bombardment? We should send our troops ashore without a prior bombardment of the area there in Normandy? Those were civilians we were killing. We killed more civilians than the Nazis did up until that time preparing for that Normandy invasion.

Well, I would say we are at war. Obviously there are decisions that have to be made at war like that, and that goes right down to what is going on today.

Mr. DELAHUNT. Would my friend yield for a moment?

Mr. ROHRABACHER. Yes.

Mr. DELAHUNT. Let me speak in response to your hypothetical.

I think what we have to remind ourselves is—you put forth a factual situation, but the trier of facts is not the Iraqi Government. It is not some amorphous “they” out there in the atmosphere someplace. In the case of American troops it is the appears.

Mr. ROHRABACHER. It is the what now?

Mr. DELAHUNT. The appears.

Mr. ROHRABACHER. The appears.

Mr. DELAHUNT. Substitute a Marine platoon for those Blackwater guards. There is a military justice system that examines, investigates and makes a determination as to what the facts are.

Clearly if there is an intentional shooting into a crowd of bystanders it is not you or I or the Iraqi Government or even civilians in the United States Government. It is the military justice system that is determining the facts.

So we can put forth different hypothetical fact situations and reach different conclusions, but I think we have to be careful of not second guessing our military when they make those determinations as to what the facts on the ground are. Otherwise you will erode

their capacity to create a disciplined, effective, professional military.

Mr. ROHRABACHER. Okay.

Mr. DELAHUNT. I think that is very, very important.

Mr. ROHRABACHER. Mr. Chairman?

Mr. DELAHUNT. None of us, we weren't there. Again, I am not alluding to the case involving—I don't know—what happened on that tragic day. It was a tragedy.

I think that is something we can all agree on, but we don't know what the facts were and we have to rely on our military, a jury of your peers, if you will—not civilians, but other Marines, colonels down to sergeants—to make that fact determination.

Mr. ROHRABACHER. Mr. Chairman, I would just note, and correct me if I am wrong, but wasn't your testimony that the Uniform Code of Military Justice covers contractors?

Ms. DICKINSON. It now does, but it is not being implemented and so—

Mr. ROHRABACHER. It has not been what?

Ms. DICKINSON. It is not being implemented, so there is no—

Mr. ROHRABACHER. Okay. So the fact is—

Ms. DICKINSON. Right.

Mr. ROHRABACHER. Yes. But you were also suggesting if the Uniform Code of Military Justices covers the contractors. Why the hell do we need the Justice Department then to come in with its lawyers, civilian lawyers, in the middle of a military operation or what would be a military operation? It would be the same with the contractors.

Ms. DICKINSON. Well, there is potentially a constitutional problem there because the Supreme Court has said that trying civilians in military courts is unconstitutional.

Now, I think that in this day and age, given what the contractors are doing, particularly if you are dealing with security contractors, that you can make a case that those constitutional concerns that were articulated when, you know, we were dealing with civilian spouses primarily who got involved in criminal activities, those concerns aren't as serious.

Nonetheless, there are some serious constitutional issues. It hasn't been implemented and so right now we have a situation where if a contractor does commit a serious abuse there is no accountability and the troops and commanders are really concerned about that.

Mr. ROHRABACHER. You are saying that it is not being implemented, but they have the—

Ms. DICKINSON. They haven't implemented it. They have the authority.

Mr. ROHRABACHER. Okay. So Congress has given them the authority. The administration has not implemented that the Uniform Code of Military Justice will apply to contractors.

It seems to me that asking a contractor, and these are very highly paid contractors I might add in Blackwater and these other things. To ask them as part of their contract with the government that they put themselves under the authority of the Uniform Code of Military Justice, that has not been declared unconstitutional, has it?

Ms. DICKINSON. Well, I think it makes a lot of sense what you propose. I think there still might be some constitutional questions whether you can waive those kinds of rights, but still I think it makes sense.

The other issue, I just want to raise two things. One, 80 percent of contractors are not U.S. citizens. We don't know what the stats are for security contractors, but there are increasingly difficult problems that arise from that. They don't get the same training as our troops, particularly in the use of force.

