

# Deconstituting Mesopotamia

## Cutting a Deal on the Regionalization of Iraq<sup>1</sup>

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In the dust-ridden Baghdad summer of 2005, probably the most remarkable aspect of the drafting of the constitution for the Republic of Iraq was not the full-scale insurgency and incipient civil war raging a few hundred meters away on Haifa Street, outside the concrete blast walls of the Green Zone.<sup>2</sup> Nor was it the complexity of Iraq's competing ethnic and sectarian constitutional agendas, nor even the breathtakingly short timetable in which the document was produced, a little over a month. Rather, it was the scale of the mismatch between anticipation and reality. The process laid bare a vaulting expectation, defying all the evidence, of a transformative moment in which a new national truth about a post-Saddam Iraqi identity would be revealed. Instead, existing ethnic and sectarian differences prevailed, and the process was so mishandled that these differences were thrown, awkwardly, into even greater relief. The constitutional text was assembled hastily, by Iraqi political leaders who could barely stand each other's pres-

ence, under intense and public U.S. pressure, without popular involvement, and with the conspicuous absence of one of Iraq's major constituencies: the Sunni Arabs. Accounting for approximately 20 percent of Iraq's population,<sup>3</sup> Sunni Arabs had, before the U.S. intervention in 2003, dominated Iraq's political and economic life. By 2005, they were the main population base for an anti-U.S. and antigovernment insurgency. In the constitutional referendum of October 2005, Sunni Arab voters overwhelmingly rejected the new constitution,<sup>4</sup> though they failed to block its entry into force. Thus the new Iraq was born.

The world of politics—and not least Middle East politics—is defined by the distance between intentions and outcomes. Even so, the Iraqi constitution drafting process is worth pausing to consider. It was a constitution-making anticlimax that, far from marking the transformation of Iraqi social and political identities, and far from forging a new social contract around an Iraqi state, instead

consecrated, in constitutional language, the already well-advanced breakup of the country into geographic regions that coincide with ethnicity and sect. The constitution-drafting process, inasmuch as it peremptorily confronted Sunni Arabs with a vision of Iraq they could not recognize, probably amplified the Sunni Arab insurgency and, in turn, steepened the slide to civil war. At the same time, this apparent failure carried the imprimatur of democratic legitimacy from beginning to end: The constitution drafters had been freely and fairly elected in January 2005 and the product of their work was duly ratified by the Iraqi people in an October 2005 referendum. Despite the Sunni Arab vote against it, nearly 80 percent of voters across Iraq approved the constitutional text in the referendum,<sup>5</sup> and soon afterward, in December 2005, reelected to the first Iraqi parliament the same politicians who had cut the deal for the constitutional carve-up of Iraq into two, and possibly three, separate regional entities. Confounding the lofty hopes of the constitutionalists, most Iraqis decided that they were not Iraqi at all. The resulting Iraqi state is, legally as well as practically, very weak: It has no power to tax if a region does not permit it<sup>6</sup>; it has management power over only a diminishing (albeit large) portion of Iraq's oil resources<sup>7</sup>; and beyond a small list of exclusive competencies, it is otherwise subject to regional paramountcy.<sup>8</sup> It is possibly the weakest federal government in the world. Why, one may ask in retrospect, would we have thought it might turn out differently?

### **Prelude to Constitution Making: A New Constitutionalism for Iraq?**

From the beginning of the March 2003 occupation of Iraq by coalition forces, Iraqi political circles, the Iraqi media, the U.S. administration, and the United Nations all assumed that establishing a constitutional democracy would be the hallmark of success

in post-Saddam Iraq. Well before Iraq's first national election on January 30, 2005, it was expected that writing a permanent constitution would be an important, perhaps crucial, turning point in Iraq's fortunes: It would be a moment of liberation, not only from Saddamism, but also from the congenital sense of arbitrariness from which Iraq, as a collection of ethnically and politically disparate Ottoman provinces and British colonial construct, had suffered. Iraq had seen constitutions before the Americans arrived; two of the most well-known examples were the Constitution for the Kingdom of Iraq, prepared in 1925 during the period of the British Mandate, and the interim constitution of 1990, which nominally governed the latter years of Baathist Iraq.<sup>9</sup> However, none of Iraq's previous constitutions were democratic, none satisfactorily acknowledged Iraq's regional and multiethnic nature, and the human rights protections expressed in these documents did little, in reality, to protect Iraqi citizens from abuse at public and private hands. Successive coups and atrocities by the autocratic rulers of Iraq through the twentieth century had eroded anything resembling constitutionalism and rule of law. From the very early days of the Coalition Provisional Authority (CPA)—the U.S.-led entity that the occupiers instituted in May 2003 as the governing body for Iraq—a new constitutional order for Iraq was a centerpiece of the occupation's promise of a new democratic future.

But a constitution drafted in what circumstances? Others have pointed out the irony that the CPA's early proposals for Iraq's constitution-drafting process hardly carried democratic credentials.<sup>10</sup> In the first two doomed iterations, the constitution was to be prepared by a CPA-appointed committee of Iraqi drafters, assisted in a somewhat public fashion by an American expert in Arab constitutions<sup>11</sup>; or, failing that, by a drafting body selected through a complicated system of caucuses, the members of which

were, again, appointed (albeit indirectly) by the CPA. The U.S. motivation behind these undemocratic proposals was clearly a fear that *elected* drafters—drawn largely from the ranks of Iraq’s religious Shia Arab majority—would be Islamist and pro-Iranian, and thus antipathetic to U.S. goals. Each of these proposals was, however, swiftly vetoed by Shia religious leader Grand Ayatollah Ali Al-Sistani, then at the height of his influence, who insisted in a *hukum sharii*, a religious ruling of greater strength than a *fatwa*, that Iraq’s constitution be written by the elected representatives of the Iraqi people.<sup>12</sup> The force of his edict was felt well outside the community of the Shia faithful. Thus began a series of political negotiations that resulted in the CPA’s promulgation of a March 2004 interim constitution that provided for a national election for a constituent body to prepare a new permanent constitution for Iraq.

The interim constitution—issued as a CPA edict<sup>13</sup> and known, somewhat euphemistically, as the Transitional Administrative Law (TAL)<sup>14</sup>—was itself far from a model of good constitutional or even good legislative process, as it was drafted by appointees of the occupier and there was very little citizen participation in its creation.<sup>15</sup> The CPA was to pay a heavy political price for its secretiveness.<sup>16</sup> However, at one remove, the TAL’s treatment of the way in which the future permanent constitution was to be drafted arguably met the ideals of any “new constitutionalist” model for participatory constitution making. The relevant provisions of the TAL are as follows:

Article 30. During the transitional period, the State of Iraq shall have a legislative authority known as the National Assembly . . . Elections for the National Assembly shall take place . . . no later than by 31 January 2005.

...

Article 60. The National Assembly shall write a draft of the permanent constitution of Iraq. *This Assembly shall carry out this responsibility in part*

*by encouraging debate on the constitution through regular general public meetings in all parts of Iraq and through the media, and receiving proposals from the citizens of Iraq as it writes the constitution.*

...

Article 61. The National Assembly shall write the draft of the permanent constitution by no later than 15 August 2005. The draft permanent constitution shall be presented to the Iraqi people for approval to a general referendum to be held no later than 15 October 2005. *In the period leading up to the referendum, the draft constitution shall be published and widely distributed to encourage a public debate about it among the people.*<sup>17</sup>

There is some anecdotal evidence that the citizen-friendly emphasis of these TAL provisions was sponsored and authored not by the Iraqi negotiators but, ironically enough, by U.S. government officials who presided over the drafting. Those negotiators perhaps did so out of anxiety at the opacity of the protoconstitutional discussion in Iraq up to that point.<sup>18</sup> On the central issue in Iraq—the nature of Iraqi federalism—the TAL reflected a U.S. bias toward strong central government in Baghdad, qualified by an important and last-minute concession to the Kurdistan regional government that any permanent constitution could be vetoed by three governorates, including the three governorates that formed the bulk of the territory of the Kurdistan Region.<sup>19</sup>

The significance of the TAL’s public-participation provisions was echoed a few months later, in June 2004, in the UN Security Council resolution that conferred international recognition on the coalition occupation of Iraq.<sup>20</sup> Though Resolution 1546 did not, in its terms, require popular participation in the making of the permanent constitution, it advocated the principle:

The Security Council . . . *Decides* that . . . the Special Representative of the Secretary-General and the United Nations Assistance Mission for Iraq (UNAMI), as requested by the Government of Iraq, shall . . . play a leading role to . . . *promote national dialogue and consensus-building*

*on the drafting of a national constitution by the people of Iraq.*<sup>21</sup>

Where, precisely, did these expectations of good constitutional process come from? It is not difficult to identify external, non-Iraqi influences at work. Certainly among the lawyers at the U.S. State Department and in the United Nations, there was an appreciation of the post-Cold War new constitutionalism and the symbolic significance of popular constitution making in the democratization of countries such as South Africa. Those lawyers turned their attention to more recent post-conflict experiences in Afghanistan and East Timor, where international programs supporting peacekeeping and governance culminated, almost triumphantly, in the entry into force of newly minted constitutions. These comparative constitutional experiences have been well documented and sustained, for some in Iraq, the dream, if not the reality, of constitution making as a safe space in which true, unmediated, uncolonized visions for a country's future could be expressed by its citizens. The image of two million South Africans helping to draft their successful constitutional compact was especially influential.<sup>22</sup>

Moreover, the overwhelming U.S. political and cultural influence in the elite politics of post-2003 Iraq brought to bear the specific U.S. vision of a constitution as the centerpiece of stability and democratic independence. The constitutionalism of Philadelphia is at the heart of the U.S. vision of its own democratic identity; it should not be entirely surprising that this vision was rhetorically projected by the United States, unaccustomed to managing a garrison state, onto the democratization effort in Iraq. In a dynamic familiar to observers of transitional governments, the idea of a permanent constitution for Iraq became, over time, more and more closely linked, in U.S. policy plans, with a nation building success and a plausible exit strategy. "The only path to full Iraqi

sovereignty is through a written constitution, ratified and followed by free, democratic elections. Shortcutting the process would be dangerous," CPA administrator L. Paul Bremer had stated the previous September.<sup>23</sup> However, these enthusiasms and expectations were also echoed in drier prose outside the U.S. government, even by those otherwise critical of U.S. policy in Iraq. Take the International Crisis Group: "Iraqis are to get on with the creation of a document that truly reflects them and their complex society, that will set up a durable state structure protective of all religious and ethnic communities."<sup>24</sup>

The internal, domestic pressures for a new constitutionalism in Iraq were less obvious and perhaps less strong. Without question, in the dwindling ranks of the educated Arab Iraqi middle classes, there was a nationalist yearning for a level of juridical normality unknown in the Saddam Hussein period, which was characterized by conspicuously "interim" constitutions, frequently breached—in short, no social compact at all. As one young Baghdad man put it in late 2004, "When we hear talk of a permanent constitution, our eyes light up."<sup>25</sup> In this nationalist vision, no particular constitutional outcome was the goal: It was enough to simply have a social compact, necessarily accompanied by a drafting process that would, somehow, engage the whole Iraqi population. The Iraqi Prospect Organization, a civil-society group with roots in the Shia south but following a liberal nonsectarian program, put it succinctly in December 2003: "This process in itself will help root democratic values and set Iraq on a course to freedom."<sup>26</sup> Never mind, for the time being, what "Iraq" actually was, and who in the end had a commitment to "Iraq" over other political entities.

The longing for a permanent social compact was powerful among Iraq's moderate Arab political elites as well. A senior independent Shia intellectual, Dr. Hussain Shahrastani, sharing the popular desire for



constitutionalism, recalled with a shudder one of Saddam Hussein's favorite *bons mots*: "A constitution is written by men so that another man can tear it up."<sup>27</sup> At the time, Dr. Shahrastani was deputy speaker of the national assembly and, apparently, was determined that the new constitution should not be so partial and flimsy. Though Ayatollah Al-Sistani's earlier insistence on an elected constitutional drafting body was typically interpreted in the West as a demand that the constitution should be authored by Iraq's Shia majority, the ayatollah was also trying, with mixed results, to express the importance of the Iraqi people generally having a say in the founding document for the future stability of the country. This view of Sistani's motives is supported by the many instances in which he later encouraged Shia politicians to bring Sunni Arabs into the drafting process, and indeed, by the liberal views on public participation that those Shia politicians closest to Sistani espoused, including the chairman of the constitution committee, Sheikh Humam Hamoudi; former National Security Adviser Mowaffak Al-Rubaie; and Dr. Shahrastani. Even if there was no strong Iraqi political identity, could not the act of drafting the constitution itself produce such an identity? Could not moderate, middle-class secularists, moderate Islamists, and moderate Arab nationalists come together and forge a new Iraqi state? Could not American constitutional idealism be harnessed to serve Iraqi ends?

Such was the more idealist constitutional narrative in Iraq. But within the complex frame of Iraqi politics, other less nationalistic, more pragmatic, and more powerful forces also worked to draw the public into the constitutional debate. Many Iraqis—particularly, but not exclusively, Iraqi Kurds—perceived that in a multisectarian, regionalized country, a permanent constitution would be desirable, if not necessary, less as a classic social compact between citizen and state, and more

as a kind of intercommunal, consociational peace treaty that might consolidate Kurdish independence from Baghdad.<sup>28</sup> Iraqi Kurds, having lived in *de facto* independence from Iraq and relative prosperity since the imposition of the no-fly zone at the end of the 1991 Gulf War, saw their own ethnic identity and the principles of their own regional constitution—in place, at least in draft form, from 1992—as the *grundnorms* of their largely secular and quasi-sovereign existence, not any Iraqi document. For Iraqi Kurds, who suffered years of Iraqi-sponsored genocide in the 1980s,<sup>29</sup> the posture toward a future permanent constitution for Iraq was essentially defensive; they wished to make sure that nothing agreed in Baghdad would erode their progress or qualify their autonomy.<sup>30</sup> To a lesser extent, the Shia Arab community replicated this approach in the south of Iraq, which had also enjoyed some protection against Saddam Hussein since 1991. This careful, pragmatic strain of constitutionalism was embodied in the unspectacular agreements among anti-Saddam oppositionists, including Kurdish and Shiite parties, at a 2002 meeting in London; these parties were united not by an Iraqi identity but by a common anti-Saddam agenda.

A constitution as treaty, then, would not be a principled document leading to the consolidation of Iraqi political identity; it would, more modestly, be a *modus vivendi* for the settlement of competing interests surrounding self-governance, resource management, and the role of religious law. As far as this last source of constitutionalism was concerned, the relevant analogies were less to the United States, or even Afghanistan and East Timor, and—though it was not spoken at the time—more to Bosnia and Herzegovina, Sri Lanka, and Sudan: countries where, if constitutional success was to be achieved, it would be in the absence of an overarching national identity. Even this pragmatic vision of an Iraq constitution, however, to some extent depended

on popular support and engagement. In Iraqi Kurdistan, which prided itself on its fledgling democratic principles, elites realized that the argument for autonomy needed to be made with reference to popular support—hence the spontaneous poll organized by the Kurdistan Referendum Movement at the time of the January 2005 election, intended to demonstrate support for Kurdish independence. The results, overwhelmingly in favor of Kurdistan's independence,<sup>31</sup> were a useful negotiating instrument for Kurdish negotiators in Baghdad the following summer as they pressed for greater regional powers. Less sophisticated methods of demonstrating popular support for constitutional issues, most notably the mass rally, were used in the much less democratic Shia south. In the ideological vacuum left by the collapse of the Arabist, secular nationalism of Saddam Hussein's Baath Party, it was these narratives of non-Iraqi identity that became stronger and stronger. For those who cared to notice, the vision of the Iraqi citizen was almost completely unrecognizable to most Iraqis.

