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SPECIAL REPORT

1200 17th Street NW • Washington, DC 20036 • 202.457.1700 • fax 202.429.6063

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Jonathan Morrow

Weak Viability

The Iraqi Federal State and the Constitutional Amendment Process

About the Report

Starting in August 2004, the U.S. Institute of Peace Rule of Law Program, one of the Institute's Centers of Innovation, has been providing in-country support on constitution making to Iraqi political, governmental, and civil society actors. The goal of this program is to maximize the transparency and inclusiveness of Iraq's constitutional process, enabling Iraqi citizens to engage directly with the drafters, and ensuring domestic ownership of the constitution.

Jonathan Morrow, senior adviser in the Rule of Law Program, has been traveling frequently to Iraq over the past two years to observe and report on Iraq's constitution-making process and constitutional implementation. In this report, he makes recommendations for Iraq's upcoming constitutional amendment process that could make for a viable, if weak, Iraqi state and that could help to arrest the current decline in the country's security situation.

The views expressed in this report do not necessarily reflect the views of the United States Institute of Peace, which does not advocate specific policy positions.

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Summary

- The cycle of violence in Iraq is, in part, constitutional: it derives from competing visions of the Iraqi state that have not been reconciled. An amendment to Iraq's constitution to delay the creation of new federal regions, together with a package of legislation and intergovernmental agreements on oil, division of governmental power between Baghdad and the regions, and the judiciary, may be enough to slow or even arrest this decline in the security situation, and may be achievable. A "government of national unity," though desirable, will not by itself be able to generate the necessary constitutional consensus.
- Iraq's new legislature, the Council of Representatives, is now considering the process of constitutional amendment described in Article 142 of the constitution. Prime Minister Nouri al-Maliki has announced the constitutional review as part of his government's platform. This amendment process, assuming it proceeds, will come in the wake of widespread opposition to the constitution from Sunni Arab Iraqis in the October 2005 referendum. It is expected that a Constitution Review Committee (CRC) will soon be appointed, in line with Article 142.
- To the extent that it was opposed by Sunni Arabs, the constitution lacks the essential criterion of any constitution: the consent of *all* major national communities. The 2005 Iraqi constitution may nonetheless, as a *legal* text, be a sufficient and necessary framework for the radically regionalized Iraqi polity that the constitution drafters envisaged.
- The constitutional challenge in Iraq is first about peacemaking, not state building. As the Iraqi parliament faces the challenge of appointing, mandating, and staffing a CRC, the first, and essential, set of questions is therefore *political*: How can the amendment process be used as a vehicle to remedy the political failure of last year's constitution drafting process? How can consensus be built, and in particular how can Iraq's Sunni Arabs be encouraged to give their assent to the new federal Iraq? How

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can Iraq's Kurdish and Shiʿa leaders be encouraged to make worthwhile constitutional concessions to Sunni Arab positions so as to elicit that consent?

- The second set of questions is *legal*: What are the minimum constitutional amendments needed, if any, to ensure that Iraq is a *viable*, if not a strong, state? To the extent that the Sunni Arab position has been one that purports to defend the Iraqi state, legal or technical improvements to the text that support Baghdad's ability to govern may draw support from Sunni Arabs, thereby generating clear political benefits. There are additional legal questions that, though not strictly related to the Sunni Arab problem, are pressing: in particular, What are the minimum constitutional amendments needed, if any, to ensure that the human rights of all Iraqis receive adequate protection? It is not only the Sunni Arabs who feel disenfranchised by the constitution; nationalists, some women's groups, and groups representing Iraq's minorities express similar views.
- It will be very difficult to pass constitutional amendments of any sort, especially those that seek to shift power from Iraq's regions to the central government. Regional interests have the upper hand, constitutionally and politically. There is no reason to expect that the constitution's Kurdish and Shia authors will see the need for constitutional amendments to the text that they themselves deliberately, if hastily, constructed.
- The referendum procedure for amendment is onerous, with a three-governorate veto power. High expectations of the amendment procedure will lead to disappointment and may amplify, rather than reduce, violence. For this reason, legal instruments other than constitutional amendments must be considered as ways to remedy the political and legal deficiencies of the constitution.
- A CRC should be established, with strong Sunni Arab membership. Given the pressing and complex nature of the necessary constitutional deal, the CRC should be mandated to make recommendations, where appropriate, not only for constitutional amendments, but also for (1) legislation, (2) intergovernmental agreements and, where appropriate (3) interparty agreements and (4) international agreements, all of which might encourage Sunni Arab political commitment to the Iraqi constitution and ensure viability for the Iraqi state.
- A three-part formula, concerning the creation of new regions, oil, and the delineation of powers between the central government and the regions, offers a way forward for the CRC to heal the wounds caused by the deficiencies in the 2005 drafting process. That formula would *not* require the Kurdistan party or the hitherto most influential Shia party, the Supreme Council for the Islamic Revolution in Iraq (SCIRI), to make *major* modifications to their constitutional positions.

