



## *USIPeace Briefing*

March 2008

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# **From Gridlock to Compromise: *How Three Laws Could Begin to Transform Iraqi Politics***

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### **Overview**

On February 13, 2008 the Iraqi parliament simultaneously passed a law that sets forth the relationship between the central and provincial governments, an amnesty law and the 2008 national budget. The passage of these laws was the result of months of negotiation and last-minute substantive and procedural compromises that could portend a shift away from merely ethnic and sectarian-based alliances to inter-ethnic and sectarian issue-based politics. At the same time, Iraqi lawmakers may have discovered a strategy of simultaneous consideration of multiple matters that could increase the likelihood of consensus and resolution – a sharp contrast to what has until now been an issue-by-issue approach that has often resulted in impasses and political gridlock.

This *USIPeace Briefing* will examine the specifics of the three laws, as well as the trade-offs and compromises that led to their passage and will explore how the politics and compromises underlying the three laws could begin to transform Iraq's fledgling democracy.

### **Introduction**

Advocates of the 2007 surge of U.S. troops into Iraq argued that the infusion would provide the much-needed political space for Iraq's leaders to produce legislation and accommodation that would lead the nation towards meaningful reconciliation. Yet, throughout the second half of 2007, even as the rate of Iraqi civilian casualties dropped precipitously,<sup>1</sup> little progress, either in the form of national legislation or political compromise, was perceptible. In fact, in the year leading up to February 13, 2008 only one piece of "benchmark" legislation was enacted into law<sup>2</sup> – the Law on Accountability and Justice (De-Ba'athification), which though hoped would reform the current De-Ba'athification regime – one of the most divisive institutions in post-Saddam Iraq – instead "essentially preserved the previous De-Ba'athification system," and in any event has so far done little to promote political progress or reconciliation.<sup>3</sup> During this same period, the Constitutional Review Committee, despite multiple extensions, failed to deliver a final set of recommendations to Parliament.<sup>4</sup> The hydrocarbon and revenue sharing laws never even made it to the parliamentary floor. And the Article 140 deadline for a referendum on the status of Kirkuk (and other disputed territories) came and went with neither a referendum nor any meaningful

progress towards a political solution. At the beginning of 2008, one could have reasonably wondered whether the surge, despite its successes, would in the end amount to little more than another squandered opportunity – that Iraqi leaders would fail to seize the moment and produce anything of meaning for the Iraqi people.

It may be that February 13, 2008 will be remembered as the day when Iraq's political climate began to catch up with its improved security situation – or, more to the point, when Iraqi leaders discovered the key to political compromise and reconciliation. That day, the Council of Representatives (CoR) simultaneously passed a law setting forth the relationship between Baghdad and the provinces, an amnesty law, and the 2008 national budget. Each piece of legislation is significant in its own right. Moreover, each legislative act reflects important compromises and concessions, revealing much about the political dynamics in Iraq. Key issues for each law are discussed in greater detail below.

As significant and revealing as the substance of each legislative act is, so too were the debates that preceded them and the process by which they were passed. The laws engendered and facilitated compromises along ideological rather than just identity-driven political lines. Whereas a year ago the Sadrist-controlled Mahdi Army was being accused of sectarian cleansing of Sunnis, on the day the laws were passed, the Sunni coalition and Sadrist party stood side-by-side advocating a stronger amnesty law. In the debate over the Provincial Powers Law, Sunnis, Shia (Sadrist, Fadilla and Dawa) and secularists<sup>5</sup> came together to form a powerful “centrist” bloc, while the largest Shiite party, the Islamic Supreme Council of Iraq (ISCI), and the Kurdish Alliance<sup>6</sup> maintained an inter-ethnic “federalist” coalition. February 13 may also, therefore, be remembered as the day when issue-politics rose above ethnic and sectarian ideology.<sup>7</sup>

### *The Compromises That Facilitated Passage*

Two compromises were critical to passing the three laws. First, Iraqis moved past the zero-sum game of Iraqi politics by bundling three laws that each constituency prioritized differently into one legislative package. This allowed for “trade-offs” between the parties, and was a marked change from the single-issue approach that had failed to achieve consensus over the hydrocarbon legislation, the constitutional review, and the disputed territories. By treating the three issues as one compromise Sunnis, most Shia, and Kurds each gave up something in order to achieve what they valued most, and were therefore able to return to their constituents declaring victory.

- The Kurdish priority was to ensure the Kurdistan region received 17 percent of the national revenues (after subtracting certain agreed upon federal expenditures). Most Sunni and Shia politicians strongly objected to this allocation, maintaining that 13 percent more closely represents the Kurdish proportion of the population.
- The Sunni priority was the Amnesty Law, which portends the release of thousands of Sunni detainees. Sunnis also supported the passage of a Provincial Powers Law that retained a strongly centralized system and allotted only limited authority to the provinces.
- The Shia, as is increasingly the case today, had disparate and conflicting interests. For most, the priority was passing a Provincial Powers Law that provided only limited autonomy for provinces and contained a provision setting a deadline for provincial elections. ISCI was the major Shia outlier, preferring a law containing greater decentralization and no election timeline. Finally, the Sadrists, ardent supporters of a more centralized Provincial Powers Law, also had an interest in an amnesty law that would facilitate the release of party

members who, they believe, had been wrongfully detained during roundups targeting the Mahdi Army.