These were the idealist and realist impulses within Iraq that the U.S. drafters of the TAL drew upon, intentionally or not, when they included the mandatory language of public meetings, public debate, and citizen proposals on the constitution of Iraq. The language became important very quickly. After the TAL drafting in March 2004, the merits of a careful, open, truly organic public drafting process became increasingly obvious and urgent. By the end of 2004, the Sunni Arab insurgency, composed of both Baathist sympathizers and Islamist radicals, gathered force, wreaking violence and radicalizing the world of even peaceful Sunni politics.<sup>32</sup> The Sunni Arab political elite made it clear that they would, in protest at the occupation of Iraq, boycott the January 2005 elections for the national assembly, effectively forfeiting their right to coauthor the constitution with their

Shia and Kurdish compatriots. With one of Iraq's three major communities having thus denied itself an elected seat at the drafting table, it followed that the only way in which Sunni Arab citizens of Iraq would be able to express their views to the constitution committee would be by direct communication; no person within the committee purporting to be a Sunni Arab leader would have the democratic legitimacy to adopt positions on the constitution on behalf of the Sunni Arab people of Iraq. In short, it was clear that unelected Iraqis would need to participate in the drafting. Therefore, the public participation component of new constitutionalism, at least within the Sunni Arab parts of Iraq, began to look less like the icing on the cake of universal suffrage and more like an essential peace-making instrument to prevent a full-scale civil war in the heart of the Middle East.<sup>33</sup> In the midst of a robust insurgency by the end of 2004, the secretly drafted TAL was already a failed document: Not a single substantive provision in it was implemented.<sup>34</sup> In particular, Kurdistan's regional government had not dismantled its irregular military forces, nor surrendered control of oil administration to Baghdad; human rights protections were in name only; provisions for the resolution of disputed internal boundaries were neglected; and the writ of the central government was barely enforceable in any part of Iraq. But, so the theory went, if Sunni Arabs could be persuaded to participate in and vote for a new, permanent constitution for a sovereign Iraq, then the alarming fractures that were opening up in Iraq could be narrowed and the coalition occupation of Iraq, apparently hated by the Sunni Arabs, could be brought to a close. Bromides about "inclusivity" and "public participation" by "civil society" began to get a foothold. This was a theory that was apparently shared across the country.<sup>35</sup> Secular, moderate, and Sunni idealists and Shia and Kurdish realists had much common

ground on the question of constitutionalism, if not the constitution itself.

In these circumstances, one might have thought that by 2005, U.S. policy settings would have been fixed to maximize the benefits, within Iraq, that widespread commitment to a participatory process and a carefully drafted Iraqi constitution might deliver. Those policy settings might have consisted of some combination of the following seven strategies: first, maximizing the likelihood that Sunni Arab politicians would be elected to the national assembly (and thereby to the constitution committee); second, making sure that the Sunni Arab elites understood the constitutional implications of their own minority status; third, ensuring that the implications were also understood in the Sunni Arab heartland, as much of the Sunni Arab elite had boycotted the political process under pressure from the insurgency; fourth, ensuring that the national assembly and the constitution committee established by the assembly were fully resourced and staffed to conduct a major, intensive, comprehensive outreach campaign to all parts of Iraq, including the Sunni Arab areas, to show the benefits of federalism to national minorities; fifth, if necessary, encouraging the drafters to invoke the time extensions built into the constitutional timetable to allow the engagement with Sunni Arabs to take place; sixth, working with Shia and Kurdish leaders to determine what symbolic or substantive concessions could be made to a Sunni position; and seventh, at all costs, removing any reason that Iraqis, particularly the highly nationalistic Sunnis, may have to suspect that the constitution for Iraq would be imposed by the United States.

In fact, the United States did not adopt such a policy, and not one of the strategies was implemented. Lurching between the loftiness of Philadelphia-inspired idealism and a readiness to abandon Iraq's constitution

to the vagaries of the U.S. domestic political timetable, the U.S. administration was quite unable to find political solutions for Iraq. In fact, through the constitutional process in 2004 and 2005, U.S. policy worked to eliminate the possibility of a moderate, realistic, federal political agenda emerging from the Sunni heartland. Sunni exclusion from the constitutional talks was mishandled. What commitment existed in Iraq's Sunni, Shia, and Kurdish communities toward participatory constitution making was more or less wasted.

### **The Constitution-Making Process and Its Unraveling**

#### *Election Failure: Sunni Arab Boycott*

The first concrete sign of Iraq's looming constitutional problem was the boycott announced by the bulk of the Sunni Arab leadership in advance of the January 31, 2005, election, required by Article 30 of the TAL. This boycott raised the specter of a constitution-drafting national assembly from which one of Iraq's major communities would exclude itself, massively undermining the status of any constitution that might ultimately emerge.

The scale of the problem was, as it turned out, compounded by the nature of the electoral law for Iraq—a law recommended by the Electoral Assistance Division of the Department of Political Affairs in the United Nations Secretariat. That law created for Iraq one single, nationwide electorate with proportional representation. The model was chosen in large part because it was easy to administer (the United Nations had implemented the same model in Afghanistan, East Timor, and elsewhere); because the model could, in theory, erode regionalism and sectarianism by forcing candidates to appeal to a nationwide electorate; and because

it gave greater scope to independent candidates and smaller parties. However, the law was prepared before the fact of a Sunni Arab boycott, and in the face of the boycott, the results of such an electoral approach carried serious consequences for Iraq's constitution. The effect of the single electorate model—as opposed, say, to a model in which each of Iraq's eighteen provinces would constitute an electorate—was ultimately to eliminate Sunni Arab representation almost entirely in the national assembly.<sup>36</sup> An electoral system based on Iraq's provinces, which might guarantee a minimum number of elected candidates from each province regardless of a low turnout in the province, would have produced an elected Sunni leadership—from the overwhelmingly Sunni provinces of Anbar, Salahiddeen, and Ninevah—of a size proportionate to the Sunni share of the Iraqi population. That leadership would have had some claim to be able to represent the Sunni people of Iraq in the constitution drafting.<sup>37</sup> As it turned out, however, the electoral law threatened to reduce Sunni representation in the assembly to zero; seats forfeited by Sunni Arab boycotters would go, in their entirety, to Kurdish and Shiite candidates. Any subsequent constitution would, therefore, be unbalanced.

As the *de facto* decision maker in Iraq, the U.S. government did little more than ponder the question of whether to postpone the January election, in the hope that the Sunni parties would relax their boycott. Throughout this period, the agony of insurgent violence and the overwhelming question of Sunni participation prevented parties from developing substantive constitutional platforms for election, which was remarkable given that the overriding responsibility of the elected was to draft a constitution. Calls to postpone the election originated with Sunni politicians, who were by now openly hostile to the U.S.-led coalition and unimpressed with the results of the CPA's June 28 handover of sov-

ereignty. The calls were picked up by opinion makers in the United States.<sup>38</sup> The U.S. administration did not postpone the election, however, and the boycott took place. In November 2004, Sunni Arab leaders, including the umbrella Iraqi National Foundation Congress, rejected the election on the grounds that it was taking place under coalition "occupation" and was therefore illegitimate and likely, in the words of the Muslim Scholars Association leader Harith al-Dhari, to be "faked."<sup>39</sup> Even the more moderate Iraqi Islamic Party—moderate enough to have been part of the CPA's governing council—pulled out of the election, provoked by the October 2004 coalition military offensive against the predominantly Sunni town of Fallujah and the deteriorating security situation generally.<sup>40</sup> The boycotts and the simultaneous campaign of violent intimidation of Sunni Arab voters by insurgents resulted in only 17 Sunni Arabs being elected to the 275-member assembly, a very low number compared to the proportion of Sunni Arabs in Iraq. Moreover, none of these delegates was elected as part of an explicitly Sunni ticket. By contrast, the Kurdistan Coalition List, drawing support from an electorate about the same size as the pool of eligible Sunni Arab voters, won 75 seats. The predominantly Shia United Iraqi Alliance won 140 seats—an absolute majority that, in theory if not in fact, gave the party the ability to write a constitution without involving any other political grouping, as the TAL, surprisingly enough, had prescribed no special parliamentary majority for the approval of the constitutional text.<sup>41</sup>

The low Sunni Arab turnout at the January election raised the likelihood of a draft constitution that would exclude Sunni Arab views and that, in an already deteriorating security environment, would cement Sunni Arab opposition to the program of any elected government. This opposition presented immediate juridical problems for the United States. The first problem was the possibility that the



constitution would be blocked at the referendum because of an overwhelming Sunni Arab vote against it in Anbar, Salahiddeen, and Ninevah.<sup>42</sup> This possibility was real, for the central functioning feature of the TAL was the provision, in Article 61(C), that gave any three of Iraq's eighteen provinces the ability to veto any constitutional draft by a two-thirds majority of votes.<sup>43</sup> Article 61(C) had been included in the TAL text as a modification of a demand from the Kurdish parties, who had strong support in at least three provinces and had perceived a threat to their de facto autonomy from an Arabist or nationalist Iraqi constitution; ironically enough, once included, an Article 61(C) veto posed the greatest threat to the Kurds, who were well-organized and therefore likely to do well in the constitutional negotiations. The Sunni Arabs, not the Kurds, were now the political outliers in Iraq, and the Kurds themselves would have a chance to write the permanent constitution, where they had no such chance with the TAL.

Sunni Arab opposition to the constitution also, however, presented a second, more grim problem that was not juridical but political in nature. Even if the constitution succeeded at the referendum, failed Sunni opposition to the text would signal a still more profound rupture in Iraq: a permanent sectarian cleavage in Arab Iraq between Sunni and Shia Muslims. This would spell the utter failure of Iraqi nationalist, new constitutionalist, and even pragmatist ambitions for a constitutional compact to include all three of Iraq's major groups. Once a permanent constitution for Iraq had been passed over Sunni Arab objections, that document would represent, indelibly, not only the absence of a shared Iraqi identity but also a failure to reach even a pragmatic treaty-like accommodation, with permanently destabilizing effects. The constitution would fail to deliver on the promise of Iraqi consensus and would be a permanent reminder of both Sunni Arab withdrawal of

consent to the Iraq state and the constant threat of violence.

*Process Failure: Time Pressures and the Exclusion of Sunni Arab Negotiators*

It was of the utmost urgency and importance that popular, if unelected, Sunni leaders be able to put to one side the anti-American politics that led to the boycott and come forward with a serious constitutional position that, within a federal framework, truly served the interests of their constituents. However, at the beginning of 2005, U.S. policy was not directed at supporting the development of a Sunni position on federalism. By April, when the first formal constitution discussions began in Baghdad, the overriding U.S. policy objective continued to be speed. The United States clung to the view that the breakneck timetable of the transition should be met at all costs; in particular, Iraqis were reminded, the constitution had to be completed by August 15, 2005, the first deadline specified in the TAL. Statements from U.S. government officials ignored the power that the national assembly had, under the TAL, to extend the August 15 deadline by six months "if necessary."<sup>44</sup> Necessity, in the circumstances, presumably would encompass an extension to secure the support of one of Iraq's three main communities.<sup>45</sup>

There was some reason to expect that even in the short period between the January elections and the August deadline, Iraq's Sunni Arabs might regroup and engage in the constitution drafting. For one thing, the Sunni leaders themselves were saying so. A number of Sunni Arab leaders publicly indicated in November 2004 that notwithstanding the election boycott, they would be willing to engage in the postelection constitutional discussions. Statements of boycott often contained an implication that if future constitutional discussions for a democratic Iraq were relatively free from coalition influence,

then unelected Sunni leaders could support those discussions as a sovereign Iraqi (and not foreign) process. In the weeks before the election, Shia and Kurdish party leaders reciprocated these Sunni Arab advances. As if to confirm the agreement, on January 27, Wamidh Nadhmi, a secular spokesman of the Iraq National Foundation Conference, echoing the views of the conservative Sunni fundamentalist Muslim Scholars Association, stated that despite the electoral boycott, "if we were invited by respectable committees [in the National Assembly] I don't see why we wouldn't say what we think of the constitution."<sup>46</sup>

Party leaders reaffirmed that this constitutional backup deal was on the table after the election results were announced in February, and their advisers acted accordingly. At that time, a group of Iraqi lawyers and political advisers discussed the question of Sunni Arab inclusion in detail in a cross-factional working session, convened by the United States Institute of Peace (USIP) and the American Bar Association near the Dead Sea, in Jordan. Senior UN officials attended the meeting. These discussions set the stage for a constitutional process that might have diminished the perception of illegitimacy among Sunni Arabs and other nationalists. Among other things, the cross-factional body recommended that Iraqis who were not elected to the assembly, including Sunni Arabs, should be appointed to any drafting committee or commission that the assembly created. These recommendations were apparently in line with Iraqi public expectation. The U.S.-based International Republican Institute's (IRI) polling conducted in April showed significant public will across Iraq to include Sunni Arabs in the constitutional process.<sup>47</sup>

As events transpired after the January 2005 elections, however, the fears of an exclusionary constitution-making process were realized. This was not immediately obvious.

The early weeks of the drafting process were promising in some respects. The national assembly leaders agreed that though the assembly was formally charged with responsibility to "write" the draft constitution under TAL Article 61(A), the 275-member assembly could appoint a smaller body to draft the document for later presentation to the larger assembly. This body—the constitution committee—was created, complete with thematic and functional subcommittees.<sup>48</sup> Moreover, with some U.S. and UN prodding, the leaders eventually agreed to the principle that nonmembers of the assembly could become members of the drafting committee. After some false starts,<sup>49</sup> Sunni Arab negotiators nominated fifteen<sup>50</sup> new representatives to join the assembly's fifty-five-member drafting committee in late June 2005, and the following weeks saw those representatives participate in the committee's activities.<sup>51</sup> The committee adopted the principle of consensus decision making<sup>52</sup> to provide some assurance that Sunni Arab members would not be sidelined in a committee on which, because they were not elected to the Assembly, they had no formal vote. In finalizing the committee composition in this way, the assembly implicitly rejected, without discussion, the earlier proposal developed at the February Dead Sea meeting that the constitution should, at least in the first instance, be drafted by a commission that would be independent of the government and the assembly, for later consideration by the assembly. The assembly also rejected the possibility raised at the Dead Sea meeting that the drafting body contain, as members, Iraqi civil-society representatives or constitutional experts.<sup>53</sup> Unelected members of the committee were added only to accommodate the most pressing constituency: Sunni Arab political figures.