Introduction: Political Failure, Legal Workability

With the formation of an Iraqi government, Iraq's permanent constitution has entered into force; and Iraq's new legislature, the Council of Representatives, has begun to discuss the process of constitutional amendment, itself mandated by the constitution in Article 142.[1] The text of Article 142 was agreed to right before the referendum, on October 12, 2005, as a last-minute compromise to prevent another Sunni Arab boycott of a vote on the country's new basic law. Many people—Iraqis and non-Iraqis—have pinned their hopes on this amendment process as a way of restoring a unitary, nonsectarian Iraqi state. Others, including some officials of the United States government, have disavowed Article 142 and dismiss the amendment process as a political impossibility, given the dim prospects of persuading the powerful Kurdish and Shia drafters to make permanent concessions to Sunni Arab positions.

Neither view is well founded: the Iraqi constitutional amendment process provides a real, if fleeting, opportunity to achieve major political and legal agreements that would

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be in the interests of Kurds, Shiite Arabs, and Sunni Arabs alike, as well as secular Iraqis, women, and minorities. The "amendment process" will not lead to many real constitutional amendments, but it can be used creatively, to work in concert with interparty peace negotiations and the development of a legislative program directed at the viability—if not the strength—of the Iraqi national government. It is too early to declare an end to the Iraqi state, for too many people in Iraq rely on its continued existence. This special report details the way in which this progress can be made.

Iraq's permanent constitution, negotiated in the summer and fall of 2005, has failed to satisfy the most fundamental criterion of constitution making: sufficient consensus. That is, it failed to command the support of all of the country's major political, sectarian, and ethnic groups. In particular, Iraq's Sunni Arab community voted overwhelmingly against the constitutional text in the October 2005 national referendum: in the predominantly Sunni governorates of Anbar and Salahaddin, more than 96 and 81 percent of voters, respectively, rejected the constitution. Iraq's interim constitution, or Transitional Administrative Law (TAL), drafted under U.S. occupation and heavy U.S. influence, clearly envisaged that each of Iraq's three major blocs—Kurd, Shia Arab, and Sunni Arab—would agree on the final constitutional text; this was the purpose of the three-governorate (province) veto provision for a permanent constitution that was the central feature of the TAL.

True, nobody could expect a constitution for Iraq to be approved by each and every Iraqi citizen. Nor could any basic law for Iraq afford to alienate any one of the country's three major political blocs—but the Iraqi constitution did just that. It is a high-water mark of the degree to which Iraq's Sunni Arabs have been excluded, and have excluded themselves, from Iraqi public life. The result of this failure has been violence. Sunni Islamist extremism, operating outside the universe of constitutional argument, has clearly played a role in fomenting such violence; but it remains quite possible that the way the Iraqi constitution was drafted in 2005 contributed to the post-August shift of the Sunni Arab insurgency to attack Shia and Kurdish civilian targets, and the corresponding arrest, summary detention, and, in some cases, torture and execution of Sunni Arab suspects by Shiite members of the Iraqi public security forces. At a minimum, the 2005 constitutional process was a lost opportunity to reduce the drift toward sectarian violence.