The second compromise was the bundling of the three laws into one package to be decided by one “up or down” vote. The rationale for one vote on all three laws was based on a lack of trust between the parties – the fear being that if the laws were voted on separately, the party whose law was passed first might then refuse to compromise on the remaining laws, or worse, leave the parliamentary chamber and prevent a vote on the remaining legislation.<sup>8</sup> On two occasions prior to the agreement to bundle the laws, parliament failed to pass this legislation due to this mistrust. On February 7, 2008, the Kurdish parliamentarians left the chamber to prevent a vote on the Provincial Powers Law before the budget was passed. And, on February 12, when Kurdish leaders again demanded that the budget be voted on first, Sunni and Shia lawmakers walked out to prevent a vote on the budget before passage of the Amnesty and Provincial Powers laws.<sup>9</sup>

The compromise, to vote on all three laws simultaneously, was a creative and unprecedented accord in Iraqi politics. As required by the CoR Rules of Procedure, the CoR voted on each law article by article before a single final vote on all three laws. That the parties had reached a compromise, however, did not completely eliminate tensions during the article-by-article voting. Several Sadrists left the chamber during the article-by-article voting of the budget (the walk out did not prevent quorum), while the vote on the provision of the Provincial Powers Law that sets a deadline for provincial elections led to an emotionally charged exchange over whether the measure actually passed (the official tally claimed it passed by a single vote). After completion of the article-by-article voting for each law, the CoR passed all three laws in one final vote.

That the state of mistrust between the parties was so great that a verbal agreement to vote on each other's legislation was insufficient does not speak well for the state of Iraqi politics today. At the same time, that the parties overcame this mistrust through a mechanism that facilitated the passage of all three laws should be viewed as a positive step in their political growth. The veto, though subsequently withdrawn, by Vice-President Adel Abd al-Mahdi, an ISCI party member, obviously undermined some of the trust that was gained through the compromise (at least any trust in ISCI), and diminished the likelihood of this particular parliamentary procedure being repeated in the future. It did not, however, diminish the significance of the CoR achieving compromise on that particular day.

## **The Provincial Powers Law**

### *Background: The Constitutional Framework and the Current Status of Provinces*

By far the hardest-fought and most contentious of the three laws was the Provincial Powers Law, which sets forth the relationship between the central government and the provinces not incorporated into regions.<sup>10</sup> The Iraqi Constitution establishes three main levels of government – the national government in Baghdad, regional government (of which there is currently only one, Iraqi Kurdistan), and the provinces (of which there are 18, though three comprise Iraqi Kurdistan and are therefore excluded from the Provincial Powers Law).<sup>11</sup>

While the relationship between the central government and the regions is for the most part constitutionally settled,<sup>12</sup> the same cannot be said for the relationship between Baghdad and the provinces, for which the Constitution is at best ambiguous, if not internally inconsistent. Article

115 bestows upon provinces broad residual powers and allows provincial legislation to trump national legislation in the case of conflict in all but a dozen or so matters (those granted exclusively to the national government in Article 110). Article 122, however, treats provinces as administrative units of the central government with little or no legislative power, and commands that national law shall regulate their “administrative and financial authorities . . . in accordance with the principle of decentralized administration.”

When the CoR first considered the Provincial Powers Law in the summer of 2007, debate became deadlocked over these competing provisions and the matter was referred to the Iraqi Federal Supreme Court (FSC) for an advisory opinion.<sup>13</sup> The FSC issued its opinion in July 2007, and relying upon aspects of Articles 115 and 122, as well as Article 61 (the jurisdiction of the CoR), determined that the CoR has the power to promulgate only national laws and may not legislate on local affairs. In addition, provinces have the authority to “enact local laws to organize their administrative and financial affairs . . . according to the principle of decentralized administration.” According to the advisory opinion, in practice this would mean provinces could legislate on all matters that are not enumerated in Articles 110 (exclusive federal powers including national security, foreign policy, and fiscal and customs policy), 111 and 112 (hydrocarbons), 113 (antiquities, archeological sights and other national treasures), and 114 (shared powers including customs, electric energy, environmental policy, public health, education, and water). Local security is a provincial affair, while matters contained in Article 114 that clearly impact local administration can be legislated on by the CoR, but in consultation with the provincial governments.<sup>14</sup> While the decision adopts neither the Article 115 nor the Article 122 formulation, it would appear to hold a more expansive view of provincial autonomy and legislative authority.

In addition to the constitutional framework, to understand the significance, or at least potential significance, of the Provincial Powers Law it is also crucial to appreciate the *de facto* power regions and provinces have historically enjoyed. While Iraqi Kurdistan has exercised relative autonomy since 1991 (and made sure to enshrine that autonomy in the 2005 Constitution) the provinces remained administrative units of the central government up through the fall of the Saddam regime in 2003, and despite the convoluted treatment of the status of provinces in the Constitution, have remained that way since. The federal ministries provide all basic services to the provinces. Under Coalition Provisional Authority (CPA) Order No. 71 – the law that sets forth the current provincial powers – provinces have no legislative or judicial powers, have nominal ability to raise revenue, and can only influence federal regulation in very limited ways.<sup>15</sup> If the Constitution is viewed as offering conflicting formulations of provincial powers, the highly centralized “administrative unit of the central government” formulation in Article 122 has prevailed to date. For proponents of greater decentralization (the Article 115 camp) the Provincial Powers Law provided the perfect opportunity to change that status.

### *Debating the Law: The Two Camps*

Perhaps the most surprising aspect of the debate over the Provincial Powers Law was which parties came down on each side of the debate. At first blush it would seem the Sunnis have the most to gain from greater decentralization, since the majority Shiite parties will always dominate the central government and greater decentralization would allow Sunnis to enjoy more autonomy in those provinces with a Sunni majority. At the same time, the looming specter of regionalization and the possibility of a nine-province Shiite super-region would be an additional

incentive for Sunnis to support greater provincial autonomy.<sup>16</sup> The reasoning goes that greater provincial autonomy would undercut the motivation for provinces to form themselves into regions. Without regionalization, the “Shiastan” scenario could not come to pass. This, it would seem, would be win-win for the Sunnis, who could simultaneously decrease influence of the Shia dominated central government over Sunni provinces and reduce the likelihood of “Shiastan.” Similarly, other more nationalistic and centrist-minded parties, such as the Sadrists, Fadilla and the Allawi bloc, might have been expected to support greater provincial autonomy as a check on ISCI’s plans of regionalization.