Even so, the extent to which the committee could operate as a forum to express Sunni Arab constitutional positions was marginal at best. The real problem was that time was

slipping away; the August 15 initial deadline was approaching. Prolonged negotiations over the formation of an Iraqi cabinet absorbed all political attention until April 28. Negotiations over committee membership continued until May 11. The chairman of the committee was not appointed until May 23. The result was that the period during which Sunni Arabs were able to take part in the committee's activities was incredibly short. It was late June before the fifteen Sunni Arab members were invited onto the committee, and it was later still, July 8, before they attended their first meeting. On July 13, the Sunni committee members arrived at the convention center and were shown texts of the sections of the constitution to which the subcommittees already had agreed, texts that settled almost all but the most important of constitutional questions, the respective powers of central and regional governments in the federation. Matters were complicated horrifically on July 19, when a Sunni Arab committee member, Sheikh Mijbil Issa, was assassinated, together with his adviser, in the Baghdad suburb of Karrada, presumably by Sunni Arab insurgents. Some Sunni Arabs on the committee suspended their membership until the government could assure them a higher level of security protection.

Meanwhile, the drumbeat from the United States on the immovability of the August 15 deadline continued. Committee leaders, having committed repeatedly and publicly to meeting the default TAL constitutional deadline of August 15, remained under intense time pressure from the United States to produce a draft. Public and private statements of senior U.S. officials, including the national security council senior director for Iraq, Meghan O'Sullivan,<sup>54</sup> Deputy Secretary of State Robert Zoellick,<sup>55</sup> Secretary of State Condoleezza Rice,<sup>56</sup> Secretary of Defense Donald Rumsfeld,<sup>57</sup> and the president himself,<sup>58</sup> dramatically increased this pressure. These statements made it clear that any move

to extend the constitutional deadline beyond August 15 would earn the displeasure of the U.S. government, on which, at that time, all politicians in Baghdad depended for their salaries and security. "The [United States] supports the Iraqi people in their desire to complete a constitution by August 15"<sup>59</sup> was the standard pronouncement, made in circumstances in which an expression of that desire was far from universal within Iraq. The desire was only ever expressed by pro-U.S. Iraqis after they had heard that the August 15 deadline was a demand of the United States government.<sup>60</sup>

Most of the Iraqis closest to the negotiations clearly favored a more extended timeline, including—though he never publicly announced as much—the chairman of the committee, Sheikh Humam Hamoudi, himself a quiet proponent of the southern federal region and particularly attuned to the fact that Iraq's Sunni Arabs were unprepared for such a structure. Under the terms of the TAL, if the assembly were to invoke the provisions to extend the constitutional process, it would have to do it before August 1, presumably on the committee's advice. On July 31, Sheikh Hamoudi indicated to the committee his wish to extend the process to September 15. In early June, he had already sought confidential independent advice from foreign consultants<sup>61</sup> on timeline extension options; the immense work needed to reach true consensus weighed heavily on his mind. This preference for an extension was shared by Mahmoud Othman<sup>62</sup> and other senior Kurdish negotiators, representatives of the group that was least dependent on U.S. protection and that, ironically, most benefited from the haste.<sup>63</sup> Foreign advisers to the Kurds, often suspected of encouraging Kurdish maximalism, also recognized the coming collision and supported extending the timeline or even abandoning the constitutional project altogether.<sup>64</sup> Senior Shia list officials on the committee, including Abbas Bayati, lent

further support to extension,<sup>65</sup> as did—privately—senior independent Shia leaders in the assembly, such as committee member and chairman of the Council of Iraqi Minorities Dr. Hunain Al-Qaddo and Dr. Younam Kanna, committee member and leader of an independent Chaldo-Assyrian Christian party.<sup>66</sup> The leaders of most, if not all, important civil-society organizations saw the problem and expressed their desire for an extension. Focus group research conducted in April 2005 by the U.S.-based National Democratic Institute (NDI) had already revealed strong reservations across Iraq regarding the value of a hasty constitutional process.<sup>67</sup> On August 1, the speaker of the assembly, moderate Sunni Islamist Hajim Al-Hassani, was clearly expecting to receive a request from Sheikh Hamoudi for an extension. Some outside observers, including the International Crisis Group, had noticed the wide interest in an extension and had publicly doubted the possibility and desirability of meeting the August 15 deadline. These outside views, picked up and echoed widely in the U.S. media,<sup>68</sup> in turn influenced the Iraqi political class.<sup>69</sup>

The United States, however, maintained its policy of haste, even when it was clear that no constitution was emerging from the committee, no public discussion had been conducted, and calls from Washington to accelerate the drafting process were increasingly heard as expressions of imperial power. In the days prior to August 1, U.S. ambassador Zalmay Khalilzad convened meetings with political party leaders to impress upon them the importance of meeting the August 15 deadline. He issued similar messages to members of the international community. The U.S. government's strong demarches stand out as the principal reason for the assembly ultimately declining to invoke the TAL extension provision on August 1. The rationale behind the rush to a deadline was sometimes explained by U.S. officials as the need to keep momentum in the Iraqi political process; what was

unstated, but widely assumed, was the desire of the George W. Bush administration to direct the attention of the U.S. public to some perceived—though, realistically, arbitrary—measure of success in Iraq.<sup>70</sup>

Under this pressure, the committee eventually snapped. By late July, the U.S. embassy was clearly unimpressed with the drafting progress the committee had made to that date and decided to move the discussions to a nonexpert, elite political level. The committee was effectively scrapped or rendered defunct by the closed-door meetings of political party leaders that began in the Baghdad International Zone on August 8, explicitly convened by the U.S. government. Scrapping the committee on August 8 meant that the Sunni Arab committee members, after no more than one month of halfhearted efforts to develop and assert a coherent constitutional position on Iraqi federalism, were retired en masse. The span of their entire life on the committee ran from July 8 to August 8.

After August 8, constitutional negotiations took place in a series of private, ad hoc meetings among Kurdish and Shia party leaders—the so-called Leadership Council, as it was termed by the international press, or more informally by committee members, the kitchen (*matbagh*).<sup>71</sup> In its basic form, the Leadership Council consisted of Supreme Council for the Islamic Revolution in Iraq (SCIRI) leader Abdul Aziz al-Hakim, Shia Dawa party leader and prime minister Ibrahim al-Jaafari, and Kurdish party leaders Jalal Talabani and Massoud Barzani.<sup>72</sup> No member of Iraq's Sunni Arab community was a member of the council. The meetings took place at irregular intervals at a number of private residences and compounds in the International Zone, and occasionally at the U.S. embassy. The U.S. ambassador was almost always present, but the Sunni committee members had no right of attendance and were not often invited, even though they frequently requested attendance. There were



so few Arab nationalists in the room that much of the discussion was conducted not in Arabic, but in Farsi.<sup>73</sup> The U.S. ambassador, in his haste, would have consented to a Shia demand that clerics be appointed to the Supreme Federal Court, had certain secular negotiators not leaked this fact to the U.S. media. The expectation instigated by the U.S. embassy was quite clear: the Shia and Kurdish parties would agree to a constitutional text, which would then be presented as a fait accompli to the Sunni Arabs, who would be asked to take it or leave it.<sup>74</sup> Though the August 15 deadline was overshot—in legally dubious circumstances—this is exactly what happened: Instead of taking it, they left. This carried grim implications that the Sunni leaders pointed out immediately: “We warn of dire consequences of this situation.”<sup>75</sup>

The problem was not the intrusion of elite politics upon some pristine expert constitutional drafting process. On the contrary, the sheer pace of the timetable made a farce of both idealist constitutionalism and any pragmatic form of intercommunal political bargaining.<sup>76</sup> The Kurdish and Shia members of the Leadership Council, though given license by an unwitting United States to dismantle the hitherto Sunni-dominated Iraqi state, were themselves distinctly uneasy with their instructions; the convening of the Leadership Council on August 8 had been delayed for weeks while the U.S. embassy strenuously pressured Kurdish national leader Massoud Barzani—the politician who most gained from the compressed timetable—to agree that a constitution for Iraq was worth the trip from the mountains. He came down from the mountains, spoke with Abdul Aziz Al-Hakim, and, to paraphrase Boris Yeltsin, they took as much sovereignty as they could swallow. The immediate result was a draft constitution that made petroleum production a regional power, stripped the federal government of taxation power, enshrined the ability of regions to maintain a regional guard,

and allowed new federal regions to be created by a unilateral electoral act. The Leadership Council summarily removed provisions establishing the powers of a federal human rights commission and the powers of an upper house of federal parliament and concentrated on bolstering the powers of regions. The future of Iraqi federalism now pivots around a uniquely short set of exclusive federal powers<sup>77</sup> and a provision that states that in all other matters—including by implication criminal process, personal status, and human rights—regional law takes priority in any conflict.<sup>78</sup>

### *Consequences of Rushing the Process: the Lost Sunni Arab Constitutional Agenda*

Before the Leadership Council began meeting on August 8, would a more extended time period for constitutional deliberations within the committee have produced a better result? Would this have created the conditions for Sunni Arab engagement with Iraqi federalism? Given the committee’s shortcomings, the proposition that an extension would have helped is, at first glance, doubtful. Through June and July, the committee lacked the ability to identify constitutional issues and reach common ground across factions. No agreement had been reached on the all-important questions of oil management and revenue, the role of religion in the state, or the status of federal regions. With some encouragement from the United States, the question of the very structure of the Iraqi state was frequently shrunk, in an exercise of rhetorical wishful thinking, to the issue of federalism—apparently just one of a number of issues, such as de-Baathification or the ethnic identity of Iraq. Committee drafting work was slow, and discussions at committee meetings were frequently abstract and academic. The discussions did not involve the practical bargaining and trading clearly necessary to produce the consensus that the committee

had established rightly as its goal. Moreover, political party leaders did not provide their committee representatives with clear mandates, inhibiting true consensus. The short life of the committee was characterized by frequent resignations and walkouts by Sunni Arab, Kurdish, and other representatives. Committee meeting minutes were not taken, so that progress was not especially clear or transparent. Subcommittees produced draft chapters haphazardly, without consulting the committee in plenary.

The committee also did not adopt a set of rules and a work plan to clearly define, for all participants, the stages in the constitutional process. There was no protocol to address the fact that crucial off-line bilateral negotiations among the three major political blocs of Shia Arabs, Kurds, and Sunni Arabs would be needed at each step of the way. Nor was there a protocol for committee interaction with the Iraqi public. Occasional press conferences were held in the heavily guarded convention center in the International Zone to update the media on the committee's drafting work, but these did not involve serious dialogue on constitutional issues. In many respects, too, many viewed the committee's failures as specifically Sunni Arab failures. The Sunni Arab committee members were continually criticized for being drawn largely from the Baghdad political elite and insufficiently representing their constituency. Meanwhile, the Kurdish and Shia committee members wrestled interminably with their incompatible desires to exclude former Baathists and consolidate their gains or, in the face of the electoral boycott, to find truly representative Sunni Arabs with whom a durable constitutional order might be negotiated. Some on the committee felt that Sunni Arab civil-society leaders, including tribal leaders, had been largely overlooked to the peril of the final constitution but were unable or unwilling to make a serious effort to find Sunni Arab

pragmatists who might, in particular, accept a federal rather than a unitary state.<sup>79</sup>

Such a profound failure does not necessarily mean that representative, pragmatic Sunni leaders actually existed in Iraq at that time. Even with all the time in the world, the gap between the Sunni Arab and Shia constitutional positions on federalism may not have been reconcilable within the committee. Even if the Sunni Arabs had accommodated themselves to the reality of a legally distinct Kurdistan Region, there was arguably little chance that the Sunni Arabs would reach an accommodation with SCIRI, which, over the course of July, pressed for a constitutional right to create a new southern federal unit to mirror that of Kurdistan, a much greater threat to the Arab nationalist identity. The model of federalism the Kurdish and Shia kitchen finally offered to Sunni Arab negotiators at the end of August would not only consolidate a large degree of autonomy for the Kurdistan Region but would also allow for other future federal regions, including a southern, predominantly Shia, federal unit. In rejecting this model, the Sunni Arabs took a stance that bluntly and fundamentally contradicted the bilateral Kurd-Shia agreement on the terms of a regionalized Iraq, when that agreement was apparently not open to modification.<sup>80</sup> The central Sunni Arab objections as stated lay with the prospect that a southern federal unit would radically challenge a Sunni Arab conception of the integrity of the Iraqi nation and—so it was imagined—sandwich weak Sunni Arab nationalists between the two strong and oil-rich provincial powers of Iraqi Kurdistan and a new Iraqi “Shiastan.”

The general sense of despair within the committee over its irreconcilable views turned into personal hostility. As constitutional rhetoric amplified toward the end of July, adherents of the Kurdistan and Shia parties alleged in public and private, and not without

foundation, that the Sunni Arab negotiators had no intention of finding common ground. They stated a belief that the Sunni Arab negotiators had as their primary objective the assembly's failure to meet the August 15 deadline. Under the relevant TAL provisions, a failure to meet—or extend—the August 15 deadline would automatically precipitate the dissolution of the assembly and mandate elections for a new assembly, to which more Sunni Arabs would be presumably be elected.<sup>81</sup> In their darker moments, Kurdish and Shia negotiators apparently believed that this so-called nuclear option was the primary ambition of the Sunni Arabs, a belief that in turn strengthened the hands of Kurds and Shiites looking for pretexts to disband the committee and strike a bargain over the Sunnis' heads.<sup>82</sup> If Sunni Arabs had never intended to cooperate—if the Sunni leadership was conducting, in the negotiating room, a similar style of resistance to that of the armed insurgency then raging throughout Iraq's cities more fiercely than ever<sup>83</sup>—what hope was there for any constitutional process in Iraq? Why not just accept the U.S.-imposed timetable? Several indicators suggest, however, that Sunni Arab positions had not hardened against federalism and were not as intractable as some have suggested. An extended constitutional process very likely would have produced better results.

#### *The Moderating Sunni Arab Position on Federalism*

First, influential sections of the Sunni Arab community in June and July, in evolving discussions on the terms of Iraqi federalism, were beginning to produce more moderate constitutional positions—not out of any growing sense of fellow feeling with their Kurdish and Shia counterparts, but out of grim pragmatism. There were signs that some influential Sunni Arabs were coming to accept the possibility that federalism

might even work to their benefit.<sup>84</sup> Sunni Arab negotiators had already accepted a governorate-based federalism that would imply self-government in Sunni Arab areas of Iraq. As one Sunni Arab lawyer put it: “When you ask a Sunni if they want Anbar to rule Najaf they say no; if you ask if they want Najaf to rule Anbar, they say no. They want federalism without realizing it.”<sup>85</sup>

Moreover, at no point was there a strong statement by Sunni Arab negotiators against the existence of a relatively autonomous Kurdistan Region. Rather, some Sunni Arab opinion makers were working with their constituents to bring about credible and acceptable Sunni Arab positions. Groups of secular Sunni Arab lawyers, including the National Constitutional Association, were working strenuously to modify the hard-line views of more extreme Sunni groups, including the Muslim Scholars Association.<sup>86</sup>

In the final days of August, some leading Sunni Arab negotiators were privately sympathetic to some models of Iraqi regional federalism but were unable to openly modify their positions because of the views of their constituent institutions and populations. Opinion data collected by NDI and others show that hostility in Sunni Arab society to the concept of federalism stemmed not from informed self-interest but rather from a misperception that federalism (*ittihadiyyah*) was some kind of code word for Kurdish separation and, more generally, the partition of Iraq.<sup>87</sup> There was scant recognition in the Sunni Arab heartland that federalism is an internationally recognized way to structure a state that can be mutually beneficial as to the respective interests of different regional and ethnic groups. Nationwide interviews conducted by the UN Office for Project Services between July 20 and July 25, 2005, showed that of the Sunni Arabs in the interview group, 51.7 percent believed federalism would lead to a divided Iraq and 46.8 percent

believed federalism would lead to civil war; only the remaining 2.5 percent of the Sunni Arab interview group took the third choice, concluding that “federalism will ensure the rights of Kurds and other minorities.”<sup>88</sup> By comparison, a year earlier Shia popular opinion reflected a similarly limited understanding of federalism, including a belief that federalism simply meant Kurdish separation. Over several months of Shia strategizing on constitutional matters, the position of popular Shia sentiment moved significantly—if not uniformly—toward accepting federal constitutional models, as evidenced by the August 11 show of support for a southern federal region. Similarly, if Sunni Arab constitutional negotiators were to accept the terms of a federal Iraq, their constituents would need to authorize them to do so. Getting Sunnis talking about federalism was clearly essential. By July, the dialogue had clearly begun, but the deadline of August 15 did not allow it to produce results. The Sunni Arab position as articulated in July and August was premature, emotional, and, most crucial, without the benefit of an informed debate among the broader Sunni Arab population.<sup>89</sup>

### *Imbalanced Negotiating Capacity*

The highly compressed timeline for constitutional discussions also amplified the imbalance between the competence of the established Kurdistan and Shia parties on the one hand and the Sunni Arab representatives on the other. The August 8 dissolution of the committee apparatus and the beginning of a last-minute, unstructured three-way negotiation shifted great weight, very suddenly, onto the respective negotiating teams. The Sunni Arab team was, by far, the least organized, further radicalizing their position.

