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Report R40011

*U.S.-Iraq Withdrawal/Status of Force Agreement: Issues for
Congressional Oversight*

R. Chuck Mason, American Law Division

December 12, 2008

Abstract. Congress has several tools by which to exercise oversight regarding negotiation, form, conclusion, and implementation of agreements by the United States and although the agreements with Iraq were negotiated and concluded as executive agreements, they have not been implemented. The agreements are not scheduled to be in force until January 1, 2009, and even then, there remain many unanswered questions about the specific terms within the SOFA. This report begins by discussing the historical legal framework governing U.S. military operations in Iraq. The report then provides a general background as to the contents of agreements traditionally considered Status of Forces Agreements (SOFAs). Finally, the report discusses specific aspects of the SOFA, highlighting issues that may require continued congressional oversight.

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December 12, 2008

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Summary

The U.S. has been involved in military operations in Iraq since March of 2003. The legal framework under which the U.S. has operated includes H.J.Res. 114 (P.L. 107-243), multiple Security Council Resolutions, as well as orders under the Coalition Provisional Authority. The U.N. Security Council extended the mandate for the multinational forces through December 31, 2008.

On November 26, 2007, U.S. President George W. Bush and Iraqi Prime Minister Nouri Kamel Al-Maliki signed a Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America. Pursuant to this Declaration, the parties pledged to “begin as soon as possible, with the aim to achieve, before July 31, 2008, agreements between the two governments with respect to the political, cultural, economic, and security spheres.” Among other things, the Declaration proclaims the parties’ intention to enter an agreement that would commit the United States to provide security assurances to Iraq, arm and train Iraqi security forces, and confront Al Qaeda and other terrorist entities within Iraqi territory.

On November 17, 2008, after months of negotiations, U.S. Ambassador to Iraq Ryan Crocker and Iraq Foreign Minister Hoshyar Zebari signed two documents: (1) the Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States and the Republic of Iraq, and (2) the Agreement Between the United States of America and Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq. The second agreement is commonly referred to as the SOFA between the United States and Iraq and is incorporated by reference into the larger strategic agreement.

Congress has several tools by which to exercise oversight regarding negotiation, form, conclusion, and implementation of agreements by the United States and although the agreements with Iraq were negotiated and concluded as executive agreements, they have not been implemented. The agreements are not scheduled to be in force until January 1, 2009, and even then, there remain many unanswered questions about the specific terms within the SOFA. This report begins by discussing the historical legal framework governing U.S. military operations in Iraq. The report then provides a general background as to the contents of agreements traditionally considered Status of Forces Agreements (SOFAs). Finally, the report discusses specific aspects of the SOFA, highlighting issues that may require continued congressional oversight.

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Military Operations in Iraq: A Historical Perspective

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

as he determines to be necessary and appropriate in order to - (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

It also requires as a predicate for the exercise of that authority that the President determine that diplomatic efforts and other peaceful means will be inadequate to meet these goals and that the use of force against Iraq is consistent with the battle against terrorism.¹ H.J.Res. 114 appears to incorporate any future resolutions concerning the continuing situation in Iraq that the Security Council may adopt, as well as those adopted prior to its enactment.² The authority also appears to extend beyond compelling Iraq's disarmament to addressing the full range of concerns expressed in those U.N. resolutions, as well as for the broad purpose of defending "the national security of the United States against the continuing threat posed by Iraq."

The United States and Great Britain, along with a number of other countries, invaded Iraq in March of 2003, asserting the authority to enforce compliance with earlier Security Council resolutions that addressed the situation in Iraq and Kuwait.³ Other Security Council members disagreed with this interpretation of the previous resolutions, denying that these resolutions contained a continuing authorization to use force against Iraq. Despite the initial lack of consensus regarding the legality of the invasion, the Security Council adopted subsequent resolutions recognizing the occupation of Iraq and generally supporting the coalition's plans for bringing about a democratic government in Iraq.⁴

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

a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring

¹ In March 2003, President George W. Bush reported to Congress the determination that was required by P.L. 107-243 regarding his exercise of authority for military operations against Iraq. House Document 108-50. March 19, 2003. A report in connection with Presidential Determination under P.L. 107-243. Communication from the President of the United States transmitting a report consistent with Section 3(b) of the Authorization for Use of Military Force Against Iraq Resolution of 2002.