Conversely, ISCI, the largest Shiite party and the strongest proponent of a nine-province Shiite region, might have been expected to oppose the granting of additional powers to the provinces. Better, it would seem, to leave the provinces under the thumb of the central government (which, at least for now, ISCI has great influence over) in order to provide as stark a choice as possible between provincial and regional status and thus increase the likelihood of regionalization beginning this spring.

Surprisingly, these parties diverted entirely from their expected stances during the debate over the Provincial Powers Law. ISCI, with support from the Kurdish Alliance, pushed for significantly greater provincial autonomy. Weary of Baghdad overreaching into Kurdish affairs, the Kurds generally favor a weak central government and were therefore natural allies of the ISCI position, despite the fact that their status as a region makes the law inapplicable to Iraqi Kurdistan. In addition, ISCI and the Kurdish Alliance have a history of mutual support and the two have formed a formidable parliamentary bloc in the CoR. The Sunni parties, aligned with Sadr, Fadilla, Dawa, other Shia independents, and Allawi’s bloc, fought for more centralized control. One parliamentary advisor described the Sunni position, seemingly against Sunni interests, as a natural response to the “cancerous fear of federalism.” Federalism in Iraq, he maintained, has “become a byword for fragmentation and disintegration” of the State, leading to positions that are more “emotional than logical.”<sup>17</sup>

The ISCI view might also be understood in the context of increasing Shia opposition to regionalization. There is strong evidence that popular support for a nine-province Shiite region is waning. If ISCI believes regionalization is less certain (especially a nine-province region), it would make sense to push for more provincial autonomy so that ISCI can maximize its influence in whichever provinces it is able to control – a backup plan in case regionalization fails.

### *The Law*

From these competing interests came a law that is as difficult to decipher as the Constitution – provinces have the right to “adopt local legislation . . . in a manner that enables [them] to run [their] affairs according to the administrative decentralization principle and in a way that does not contradict the Constitution and the federal laws.”<sup>18</sup> The prohibition against contradicting federal laws is the key limitation. Given that all federal ministries have, or in theory will have, originating statutes that grant them authority to regulate within their respective areas of competence, a fair reading of the law would not carve out much legislative space for the provinces to govern – any attempt to modify current ministerial regulation through provincial legislation could be struck down as contradicting the applicable federal law.

On its face, the Provincial Powers Law would appear to contradict the FSC advisory opinion, since it allows the CoR not only to continue to legislate on local matters, but also enjoy legislative priority on matters for which the FSC believes provinces should have sole jurisdiction. As explained earlier, however, the advisory opinion does not enjoy the force of law, which merely portends the likelihood of additional future litigation should this version of the Provincial Powers Law be enacted. It also underscores the reality that with or without a law, the true extent of provincial legislative authority may remain unknown for quite some time.

Other provisions limit provincial autonomy as well – the law grants the CoR the power to remove provincial governors and dissolve provincial councils, and allows the Council of Ministers<sup>19</sup> to remove other senior provincial officials.<sup>20</sup> Provincial revenue would continue to be derived largely from allocations from the federal budget.<sup>21</sup> While the 2008 budget raised provincial allocations on average by 50 percent from 2007, when asked what the provinces can do with that money one American official who works closely with a provincial government replied, “they can build hospitals, schools, roads, and other development projects, which will then necessarily be administered and controlled by the applicable federal ministry.”<sup>22</sup>

The law does expand provincial authority in meaningful ways – it grants provinces direct authority over local security, it allows provincial officials to oversee and inspect public facilities in the province (other than courts, military units, universities, colleges, and independent institutions),<sup>23</sup> and it gives provincial officials some input into the appointment of senior ministry officials in the province (directors general) and allows them to dismiss such officials by an absolute majority vote in the provincial council.<sup>24</sup>

Perhaps the most contentious provision of the law is an article that establishes October 1, 2008 as a deadline for provincial council elections, and mandates that the CoR pass an election law to facilitate provincial elections within 90 days of passage of the Provincial Powers Law. (The Provincial Powers Law does not take effect until after these elections.) ISCI in particular, but also the Kurdish Alliance, objected to this provision, which passed by only a single vote during the law’s article-by-article reading.

### *ISCI’s Veto*

On February 26, 2008, the Presidency Council vetoed the provincial powers law due to “disapproval” on the part of Vice-President Adel Abd al-Mahdi over a “centralized approach [in the law] that is in contradiction with the Constitution.”<sup>25</sup> The veto not only demonstrated how greatly ISCI objected to the law itself, but also underscored the fact that ISCI was the only major political interest that did not derive direct benefit from the February 13 compromise – to review, the Amnesty Law was a Sunni and Sadrist priority, the budget secured the buy-in of the Kurds, and the Provincial Powers Law favored the position of the “centrists.” The precariousness of a legislative compromise that gave nothing to a veto-wielding interest should have been obvious.

This, of course, begs the question why ISCI agreed to support the legislative package in the first place. ISCI’s close political relationship with the Kurdish Alliance may have made it difficult for ISCI to vote against a package that included the agreement on the 2008 budget. Additionally, Kurdish support for the compromise meant ISCI did not have the votes to prevent passage anyway. ISCI may have calculated it was better not to upset the package agreement in

parliament and instead use its power in the Presidency Council to veto the one law it found most objectionable.