By August 2005, the Kurdistan Region parties were well prepared for ad hoc negotiations. They had developed constitutional positions and even draft Iraqi constitutional

texts that, over time, became increasingly ambitious and firm. The Kurds had internally agreed on their nonnegotiable red-line positions, which committee members from the Kurdistan Coalition were not at liberty to modify.<sup>90</sup> During the January election, the Kurdish parties orchestrated a region-wide poll that predictably showed a popular preference for independence over integration into Iraq. This result sent the message to non-Kurdish parties that the Kurdish leaders had little room to retreat from maximalist constitutional positions. Similarly, in late July, the Kurdistan national parliament gave the Kurdistan parties a clear mandate on these red-line positions, which were made public.<sup>91</sup> Street demonstrations across the Kurdistan Region on August 15 also showed support for the Kurdish parties. Furthermore, the Kurdish parties were able to invite into the ad hoc meetings experienced non-Iraqi negotiators and constitutional lawyers to advance the Kurdish case.<sup>92</sup>

The Shia parties, for their part, did not have clear mandates from their constituencies and did not choose to deploy foreign experts or negotiators. The Shia Alliance position during the final days of the Shia-Kurd negotiations was subject to radical changes and reversals, frequently wavering on the basic terms of federalism, petroleum management, and the constitutional status of Shia clergy. Somewhat surprisingly, no Shia party tabled a ready-made draft constitution for Iraq. (An earlier, very Islamist-influenced draft, circulated in early 2005 by a branch of the Islamic Dawa Party of Iraq, did not arrive at the negotiating table.)<sup>93</sup> Strong factions within the Shia Alliance, however, clearly had resources to use as soon as their strategic interests became clear. On August 11, in the final days of negotiations, SCIRI leader Abdul Aziz al-Hakim mobilized the well-organized SCIRI base to stage large public demonstrations in Najaf and other southern Iraqi cities in favor of forming a southern federal region, a move



even the Kurds declared to be surprising.<sup>94</sup> Anecdotal evidence suggests also that the government of Iran was channeling financial and in-kind support to bolster SCIRI's position.

The Sunni Arab negotiators, though not without institutional affiliation and support, lacked the ability to rally constituents and resources around a coherent constitutional strategy. Iraq's Arab neighbors had had little practical experience with constitutional matters and were of little help. At least until August, there was no clear Sunni Arab constitutional position at all beyond an outright rejection of the offered document. Again, Sunni Arab competence, negotiating mandates, and ability to organize the constituency could have coalesced with adequate time, but time was the resource least available to them.

The capacity imbalance further isolated and radicalized Sunni Arab negotiators; without an institutional means of developing a considered constitutional position, Sunni Arab negotiators resorted to emotional, rejectionist postures. The vehicle of the committee had perhaps been crucial in holding open the possibility of a rational Sunni engagement with the principles, and the merits, of federalism. Definitive Sunni Arab denunciation of regional federalism of the sort that the Kurds and SCIRI proposed came after, not before, the committee dissolution on August 8. As the July and August ad hoc discussions progressed, it became increasingly commonplace for Iraqi leaders to identify themselves and act according to ethnic and sectarian politics. The Sunni Arab participants, who typically (and misleadingly) saw themselves as simple nationalists,<sup>95</sup> were not well versed in these practices and did not succeed in pressing a coherent Sunni Arab constitutional position. As with any negotiation, all parties were hurt by the relative lack of competence of one side. Sunni Arab negotiators, in chaotic retreat, quickly moved

away from the negotiating table and reverted to a strategy hinging on veiled and unveiled threats of nonparticipation, support for the armed insurgency, and opposition to the referendum. Constructive bargaining was finished almost before it began.

#### *Lost Opportunities for International Mediation*

The compressed time frame also undermined the ability of the United Nations and independent foreign constitutional experts to mediate among the parties to the negotiations and to help foster a realistic Sunni Arab agenda. The constitutional support team of the United Nations Assistance Mission in Iraq (UNAMI), led by South African lawyer Nicholas Haysom, arrived in Baghdad in May 2005 to begin the task of supporting the committee.<sup>96</sup> UN headquarters had been slow in starting to discharge its constitution-making mandate under Security Council Resolution 1546, waiting to formalize its role with the transitional Iraqi government and taking time to assemble its constitutional team. As in East Timor and Afghanistan, the United Nations in Iraq suffered from the lack of a ready roster of experts for rapid deployment to the field in support of post-conflict constitution making.

The Iraqi government did not issue a formal invitation to the United Nations to help with the constitution—required under the terms of Resolution 1546—until early June 2005. Further, committee chairman Sheikh Hamoudi was clearly skeptical of the value and propriety of any international involvement, however enlightened and unobtrusive, in the Iraq constitution-making process. Before this invitation was issued, Haysom, a veteran of the South African constitutional negotiations, worked behind the scenes to help the committee incorporate Sunni Arabs as members and offered assistance on community outreach. He developed a consensus model of decision making that would avoid

the question of whether Sunni Arab appointees would have full voting rights. After the invitation was reluctantly issued to the United Nations, Haysom worked with the committee in designing the arrangement of thematic and technical subcommittees. On the substance, he explained to the committee a number of comparative federal models that might be sufficiently flexible to allow for the addition of future federal units and balance regional and national interests in natural resources. A paper he circulated on August 10, "A Framework for Decentralised Government in Iraq," set out a scheme of exclusive federal powers, a mechanism for the creation of new federal units, and joint federal-regional oil management. This paper would have carved out a clear, viable space for a central Iraqi government and thus would have been at least minimally sellable to Sunni Arabs. Kurdish and Shiite negotiators immediately accepted the paper, but the U.S. embassy rejected it as unsuitable on the grounds that it did not centralize petroleum power in Baghdad. The United Nations, in a move that it may now regret, withdrew the paper.<sup>97</sup>

Foreign experts brought to Iraq by the United Nations and USIP, including constitutionalism expert Professor Yash Ghai, had also made good early progress, working directly with Sheikh Hamoudi beginning in early June. With the sheikh's encouragement, they gave particular attention to the Sunni Arab committee members, spending much time illustrating the value of federalism in multiethnic states. Professor Ghai referred extensively to comparative constitutional models, explaining that federalism, far from precipitating the breakup of the state, in fact might hold Iraq together. "Iraq does not face a choice between a unitary or federal/autonomous system," he advised, "but between federalism/autonomy and bitter civil war (and ultimately no Iraq)."<sup>98</sup> During this time, committee members studied the Spanish constitution closely. Though it never

commanded the support of the Sunni representatives, more than any other model, the Spanish constitution provided the conceptual basis for the gradual process of creating new federal regions negotiated in the final Iraq text.

The colloquies with Sunni Arabs were broken, however, when the committee dissolved in August. Though Haysom had quite properly formalized a role for UNAMI in dealing with the committee, as of August 8 and the committee's de facto dissolution, the UNAMI role became unclear and informal. Haysom and other UN officials were sometimes called on to speak to party leaders and perform secretariat functions to the Leadership Council. The UN officials worked especially hard with Saleh Mutlaq of the National Dialogue Council, who had emerged as the most prominent, if not most reasonable, Sunni Arab negotiator, to reconcile his views with those of the Kurdish and Shia leadership. By this stage, however, there was no longer a negotiating table to which the United Nations had a standing invitation. The UN position was considerably weakened, especially by U.S. intervention in the negotiations. The UN role with respect to the Leadership Council was never clarified or assured.

#### *Increased U.S. Visibility*

The compressed timetable allowed, and inevitably required, a much heavier and more visible involvement of U.S. officials in the negotiations than would otherwise have been the case. August 15 was, after all, their deadline. The fingerprints of a foreign power in something so uniquely sovereign as the writing of a constitution is probably always regrettable, and not least in the heart of a Sunni Arab-dominated Middle East, in which national identity is almost by definition anticolonial. Even moderate Sunni Arab nationalists would frequently express the fear

that the Iraq constitution would be written in Washington, DC, and, as one Baghdad University political science professor put it, only half-joking, “dropped from a helicopter onto Baghdad.”<sup>99</sup> Prior to August 8, the U.S. embassy had kept some distance from the committee, referring to the need for the Iraqi constitution to be settled with Iraqi, not American, solutions. It was apparently not possible, however, to maintain this distance and at the same time to insist, as a matter of U.S. policy, that the August 15 deadline be met. From the time the Leadership Council was formed, U.S. Ambassador Khalilzad attended its meetings regularly, and U.S. embassy officials were engaged in less-than-subtle efforts to accelerate a final constitution. Several of the early meetings of the Leadership Council took place at the embassy. By August 10, the United States was expressing strong views on substantive constitutional issues to reach what they hoped would be fast compromises that resembled the terms of the TAL. The United States failed to centralize the petroleum sector, but its lumbering presence, with the suit pockets of embassy officials bulging with drafting suggestions, had been felt.

On August 12, in further efforts to accelerate the drafting process, the U.S. embassy circulated its own draft constitution in English. This took the form of a track-changes version proposing amendments to the committee’s draft text and offering extensive U.S. views on the terms of federalism, the judiciary, human rights protections, de-Baathification, and other matters.<sup>100</sup> It is grimly ironic that the U.S. government, having urged an early Shia-Kurd deal on federalism to the exclusion of Sunni Arabs, expended a great deal of strenuous and ultimately futile effort in the final days of negotiations urging a speedy settlement of outstanding issues by pressing the Shia parties to accommodate Sunni Arab concerns. This effort included a telephone call from President Bush to SCIRI leader Abdul

Aziz Al-Hakim on August 25. The American press and the Baghdad-based *Al Sabah* newspaper reported this telephone call,<sup>101</sup> raising the U.S. profile in Iraq to a point that might be seen to confirm Sunni Arab suspicions that the constitution would be a U.S. or, worse, an Iranian product, as the president’s call resulted in no observable softening of the SCIRI position. Finally, Ambassador Khalilzad took the unusual step of attending the national assembly’s meeting on August 15, at which its leadership moved for a seven-day extension, and again on August 22, when a further extension was sought. Domestic Iraqi television channels broadcasted his attendance in the assembly, predictably attracting criticism from Iraqi nationalists and some Arab media.

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All these factors amplified Sunni Arab hostility to the constitution at precisely the moment when Iraq was heading into civil war, a fact that eclipsed the other casualties of the constitutional process. Not one of the fifteen Sunni representatives in the constitution committee endorsed the constitution, and Iraq’s Sunni Arabs voted overwhelmingly against the constitution in the October referendum,<sup>102</sup> setting the stage for a prolonged civil conflict with key constitutional issues—including federalism—at its heart.

### *Final Process Breakdown: Charges of Illegality*

Beyond the impact on the Sunni Arab negotiating position, the headlong rush to August 15 led to grounds for worse criticism still, as the assembly overshot the deadline but chose to ignore the TAL provisions dealing with this eventuality. It was predictable from the outset of the process that even with the scrapping of the committee, the August 15 deadline was not likely to be met, given the ambitious goals, the complex and conten-

tious political environment, and the delayed start. Not surprisingly, then, the unrealistic decision on August 1 not to extend the timetable beyond August 15 using TAL Article 61(F) led to a series of ad hoc assembly decisions after the deadline was missed. This exposed the assembly to reasonable accusations that it was operating illegally. Sections 61(E) and (G) of the TAL treated the eventuality of a missed August 15 deadline in the same way as a failed referendum. In both cases, the TAL prescribed that “the National Assembly shall be dissolved. Elections for a new National Assembly shall be held no later than 15 December 2005.” Had the assembly behaved lawfully, the argument goes, it should have automatically dissolved, leaving the government to plan for new elections.

The precise nature of the assembly’s proceedings on the evening of August 15 are unclear, though it seems arguable that the assembly, by a show of hands that exceeded the necessary 75 percent majority, effectively amended the TAL to change the deadline to August 22. In doing so, it seems that the assembly acted lawfully, albeit in a way that the TAL drafters may have thought eccentric. It is less clear, however, that the speaker’s August 22 announcement allowing the assembly three additional days,<sup>103</sup> or an August 25 press conference purporting to grant the assembly still more time,<sup>104</sup> conformed to either the letter or the spirit of the TAL. The reading and adoption of the constitution by the assembly did not take place until August 28.<sup>105</sup> For its part, the U.S. embassy had always been somewhat vague as to the legal consequences of a failure to meet the August 15 deadline, being unwilling to discuss publicly the probable scenario that the deadline would not be met. Regardless, after August 15, the assembly did not formally amend the TAL deadline, and after August 1, formal amendment of the TAL deadline was the only legal mechanism by which to avoid the mandatory provisions of Article 61(E) and

(G). The Leadership Council was clearly unwilling to submit a series of rolling amendments of the TAL deadline to the assembly, in circumstances where the negotiating text of the constitution was being withheld even from assembly members. The Iraqi constitutional process was remarkable for the way in which assembly members, though legally charged with responsibility for writing the draft, were sidelined. Rank and file national assembly members had no access to constitutional drafts from August 8 to August 22, and the assembly leadership denied members’ requests to address constitutional issues on the floor.<sup>106</sup>

Criticisms from the Sunni Arab community and elsewhere stating that the assembly acted contrary to the interim constitution continued to be aired after August 28, strengthening claims that the assembly and the document it later produced lacked legitimacy.<sup>107</sup> Worse, the version of the draft constitution that the assembly apparently endorsed on August 28 was later changed in negotiations before the United Nations printed and distributed five million copies throughout Iraq ahead of the referendum<sup>108</sup>; worse still, the distributed version was changed again, right up to October 12,<sup>109</sup> without formal public notification. In short, the assembly and the public were left in the dark, even up to the point of the referendum, as to the status and contents of the constitution. It is likely, of course, that had the United States allowed the assembly to adopt a more realistic deadline—a deadline that the assembly could reasonably meet—the constitution would not be exposed to claims of illegality and illegitimacy.