² For a historical overview of Security Council Resolutions addressing the situation in Iraq prior to 2003, see CRS Report RS21323, *The United Nations Security Council—Its Role in the Iraq Crisis: A Brief Overview*, by Marjorie Ann Browne.

³ See Sean Murphy, *Assessing the Legality of Invading Iraq*, 92 Geo. L.J. 173 (2004).

⁴ For an overview of the process, see CRS Report RL31339, *Iraq: Post-Saddam Governance and Security*, by Kenneth Katzman.

necessary conditions for the implementation of the timetable and programme [for establishing a permanent government in Iraq] as well as to contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure.

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

The Security Council resolutions do not provide for the immunity of coalition troops from Iraqi legal processes. A SOFA was not deemed possible prior to the recognition of a permanent government in Iraq.⁵ Immunity for coalition soldiers, contract workers, and other foreign personnel in Iraq in connection with security and reconstruction was established by order of the CPA, which relied for its authority on the laws and usages of war (as consistent with relevant Security Council resolutions). CPA Order 17, Status of the Coalition Provisional Authority, MNF - Iraq, Certain Missions and Personnel in Iraq,⁶ established that all personnel of the multinational force (MNF) and the CPA, and all International Consultants, are immune from Iraqi legal process, which are defined to include “arrest, detention or proceedings in Iraqi courts or other Iraqi bodies, whether criminal, civil, or administrative.” Such persons are nevertheless expected to respect applicable Iraqi laws, but are subject to the exclusive jurisdiction of their “Sending States.” States contributing personnel to the multinational force have the right to exercise within Iraq any criminal and disciplinary jurisdiction conferred on them by their domestic law over all persons subject to their military law.⁷

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

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

⁵ The United States reportedly made an effort to establish a SOFA with the Iraqi Governing Council prior to the handover of sovereignty and establishment of the Iraqi Interim Government, but Iraqi officials took the view that only a permanently established government in Iraq would have the authority to enter binding international agreements. See Robin Wright, “U.S. Immunity in Iraq Will Go Beyond June 30,” *Washington Post*, June 24, 2004, at A01.

⁶ Available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev__with_Annex_A.pdf.

⁷ *Id.* § 4.

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

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

Prior to the handover of sovereignty to the interim government, Ambassador Bremer issued CPA Order 100 to revise existing CPA orders, chiefly by substituting the MNF-Iraq for the CPA and otherwise reflecting the new political situation.⁸ 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.⁹

Under Article 26 of the Transitional Administrative Law of Iraq (TAL),¹⁰ “The laws, regulations, orders, and directives issued by the Coalition Provisional Authority pursuant to its authority under international law shall remain in force until rescinded or amended by legislation duly enacted and having the force of law.”

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

The U.N. Security Council extended the mandate for the multinational forces until December 31, 2006,¹¹ and again until December 31, 2007,¹² and finally, until December 31, 2008.¹³ Iraqi Prime Minister al-Maliki requested the Security Council extend the MNF mandate “one last time” until the end of December, 2008, “provided that the extension is subject to a commitment by the

⁸ 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.

⁹ *Id.* § 1.

¹⁰ 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>.

¹¹ U.N.S.C. Res. 1637 (November 11, 2005).

¹² U.N.S.C. Res. 1723 (November 28, 2006).

¹³ U.N.S.C. Res. 1790 (December 18, 2007).