Mr. ROHRABACHER. Let me note that is not true at all for Blackwater.

Ms. DICKINSON. Right.

Mr. ROHRABACHER. Blackwater's people have more training than our own troops. They are usually Special Forces people who have had 20 years of experience and have retired. The case that you are describing, the people there were veterans.

Mr. DELAHUNT. She ceded that point to you.

Mr. ROHRABACHER. Okay. Yes. Yes.

Mr. DELAHUNT. Let us talk about the other—

Ms. DICKINSON. Well, the other point I just wanted to raise, in addition to your excellent points, is that we now have more contractors than troops in Iraq. Figures yesterday suggest it could be as high as 180,000, even higher.

Going back to Chairman Delahunt's point about involvement of Congress in the war, there is a potential that the more contractors you use the more you reduce the role of Congress.

It is true that Congress, as you said, Mr. Rohrabacher, always has the power of the purse with respect to contractors as well, but the more contractors you use the more you reduce the role of Congress in authorizing the war, so that potentially impedes on—

Mr. ROHRABACHER. Yes. Well, you and I disagree on that.

As I say, I think once we have determined to go to war and once Congress has permitted the President to move forward by authorizing and appropriating the money necessary for that conflict it is up to Congress then to decide where the threshold is where they won't do that anymore.

It is not the job of Congress to mini-manage the war. If the President wants to have the authority to continue he is going to have to consult with us then, but consulting should not be mistaken with mini-managing.

Dr. Wedgwood, you had something you obviously were anxious to say.

Ms. WEDGWOOD. I must have been making facial expressions. I apologize.

Two things. One is I very much take your point that folks who are in the military or ex-military do worry. It is part of the phenomenon of the civilianization of war crimes trials that folks who have not been there don't know what it is like to figure out what that flash in the window of the Madrid Hotel really is, a camera or an RPG.

We have been civilianizing war crimes trials of late in the Yugoslav Tribunal, Rwanda Tribunal, mostly because those were massacre law and seemed simpler—

Mr. ROHRABACHER. Right.

Ms. WEDGWOOD [continuing]. With wholesale slaughter of civilians.

On the point about contractors, it is a very interesting problem and certainly bears I think lots of attention by Congress and the executive branch.

In my year at the Naval War College on sabbatical when I first learned what ROEs were, folks taught you that the key to having good battlefield performance is training, training, training, and really clear ROEs, and ROEs that are adapted to the particular situation—plus command responsibility where the commander is responsible not only to order, but if he didn't take reasonable steps to prevent it.

So I think one of the real difficulties for the future, and personally I am in favor of growing the Army and growing the Marines, but it is going to be hard if contractors are run by State Department to really get the kind of ROE embeddedness and the role playing training, scenario training, that you get with uniformed military. SOF guys are very skillful. But they may be trained for a slightly different mission at times.

I think it is something Congress should look at to think about whether you need to try to mainstream many of the functions that we have put into a surge capacity.

A final point. On fact-finding on the ground, since you don't have an SJAG accompanying your contractors all the time you are going to get delays in evaluation of the facts in a way that you might not in a purely military situation.

Mr. DELAHUNT. We have a vote. I think we have 10 minutes. Just two quick questions, and let me direct them to this side of the panel starting with Mr. Matheson.

I understand that we have the power of the purse, but that in many instances is a reactive power or authority, particularly when—well, let me just leave that out there.

But I would ask you to think about in terms of the discussion as far as Status of Forces Agreements that what we are talking about, and I think it was you, Professor Matheson, that used the word scope. The scope of the authority. I would submit we have to be very careful not to make that an exclusive executive power, but that Congress should participate in designing the scope or defining the scope in the boundaries of the authority to use force.

Am I saying anything that goes against what you understand to be the constitutional prerogative of the Congress when I talk about scope and authority?

Mr. MATHESON. I think you are describing not so much a constitutional or a legal proposition, but a sensible policy proposition that Congress has to perform its role since it has so many of these functions of the purse, public policy, representation of the constituencies, so it has to have its role as a matter of sound policy, as well as the executive branch.