### *Collateral Damage: Exclusion of Civil Society*

Sunni politics and the legality of the final document were not the only casualties of Iraq’s constitutional process. Other casualties must be recorded if only because they con-



firm how far the Iraq constitutional process was from the ideal of new constitutionalism. The breakdown of the process worked against the interests of women, ethnic and religious minorities, and liberal and centrist political formations. From the time of the occupation, the continued rise of sectarian and ethnic political parties fragmented and marginalized these groups. It is thus doubtful whether any constitutional process, however inclusive, would have delivered to them the constitutional recognition they sought, such as strong statements of equality and human rights protections. Shia Muslim religious conservatives, clearly in the ascendancy by the time of the constitution-making process, contested those objectives at every step. Nevertheless, small and marginalized segments of Iraqi society had, by August 2005, hardly had the chance to group together under strong civil-society institutions to press their claims.

Some of the most promising initiatives in the postelection period came from nonpartisan leaders who wanted to form umbrella organizations to represent what remained of Iraqi civil society in constitutional discussions. From a centrist, relatively secular perspective, Dr. Ghassan Al-Atiyyah of the Iraq Foundation for Development and Democracy developed a proposal for an independent constitution commission (ICC). The ICC's stated purpose was to work alongside the official constitution committee and bombard it with civil-society constitutional views, under the oversight of a board composed of senior political party members. The ICC membership would consist of a large number of Iraqi non-governmental organizations (NGOs) that were active in canvassing popular views on the constitution through 2005.

Similarly, the Thaqlayn Research Institute, an independent Shia religious NGO, started up a civil constitutional forum of NGOs under the leadership of Dr. Sallama al-Khafaji and Sheikh Fateh al-Ghitta. The forum was designed to educate religious Shia

communities on the value of constitutionalism and the separation between religious institutions and the state as well as bring consolidated civil-society views to the committee. Both the Iraq Foundation for Development and Democracy and the Thaqlayn Research Institute were, in the end, able to play a modest role in engaging the committee. Neither organization, however, realized its goal of creating the institutions necessary to strengthen civil society's influence on the draft. As the time-pressured Kurdish negotiators quickly withdrew their commitment to federal institutions in reaction to Sunni Arab centrism, the major axis of progressive secularism in northern and central Iraq was crippled: Kurds were no longer prepared to advocate humanitarian principles throughout Iraq, contenting themselves with consolidating the Kurdistan human rights regime.<sup>110</sup> Both Ghassan Al-Atiyyah and Sheikh Fateh al-Ghitta pointed to the lack of time as the primary reason for civil-society failure.<sup>111</sup> The effect of this failure was probably not trivial, as both civil-society organizations were well positioned to bypass sectarian lines and, in particular, cultivate serious discussions in the Sunni Arab heartland about ways in which federalism might work to everyone's benefit.

The truncated time frame also adversely affected women's groups in their efforts to reinstate the constitutional authority of a relatively secular 1959 Iraqi law on personal status. At meetings of such groups in late July, many participants identified an unmet need for a greater level of coordination if they were to successfully represent women's views to the committee. One proposed solution discussed at the meetings involved the creation of an Iraqi women's coordination committee. Again, it was clear that lack of time was the major constraint. Hanaa Edwar, leader of one very active women's group, the Iraqi Women's Network, met with the constitution committee briefly in late July but immediately expressed her anxiety that women had had no

chance to interact with the committee and had generally been marginalized from any substantive discussion on the constitutional text.<sup>112</sup> She later resorted to a series of public demonstrations in Baghdad.

The committee composition may have represented a way of partially correcting the lack of minority and women's participation. The Kurdish and Shia blocs had taken some care to ensure that women were present on the committee, with a total of nine members, as well as representatives of the Assyrian, Shabak, and Yazidi communities. One of the committee members, Hunain Al-Qaddo, was also serving as chairman of the Council of Iraqi Minorities, a body formally established on July 2, 2005, by eight ethnic minority groups to advocate for their concerns in the constitutional discussions. However, the demise of the committee on August 8 dramatically reduced the ability of these groups to participate in negotiations. The post-August 8 ad hoc Leadership Council meetings included no women and no non-Kurdish minorities. Centrist party representatives, when they attended, played a minor role, having moved closer to Sunni Arab skepticism. As a result, the constitutional provisions that these groups were seeking in the text were frequently removed from the committee draft, diluted, or modified in ways that bore little relationship to the views of the groups concerned.

The removal of the drafting responsibility from the committee resulted in smaller groups, including Iraq's ethnic and religious minorities, turning immediately to international institutions for lobbying support and patronage. Previously they had been able to access Iraqi members of the committee directly. Hoping to influence the draft after August 8, these groups had an incentive to seek the backing of the U.S. embassy, and to a lesser extent the United Nations, as there were no longer accessible or sympathetic Iraqis close to the drafting action. The United

States and the United Nations clearly welcomed this role. The UN special representative, Ashraf Ghazi, defined his own role as protecting human and minority rights in the constitution. The press releases he issued in August reveal a series of meetings with Iraqi applicants looking for UN help when apparently none was available elsewhere.<sup>113</sup>

It is far from clear that the adopted roles of the United States and UNAMI as human rights lobbyists were successful. There is no doubt that some of the Iraqi minority groups found their meetings with the U.S. embassy and United Nations to be useful, if only to determine the status of the latest drafts of the constitution. By August, it became very difficult even for participants in the negotiations to follow the drafting work; at times, two or even three different drafts were being circulated by different negotiators as the "latest draft." Competing "authoritative" texts were variously claimed by Dr. Hajim Al-Hassani, the speaker of the assembly; Sheikh Humam Hamoudi; the U.S. embassy; and the United Nations. Although on two occasions certain drafts were leaked to the Iraqi press,<sup>114</sup> no drafts were officially released to the Iraqi public for comment. Very few, if any, were released to members of the committee or to the national assembly.

The absence of drafting and consultation protocols made it extremely difficult for nonexpert Iraqis to follow the process. This background of confusion and the desire for patronage by smaller Iraqi interests led, in turn, to the U.S. embassy gaining still greater publicly visible involvement in Iraqi constitutional politics. The embassy also became the most obvious agent for a range of non-Iraqi advocacy institutions, including the U.S. Commission for International Religious Freedom, Freedom House, and various U.S.-based Iraqi expatriate and women's groups.<sup>115</sup> Regardless of the value of these efforts to improve the constitution, the time pressure increased the likelihood that Iraqis would see

foreigners as dominating their constitutional process, minimizing the popular legitimacy of the text.

### *Losing the Public*

If relatively well-organized and well-connected women's and minority groups found it difficult to interact with the constitutional drafters, these difficulties were much greater for ordinary Iraqi citizens. Every meeting of the committee, the national assembly, and the Leadership Council took place behind the blast walls, barbed wire, and gun turrets of Baghdad's International Zone, to which Iraqi citizens could gain entry only after time-consuming and dangerous queuing and multiple body searches. Phone lines and Internet connections throughout the country were either bad or nonexistent. The opportunity for Iraqis to communicate, either formally or informally, with their constituent representatives was practically nil. The progress of the constitution-making process was covered extensively in Iraqi media, and there were indications that the Iraqi public was seized with the subject. However, and notwithstanding the efforts of committee staff, almost none of the popular debate on constitutional matters was formally presented to the committee in time for it to influence the constitutional text.

### *The Outreach Unit: A Missed Opportunity*

In early June, under the management of Dr. Adnan Ali, Chairman Sheikh Hamoudi had established a skeleton secretariat for the committee. The secretariat was to include an outreach unit, responsible for disseminating constitutional information to the public and for receiving and analyzing the public response.<sup>116</sup> However, before June, neither the United States nor the United Nations had taken steps to prepare office space or other resources for the committee secretariat.<sup>117</sup>

As a result, it worked in an ad hoc fashion out of a cramped space in the International Zone's convention center through late July. Though the United Nations, NDI, and USIP each provided practical support to the unit, including funding and staffing, several weeks were lost recruiting the Iraqi staff. In late July, the outreach unit issued a one-page constitutional questionnaire, containing six questions designed to be disseminated throughout the country and returned for entry into a computer database.<sup>118</sup> The completed questionnaires could be placed in public submission boxes or emailed to a Yahoo address (dostorna@yahoo.com). By the end of July, when USIP officers visited the newly established outreach unit offices in downtown Baghdad, a staff of fifty was working around the clock in precarious security conditions to enter piles of public submissions into a computerized database and prepare a report to the committee.

Despite the professionalism and bravery of the outreach unit staff, the shortcomings of the process were striking. No written submissions reached the constitution committee before its demise on August 8. In the circumstances, this was perhaps unsurprising. From its inception in early June, the outreach unit had no more than eight weeks to complete its work. The attempt to conduct a serious national constitutional dialogue in such a short space of time was probably unprecedented; the East Timorese and Afghan constitutional processes, widely regarded as overly hasty, took around six and fifteen months, respectively. The effort in Iraq was all the more remarkable, given the poor and deteriorating security situation, not to mention the nationwide difficulties in delivering basic government services, including power and water. As there was no period of public education on constitutional issues, non-elite Iraqis had little chance to understand even the simple questionnaire. The outreach unit had no clear ability to receive substantial

input from the Sunni Arab or even Kurdish regions of Iraq. By July 28, the outreach unit had received only 20,300 submissions. By August 10—after the committee was effectively disbanded—the outreach unit had received 126,000 submissions, but none from Kurdistan or the Sunni Arab regions. As of August 15, it had received around 150,000 submissions, of which only around 20,000 were from the Kurdistan Region and only around 10,000 from Sunni Arab areas (indeed, all 10,000 were from Fallujah). This was a politically volatile imbalance that the outreach unit was ultimately unable to correct.

The outreach unit staff was drawn mainly from religious Shia social networks, and the networks put in place to receive submissions were biased toward Shia areas of Baghdad and other cities. It is unclear whether there were any Sunni Arabs on the unit staff, though in early August, the unit attempted to recruit some Iraqis from smaller ethnic and religious minorities. The unit also distributed boxes in government buildings in Baghdad to allow citizens to submit completed questionnaires and written submissions for later collection; however, the distribution of these boxes was uneven at best.<sup>119</sup> Moreover, there was no ability to enter nonquestionnaire submissions—that is, open-ended submissions—into the database, obviously limiting the range of views that the public could express on constitutional issues. In addition, the results of the extensive constitutional awareness programs run throughout Iraq by international organizations, including NDI and IRI—again, largely in the form of questionnaires—were presented too late for the results to affect the draft constitution, if they were presented at all.

Most important, perhaps, the outreach unit could not circulate a report to the committee members until August 13, after the committee had already been sidelined. Interviews conducted with committee members in early August confirmed that they had not

received reports from the outreach unit.<sup>120</sup> This was hardly surprising given the time constraints. As a result, there was little or no chance for the views of the public, as expressed to the committee via the unit, to be taken into account in the preparation of the constitution. By August 13, a mature negotiating draft had existed for some time with no will within the political blocs to reopen settled agreements within that draft. In short, any effort by an Iraqi citizen to communicate in writing to the committee was futile and had no effect on the draft constitution whatsoever. Later statements from the committee secretariat stated that they had received more than 400,000 submissions, but none of these reached the committee itself by the deadline; that fact alone suggests that even a modest deadline extension to allow the committee to digest the weight of the submissions would have offered a tremendous opportunity to interact with at least large parts of the Iraqi public, including Sunni Arabs. But this, of course, did not happen; the 400,000 submissions were wasted.<sup>121</sup> In very precise terms, the national assembly, under tremendous pressure, failed to meet the obligation imposed by Article 60 of the TAL to “receiv[e] proposals from the citizens of Iraq as it writes the constitution.”<sup>122</sup>

## Conclusion

The pressure-cooker approach that the United States foisted on Iraq’s constitution-making process might conceivably have been effective if the central problem was that Iraqi parliamentarians were simply being slow in moving to consolidate their Iraqi identity in constitutional terms, though even in those circumstances, the U.S. haste would have been unwise and, probably, unethical.<sup>123</sup> The problem, however, was something much more profound: No strong Iraqi identity existed at all, and hasty constitution drafting prevented a clear recognition of this fact.<sup>124</sup> Kurds had



never adopted an Iraqi identity in their history. Sunni and Shia Arabs, though they might have each expressed some form of Iraqi nationalism, were talking at cross purposes. Sunnis sought a centralized, secular Iraq under Sunni control that might be purged of Saddamism, but otherwise unchanged; those Shiites who rejected federalism (including the party of Moqtada Al Sadr) sought a new religious Iraq, over which they, as the majority, held sway. This clash of competing nationalisms—between those few Sunni and Shia Arabs who were nationalists—spurred the civil war that raged most strongly in 2006 and 2007 and has surely not yet run its course. The regionalist camps within the Shiite and Kurdish parties were relatively uninterested in battling for Baghdad, a capital that could not govern itself, much less the whole of Iraq, and were much more capable of reaching consensus. The superficial problem of Sunni Arab exclusion masked the more fundamental fact that Sunni Arabs could not, in the summer of 2005, reconcile themselves to a federal Iraq: Policy that was directed at making Sunni Arabs part of the central government should have instead encouraged them to regionalize.<sup>125</sup> The tragedy is that there was no time for Sunni regionalists to emerge.

The distance between expectations and reality need not have been so great. None of these political realities in Iraq were especially difficult for the U.S. government to identify, and they were indeed frequently identified by informed U.S. commentators.<sup>126</sup> It should have been clear from the outset that Iraqi constitution making would require a complex three-way treaty-like negotiation in circumstances where nothing could be taken for granted—certainly not a residual shared Iraqi identity. Conventional wisdom among U.S. policymakers presented Iraq as a centralized state undergoing a form of decentralization,<sup>127</sup> when the reality was almost diametrically opposite. Regionally based powers were, in effect, negotiating the terms

of a possible delegation of powers to the center. The three major negotiating blocs—Shia Arab, Kurd, and Sunni Arab—derived their authority (whether they would have admitted it or not) from *de facto* regional interests, and the power of any central government during the negotiating phase was marginal at best. No faction, not even the Sunni Arabs, saw any tactical reason to delegate power to the Baghdad government of the day, or even to commit wholeheartedly to constitutional negotiations. Any faction could walk out at any time. And the Sunni Arab walkout—the worst of the possible outcomes—not only accelerated the creation of Kurdish and Shiite ministates (probably inevitable) but also guaranteed a durable anger among Iraq's Sunni Arabs that would continue to feed the insurgency (nothing short of disastrous). The absence of the Sunni negotiators from the happy committee press conference of August 29, announcing the new draft, was well publicized and ominous.<sup>128</sup>

One can only assume that the U.S. government missed this fact. No amount of *ex post facto* fiddling by Ambassador Khalilzad could undo the damage.<sup>129</sup> Some eleventh-hour negotiations in September 2005 resulted in minor adjustments to the final text adopted by the national assembly before submitting the text to referendum. Those changes, designed to woo the Sunni Arab voters, included language stating that Iraq is “a founding and active member of the Arab League,” moderating the language denigrating the Baath party; confirming the “unity” of Iraq; and adjusting provisions relating to international covenants and water resources. Immediately before the October referendum, yet another change was introduced to accommodate the Sunni Arab position, promising a process of “constitutional amendment” that would give the Sunni Arabs a theoretical chance to roll back Iraqi federalism if the constitution was approved in the referendum.<sup>130</sup> However, none of these efforts bore fruit: Sunni

Arabs almost universally opposed the constitution in the referendum, the constitution was passed,<sup>131</sup> and the civil war raged on.<sup>132</sup> Kurdistan political offices in the Green Zone were hit by Katyusha rockets in late August, and a rise in anti-Shiite sectarian violence culminated in the demolition of the Golden Mosque in Samarra, triggering a massive increase in sectarian violence. Four years later, by October 2009, no agreement had been reached on constitutional amendment, and the prospect of any substantive amendment, though it may be hoped for if only to secure a weak form of viability for the Iraq state,<sup>133</sup> is uncertain at best. By contrast, the Kurdistan and Shia parties pushed through legislation in October 2006—during yet another Sunni Arab boycott of Parliament—for the creation of a southern “Shiastan” that seems, sooner or later, to be inevitable. Efforts by current prime minister Nuri Al-Maliki to centralize power have been predictably sclerotic and are further alienating Kurdistan and Basra from Baghdad.