ISCI specifically objected to twenty-one provisions of the Provincial Powers Law and proposed amendments for each. Most of the objections highlighted ISCI's preference for the Article 115 formulation of provincial power. The most notable objections were:

- An objection to the limited legislative authority bestowed upon the provinces, preferring instead that the prohibition against contradicting federal laws be limited to matters exclusively granted to the federal government in Article 110 of the Constitution (an adoption of the Article 115 expression of provincial powers);
- Eliminating the provisions allowing the CoR to remove the governor and dissolve the Provincial Councils, or alternatively, placing these powers within the competency of the Federation Council;<sup>26</sup>
- Eliminating from the Council of Ministers the power to remove other high-ranking provincial officials;
- Freeing the governor and other provincial leaders from being subject to the national Civil Service Law;
- Amending provisions relating to the provincial allocation of the national budget so as to give provinces greater financial independence and a greater guaranteed share of national revenues.<sup>27</sup>

Notably, both the veto and follow-up letter explicitly affirmed ISCI's support for the October 1, 2008 provincial election deadline, despite the fact that ISCI opposed this provision more vociferously than any other during the article-by-article voting. The affirmations appeared to some to be "protesting too much," and suspicions are high that the ISCI veto was first and foremost an underhanded effort to undermine provincial elections. While ISCI currently enjoys significant influence over most southern provincial governments, it is widely believed that popular support for ISCI has waned since the 2005 elections and that ISCI will fare far worse in future elections, particularly compared to the Sadrist. Moreover, obstructing local elections is not merely delaying the inevitable, as short term plans to initiate the regionalization process depend on ISCI having significant representation on the provincial councils in the south. There are many who believe ISCI, despite recently withdrawing its veto, will continue to try to thwart provincial elections by impeding passage of the forthcoming Provincial Election Law, and by hampering efforts on the part of the Iraqi Higher Electoral Commission to prepare for these elections<sup>28</sup> – all in an effort to maintain ISCI's control over provincial councils for as long as possible.

Another plausible explanation for ISCI's veto was, as described above, ISCI's desire for a nine-province Shiite super-region. Without the Provincial Powers Law, the *status quo* of centrally administered provinces would have continued, leaving regionalization as the only available means for provinces to achieve even a modest degree of self-rule. This is not to suggest that without the law regionalization in the south would be assured. Many Shia possess a strong centrist view and will likely resist any regionalization. ISCI will also have to overcome powerful Shia constituencies that might seek to form single province regions, or at most a three-province region of Basra, Maysan, and Dhi Qar. Still, keeping provinces as mere administrative units of the central government would likely compel some who might otherwise have been satisfied with

the limited autonomy in the Provincial Powers Law to support greater self-rule through regionalization, making a nine-province Shiite region at least slightly more likely.

ISCI's veto, while distressing to Sunnis, was not a case of sectarian politics and discord. The veto did not upset the larger legislative compromise – both the amnesty law and the budget were approved – and in fact was most vociferously condemned by other Shiite parties. The Sadr bloc immediately decried the veto as “illegal,”<sup>29</sup> and threatened demonstrations and strikes if the matter was not resolved to its satisfaction.<sup>30</sup> In any event, on March 19, 2008 Vice-President Adel Abd al-Mahdi withdrew his objection to the Provincial Powers Law, paving the way for the Presidency Council to approve the law as passed by the CoR on February 13. The withdrawal came just two days after U.S. Vice-President Cheney visited Baghdad, and at least one Iraqi news outlet reported Vice-President Adel Abd al-Mahdi confirming U.S. pressure to withdraw the veto.<sup>31</sup> Ongoing discussions between ISCI, Sadrist and Fadilla also apparently played a role in the withdrawal, with the three parties agreeing to discuss possible amendments to the law before the October deadline for provincial elections – again underscoring how the relationship between Baghdad and the provinces may not be fully formed for quite some time.

## **The Amnesty Law**

### *Background*

The Amnesty Law was first and foremost a Sunni priority that also enjoyed strong Sadrist support. Recent figures estimate there are about 26,000 detainees in Iraqi prisons and 80% of them are Sunni.<sup>32</sup> Iraqi Sunnis have long contended that many of those detained are not guilty of any crime, but are in fact victims of being in the wrong place at the wrong time. Worse still, some argue that many Sunni detainees are victims of persecution on the basis of their sectarian identity. Securing their release has long been a priority and chief demand of Sunni officials, who in August 2007, walked out of the Maliki government, citing “arbitrary arrest and detention of Sunni citizens” as one of the reasons.<sup>33</sup>

Sadrist leaders have levied similar accusations against the Iraqi government, claiming followers have been wrongfully detained and arrested, and alleging there are currently thousands of Sadrists being held in Iraqi prisons.<sup>34</sup> In its most recent Human Rights Report, the United Nations Assistance Mission in Iraq (UNAMI) added credibility to these Sunni and Sadrist concerns, finding that, “arrest sweeps conducted under the Baghdad Security Plan are often less targeted . . . and that a significant number of suspects are apprehended because they were in the wrong place at the wrong time following a security incident. The approach seems to be to arrest those in the vicinity at the time, with the ‘sorting’ carried out subsequently.”<sup>35</sup>

At the same time other forces, political and otherwise, have contributed to the pressure for an amnesty law in Iraq. The Maliki government has publicly supported a limited amnesty in order to foster national reconciliation,<sup>36</sup> while the U.S. embassy has continued to push for an amnesty law as part of the “benchmark” legislation. Additionally, the huge number of people detained has stretched the Iraq criminal justice system beyond capacity. It is becoming more and more difficult for the government to support the prison population, and the court system is severely overwhelmed – nearly half of all those detained have not been sentenced, and many have not had a hearing before an investigative judge (the Iraqi equivalent of being charged).<sup>37</sup>



## *The Law*

The CoR passed a limited (as opposed to general) amnesty. It applies to all “Iraqis and those residing in Iraq” who have been:

- Sentenced to imprisonment, unless sentenced for one of the enumerated excluded crimes;
- Charged but not sentenced for a crime other than one of the enumerated excluded crimes;
- Detained for six months or more without being presented in front of an investigative judge for conformation of charges;
- Detained for one year or more without being presented before a competent court for trial.<sup>38</sup>

Those who are charged with or have been sentenced to imprisonment for the commission of certain crimes may not be granted amnesty under the new law. These offenses include crimes against humanity, genocide, war crimes, crimes of terrorism that resulted in killing or infliction of permanent injury, premeditated murder, manslaughter in which the claimants (the victim’s family) have refused to waive their personal rights, kidnapping, aggravated theft, embezzling state funds, rape, sodomy, incest, counterfeiting Iraqi or foreign currencies, forging official documents, drug crimes, smuggling of antiquities, and offenses of the Military Penal Code. In addition, anyone sentenced to death is not eligible.