The irony at the heart of this political tragedy, though, is that as a *legal* text, the constitution may be a reasonable basis for a workable Iraqi polity, and it may be the *only* such basis. The feature of the constitution that is apparently most objectionable to Iraq's Sunni Arabs is regionalization; but it is hard to imagine a different state structure for a country in which power, culture, ethnicity, sect, and tribe have created de facto regional identities and enabling institutions. The regionalizing identities are not necessarily permanent, but they are certainly durable. Regional institutions appear to be willing to govern, and, at least in the case of the Kurdistan Region and some southern centers (including Najaf and Karbala), they are able to do so.

Apart from the political problems that form the context of Iraq's constitution, there are some inherent deficiencies that are specifically legal. Contributing to the political failure of the constitution was the appearance of a constitutional text that did not meet high drafting standards and did not deliver, at a technical level, a wholly coherent vision of the Iraqi state. The constitutional text has now been the subject of several legal analyses, some of which catalogue the deficiencies in the text. Some of those analyses address aspects of the constitution that are believed to fall short of best-practice federal models, particularly those aspects of the constitution that do not provide for a strong Iraqi state. For example, under the Iraqi constitution, the central government has no power to tax in regions if the regions object, no explicit power to disband existing militias, and no exclusive power to regulate Iraq's oil sector. Regional security forces are explicitly recognized (apparently enabling the Kurdistan Regional Government to retain the *peshmerga*) at the expense of national military authority in the north. Iraqi central government law is subordinated to regional law if there are any inconsistencies between the two. Also (unusual

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for a parliamentary democracy), the prime minister cannot dismiss cabinet ministers without the consent of the parliament (Article 77). Iraq's central government, on paper and in reality, is possibly the weakest of any federal model in the world.

Some of the legal analyses of Iraq's constitution ascribe these deficiencies to inexpert or hasty drafting. What they often do not acknowledge, however, is that the predominantly Kurdish and Shia authors of the constitution, as they sat around their Green Zone tables in the Baghdad summer of 2005, were attempting the very constitutional outcome that was achieved: a prescription for a radically regionalized Iraq, with a weak (if not incapacitated) central government. Where the constitutional language as drafted is ambiguous—as with the provisions on oil—it usually reflects an inability of the parties to agree on the details. Yet it was no drafting error that led to the fragility of the central government as described in the constitution: For the most powerful of the Kurdish and Shia drafters, any government in Baghdad would be a natural object of suspicion. In the case of the Kurdish politicians, their constituents had already expressed in a January 2005 regional poll a very clear preference for government by a more or less full-fledged Kurdistan Regional Government, as opposed to central rule from Baghdad. The commitment of some of the most powerful Shia drafters to a regionalized Iraq, confirmed as late as August 11, 2005, came as more of a surprise, although it had antecedents in the desire of the residents of Basra to have a share in the oil wealth that surrounded their neglected city, as well as a more widespread and general Shia distrust of Baghdad.

Certainly, much of the international commentary, however perceptive on other matters, misses the central point about the constitutional drafting process in Iraq: radical regionalization was deliberate. One recent report points to the provision that subordinates central government law to residual regional law (Article 115) as needing amendment because it may topple the federal structure of Iraq. Certainly Article 115 poses special problems for the viability of Iraq, but to expect Iraqi parliamentarians to amend the provision for this reason is to lose sight of the major political current of contemporary Iraqi politics. Iraq is *not* going through a process of "decentralization," in which Saddam Hussein's extremely centralized powers are being more or less gradually devolved to regional interests that still depend on the center. Iraq did not enjoy the luxury of gradualism. Regime change did not consist of replacing Saddam Hussein's cabinet ministers with U.S. appointees; the dismantling of government ministries was near total. Saddam Hussein's government apparatus was utterly destroyed in 2003, and the central governmental power that existed before then reverted more or less immediately to regional and local sectarian interests. There is now little or no inherent power in the center at all, in part because there is no real center. Any new Iraqi government will hold only such power as regional interests permit it to assume. The new constitution of Iraq reflects this reality.