In a grim irony, the constitution as a substantive document is a fairly accurate representation of the views of most Iraqis regarding the fate of the Iraqi state. The constitution represents probably the only workable solution to competing interests of Arab nationalism, Kurdish nationalism, and Shia Islamism. Those critics of the constitution who blame the text itself for the poor governance in Iraq exaggerate the likelihood and desirability of a regionalized, heterogeneous Iraq being willing and able to resurrect a strong central government.<sup>134</sup> Those same critics also mistake the strength of regional entities in the Iraq constitution as a deficiency in drafting—an unfortunate ambiguity—rather than as a fairly unambiguous and deliberate dismantling of an excessively powerful central state.<sup>135</sup> As a model for a loose confederation, the constitution is adequate enough. However, this hardly obscures the fact that the procedure by which

the Iraqi constitution was created was unacceptably poor. Though Iraq already was a chronically fragmented society, the rushed constitutional process amplified these fissures and squandered an opportunity to narrow them. Something that might have been organic looked very American and artificial. The prospect of a Sunni federalist or even regionalist political bloc emerging in 2005 was reduced to zero. Efforts by some in the United States to pretend that the 2005 process was successful should be seen, at best, as worthless.<sup>136</sup> Iraq in this sense marks a certain high point of neglect, and even cynicism, regarding the value of serious constitutionalism. The international community and the United States in particular promised—and required by law—if not an organic rebirth of the nation through constitutionalism, then at the very least a consensus-based, deliberative, treaty-like *modus vivendi*. For a moment, constitutionalism may have had a chance, more modestly, to produce a Sunni Arab negotiating position. Instead, the international community delivered to Iraq, and Iraq’s leaders acquiesced in, a one-month charade from which not only fragmentation, but also civil war, was virtually guaranteed. It may be that over time, Iraq’s Sunni Arabs will learn to live within Iraq’s new regionalized federal structure,<sup>137</sup> but they will do so despite Iraq’s constitutional process.

## Notes

1. Portions of this chapter were originally published in two United States Institute of Peace reports by this author: Jonathan Morrow, “Iraq’s Constitutional Process II: An Opportunity Lost,” USIP Special Report 155 (Washington, D.C.: USIP, 2005), available at [www.usip.org/pubs/specialreports/sr155.html](http://www.usip.org/pubs/specialreports/sr155.html) (accessed on April 19, 2009); and Jonathan Morrow, “Weak Viability: The Iraqi Federal State and the Constitution Amendment Process,” USIP Special Report 168 (Washington, D.C.: USIP, 2006), available at [www.usip.org/pubs/specialreports/sr168.html](http://www.usip.org/pubs/specialreports/sr168.html) (accessed on April 19, 2009).

2. In August 2005, the month the bulk of the constitution was written, there were 70 attacks per day by “insurgents” throughout Iraq. There were 282 Iraqi military and police killed in that month, between 414 and 2,475 Iraqi civilians killed, and 81 members of the U.S. military killed in hostile incidents. There were 27 multiple fatality bombings, 23 kidnappings of non-Iraqis, and 3,000 insurgents detained or killed: see Iraq Index, Brookings Institution, September 26, 2005, available at [www.brookings.edu/fp/saban/iraq/index20050926.pdf](http://www.brookings.edu/fp/saban/iraq/index20050926.pdf) (accessed on April 19, 2009).

3. Iraq’s other major communities include Shia Arabs (approximately 60 percent of the population) and Kurds (approximately 20 percent of the population). There are no accurate figures available, but these are the commonly accepted approximate numbers. This conventional breakdown of Iraq into three groups is an oversimplification of the many ethnic, religious, and political identities within Iraq’s borders, but constitutional negotiations were characterized by this tripartite arrangement.

4. In the predominantly Sunni governorates of Anbar and Salahaddin, more than 96 and 81 percent of voters, respectively, rejected the constitution. See Independent Electoral Commission of Iraq, “Certification of the Constitutional Referendum Final Results,” October 25, 2005, available at [www.ieciraq.org/English/Frameset\\_english.htm](http://www.ieciraq.org/English/Frameset_english.htm) (accessed on April 19, 2009).

5. More than 78 percent voted yes. Independent Electoral Commission of Iraq, “Certification of the Constitutional Referendum Final Results.”

6. Article 110 of the constitution. I note Nathan Brown’s argument that the federal government’s exclusive power in relation to *wizarat al maliyya* (usually translated as finance) is, in fact, a reference to taxation. However, this is a minority view.

7. Article 112 of the constitution. For an analysis of these critical provisions, see Brendan O’Leary, “Federalizing Natural Resources,” in *Iraq: Preventing a New Generation of Conflict*, ed. Markus E. Bouillon, David M. Malone, and Ben Rowswell (New York: International Peace Academy, 2007).

8. Article 115 of the constitution.

9. Phebe Marr narrates Iraq’s twentieth-century history as a failure of constitutionalism, in particular the ineffectiveness of fundamental law and sporadic erasure of the distinction between executive and legislative authority: Phebe Marr, *The*

*Modern History of Iraq* (Boulder, CO: Westview Press, 2004).

10. See, e.g., Larry Diamond, *Squandered Victory: The American Occupation and the Bungled Effort to Bring Democracy to Iraq* (New York: Henry Holt and Company, 2005), p. 49; Noah Feldman, *What We Owe Iraq: War and the Ethics of Nation Building* (Princeton, NJ, and Oxford: Princeton University Press, 2004).

11. The committee’s October 2003 report to the interim governing council presented no recommendations. A *New York Times* article had earlier announced the engagement of Noah Feldman, a New York University Law School professor and expert on Arab world constitutions, with the Iraq constitution. Jennifer Lee, “American Will Advise Iraqis on Writing New Constitution,” *The New York Times*, May 11, 2003.

12. The approved English translation of the June edict rejected the appointment of constitution drafters and called for a “general election” to choose representatives to a “foundational constitution preparation assembly.” For the full text, see [www.juancole.com/2003\\_07\\_01\\_juanricole\\_archive.html](http://www.juancole.com/2003_07_01_juanricole_archive.html) (accessed on April 19, 2009) or Feldman, *What We Owe Iraq*, p. 146. For an analysis of the significance of Ayatollah Sistani’s fatwas, see Reidar Visser, “Sistani, the United States and Politics in Iraq: From Quietism to Machiavellianism?” Norwegian Institute of International Affairs, 2006, available at <http://historiae.org/documents/Sistani.pdf> (accessed on April 19, 2009). At this point, the only governance issue in which Ayatollah Sistani expressed interest was constitution making.

13. See [www.cpa-iraq.org/government/TAL.html](http://www.cpa-iraq.org/government/TAL.html) (accessed on April 19, 2009). The TAL was issued in the name of the Iraqi people and formally approved by a group of Iraqi leaders known as the Iraqi Governing Council. After the transfer of sovereignty in June 2004 and the dissolution of the Governing Council, the TAL was published in Iraq’s Official Gazette. However, as Andrew Arato notes, the reality was that the council “had no legal or factual independence” from the CPA. Andrew Arato, “From Interim to Permanent Constitution in Iraq?” paper dated October 2005, p. 2 (on file with the author).

14. The full name for this instrument is the Law of Administration for the State of Iraq for the Transitional Period.

15. See, e.g., Ghassan al-Atiyyah, “Memorandum to the Supreme Preparatory Committee for the National Conference,” July 14, 2004 (on file with the



author). Though the key provisions of the TAL were the subject of negotiation among the Iraqi political factions, the TAL was orchestrated by the U.S. government, drafted in English, and is clearly the product of Western-educated lawyers. One observer of the TAL process, a former adviser to the Kurdistan regional government, has stated that “all deliberations on the law were done in secret and probably fewer than one hundred Iraqis saw a copy of the [interim] constitution before it was promulgated. To write a major law in any democracy—much less a constitution—without public discussion should be unthinkable.” Peter Galbraith, “How to Get Out of Iraq,” *New York Review of Books*, vol. 15, no. 8, May 13, 2004. Sustained Iraqi engagement with the text was limited to expatriate lawyers Feisal Istrabadi and Salem Chalabi. See also the comment of Larry Diamond, former senior adviser to the Coalition Provisional Authority in Iraq: “The CPA had long been planning a campaign to sell the TAL to the Iraqi people once it was adopted. A British advertising agency with offices in the Middle East had been hired to produce a campaign of emotional and highly symbolic television and newspaper ads. Yet inexplicably, this campaign did not begin until several weeks after the TAL’s signing.” Larry Diamond, “What Went Wrong in Iraq,” *Foreign Affairs*, vol. 83, no. 5 (September–October 2004), pp. 34–56.

16. See Diamond, *Squandered Victory*, p. 183 ff.

17. Transitional Administrative Law, [www.cpa-iraq.org/government/TAL.html](http://www.cpa-iraq.org/government/TAL.html) (accessed on April 19, 2009; emphasis added).

18. The International Crisis Group had noted in November 2003 that “the sense that Iraqis have no ownership of the political process and are blocked from participation in decisions critical to the future of their country is profound.” International Crisis Group, *Iraq’s Constitutional Challenge*, Middle East Report no. 19, November 13, 2003, p. 26.

19. Article 61(C).

20. Because the TAL was adopted neither by the Security Council nor by a sovereign Iraqi government, its legality remains doubtful.

21. United Nations Security Council Resolution 1546, S/RES/1546 (2004), June 8, 2004, para. 7 (emphasis added).

22. The comparative experience was more influential within the United Nations, which had borne direct responsibility for constitution making in East Timor and Afghanistan; this is evident in the papers circulated by Jamal Benomar, former adviser on Iraq to Ambassador Lakhdar Brahimi and senior official of the United Nations Development Program,

in 2004, including “Constitution-Making, Peace-Building and National Reconciliation: Lessons Learned from the Constitution-Making Processes of Post-Conflict Countries” and “Constitution-Making in Iraq: Framework and Options for an Effective, Participatory, Inclusive and Transparent Process” (copies on file with the author).

23. Statement by Ambassador Bremer before the House Armed Services Committee, U.S. House of Representatives, September 25, 2003. It was, notably, Bremer’s primary (and unrealized) goal that he personally put in place a permanent constitution for Iraq—though not one that would reflect majoritarian Iraqi Islamist views. See generally L. Paul Bremer III and Malcolm McConnell, *My Year in Iraq* (New York: Simon and Schuster, 2006); and Rajiv Chandrasekaran, *Imperial Life in the Emerald City* (New York: Knopf, 2006).

24. International Crisis Group, *Iraq’s Constitutional Challenge*, p. 2.

25. Author’s conversation with a young Sunni Arab engineer, Baghdad, November 2004.

26. Iraqi Prospect Organisation, *Iraqi Constitution: Iraqi Thoughts*, December 2003, p. 8, available at [www.iprospect.org.uk/rep8dec.html](http://www.iprospect.org.uk/rep8dec.html) (accessed on April 19, 2009).

27. Conversation with the author, Baghdad, April 2005. Dr. Shahrastani spent eleven years imprisoned by the Hussein regime, much of it in solitary confinement. At the time of this writing, he is the Iraqi minister of oil.

28. For an explanation of Iraq’s recent political history as an example of liberal consociation, see John McGarry and Brendan O’Leary, “Iraq’s Constitution of 2005: Liberal Consociation as Political Prescription,” *International Journal of Constitutional Law*, vol. 5, no. 4 (2007), pp. 670–98.

29. For an account of that episode, see Samantha Power, *“A Problem from Hell”: America and the Age of Genocide* (New York: Basic Books, 2002).

30. See, generally, Brendan O’Leary, John McGarry, Khaled Salih, eds., *The Future of Kurdistan in Iraq* (Philadelphia: University of Pennsylvania Press, 2005).

31. Polling centers were set up next to voting booths. The Kurdistan regional government claimed that more than 98 percent of those polled preferred Iraqi Kurdistan’s independence to its continuation as part of Iraq. These claims seem plausible, and Western news outlets reported the strong preference. See, e.g., Ellen Knickmeyer, “Iraqi Kurds Call for Referendum,” *Washington Post*, July 23, 2005.



32. For two accounts of the Sunni Arab insurgency, see Amatzia Baram, "Who Are the Insurgents? Iraq's Sunni Arab Rebels," USIP Special Report 134 (April 2004), available at [www.usip.org/pubs/specialreports/sr134.html](http://www.usip.org/pubs/specialreports/sr134.html) (accessed on April 20, 2009); and International Crisis Group, *In Their Own Words: Reading the Iraqi Insurgency*, Middle East Report no. 50, February 15, 2006.

33. The International Crisis Group in November 2003, aware of the problems earlier than most, said that "Iraq's constitutional process must begin to move forward, but at a deliberative pace and in a transparent and consultative manner." International Crisis Group, *Iraq's Constitutional Challenge*, Middle East Report no. 19, November 13, 2003, p. ii.

34. The only procedural provisions implemented, in the end, were those requiring an election by January 2005 (art. 30) and the establishment of a Federal Supreme Court (art. 44). Nor did the TAL provide, as Bremer had hoped (see Diamond, *Squandered Victory*, p. 16), a basis for the permanent constitution.

35. The U.S.-based National Democratic Institute for International Affairs (NDI) found that by April 2005, "almost every participant" in national, cross-sectarian focus group research "is of the opinion that the Iraqi citizens should be involved in the preparation of the constitution." David M. Dougherty, *Iraqi Voices: Public Attitudes and Political Opportunity in Transition; Findings from Focus Groups with Iraqi Men and Women (Conducted April 13–15, 2005)*, National Democratic Institute for International Affairs, p. 32, available at [www.accessdemocracy.org/library/1921\\_iq\\_focusgroups\\_060105.pdf](http://www.accessdemocracy.org/library/1921_iq_focusgroups_060105.pdf) (accessed April 20, 2009).

36. For a contemporary argument in favor of a province-based electoral system, also citing the argument that a provincial system would have allowed for a delay in polling in the troubled Sunni Arab provinces, see Larry Diamond, "Getting to Elections in Iraq," unpublished paper, November 2004 (on file with the author).

37. This model was ultimately adopted for the December 2005 parliamentary elections in which fifty-five Sunni Arab legislators were elected.

38. See, e.g., *New York Times*, editorial, January 12, 2005.

39. Alissa Rubin, "46 Groups Will Boycott Iraq Vote," *New York Times*, November 19, 2004. See also "Statement by the Iraqi National Foundation Congress on the Elections," November 18, 2004, (copy on file with the author): "The illegitimacy of the occupation and the attacks on Iraqi cities, es-

pecially the savage massacres in Falluja, categorically preclude sound participation in the political process under occupation and denial of sovereignty. How can a national dialogue and a political process proceed while crimes are being routinely committed against the people?"