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.”¹⁴

On November 26, 2007, U.S. President George W. Bush and Iraqi Prime Minister Nouri Kamel Al-Maliki signed a Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America.¹⁵ Pursuant to this Declaration, the parties pledged to “begin as soon as possible, with the aim to achieve, before July 31, 2008, agreements between the two governments with respect to the political, cultural, economic, and security spheres.”¹⁶ Among other things, the Declaration proclaims the parties’ intention to negotiate a security agreement

To support the Iraqi government in training, equipping, and arming the Iraqi Security Forces so they can provide security and stability to all Iraqis; support the Iraqi government in contributing to the international fight against terrorism by confronting terrorists such as Al-Qaeda, its affiliates, other terrorist groups, as well as all other outlaw groups, such as criminal remnants of the former regime; and to provide security assurances to the Iraqi Government to deter any external aggression and to ensure the integrity of Iraq’s territory.¹⁷

During a joint hearing before the House Foreign Affairs Subcommittee on the Middle East and South Asia and the Subcommittee on International Organizations, Human Rights and Oversight, on March 4, 2008, Ambassador David M. Satterfield, Senior Advisor to the Secretary and Coordinator for Iraq, testified that seven background briefings by senior administration officials had been held with Members of Congress concerning the prospective U.S.-Iraq agreement.¹⁸ He further testified the Administration intent to negotiate two separate agreements with Iraq. The first agreement would constitute a legally-binding SOFA to define the legal status of U.S. forces within Iraq. The second agreement, described as a “strategic framework agreement,” would broadly address topics outlined in the Declaration of Principles. According to Ambassador Satterfield, the Administration does “not at this stage contemplate it as a legally-binding agreement.... Should that change in the course of the discussions, we will, of course, so inform

¹⁴ Letter from Nuri Kamel al-Maliki, Prime Minister of the Republic of Iraq, to the Security Council, attached as Annex I to U.N.S.C. Res. 1790.

¹⁵ The text of this agreement is available at <http://www.whitehouse.gov/news/releases/2007/11/20071126-11.html> [hereinafter “*Declaration of Principles*”]. The Declaration is rooted in an August 26, 2007 communiqué, signed by five top political leaders in Iraq, which called for a long-term relationship with the United States. The strategic arrangement contemplated in the Declaration is intended to ultimately replace the United Nations mandate under which the United States and allied forces are responsible for contributing to the security of Iraq. For further background on the implications of the prospective U.S.-Iraq agreement, see *The Proposed U.S. Security Commitment to Iraq: What Will Be In It and Should It Be a Treaty?: Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight & Subcomm. on the Middle East and South Asia of the House Comm. on Foreign Affairs*, January 23, 2008 (statement by CRS Specialist Kenneth Katzman). For further discussion of U.S. operations in Iraq and issues related to Iraqi governance and security, see CRS Report RL31339, *Iraq: Post-Saddam Governance and Security*, by Kenneth Katzman, and CRS Report RL33793, *Iraq: Regional Perspectives and U.S. Policy*, by Christopher M. Blanchard et al.

¹⁶ *Declaration of Principles*, *supra* note 16.

¹⁷ White House Office of the Press Secretary, *Fact Sheet: U.S.-Iraq Declaration of Principles for Friendship and Cooperation*, November 26, 2007, available at <http://www.whitehouse.gov/news/releases/2007/11/20071126-1.html>.