Indeed, regional interests are so powerful that Iraq must be thought of as a *confederation*—a collection of loosely affiliated states in a political union—not the federation that Iraq's constitution declares the country to be. More accurately still, the "Republic of Iraq" itself should be thought of as analogous to those entities stemming from international agreements (e.g., the European Union) whose purposes would be hard to achieve without constituent state support. In the case of Iraq, that support cannot be presumed. The basis of Iraqi nationalism is now slender indeed; the antiwar commentators in the United States who see an Iraqi identity emerging in a coherent antigovernment insurgency are as wrong as those proponents of the war who took a strong Iraqi state as a given.

It is true that this vision of a radically regionalized Iraq, when it found constitutional expression in August 2005, had the effect of amplifying Sunni Arab hostility to the constitutional text, in circumstances where Sunni Arabs had already been excluded from the drafting table.[2] Iraq's Sunni Arabs typically describe the constitution as a dismemberment of the nation that they once dominated, and they often equate regionalization with disintegration, anarchy, or civil war. It was this view, expressed with a greater or lesser degree of force by Iraq's Sunni Arabs in August 2005, together with their declared inten-

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tion to block the constitution at referendum, that prompted a last-minute agreement on October 12, brokered by U.S. ambassador Zalmay Khalilzad, between Shia leaders and the predominantly Sunni Arab Iraqi Islamic Party, for a constitutional review that would supposedly amend the basic law to assuage Sunni Arab concerns in exchange for their support of the referendum. 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."[3] He repeated his view that amendments were necessary for the constitution to have sufficient consensus in an op-ed piece published in *The Washington Post* on December 15, 2005: "To bring Iraqis together and consolidate their participation in the political process, the next National Assembly will have the opportunity to amend the constitution, with the goal of broadening support for the document and turning it into a national compact."

Politics and the Three-Governorate Veto: The Difficulty of Amendment

The terms of the October 12 agreement, as set out in Article 142 of the constitution, are as follows:

> ***First:*** The Council of Representatives shall form at the beginning of its work a committee from its members representing the principal components of the Iraqi society with the mission of presenting to the Council of Representatives, within a period not to exceed four months, a report that contains recommendations of the necessary amendments that could be made to the constitution, and the committee shall be dissolved after a decision is made regarding its proposals.
>
> ***Second:*** The proposed amendments shall be presented to the Council of Representatives all at once for a vote upon them, and shall be deemed approved with the agreement of the absolute majority of the members of the Council.
>
> ***Third:*** The articles amended by the Council of Representatives pursuant to item "Second" of this Article shall be presented to the people for voting on them in a referendum within a period not exceeding two months from the date of their approval by the Council of Representatives.
>
> ***Fourth:*** The referendum on the amended Articles shall be successful if approved by the majority of the voters, and if not rejected by two-thirds of the voters in three or more governorates.
>
> ***Fifth:*** Article 126 of the constitution (concerning amending the constitution) shall be suspended, and shall return into force after the amendments stipulated in this Article have been decided upon.

There are two important contextual points regarding Article 142. They are sobering for anyone looking for quick peacemaking deals surrounding an amended constitution.

First, the October 12 agreement that led to the inclusion of this provision in the text of the constitution had a limited constituency. In particular, the only Sunni Arab group that appears to have placed any value in the October 12 agreement—or indeed to even have been party to it—was the Iraqi Islamic Party, a party so amenable to U.S. interests that it had accepted membership in the Iraqi Governing Council during the period of formal coalition occupation. Several other Sunni Arab groups, including those now represented in the Iraqi parliament, did not join the Iraqi Islamic Party and their secular centrist colleagues in consenting to support the constitution once Article 142 was included. On the contrary, their mobilization against the constitution remained steadfast, as evidenced by both the referendum results in the Sunni Arab regions and ABC News opinion polling data, the latter of which showed that through November 2005, only 27 percent of people living in Sunni Arab parts of Iraq approved of the constitution.[4] There is also evidence that even the Iraqi Islamic Party itself was lukewarm in its support for the constitution;

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much of its literature supporting the draft did not appear until after October 15. In any event it is not clear, looking at the referendum results in the Sunni Arab governorates, that the Iraqi Islamic Party was decisive in securing the ultimate success of the "yes" campaign in Iraq.