The law requires the head of Iraq’s Higher Judicial Council (HJC), the judicial body charged with overseeing and administering the Iraqi judiciary, to form committees of three judges to implement the law and administer the amnesty, and to promulgate any additional rules necessary to facilitate implementation of the law. Applications for amnesty are to be submitted to these committees (with at least one committee in each province), at which point the committee will review the application and rule on the amnesty. Committee decisions may be appealed to the appeals court for that province.

### *Implementation: Issues and Concerns*

The extent to which the law will positively contribute to national reconciliation and accommodation will depend almost entirely on its implementation – how many people are actually released and how soon. While no one has committed to a hard number, it is generally agreed that for the law to have any positive impact the Sunni community will need to see a sizable number of detainees freed in a relatively short time frame, some say as short as three months.

The number and speed with which detainees will be released will depend on two factors: how many detainees fall within one of the excluded crimes (and are therefore ineligible for amnesty) and the capacity of the HJC to efficiently and effectively administer the amnesty process.

Concerns abound about the application of the excluded crimes. First, the list includes the crime of terrorism, which is ambiguously and vaguely defined under Iraqi law and potentially subject to broad application. As one example, the law provides that a person is guilty of committing an act of terrorism if he/she “contributes” or “participates” in a terrorist act, but the law does not define the words “contributes” or “participates.”<sup>39</sup> A broad application of these undefined terms

could result in charges or convictions based on a tenuous connection to a terrorist act that resulted in death or permanent injury – thus denying amnesty to the very people Sunni and Sadrist leaders claim were in “the wrong place at the wrong time,” and the very people whose release it is hoped will contribute to national reconciliation.

Second, there are reports that the human rights of suspects and accused persons have been violated. UNAMI contends that many detainees are denied legal counsel when coming before the investigative judge and that there is “little opportunity for self-defense.”<sup>40</sup> Detainees have reported to UNAMI officials that they appeared before the investigative judge for a matter of minutes only, and that they were forced to sign statements before the investigating officer while blindfolded and sometimes handcuffed. Reports of torture and ill treatment also persist, which may in turn lead to the extraction of a false confession.<sup>41</sup> If true, these practices call into question the denial of amnesty for persons who have been convicted of an excluded crime for which the only evidence was an illegally obtained confession or where a conviction was obtained through an investigation or trial process that violated international human rights norms and standards.

Another concern related to the implementation of the Amnesty Law is that it only applies to those detained in Iraqi prisons. About an equal number of prisoners are currently being detained by the coalition forces (MNF-I). There is a provision in the law that calls for the Iraqi Government to undertake measures to “transfer those detained from the MNF-I jails to the Iraqi jails in order to implement the [amnesty] on them.”<sup>42</sup> How vigorously the government will endeavor to fulfill this obligation, and the extent to which the government will be successful is, of course, unknown.

The law should be applauded for resting implementation with the HJC, a highly respected government institution that is largely considered fair and neutral in a nation where few government institutions enjoy such a reputation. That said, the HJC has presided over a judiciary that has already failed to efficiently and effectively adjudicate the cases of thousands of detainees. One could reasonably be concerned with its capacity to create yet another quasi-judicial body when those already in existence are understaffed and stretched far beyond capacity.<sup>43</sup>

### *Prospects for Promoting Reconciliation*

How the law will be implemented, and therefore the extent to which it will help move Iraqis towards greater reconciliation is difficult to know at this time. Immediately after the law’s passage there were positive signs that it could at least help repair the rift in the Maliki government. Said one prominent Sunni lawmaker, “[w]e have no doubt that passing this law will have a remarkably positive effect in speeding up the return of the Accordance Front [the largest Sunni bloc] to the government.”<sup>44</sup> Unfortunately, a month after passage of the law the Accordance Front had not ended their boycott, and on March 9, 2008 the Iraqi press reported that the Accordance Front had submitted to the Maliki Government a new list of demands for their return.<sup>45</sup>

With regard to the number of detainees who might ultimately be released, one official in the U.S. Embassy in Baghdad predicted it could be between 8,000 and 12,000 detainees.<sup>46</sup> *The Iraq Weekly Status Report* for January 3, 2008, put out by the U.S. Department of State, Bureau of

Near Eastern Affairs, estimates the number is closer to 5000.<sup>47</sup> On March 15, 2008, the HJC reported 2744 detainees already had been released under the Amnesty Law.<sup>48</sup> Two days later, the number had risen to 3245.<sup>49</sup> On March 20, the HJC official count was 8229<sup>50</sup> – encouraging short-term indications that the law could have a positive impact.

## **The 2008 Budget**

The 2008 budget is a complex piece of legislation that includes a range of budgetary issues such as the computation of national revenue, spending charts, allocations to the various ministries and other line items, and a myriad of other financial and economic matters. For the purpose of the present discussion, of more interest is the role that the budget played in the compromise reached on February 13, and the most contentious issues that go to the heart of Iraqi politics.

### *Negotiations and The Law*

The Constitution mandates allocations to regions and provinces on the basis of their proportional population percentage.<sup>51</sup> During negotiations, Kurds maintained that the population percentage of the Kurdistan region is 17 percent, while Arabs argued it is closer to 13 percent. Arab lawmakers based their support for 13 percent on the proportion used by the Ministry of Trade for the Public Distribution System – the food rations given to all Iraqi citizens. Kurds, however, relied on the precedent set by former Prime Ministers Ayad Allawi and Ibrahim Jafari, each of which agreed to a 17 percent allocation, and Prime Minister Maliki, who agreed to 17 percent in the 2007 budget. As current census data is unavailable, it is difficult if not impossible to know with certainty which figure is correct. In the end, and as a direct result of the compromise over the other two laws, the parties agreed to 17 percent.