¹⁸ *Hearing of the Subcommittee on the Middle East and South Asia, and the Subcommittee on International Organizations, Human Rights, and Oversight of the House Foreign Affairs Committee; Declaration and Principles: Future U.S. Commitments to Iraq*, March 4, 2008 (statement by Ambassador David M. Satterfield in response to question by Representative William Delahunt).

the Congress and we'll take appropriate measures in accordance with our constitutional provisions.¹⁹

On November 17, 2008, after months of negotiations, U.S. Ambassador to Iraq Ryan Crocker and Iraq Foreign Minister Hoshyar Zebari signed two documents: (1) the Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States and the Republic of Iraq, and (2) the Agreement Between the United States of America and Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq. The second agreement is commonly referred to as the SOFA between the United States and Iraq and is incorporated by reference into the larger strategic agreement.²⁰ The agreements, while negotiated and concluded as executive agreements by the U.S. government and without the consent of the Congress,²¹ required approval on multiple levels by the Iraqi government. The Iraqi Council of Ministers first approved the agreements on November 16, 2008; the Iraqi Council of Representatives followed on November 27, 2008; and finally the Iraqi Presidential Council approved them on December 4, 2008. The agreements will enter into force on January 1, 2009, following an exchange of diplomatic notes between the United States and Iraq, and are set to expire on December 31, 2011.

What is a Status of Forces Agreement (SOFA)?

A SOFA is an agreement that establishes the framework under which armed forces operate within a foreign country.²² The agreement provides for rights and privileges of covered individuals while in the foreign jurisdiction, addressing how the domestic laws of the foreign jurisdiction shall be applied to U.S. personnel.²³ SOFAs are peacetime documents and therefore do not address the rules of war, the Law of Armed Conflict, or the Law of the Sea. In the event of armed conflict between parties to a SOFA, and because the agreement is a contract between the parties and may be canceled at the will of either, the terms of the agreement would no longer be applicable.

With the exception of the multilateral SOFA among the United States and North Atlantic Treaty Organization (NATO) countries, a SOFA is specific to an individual country and is in the form of an executive agreement.²⁴ The Department of State and the Department of Defense, working

¹⁹ *Id.* (statement by Ambassador David M. Satterfield in response to question by Representative William Delahunt concerning legally-binding nature of proposed agreement).

²⁰ Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq, Section III, November 17, 2008.

²¹ For further background on tools available to Congress related to oversight, see CRS Report RL34362, *Congressional Oversight and Related Issues Concerning the Prospective Security Agreement Between the United States and Iraq*, by Michael John Garcia, R. Chuck Mason, and Jennifer K. Elsea.

²² For additional background on SOFAs, see CRS Report RL34531, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?*, by R. Chuck Mason. (It must be noted that there are at least 10 SOFAs that currently are classified documents. The agreements are classified for national security reasons and therefore their attributes are not discussed in this report.)

²³ U.S. personnel may include U.S. armed forces personnel, Department of Defense civilian employees, and/or contractors working for the Department of Defense. The scope of applicability is specifically defined in each agreement.

²⁴ For a discussion on the form and content of international agreements under U.S. law, distinguishing between treaties (continued...)

together, identify the need for a SOFA with a particular country and negotiate the terms of the agreement. The NATO SOFA²⁵ is the only SOFA that was concluded as part of a treaty.²⁶ The Senate approved ratification of the NATO SOFA on March 19, 1970, subject to reservations. The resolution 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.²⁷

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 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.²⁸

The Department of Defense issued Directive 5525.1 providing policy and guidance specific to SOFAs.²⁹ 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.”³⁰ The directive addresses the Senate reservations to the NATO SOFA by stating even though the reservations accompanying its ratification only apply to NATO member 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.³¹

(...continued)

and executive agreements, see CRS Report RL34362, *Congressional Oversight and Related Issues Concerning the Prospective Security Agreement Between the United States and Iraq*, by Michael John Garcia, R. Chuck Mason, and Jennifer K. Elsea.

²⁵ 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.

²⁶ 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 (SOFA in the form of an executive agreement pursuant to a treaty).

²⁷ S. Res. of July 15, 1953, Advising and Consenting to Ratification of the NATO SOFA. See also 32 C.F.R. § 151.6.

²⁸ *Id.*

²⁹ Available at <http://www.dtic.mil/whs/directives/corres/pdf/552501p.pdf>.