40. See, e.g., Michael Howard, "Main Sunni Party Pulls Out of Election," *The Guardian*, December 28, 2004.

41. The omission of a special majority for parliamentary approval of the text was probably an oversight; none of the authors of the TAL have provided a reason for the unusually low threshold. In hindsight, the practical effect of such a mistake was negligible, however, given the three-governorate veto provision, which effectively required near unanimity of support in the parliamentary factions for any constitutional text.

42. In May 2005, the Muslim Scholars Association began to threaten to invoke the three-governorate veto. See Nancy Youssef, "Iraq Set to Take Major Step toward Drafting Constitution," *Knight Ridder*, May 14, 2005.

43. Article 61(C) states: "The general referendum will be successful and the draft constitution ratified if a majority of the voters in Iraq approve and if two-thirds of the voters in three or more governorates do not reject it." This provision gave great power to any organized region of Iraq—including Kurdistan—against an aspiring national government. Andrew Arato argues, persuasively, that the only "genuine bargaining" on the TAL was between the Kurdistan regional government and the United States on this and other key provisions: "The immediate reason . . . was that it was these two parties that held at the time something like state power in Iraq." Arato, "From Interim to Permanent Constitution in Iraq?" p. 6.

44. Article 61(F) of the TAL reads: "If necessary, the president of the National Assembly, with the agreement of a majority of the members' votes, may certify to the Presidency Council no later than 1 August 2005 *that there is a need for additional time to complete the writing of the draft constitution*. The Presidency Council shall then extend the deadline for writing the draft constitution for only six months" (emphasis added). Transitional Administrative Law, available at [www.cpa-iraq.org/government/TAL.html](http://www.cpa-iraq.org/government/TAL.html) (accessed on April 20, 2009).

45. Diamond notes that the reason for including the six-month extension in the TAL was because "we all worried that even six months might

not be enough for the [constitutional] convention to complete its work in a manner that involved the Iraqi public." See *Squandered Victory*, p. 155.

46. Roula Khalaf, "Boycott Groups See Election as Just 'Small Step,'" *Financial Times*, January 27, 2005.

47. International Republican Institute, *Survey of Public Opinion*, April 11–April 20, 2005, available at [www.iri.org/mena/iraq/pdfs/2005-05-05-Iraq%20Poll%20April%20April.pdf](http://www.iri.org/mena/iraq/pdfs/2005-05-05-Iraq%20Poll%20April%20April.pdf) (accessed July 14, 2009). The press release accompanying the survey results stated: "Iraqis also want all groups to participate in the constitutional process. More than 35 percent strongly agree and another 35 percent generally agree that those who did not or could not participate in the January 30 election have a right to contribute to writing the constitution."

48. The subcommittees' themes included basic principles; system of government; federalism and local government; constitutional guarantees, rights, and duties; and transitional and amendment provisions.

49. In one early proposal of Deputy Speaker Hussain Shahrastani and Committee Chairman Hamoudi, additional Sunni Arab participation was to be limited to providing subcommittees with advice. See e.g., National Public Radio (U.S.), Morning Edition, interview by Peter Kenyon with Sheikh Humam Hamoudi, May 23, 2005. In another proposal, the 55-member committee would be expanded to 101 members. See e.g., "Forty-Six New Members to Write the Iraqi Constitution," *Al-Taakhi* (Baghdad), May 24, 2005.

50. A number arrived at so as to maximize Sunni participation without exceeding the representation of the Kurdistan Alliance representation.

51. The fifteen additional Sunni Arab members were accompanied by ten Sunni Arab non-member experts. Of the original fifty-five members of the committee, three were Sunni Arabs who had been elected to the national assembly: the deputy chairman, Dr. Adnan al-Janabi; the former oil minister, Dr. Thamir Abbas Al-Ghadban; and Abd-al-Rahman Sa'id Husein al-Nu'aimi. The enlarged body was notionally renamed a commission (*hay'a 'ameh*) but was continually referred to in practice as "the committee" (*lajneh*).

52. As distinct from unanimous decision-making, thus permitting, at least in theory, the principle of "sufficient consensus" to permit decisions to be made over the objections of a small but unspecified number of members.

53. Assembly Speaker Hajim Al-Hassani, Deputy Speaker Hussein Shahrastani, and Committee Chairman Sheikh Hamoudi each held the view that civil-society representatives should not be on the committee.

54. Meghan O'Sullivan traveled to Baghdad in the weeks prior to the drafting of the constitution to press Iraqi leaders to meet the initial August 15, 2005 deadline.

55. Interviews with NBC News and Al Arabiya television in Baghdad, April 13, 2005.

56. See, e.g., "Rice Makes Surprise Visit to Iraq: U.S. Secretary of State Urges Leaders to Get Constitution Done," CNN.com, May 16, 2005.

57. On July 26, Secretary Rumsfeld made an unannounced visit to Baghdad and told reporters, "We don't want any delays. Now's the time to get on with it." Eric Schmitt, "Rumsfeld Presses Iraqi Leaders on Constitution and Insurgency," *New York Times*, July 28, 2005.

58. He stated at a press conference at the White House on April 28, 2005, of then-prime minister of Iraq, Iyad Allawi, "He understands the need for a timely write of the constitution." See White House press release, April 28, 2005.

59. This was the standard talking point on the subject for U.S. officials in Baghdad. Robert Ford, the head of the U.S. embassy's political section, attempted to prevent the U.S. Institute of Peace, an independent federal institution, from even discussing the possibility of an extension of the August 15 deadline with Iraqis.

60. See, e.g., television interview with Deputy Secretary of State Robert Zoellick, conducted by Sawad Kazum of Al Arabiya, Baghdad, April 13, 2005: "Well, this is a topic that I discussed with all the Iraqi officials—Prime Minister Allawi, the President, Prime Minister-designate, the Speaker—and I get a sense that all of them want to stick to the timeframe that Iraqis have set to try to get that constitution done by August 15 . . . So, you know, constitutions—the U.S. Constitution was drafted in less time than that and so right now the Iraqi people have a start through the TAL."

61. Professor Yash Ghai and Mr. Scott Carlson, constitution process experts provided to the committee by USIP, provided this advice in "Constitutional Timetable Options with December 2005 Parliamentary Elections," a memorandum dated July 11, 2005 (on file with the author). The memorandum concluded that "to fulfill the TAL public participation mandate, some form of extension is needed" (p. 4).

62. Othman was quoted as saying, "If you're talking about a consensus, something on which we all agree, I certainly don't think it can be done on time. This is something too important to rush. We shouldn't be driven by America's domestic agenda." Liz Sly, "Iraqi Constitution Writers Find Time Is Running Out," *Chicago Tribune*, July 26, 2005.

63. See also Feryad Rawandozi, "Opinion: Constitution Deadline Should Have Been Delayed Earlier," *Al-Ittihad*, August 17, 2005. *Al-Ittihad* is the newspaper of the Patriotic Union of Kurdistan.

64. Ambassador Peter Galbraith, interview by Jim Lehrer, *The Newshour with Jim Lehrer*, PBS, May 4, 2005: "My sense is that if the constitutional process doesn't work, that Iraq would do well to set it aside. . . . There are many issues that can be handled practically, but which could make the situation in Iraq much worse, in fact contribute to the breakup of the country, if they are tried to be resolved in a constitutional process."

65. See, e.g., Hannah Allam and Alaa al Baldawy, "Shiite Cleric to Lead Panel Drafting Iraqi Constitution," Knight Ridder, May 24, 2005.

66. See also statements from former president Sheikh Ghazi al-Yawer, Iraqi Al-Sharqiyah television, May 2, 2005; and Dr. Bahaa Mayah, adviser to Prime Minister Jaafari, in Richard Beeston, "Squabbles as Iraq Prepares to Draw Up a Constitution," *The Times* (London), May 14, 2005.

67. National Democratic Institute for International Affairs, *Iraqi Voices: Public Attitudes and Political Opportunity in Transition, Findings from Focus Groups with Iraqi Men and Women (Conducted April 13–25, 2005)*, available at [www.accessdemocracy.org/library/1921\\_iq\\_focusgroups\\_060105.pdf](http://www.accessdemocracy.org/library/1921_iq_focusgroups_060105.pdf) (accessed on April 20, 2009), p. 31: "Iraqis are eager for stability and want the Constitutional Committee to draft a constitution as quickly as possible. However, many focus group participants expressed a desire for the Committee to take the necessary time to ensure the creation of a comprehensive and effective constitution and to sufficiently educate the Iraqi people on the constitutional process."

68. "An Iraqi Constitution," editorial, *New York Times*, August 12, 2005: "It would have been wiser to allow time for compromise and consensus." See also Charles Krauthammer, "Shelve this Deadline," *Washington Post*, July 1, 2005.

69. See International Crisis Group, "Iraq: Don't Rush the Constitution," Middle East Report no. 42, June 8, 2005; Nathan Brown, "Iraq's Constitution Process Plunges Ahead," Carnegie Endowment for International Peace, Policy Outlook, July

2005, available at [www.carnegieendowment.org/files/PO19Brown.pdf](http://www.carnegieendowment.org/files/PO19Brown.pdf) (accessed on April 20, 2009).

70. For a discussion of this phenomenon in the U.S. handling of Iraq policy—including the constitution—see, e.g., Peter Baker and Robin Wright, "In Iraq, Bush Pushed for Deadline Democracy: Timeline Yields Order, Not Peace," *Washington Post*, December 11, 2005.

71. For an account of this drafting period from the perspective of two State Department lawyers then in the U.S. embassy in Baghdad, see Ashley S. Deeks and Matthew D. Burton, "Iraq's Constitution: A Drafting History," *Cornell International Law Journal*, vol. 40, no. 1 (2007), pp. 2–84.

72. Talabani was leader of the Patriotic Union of Kurdistan (PUK) and president of Iraq; Barzani was leader of the Kurdistan Democratic Party (KDP) and was president of the Kurdistan region.

73. Most of the Shia elites speak the language of their coreligionists in Persia, and the Kurds' native tongue is an Indo-European language closely related to Persian. In the Green Zone in the summer of 2005, it was often noted, wryly, that the Arabic word for constitution—*dustour*—is actually a Persian import. But by the time the text reached the *matbagh*, the drafting was done in English.

74. *Al-Sabah* paraphrased the sentiment in their headline of August 22, 2005: "US Embassy to Sunni Arabs: 'This Is an Iraqi Matter, and We Have Nothing to Do with It.'"

75. Sheikh Abd al-Nair al-Janabi, reported in Baghdad daily newspaper *Al-Sabah* on August 22, 2005. Former Baathist and lead Sunni constitutional negotiator Salih al-Mutlak was also quoted in the same report as saying: "We were not met, and both lists are trying to finish the draft without us. We contacted the American Embassy in order to get to know the situation, and we were notified that that was an Iraqi matter and the Embassy had nothing to do with it."

76. The proposal of one senior Kurdish member of the constitution committee, Dr. Saedi Barzinji, that Kurdish autonomy should be protected in the constitution by a set of international guarantees did not find its way into the final draft. That proposal will likely be proved to have been prescient.

77. Article 110 of the constitution.

78. Article 115 of the constitution.

79. In early June, Shia and Kurdish committee members—probably with U.S. embassy encouragement—rejected as too time-consuming a proposal to identify "grass roots" Sunni Arab constitutional drafters through a multiweek regional



caucus. The Iraq Institute of Peace, a nongovernmental interfaith dialogue organization with strong Sunni Arab tribal connections, had tested the idea. As they were the only NGO able to open offices in the Sunni Arab heartland without being attacked, they convened a number of large Sunni meetings in May, including a May 2 conference of 800 Sunni Arab leaders, which elected ten representatives and formulated a set of precise constitutional recommendations—later overlooked.

**80.** The terms of that Kurd-Shia agreement gave to one or more of Iraq's eighteen provinces the right to "organize into a region" following a referendum in the respective province or provinces.

**81.** Article 61(G) of the TAL provided that "if the National Assembly does not complete writing the draft permanent constitution by 15 August 2005 and does not request extension of the deadline in Article 61(D) above, the provisions of Article 61(E), above, shall be applied." Article 61(E)—the provision dealing with the consequences of a failed referendum—stated that "the National Assembly shall be dissolved. Elections for a new National Assembly shall be held no later than 15 December 2005."

**82.** There can be little doubt that some Sunni negotiators, including Saleh Mutlaq, were attempting to precipitate this crisis; private comments of moderate assembly speaker Hajim Al-Hassani (April 2005) suggest that he too was entertaining this view.

**83.** Several of the fifteen Sunni Arab members of the committee were accused of being members of Saddam Hussein's Baath Party, including Sheikh Mijbal Issa (later assassinated) and Haseeb Arif. See, e.g., James Glanz, "Baathists May Be Joining Iraq's Constitution Drafters," *New York Times*, July 1, 2005. Some of the committee members, including Saleh Mutlaq, publicly aligned themselves with Baathism.

**84.** Although they do not conceive of themselves as a national minority, Iraq's Sunni Arabs have similar interests to other Iraqi ethnic and sectarian minority groups that are concentrated in particular areas and neighborhoods of the country. Far from having a real interest in a strong central government, they must look to the conventional political methods of preserving minority rights, including some of the minority and regional self-government and veto powers that the much-reviled Iraqi constitution provides. In particular, perhaps they should ensure that Iraq's Sunni Arab areas, oil-poor at least for the time being, receive from other regions their

constitutional entitlement of a share of Iraq's national oil revenues proportional to their share of the national population.

**85.** Author's conversation with Moamer Alkubesi, director, National Constitutional Society, Baghdad, August 2005. Alkubesi, a leading Sunni Arab lawyer from Fallujah and interlocutor with the hard-line Association of Muslim Scholars, had early seen the merits of federalism as the solution for Iraq—including power sharing on oil management and other sensitive matters—quite apart from Kurdish aspirations.

**86.** Those same lawyers were trying to address a major but clearly soluble grievance among Sunni Arab elites: that the Kurdish and Shia parties overlooked Sunni Arab technical constitutional expertise. The compressed timetable virtually eliminated any engagement with Iraqi technical experts of any sect or ethnicity. Iraq's federal judiciary had no opportunity to influence the draft; government ministries (such as the Ministry of Justice) were in the same situation.

**87.** Presentation by Leslie L. Campbell, senior associate and director of Middle East programs, National Democratic Institute, at U.S. Institute of Peace, Washington, D.C., October 2005.

**88.** *Constitutional Baseline Survey, Conducted on Behalf of the Transitional National Assembly, Constitution Drafting Committee*, copy on file with the author. If anything, these figures understate the degree of Sunni Arab distrust of federalism, as for security reasons, interviews could not be conducted in the overwhelmingly Sunni Arab Anbar governorate.

**89.** The results of a USIP-convened meeting of Iraq's Sunni Arab leaders in February 2006 suggested that, with time, incrementally more realistic positions could have been achieved: see Jonathan Morrow, "Weak Viability: The Iraqi Federal State and the Constitution Amendment Process," USIP Special Report 168 (July 2006), available at [www.usip.org/pubs/specialreports/sr168.html](http://www.usip.org/pubs/specialreports/sr168.html) (accessed on April 22, 2009).

**90.** One Kurdistan member of the committee, Dr. Saedi Barzinji, walked out of the committee over issues of regional autonomy.