A second point of contention was whether the national government or Kurdistan Regional Government (KRG) would fund the Kurdish regional guard, or Peshmerga. The Kurdish position was that funding should come from the national government and not out of the Kurdish allocation. Predictably, government officials and Arab lawmakers argued differently. In the end this issue was left unresolved – the budget calls for the national prime minister and the prime minister of the KRG to “conclude an agreement... over the expenditures of the regional guards [Peshmerga].”<sup>52</sup>

### *The Larger Compromise*

Negotiations over the budget were crucial to securing Kurdish support for the package of laws. In a press conference on February 11, 2008, Speaker of Parliament Mahmoud al-Mashadani confirmed the *quid pro quo* when he told reporters that Arab Sunni agreement over the 17 percent was in exchange for Kurdish support of the Amnesty Law, and that Sadrists and Fadilla had only agreed to the 17 percent after receiving assurances of Kurdish support for the Provincial Powers Law.

Kurdish pressure on the Maliki government likely also influenced the outcome of the debate. In December 2007, a delegation from the KRG traveled to Baghdad to communicate a list of demands for continued Kurdish support. With the Sunni’s and Allawi bloc already boycotting the cabinet, Maliki’s government could not have survived a Kurdish walk out. Chief among the list of Kurdish demands was the 17 percent allocation.<sup>53</sup>

## Conclusion and Future Prospects

The extent to which the February 13 compromise will transform Iraqi politics is impossible to know at this time. To be sure, whatever political progress comes from the compromises will be slow in developing – there will be numerous challenges ahead, and no one should expect too much too soon. In particular, Iraqi lawmakers will have to overcome the mistrust engendered by the ISCI veto, and find a new mechanism to facilitate the packaging of multiple issues into one legislative compromise. (An explicit pledge from each party not to use the veto power to upset future legislative deals might be sufficient.) Three developments, however, stand out as possible positive by-products from the parliamentary compromise.

First, Iraqi politicians learned they could reach consensus on a broad range of issues where resolution of any one would have been difficult if not impossible standing alone. Most Shiite parties supported the 17 percent Kurdish allocation in the budget in return for Kurdish support for the Provincial Powers Law. Sunnis supported the Kurdish allocation in exchange for the Amnesty Law and the Provincial Powers Law. And Kurds voted in favor of the Amnesty Law and Provincial Powers Law in order to secure their 17 percent of the budget. As a result of these trade-offs, the CoR was able to pass a package of three significant laws when over the previous year it had failed to resolve them separately.

Recent failure to agree on other critical political issues, including amendments to the Constitution, the hydrocarbon and revenue sharing legislation, and resolution of the disputed territories through implementation of Article 140, might also be traced to treating each as single issues, standing alone. One can easily identify interconnected and underlying interests that might be positioned for a larger compromise over some, if not all, of these issues. For example, it is at least possible that handing over disputed territory (including Kirkuk) to Iraqi Kurdistan will be more palatable to Iraqi Arabs if accompanied by simultaneous agreement for national management over natural resources. Similarly, most Iraqi Arabs (Sunni and Shia) support greater centralization of powers vis-à-vis the regions – offering at least the possibility of a compromise involving constitutional amendments on the division of powers in exchange for implementation of Article 140. One can only hope that these sorts of deals will be contemplated, as they offer the potential for resolving currently deadlocked issues and moving forward national reconciliation and accord.

Second, the February 13 compromise offers the possibility of more robust inter-sectarian political alliances. The issue of regionalization has in the past caused the more nationalistic Shiite parties to align with Sunnis and secularists. Now, however, we may be seeing the fortification of issue-based politics split among “centrists” and “federalists,” instead of just along ethnic and sectarian lines. If the experience of fruitful compromise and the bitterness at the ISCI betrayal serve to strengthen an alliance between Sunni and some Shiite political interests, this could do more to advance inter-sectarian accommodation than any single legislative achievement.

Third, ISCI’s opposition to the Provincial Powers Law may have weakened the Shia/Kurdish alliance that has until now dominated Iraqi politics. Since the 2005 elections the United Iraqi alliance (UIA)<sup>54</sup> and the Kurdish Alliance have combined to command a majority in parliament,

dominate key positions in government, and control Iraq's political agenda. The UIA, however, has been losing political cohesion over the past year, most notably with withdrawal of Sadrists and Fadilla in 2007. ISCI's veto (along with any future efforts at regionalization or obstruction of provincial elections) may deepen this fragmentation, not only weakening the UIA but by extension its partnership with the Kurdish Alliance as well. It may have been these longer-term considerations that in part compelled ISCI to work out a compromise with Sadrists and Fadilla. To be sure, an ISCI/Kurdish alliance would still remain the best organized and funded of Iraq's political interests (and both enjoy strong U.S. support) – and might therefore maintain a disproportionate control over the political agenda. An ISCI/Kurdish alliance, however, would fall far short of the votes needed to pass legislation in the CoR and would face stronger opposition to many of its initiatives and policies – this could portend an important change in the political dynamics in Iraq, opening up the possibility of new alliances and government policies more likely to lead to meaningful progress and accommodation.

Finally, it is worth noting how the debate on the Provincial Powers Law may herald increasing respect in Iraq for the principle of the rule of law. Throughout the debate, centrists and federalists alike went to great lengths to frame their positions on the basis of popularly agreed upon constitutional principles. When, as explained earlier, parliamentary negotiations became deadlocked lawmakers looked to the Federal Supreme Court for guidance. ISCI's objections to the Provincial Powers Law were due to "contradiction[s] with the Constitution," and ISCI's proposed alternate formulations were "[i]n order to ensure the constitutionality of the law." Of course these positions are based on political agendas, and one should be cautious not to draw too far-reaching a conclusion from one parliamentary debate. But in a nation with scant experience with liberal democratic governance, this reliance on the Constitution and judicial institutions should give pause for reflection, and perhaps cautious hope, that a new political culture is beginning to take root in Iraq – one based not on pure power politics, but a principled respect for the rule of law.