³⁰ *Id.*

³¹ *Id.*

There are no formal requirements governing the content, detail, and length of a SOFA and the United States has concluded agreements as short as one page and in excess of 200 pages. 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, license requirements, and customs regulations. They do not generally authorize specific military operations or missions by U.S. forces, but the inherent right of self-defense is not affected or diminished. U.S. personnel always have a right to defend themselves, if threatened or attacked, and a SOFA does not take away that right.³²

The issue most commonly addressed in a SOFA is the legal protection from prosecution that will be afforded U.S. personnel while present in a foreign country. The agreement establishes which party to the agreement is able to assert criminal and/or civil jurisdiction. In other words, the agreement establishes how the domestic civil and criminal laws are applied to U.S. personnel while serving in a foreign country. 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 other signatory country. Exclusive jurisdiction is when the United States retains the right to exercise all criminal and disciplinary jurisdiction for violations of the laws of the foreign nation while the individual is present in that country. Shared jurisdiction occurs when each party to the agreement retains exclusive jurisdiction over certain offenses but also allows the United States to request that the host country waive jurisdiction in favor of the United States exercising criminal and disciplinary jurisdiction. 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.

U.S.–Iraq Withdrawal/Status of Forces Agreement

The withdrawal agreement signed on November 17, 2008, is included by reference as part of the larger strategic agreement and although it is titled differently, it is commonly referred to as the SOFA. As indicated above, there are no formal requirements as to the content, detail or length of a SOFA, but many agreements share the same basic framework, and this one is no different. Rules and procedures related to such issues as carrying weapons, the wearing of uniforms, entry and exit into Iraq, taxes, customs, and claims, among other operational concerns, are addressed in the agreement. While there are many similarities between this and other SOFAs concluded by the United States, most do not have an expiration date, but this agreement is set to expire on December 31, 2009. Additionally, there are substantial departures from the clauses most often found in a traditional SOFA, including, in such areas as civil and criminal jurisdiction, the authorization for military operations, the establishment of a withdrawal timeline, and the creation of committees to implement the agreement.

³² 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).

Criminal and Civil Jurisdiction

The right to assert criminal and civil jurisdiction is a common component of SOFAs and is addressed in Article 12 of this agreement. The agreement creates two distinct classes of individuals: (1) U.S. forces, including the civilian component, and (2) U.S. contractors and their employees.³³ The two classes are treated differently with respect to civil and criminal jurisdiction. Iraq maintains exclusive jurisdiction over U.S. contractors and their employees, but shares jurisdiction with the United States over U.S. forces, including the civilian component. As the term is defined in the agreement, “U.S. contractors and their employees” only applies to contractors that are operating under a contract/subcontract with or for the United States Forces.³⁴ Therefore, U.S. contractors operating in Iraq under contract to other U.S. departments/agencies are not subject to the terms of the SOFA and are, arguably, immune from Iraqi civil and criminal jurisdiction as long as CPA Order 17 remains in effect.

According to the terms of the agreement, Iraq is able to assert exclusive jurisdiction over U.S. forces, including the civilian component, for the commission of “grave premeditated felonies” while off-duty and outside agreed upon facilities and areas.³⁵ It is unclear what crimes constitute a grave premeditated felony as the term is not further defined. Rather, the agreement calls for the creation of a U.S.–Iraqi Joint Committee to enumerate the grave premeditated felonies.³⁶ Only after the committee enumerates the offenses, and also establishes procedures and mechanisms consistent with due process standards and protections available under U.S. and Iraqi law, will Iraq be able to assert jurisdiction over U.S. forces and members of the civilian component.³⁷ Additionally, Iraq is required to give notice to the United States within 21 days of discovery of the alleged offense that it intends to assert jurisdiction.³⁸ At that point, the United States may request that Iraq waive its right to jurisdiction, but Iraq is not obligated to relinquish its right.³⁹

All offenses committed by U.S. forces or members of the civilian component, not considered grave premeditated felonies, remain under the exclusive jurisdiction of the United States. The U.S. forces and civilian components are entitled to due process standards and protections pursuant to the Constitution and laws of the United States.⁴⁰ In the event that the victim of the crime is an Iraqi citizen, the United States, when mutually agreed by the parties, will seek to hold the trial of the accused in Iraq, but if it isn’t feasible to do so, efforts will be undertaken to allow for the personal attendance of the victim at the trial in the United States.⁴¹

³³ Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, Article 12, November 17, 2008 [hereinafter *Withdrawal Agreement*].