**91.** On August 6, Massoud Barzani, Kurdistan region president, addressed the Kurdistan parliament on the negotiations, and Prime Minister Nurchivan Barzani articulated a set of "red lines"



in "Why Kurdistan Insists on Kirkuk," *Financial Times*, August 15, 2005.

**92.** Those negotiators included former U.S. diplomat Peter Galbraith and University of Maryland professor Karol Soltan.

**93.** Copy on file with the author.

**94.** Hadi al-Amiri, head of the Badr Brigades, announced to the gathering: "Federalism has to be in all of Iraq. They are trying to prevent the Shi'ites from enjoying their own federalism. We have to persist in forming one region in the south or else we will regret it. What have we got from the central government except death?" See "Shi'ite Militia Calls for State in the South," Reuters, August 11, 2005. The August 11 declaration by SCIRI had been foreshadowed by smaller breakaway movements in Basra. See, e.g., Steven Vincent, "In the South, A Bid to Loosen Baghdad's Grip," *Christian Science Monitor*, June 28, 2005; Edward Wong, "Secular Shiites in Iraq Seek Autonomy in Oil-Rich South," *New York Times*, June 30, 2005. Similar regionalist initiatives were also made public in the central Iraqi cities of Kerbala (*Sharq Al-Awsat*, June 7, 2005) and Najaf ([www.nahrain.com/d/news/05/06/16/nhr0616e.html](http://www.nahrain.com/d/news/05/06/16/nhr0616e.html); accessed April 22, 2009).

**95.** Nathan Brown observes that the fifteen-member Sunni Arab delegation on the constitution committee preferred to call themselves "representatives of those boycotting the election." Nathan Brown, "Iraq's Constitution Process Plunges Ahead," Carnegie Endowment for International Peace, Policy Outlook, July 2005, p. 7, available at [www.carnegieendowment.org/files/PO19Brown.pdf](http://www.carnegieendowment.org/files/PO19Brown.pdf) (accessed April 22, 2009).

**96.** Haysom is a South African who served as Nelson Mandela's legal adviser during the South African constitutional negotiations and advised on many other constitutional problems, including those in Sudan, Burundi, East Timor, and Lebanon.

**97.** The goal of this strategy was probably questionable; the implementation certainly was. A few days after Ambassador Khalilzad did Washington's bidding by rejecting Haysom's oil provisions, new provisions emerged from the Kurdish-Shia negotiating table that gave oil powers almost entirely to the regions. By that stage, Ambassador Khalilzad had realized that a centralized oil sector was not on the table and consecrated the deal.

**98.** Yash Ghai, Jill Cottrell, and Bereket Sellassie, "Paper on System of Autonomies in Iraq," August 6, 2005, copy on file with the author.

**99.** Interview with Dr. Saad Jawad Al-Saati, Baghdad, August 2005.

**100.** See Alissa Rubin, "Envoy Delivers U.S. Vision for Iraqi Constitution," *Los Angeles Times*, August 12, 2005. The U.S. version of the constitution removed an article that would have incorporated international human rights standards into Iraq domestic law.

**101.** See Ali Al-Basri, "The Telephone Call and Its Effect on Influencing the Draft Constitution," editorial, Iraq 4 All News, August 28, 2005, <http://iraq4all.org> ("Day after day U.S. interventions in the drafting of the Iraqi constitution reveal themselves.").

**102.** Shortly after the referendum, an ABC News poll conducted in November 2005 found that just 27 percent of people in Sunni Arab areas of Iraq approved of the constitution, compared with more than 80 percent in mixed, Kurdish, and Shiite areas. ABC News poll, "Where Things Stand in Iraq," December 12, 2005, available at [abcnews.go.com/images/Politics/1000a1IraqWhereThingsStand.pdf](http://abcnews.go.com/images/Politics/1000a1IraqWhereThingsStand.pdf) (accessed on April 22, 2009).

**103.** See BBC News, "Iraq PM 'Confident of Agreement,'" August 23, 2005, available at [news.bbc.co.uk/1/hi/world/middle\\_east/4176610.stm](http://news.bbc.co.uk/1/hi/world/middle_east/4176610.stm) (accessed on April 22, 2009).

**104.** The parliament's announcement of a further delay did not set a date for a future session.

**105.** The adoption of the constitutional text by the assembly took place without a vote.

**106.** Interview with Dr. Sallama Al-Khafaji, member of the national assembly, Baghdad, August 2005.

**107.** The first such charge was voiced by Sunni hard-liner Saleh Mutlaq, who said when the August 15 deadline was not met that any subsequent extension "wouldn't be legal. . . . I think they may do it, but if they do, we [the Sunnis] will object to it in the strongest terms." Reuters, August 15, 2005.

**108.** On September 8, 2005, Nicholas Haysom of the United Nations stated that "we are awaiting a text certified by the National Assembly." See "UN Holds Presses on Iraq Constitution," Reuters, September 8, 2005.

**109.** October 12 was the date of an agreement to a schedule of "amendments" recorded in a letter from Sheikh Humam Hamoudi, "Amendments to the Constitution," letter dated October 13, 2005 (copy on file with the author).

**110.** Private conversation with Bakhtiar Amin, the Kurdish former minister for human rights in Iraq, May 2007, Erbil.

**111.** Private conversations with the author, July 2005, Baghdad.

**112.** Private email to the author, November 2005. See also Thalif Deen, "Iraqi Women May Lose Basic Rights Under the Constitution," Inter Press News Service, July 23, 2005.

**113.** See, e.g., "Special Representative of the Secretary-General for Iraq, Mr. Ashraf Qazi, Met with Sheikh Harith Al Dhari," June 29, 2005; "Special Representative of the Secretary-General for Iraq, Mr. Ashraf Qazi, Met with Representatives of the Turcoman Front," July 24, 2005; "Special Representative of the Secretary-General for Iraq, Mr. Ashraf Qazi, Met the President of the Council of Iraqi Minorities," August 4, 2005; and "The Special Representative of the Secretary-General for Iraq Recognizes Significant Public Participation in the Iraqi Constitution-Making Process," August 4, 2005. All press releases, UN Assistance Mission in Iraq, available at [www.uniraq.org/newsroom/press\\_releases.asp](http://www.uniraq.org/newsroom/press_releases.asp) (accessed on April 22, 2009).

**114.** The Iraqi newspaper *Al-Hayat* published extracts from the draft on July 25; *Al-Sabah* published a draft on July 26. It is perhaps remarkable that public participation in constitution making has relied so much on leaks. A leaked draft was the beginning of public involvement in Spain in 1978, one of the most successful constitution-making processes in recent times. See Andrea Bonime-Blanc's chapter on Spain in this volume.

**115.** For a detailed criticism of this phenomenon, see Nathan Brown, "Constitution Drafting Update," Carnegie Endowment for International Peace, August 8, 2005, available at [www.carnegieendowment.org/files/ConstitutionDraftingUpdate.pdf](http://www.carnegieendowment.org/files/ConstitutionDraftingUpdate.pdf) (accessed on April 22, 2009).

**116.** The outreach unit structure and mandate was prepared with the assistance of UN and USIP experts, including Scott Carlson, who had advised the Albanian constitutional commission.

**117.** The status of the outreach unit was somewhat complicated by the appearance of a proposal from the government that the minister for national assembly affairs, Dr. Safa al-Safi, would establish "a ministerial committee under the name of the Committee of Supporting and Encouraging National Dialogue on Popular Participation in Drafting the Constitution." See "Defense Department Briefing by Dr. Safa al-Safi," Combined Press Information Center, Baghdad, May 27, 2005. It is

not clear that the ministerial committee conducted many constitutional dialogues.

**118.** The questions included the following, with multiple-choice options under each question: "Which form of government do you prefer?" (options including presidential, parliamentary, mixed); "What is the most suitable form for the distribution of power in Iraq?" (a range of federalist and unitary state options); "What is the role of Islam in legislation?" (a range of options from Islam as the only source for legislation to no mention of Islam or religion); "Who owns the natural wealth (such as oil, gas, etc.)? The public? What, in your view, is the ideal way to distribute it?"; "How can women's rights be protected in your view?"; "Which of the following issues needs to be mentioned in the constitution?" (options include de-Baathification, integrity commission, special court.) I am grateful to Dr. Yasin Al-Jibori for his assistance in translating this and other original documents.

**119.** USIP staff members in Baghdad, living in various neighborhoods, were unable over several weeks to locate a single box. The UNAMI note on July 24, 2005, on the collection of submissions from the boxes, stated that "except for Al Anbar, Salah Ad Din, Ninevah, At Tameem and Diyala governorates, regular collection takes place every couple of days." The named governorates are, of course, those with large Sunni Arab majorities and minorities.

**120.** Private conversations with Adnan Al-Janabi and Hunain Al-Qaddo, August 2005, Baghdad.

**121.** As of December 2006, it was unclear where the records of the constitution committee were being stored. The deputy chairman of the constitution review committee, Ayad Al-Samarraie, stated in a private conversation with the author on December 7, 2006, that he did not know what had happened to the committee's library.

**122.** The United Nations Office for Program Services interview study of July 20–25, 2005, showed, remarkably, that when asked, "Have you ever participated in a discussion, forum, or other event on the constitution?" 93 percent of Iraqis answered no. When asked, "How willing would you be to attend a live public forum on the constitution?" nearly 60 percent of Iraqis answered that they were either very willing or somewhat willing. *Constitutional Baseline Survey, Conducted on Behalf of the Transitional National Assembly, Constitution Drafting Committee*, copy on file with the author.

**123.** See, e.g., the third printing of Feldman, *What We Owe Iraq*, pp. 135–36, in which he makes this argument. Feldman's and other intelligent com-

mentaries on U.S. policy toward Iraq's constitution making do not quite appreciate, however, the degree to which Iraqi identity was not capable of being expressed in constitutional language.

**124.** For one excellent dispassionate exposition of this fact from a longtime observer of Iraq, see Patrick Cockburn, *The Occupation: War and Resistance in Iraq* (London: Verso, 2006).

**125.** To this extent, the prescription of Larry Diamond that "Iraq needs . . . a political accommodation with the bulk of the Sunni population that feels marginalized from the emerging political order" (*Squandered Victory*, p. 316) addresses only part of the problem. Marina Ottaway of the Carnegie Endowment for International Peace was an early advocate for U.S. policy to work to create a "viable Sunni region," a policy that sadly was never implemented: see Marina Ottaway, "Back from the Brink: A Strategy for Iraq," Carnegie Endowment for International Peace Policy Brief 43, November 2005.

**126.** The views of advocates of the partition and regionalization of Iraq, including Leslie Gelb, Senator Joseph Biden, and Peter Galbraith, were dismissed out of hand by U.S. policymakers at least until the end of the George W. Bush administration.

**127.** It is ironic that many Sunni Arab Iraqis and their sympathizers since have accused the United States of adopting excessively consociational policies in Iraq, when in fact U.S. policy in the Bush administration ran in precisely the opposition direction.

**128.** "The 15 Boycotters Refuse to Sign the Draft Constitution," *Al-Sabah*, August 29, 2005, p. 2.

**129.** Even the strongest proponents of post-August renegotiation, including the International Crisis Group, acknowledged that a "last-ditch, determined effort to broker a true compromise" had doubtful chances of success. International Crisis Group, *Unmaking Iraq: A Constitutional Process Gone Awry*, Middle East Briefing no. 19, September 26, 2005, p. 1.

**130.** See Sheikh Humam Hamoudi, "Amendments to the Constitution," letter dated October 13, 2005, setting out the schedule of amendments (copy on file with the author). On October 12, after concluding the agreement, Ambassador Khalilzad announced in a Baghdad speech: "At the core of their agreement is a decision to mandate the next democratically elected Council of Representatives to review the constitution after its passage and recommend any amendments necessary to cement

it as a national compact. This constitution, the basis of Iraq's emerging democratic government and the road map to its future, will be a living document, as all enduring constitutions are." See Embassy of the United States, Baghdad, Iraq, "U.S. Envoy Welcomes Compromise on Iraq's Draft Constitution," available at [iraq.usembassy.gov/iraq/101305\\_compromise.html](http://iraq.usembassy.gov/iraq/101305_compromise.html) (accessed on April 22, 2009).

**131.** A number of informed observers commented ahead of the referendum that notwithstanding any merits of the constitutional text, the politics of its production meant that it would be better if the constitution were rejected. See, e.g., Bernard Gwertzman, "Brown: Best Hope for Iraq Is Rejection of Draft Constitution and Reopening of Negotiations," Council on Foreign Relations, August 29, 2005, available at [www.cfr.org/publication/8772/brown.html](http://www.cfr.org/publication/8772/brown.html) (accessed on April 22, 2009).

**132.** For a discussion of the connection between the constitution and Sunni Arab violence, see International Crisis Group, *In Their Own Words: Reading the Insurgency*, Middle East Report no. 50, February 15, 2006, p. 16 ("Armed groups condemn the constitution as a recipe for partition, a symptom of politicians' opportunism and selfishness and evidence of U.S. plans to break up the country"). For the role of the constitution and the civil war, see also International Crisis Group, *The Next Iraqi War? Sectarianism and Civil Conflict*, Middle East Report no. 52, February 27, 2006.

**133.** See, e.g., the Iraq Study Group report, which placed great hope for national reconciliation on the prospect of constitutional amendment, with little chance of a result. *The Iraq Study Group Report* (New York: Vintage Books, 2006), Recommendation 26, p. 65.

**134.** In this respect I disagree with the analyses of the International Crisis Group. See, e.g., International Crisis Group, *Unmaking Iraq: A Constitutional Process Gone Awry*, Middle East Briefing no. 19, September 26, 2005, p. 1 ("The second casualty was the text itself. Key passages, such as those dealing with decentralization and with responsibility for the power of taxation, are ambiguous and so carry the seeds of future discord"). For variations on this theme from Iraqis who were ideologically committed to a future Iraqi nation-state of a unitary (non-federal) sort, see also Hatem Mukhlis, "Voting 'Yes' to Chaos," *The New York Times*, October 18, 2005; Kanan Makiya, "Present at the Disintegration," *The New York Times*, December 11, 2005.

**135.** This fact has attracted a historians' debate on the question of whether Iraq was, in the

wake of World War I, an artificial construct, or whether there was some preexisting Iraqi identity that will be sufficiently durable to reemerge from the 2005 constitutional carve-up. See, e.g., Reidar Vissar, "Centralism and Unitary State Logic in Iraq from Midhat Pasha to Jawad al-Maliki: A Continuous Trend?" April 22, 2006, available at [www.historiae.org](http://www.historiae.org) (accessed April 22, 2009). It is not clear that this debate, and the contested historical trend lines to which the debate refers, will affect the juridical and political realities in a fragmented Iraq.

**136.** See, e.g., the National Security Council, National Strategy for Victory in Iraq, November 2005, pp. 15–16 ("In June, the national leg-

islature formally invited non-elected Sunni Arab leaders to join constitutional negotiations, demonstrating that leaders from all communities understood the importance of a constitution with input from Iraq's major groups. . . . Signs of vibrant political life are sprouting. The constitutional drafting committee received more than 500,000 public comments on various provisions").

**137.** There are signs that a viable Sunni Arab Iraqi regionalist political leadership may now be emerging. See, e.g., "Tribes in the Western Region Form a Police Force, Fight al-Qaida," *Ad-Dustoor*, April 29, 2007.