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**About the Author:**

This *USIPeace Briefing* was written by Jason Gluck, rule of law advisor, in the Rule of Law Center of Innovation at the United States Institute of Peace. The views expressed here are not necessarily those of USIP, which does not advocate specific policies. The author would like to thank the following people for their advice and input: Neil Kritz, Daniel Serwer, Paul Hughes, Vivienne O'Connor, Peter Lyon, and Lauren Piera, all at USIP; Reidar Visser, Norwegian Institute of International Affairs; Miranda Sissons, International Center for Transitional Justice; and Joseph Logan, Human Rights Watch. In writing this *USIPeace Briefing*, the author relied upon unofficial translations of most Iraqi documents.

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<sup>1</sup> According to the UK-based NGO Iraq Body Count, Iraqi civilian deaths dropped from 10,240 for the four-month period January-April, 2007, to 4258 for September-December, 2007. See [www.iraqbodycount.org](http://www.iraqbodycount.org).

<sup>2</sup> The Iraq Accountability Appropriations Act passed by the U.S. Congress in 2007 identifies eighteen legislative, political, and security “benchmarks” to evaluate Iraqi progress towards national reconciliation. The benchmarks that require legislative action include: the constitutional review; hydrocarbon and revenue sharing laws; a De-Ba’athification law; an amnesty law; a provincial election law and deadline for provincial elections; a law on the procedures to form regions; a provincial powers law; a law establishing an electoral commission; and a law on disarmament, demobilization, and re-integration.

<sup>3</sup> International Center for Transitional Justice, Briefing Paper on “Iraq’s New ‘Accountability and Justice’ Law,” January 22, 2008. Available at: <http://www.ictj.org/en/news/pubs/index.html>

<sup>4</sup> Pursuant to Article 142 of the Constitution, the CoR established the Constitutional Review Committee (CRC) in September 2006 to deliver a set of proposed constitutional amendments for parliamentary consideration by May 2007. The CRC submitted a draft report in May 2007, and received a one-month extension in order to reach consensus on a few outstanding issues. However, since the submission of its draft report, the CRC has failed to resolve key points of contention, and in fact has lost consensus on several of the most critical amendments contained in the draft report. The CoR recently granted the CRC an extension until August 2008.

<sup>5</sup> The “secularists” in Iraqi politics are members of the Ayad Allawi-led Iraqiya bloc, of which the two most important parties are the Iraqi National Accord, led by Ayad Allawi, and the Iraqi Front for the National Dialogue, led by Saleh al-Mutlaq.

<sup>6</sup> The Kurdish Alliance is a coalition of Kurdish parties that is dominated by the two largest Kurdish parties, the Kurdish Democratic Party (KDP) and the Patriotic Union of Kurdistan (PUK).

<sup>7</sup> This is not the first time issue politics trumped identity politics. In 2006 Sunnis, Sadrists, and secularists joined to temporarily block passage of the Law on the Executive Procedures to Form Regions. Similarly, in January 2008 a coalition of 10 Shiite and Sunni political parties formed the National Understanding Project in an effort to block certain Kurdish ambitions for decentralization. What sets February 13 apart, however, is that it marks the first time these inter-sectarian interests aligned to pass major legislation.

<sup>8</sup> To reach quorum and be able to conduct parliamentary business, 138 of the 275 members must be present. The Shiite bloc (UIA) has 128 seats, though it is extremely fractured. The Kurdish Alliance has 53 seats. And the Sunni bloc (Tawafaq) has 44 seats. Thus, no bloc, even assuming it can command attendance from all its members, can achieve quorum on its own. Parliamentarians have on several occasions boycotted parliament to prevent quorum in order to prevent passage of unfavorable legislation.

<sup>9</sup> At one point during the February 12 session a Sadrist leader explicitly voiced concern that if the budget were passed the Kurds would end the session by walking out, while Arif Teyfour, the Second Deputy Speaker and a Kurd, later stated his belief that if the CoR voted on the amnesty law, quorum would be lost before voting on the budget and Provincial Powers Law.

<sup>10</sup> The Provincial Powers Law is merely the latest in a long line of attempts to reach consensus over the federal nature and structure of Iraq (previous attempts include the 2004 Transitional Administrative Law, the 2005 Constitution, the 2006 Law on the Formation of Regions, and the 2007 constitutional review).

<sup>11</sup> Iraq Constitution, Art. 116. Available at: <http://law.case.edu/saddamtrial/index.asp?t=1>

<sup>12</sup> Though settled, the highly decentralized relationship between Baghdad and the regions does not enjoy support from Arab Sunni and Shia, who during the 2007 constitutional review advocated for increased powers for the central government to allow Baghdad to play a greater role in setting national policy and providing effective federal coordination.

<sup>13</sup> The FSC can issue an advisory opinion upon request, but such an opinion, while carrying considerable weight, does not enjoy the same force of law enjoyed by a ruling issued pursuant to adjudication.

<sup>14</sup> Iraqi Federal Supreme Court Opinion No. 13/2007, July 31, 2008. See also, Constitution Art. 114.

<sup>15</sup> Coalition Provisional Authority Order No. 71, Local Governmental Powers, Article 2, at <http://www.cpa-iraq.org/regulations/>

<sup>16</sup> Pursuant to the 2006 Law on Executive Procedures to Form Regions, provinces are entitled to begin the process of regionalization in April 2008.

<sup>17</sup> Author’s interview with advisor to members of the CoR.

<sup>18</sup> Provincial Powers Law, Art. 2.1.