³⁴ *Id.*, Article 2.5.

³⁵ *Id.*, Article 12.1.

³⁶ *Id.*, Article 12.8.

³⁷ *Id.*, Article 12.8.

³⁸ *Id.*, Article 12.6.

³⁹ *Id.*

⁴⁰ *Id.*, Article 12.7.

⁴¹ *Id.*

If a member of the U.S. forces or civilian component commits an offense considered to be a grave premeditated felony, a determination must be made as to duty status. If the individual is determined to not be in a duty status, Iraq will be able to assert jurisdiction. However, if the determination is made that the individual is in a duty status at the time of the offense, the U.S. will retain exclusive jurisdiction. The determination of duty status is the responsibility of the U.S. authorities.⁴² If the Iraqi authorities believe that an individual was not in a duty status and therefore should be subject to their jurisdiction, they may appeal the determination to the Joint Committee, the same committee responsible for establishing the procedures and mechanisms for asserting jurisdiction, but the ultimate determination remains with the U.S. authorities.⁴³

Article 12 of the agreement also includes one very unusual clause, a requirement to review the terms of the article every 6 months.⁴⁴ While the overall agreement is for a term of three years, and may be canceled by either party with one-year notice, the terms of the civil and criminal jurisdiction clause are reviewable, but the agreement does not specify any mechanisms for modifying the agreement. It remains to be seen who would approve the changes. Would it require the consent of all the political bodies in Iraq, like the original agreement, or might it be changed at a lower level?

Military Operations

As noted above, the right to engage in military operations is not something found in previously concluded SOFAs. However, this agreement is different in that it specifically addresses military operations by U.S. forces in cooperation with Iraqi forces. In Article 4, Iraq requests the temporary assistance of the United States in supporting Iraqi forces in efforts to maintain security and stability in Iraq.⁴⁵ Iraq specifically requests assistance with cooperation in the conduct of operation against al-Qaeda, other terrorist groups, outlaw groups, and remnants of the former regime.⁴⁶

All military operations conducted must be with the agreement of the Government of Iraq.⁴⁷ The agreement calls for the creation of a new Joint Military Operations Coordination Committee (JMOCC) which will oversee the coordination of all military operations.⁴⁸ There is an additional requirement that all operations shall not infringe upon the sovereignty of Iraq and its national interests, as defined by Iraq, and U.S. forces must respect the laws, customs, and traditions of Iraq.⁴⁹ It has been suggested that U.S. forces are in some manner under foreign command and control through the creation of the JMOCC, but there is nothing in the agreement that would lead to this belief. The agreement calls for coordination of activities and operations. It doesn't appear to require the Iraqi government controls the operations. Additionally, the requirement that U.S.

⁴² *Id.*, Article 12.9.

⁴³ *Id.*

⁴⁴ *Id.*, Article 12.10.

⁴⁵ *Id.*, Article 4.1.

⁴⁶ *Id.*

⁴⁷ *Id.*, Article 4.2.

⁴⁸ *Id.*

⁴⁹ *Id.*, Article 4.3.

forces respect the laws, customs, and traditions of the foreign country is a common clause found in many, if not all, SOFAs.