Mr. DELAHUNT. I guess what I am saying is I noted in the op-ed piece by Secretaries Gates and Rice this particular statement in terms of what constitutes a Status of Forces Agreement, and I disagree with this statement because I think we are talking, as you have made the distinction between status and mission. I don't

think that this op-ed piece makes that distinction, and I refer to a specific statement:

“Whenever American troops are stationed a number of legal questions arise ranging from the overall scope of their mission to the minutia of day-to-day life from authority to fight to rules for delivering mail.”

Now, it is my understanding or at least my opinion that the authority to fight—not just simply the power of the purse—is part of the declaration of war authority that was conferred in Article I on Congress.

Sure, I think there is unanimity in terms of how they want to deliver the mail. That can be a sole executive agreement, but in terms of the authority to fight that at least at its inception ought to be a decision that implicates both the executive and the congressional branches.

Comment?

Mr. MATHESON. I agree, except you have to recognize, of course, that there are situations in which the President may have to fight and which he may do so without congressional authorization.

Mr. DELAHUNT. Absolutely. In terms of emergency situations and—

Mr. MATHESON. Self-defense.

Mr. DELAHUNT. Self-defense. Yes. I understand that, and I am not disagreeing with that.

But where there are no exigent circumstances, using a legal term, where there is time for deliberations, and then even under those circumstances I would submit that it is incumbent upon the executive to come back to Congress to receive appropriate authorization.

Chuck?

Mr. MASON. Sir, I—

Mr. DELAHUNT. How many SOFAs have incorporated within the authority to fight out of the 115, if you know?

Mr. MASON. Again, sir, reviewing the unclassified documents that I have been able to review at this point—I am upwards of 70 agreements at this point—I have not come across language that specifically calls for the authority to fight.

Mr. DELAHUNT. Jennifer?

Ms. ELSEA. I am not aware of any agreements like that.

I would like to make a point about the Status of Forces Agreements that in general their concentration is on how U.S. troops are going to be treated under the foreign law and not U.S. law.

Mr. DELAHUNT. Right.

Ms. ELSEA. So whether we can deliver the mail or whatever, how does it fit into the law of the state where we are doing that?

But Congress has the authority to make regulations for the armed forces, and Congress can set its own rules for how these things internally to the military are done.

Mr. DELAHUNT. I guess I want to get back to the research done by CRS and in particular Mr. Mason’s response. In not a single Status of Forces Agreement can one find the authority to fight.

What I am suggesting is that at least from what I glean from the Declaration of Principles this is not a typical SOFA. This is something more.

I said earlier in terms of the use of the term strategic framework agreement—does that mean anything to anybody, a strategic framework agreement? Have you heard that in your experience in these and other matters?

Mr. MATHESON. I know what it means in a technical sense.

There are lots of international documents in the past that describe a general relationship between the U.S. and a foreign country. Some of them are treaties of friendship and commerce. Some of them are political joint declarations. We see an example of that in Afghanistan.

In terms of a specific document called a framework agreement, I am not sure what that means.

Mr. DELAHUNT. Again, I think it is very important that the administration clarify and be very precise in its definitions here and not to confuse a Status of Forces Agreement because I believe that is misleading. It is misleading to Congress, and it is misleading to the American public.

What is being contemplated, again from what I can guess, is something more than a Status of Forces Agreement, and maybe we will discover what that is on Tuesday.

Mr. ROHRABACHER. Well, I would hope, Mr. Chairman, that we maintain those very thick chains that shackle our President to have to go to the Congress for a declaration of war and that other shackle that says that Congress can at any time defund whatever effort they do not agree with.

I hope that we make sure that those shackles are there, but make sure that we do not bind our American persona with the thousands of legal technicalities, you know, each one a string like Lilliputians adding onto a giant, that will prevent us from being able to confront the challenges that we face in securing our country and the safety of our people in the future.

Mr. DELAHUNT. Thank you all very much. We have to run to vote. We are adjourned.

[Whereupon, at 11:28 a.m. the subcommittee was adjourned.]