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- <sup>19</sup> The Council of Ministers is the executive branch of the government, which is led by the Prime Minister and includes his cabinet.
- <sup>20</sup> Provincial Powers Law, Article 20.2.
- <sup>21</sup> The Provincial Powers Law bestows no tax power upon the provinces, but does grant undefined authority to levy local fees and fines, and generate revenue from services and investment projects, as well as grants and donations. Article 44.
- <sup>22</sup> Author's interview with U.S. Government contractor working with Iraqi provincial officials.
- <sup>23</sup> Provincial Powers Law, Art. 31.4.
- <sup>24</sup> Provincial Powers Law, Art. 7.9.
- <sup>25</sup> Letter from Vice-President Adel Abd al-Mahdi to the Office of the Presidency of the Republic, February 26, 2008. Under the transitional provisions of the Iraq Constitution, laws passed by the CoR must be unanimously approved by the three-person Presidency Council, which consists of the Iraq President, Jalal Talabani (Kurd), and two vice-presidents, Tariq al-Hashimi (Sunni) and Adel Abd al-Mahdi (Shia). If the Presidency Council rejects the law, it is returned to the CoR for reconsideration. If passed again and then vetoed a second time, the second veto can be overridden by a three-fifths majority vote. Constitution, Article 138.5.
- <sup>26</sup> The Federation Council is the yet to be established Second Chamber of Parliament, which is to be comprised of representatives of the regions and provinces.
- <sup>27</sup> Letter from Adel Abd al-Mahdi to the Speaker of the CoR setting forth specific objections to the Provincial Powers Law as passed by Parliament on February 12, 2008.
- <sup>28</sup> ISCI has already begun to publicly question whether provincial elections are feasible in the near future on technical grounds. See Reidar Visser, "Debating Devolution in Iraq," March 10, 2008, at <http://www.merip.org/mero/mero031008.html>
- <sup>29</sup> "Iraq Provincial Law Rejected," *Los Angeles Times*, February 28, 2008. Available at <http://www.latimes.com/news/nationworld/world/la-fg-law28feb28.0.5199445.story>
- <sup>30</sup> "Al-Sadr Threatens Demonstrations and Strikes if Parliament Does Not Approve Provincial Law," *Attaakhi*, March 4, 2008.
- <sup>31</sup> *Al-Sharqiya* Television News, March 18, 2008. (It was likely U.S. support for provincial elections, rather than any particular preference for provincial powers, that led the U.S. to pressure ISCI to withdraw the veto.)
- <sup>32</sup> U.S. Department of State, Bureau of Near Eastern Affairs, *Iraq Weekly Status Report*, February 20, 2008, pg. 5, available at <http://www.state.gov/p/nea/rls/rpt/iraqstatus/c24957.htm>; see also, [http://www.nytimes.com/2008/02/14/world/middleeast/14iraq.html?\\_r=1&scp=6&sq=alissa+rubin+iraq&st=nyt&oref=slogin](http://www.nytimes.com/2008/02/14/world/middleeast/14iraq.html?_r=1&scp=6&sq=alissa+rubin+iraq&st=nyt&oref=slogin). This does not include those prisoners currently held by coalition forces.
- <sup>33</sup> "Iraq Sunni bloc quits coalition," *Aljazeera*, August 1, 2007. Available at: <http://english.aljazeera.net/NR/exeres/73B20040-C171-4C31-A0D3-2480CCF2EF18.htm>
- <sup>34</sup> "Iraq's Sadr followers reconsidering ceasefire," *Reuters*, January 19, 2008. Available at: <http://www.reuters.com/article/latestCrisis/idUSL19313814>
- <sup>35</sup> UNAMI Human Rights Report, June 30, 2007, pg. 22. Available at: <http://www.uniraq.org/aboutus/HR.asp>
- <sup>36</sup> "Iraq's al-Anbar considers amnesty," *Aljazeera*, September 2, 2006. Available at: <http://english.aljazeera.net/English/archive/archive?ArchiveId=35657>
- <sup>37</sup> "Ending Impasse, Iraq Parliament Backs Measures," *New York Times*, February 14, 2008. Available at: [http://www.nytimes.com/2008/02/14/world/middleeast/14iraq.html?\\_r=1&scp=6&sq=alissa+rubin+iraq&st=nyt&oref=slogin](http://www.nytimes.com/2008/02/14/world/middleeast/14iraq.html?_r=1&scp=6&sq=alissa+rubin+iraq&st=nyt&oref=slogin). See also, UNAMI Human Rights Report, June 30, 2007, pg. 21. Available at: <http://www.uniraq.org/aboutus/HR.asp>
- <sup>38</sup> Amnesty Law, Arts 1 & 3.
- <sup>39</sup> Anti-Terrorism Law of 2005, Art. 2.3.
- <sup>40</sup> UNAMI Human Rights Report, June 30, 2007, pg. 23.
- <sup>41</sup> *Ibid.*
- <sup>42</sup> Amnesty law, Art. 6.
- <sup>43</sup> The Iraqi judiciary is operating at about three-quarters capacity and is in need of about 300-400 more judges. While new judges are being trained each year, it is estimated it will be one and a half to two years before the judiciary is fully staffed with judges.
- <sup>44</sup> "Iraq lawmakers pass key budget and amnesty laws," *Reuters*, February 13, 2008. Available at: <http://www.reuters.com/article/middleeastcrisis/idus113886558>

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<sup>45</sup> “Accordance Front Announces New Conditions to Return to Government,” *Addustour*, March 9 2008.

<sup>46</sup> Author’s discussion with U.S. Embassy official.

<sup>47</sup> U.S. Department of State, Bureau of Near Eastern Affairs, *Iraq Weekly Status Report*, January 3, 2008, pg. 4. Available at <http://www.state.gov/p/nea/rls/rpt/iraqstatus/c24957.htm>

<sup>48</sup> “Higher Judicial Council Issues New Instructions for Releasing Detainees,” *Al-Mada*, March 15, 2008.

<sup>49</sup> “3245 Released Under Pardon Law,” *Al-Khaleej*, March 17, 2008.

<sup>50</sup> *Aswat al-Iraq* Website, March 20, 2008.

<sup>51</sup> See, e.g., Article 112.1 (relating to revenue from hydrocarbons); Article 121.3 (relating to national revenues).

<sup>52</sup> General Federal Budget Law for Fiscal Year 2008, Art. 17.7.

<sup>53</sup> “Despite Problems, Iraqi Leader Boasts Of Success,” *Washington Post*, February 29, 2008. Available at: <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/28/AR2008022804209.html>

<sup>54</sup> The UIA is a coalition of Shiite political parties, including ISCI, Dawa, the Sadrist party, and some Shia independents.