The potential for military operations is also addressed in Article 27 (Deterrence of Security Threats) of the agreement. The agreement calls for “strategic deliberations” in the event of external or internal threat or aggression against Iraq, and states the United States “shall take appropriate measures, including diplomatic, economic, or military measures” to deter the threat.⁵⁰ It has been argued that this clause requires the United States to come to the defense of Iraq, and therefore this agreement is more than a SOFA; but rather it is a security agreement and requires the input and consent of Congress.⁵¹ When the clause is read in its entirety, the United States is not required to do anything other than engage in strategic deliberations, and then only at the request of Iraq. As part of the deliberations, all options are available to the parties, including military measures, but none are absolutely required actions.⁵²

Withdrawal Timeline

SOFAs have been drafted in the past for specific exercises and/or events,⁵³ but including a date for the withdrawal of all forces from a foreign territory is unique to this agreement.⁵⁴ The withdrawal is a two-phase process. The first requires the withdrawal of all U.S. combat forces from Iraqi cities, villages, and localities no later than June 30, 2009; the second requires the withdrawal of all U.S. forces from Iraqi territory no later than December 31, 2011.⁵⁵ The JMOCC, created to coordinate military operations, will establish the areas and facilities where U.S. forces will be stationed between June 30, 2009, and December 31, 2011.⁵⁶ Additionally, the clause recognizes the sovereign right of Iraq to request the departure of U.S. forces at any time and also the right of the United States to withdraw its forces at any time.⁵⁷ Even though the term of the agreement is three years, and either party may cancel the agreement with one-year notice, both countries retain the right to remove U.S. forces independent of the agreement. However, because the agreement requires the removal of all U.S. forces no later than December 31, 2011, if any U.S. forces were to remain in Iraq in support of security training, or other programs, the withdrawal agreement will need to be extended or replaced with a standard peacetime SOFA.

⁵⁰ *Id.*, Article 27.1.

⁵¹ For a discussion on security agreements, see CRS Report RL34362, *Congressional Oversight and Related Issues Concerning the Prospective Security Agreement Between the United States and Iraq*, by Michael John Garcia, R. Chuck Mason, and Jennifer K. Elsea.

⁵² *Withdrawal Agreement*, Article 27.1.

⁵³ For a survey of current U.S. SOFAs, see CRS Report RL34531, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?*, by R. Chuck Mason.

⁵⁴ *Withdrawal Agreement*, Article 24.

⁵⁵ *Id.*, Articles 24.1 and 24.2.

⁵⁶ *Id.*, Article 24.3.

⁵⁷ *Id.*, Article 24.4.

Committees

The majority of SOFAs concluded by the United States have not required additional implementing agreements or the creation of committees to implement the agreement. This agreement is different in that it requires the creation of no fewer than three joint committees for implementation.⁵⁸ A Joint Ministerial Committee is to be the first committee created and it requires participation at the ministerial level determined by both parties.⁵⁹ The Joint Ministerial Committee is then responsible for creating the JMOCC, discussed above, consisting of representatives from both parties.⁶⁰ The Joint Ministerial Committee is also responsible for creating a Joint Committee, with representatives from both parties, responsible for addressing all issues outside the exclusive competence of the JMOCC.⁶¹ The Joint Committee is then authorized to create Joint Sub-Committees as needed.⁶²

While the agreement calls for the creation of the numerous committees, the specifics of membership or the rules and procedures that should be utilized by the committees is not established. How the committees are to operate within the framework of the overall agreement is unclear. There is no dispute resolution mechanism within the implementation clause. The potential exists for confusion as to how the committees will function and therefore they may be unable to implement the agreement. For example, are the committees able to modify the agreement, or must the agreement be submitted to the larger government bodies? Congress, through its ability to exercise oversight of the implementation of the agreement, may be able to provide guidance and solutions to potential problems as they are realized.

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⁵⁸ *Id.*, Article 23.

⁵⁹ *Id.*, Article 23.1.

⁶⁰ *Id.*, Article 23.2.

⁶¹ *Id.*, Article 23.3.

⁶² *Id.*, Article 23.4.