For these reasons, it is not accurate to suggest that the review and amendment provisions under Article 142 of the Iraqi constitution represent the hopes of Iraq's Sunni Arab community as a whole. Precisely for these reasons, too, one cannot expect Iraq's Kurdish and Shia leaders to feel toward Iraq's Sunni Arab community a strong sense of moral obligation to amend the constitution through Article 142. As the Kurds and Shiites might point out, the majority of Iraq's Sunni Arabs themselves did not see fit to invest Article 142 with great value when voting in the October 15 referendum. Moreover, the text of the constitution that had been distributed nationwide to Iraqi voters prior to the October 15 referendum did *not* contain the eleventh-hour paragraphs of Article 142. The distributed text had been sent to the printers in late September. Article 142 therefore was not presented to Iraqi voters, and it does not enjoy an especially strong popular mandate. In all these circumstances, the moral and political force of Article 142—if not its legal force—is somewhat weaker than may appear to be the case.

The second point is that the October 12 agreement, as reflected in Article 142, sets a high bar for constitutional amendment. True, in one respect Article 142 lowers the ordinary threshold for constitutional amendment for the one-time-only special review process: It dispenses with the special (two-thirds) parliamentary majority prescribed in Article 126 for regular amendments and avoids the article's entrenching of "fundamental principles" and human rights provisions. Instead, Article 142 contemplates an absolute majority in parliament for all constitutional provisions and also lowers the threshold by suspending the Article 126 requirement for a regional referendum in circumstances where an amendment might diminish the powers of the regions.

However, for all its apparent leniency, Article 142 substitutes a referendum requirement that makes amendment hardly any easier: the requirement in the fourth paragraph that subjects any amendment to the possibility of a by now familiar three-governorate veto. It is this veto provision that guarantees the ability of the Kurdish and Shia parties—each of which has amply demonstrated the ability in the two previous elections to muster the strong if not overwhelming support of voters in three governorates—to stop dead any proposed Sunni Arab or centralist amendments. In an already regionalized Iraq that remains heavily influenced, if not dominated, by the same Kurdish and Shia leaders who drafted the constitution, the prospects for any proposed amendment that runs counter to those party platforms are very bleak indeed.

Lest there be any doubt on this last point, the leaders of the dominant Shiite party in the constitutional drafting room, the Supreme Council for the Islamic Revolution in Iraq (SCIRI) and the Kurdish president of Iraq and leader of the Patriotic Union of Kurdistan (the more Baghdad-friendly of the two main Kurdish parties) have each pronounced apparently implacable views on the matter. On December 10, 2005, SCIRI leader Abdul-Aziz al-Hakim was reported in SCIRI's own semiweekly newspaper *Al-Adala* as stating an intention to "work on keeping the constitution as it is without changing it." He was reported in the Iraqi media as having stated, during his January 11, 2006 Eid al-Adha sermon at SCIRI headquarters in Baghdad, that Iraqi Shia would not negotiate on the core principles of the constitution. He was soon after reported by Reuters as saying that "the first principle is not to change the essence of the constitution" and by Associated Press that there would be no "substantive changes" to the constitution, "including the provision that leaves provincial governments strong and the central government weak." More recently still, he has expressed the same views in the midst of the Basra crisis, in which the Fadhila party may emerge as another regionalist movement.[5] Abdul Aziz al-Hakim's son, Muhsen al-Hakim, claims continued SCIRI control of five southern governorates.[6] Hakim's comments have been echoed and reinforced by SCIRI lieutenants Sheikh Humam Hamoudi, formerly

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the chairman of the Constitution Drafting Committee, and Hamid al-Bayati, author of a recent paper in praise of Iraq's federal model. Most recently, Iraqi vice president Adil Abdul Mahdi was reported in the Kurdistan newspaper *Al-Taakhi* on May 10, 2006 as stating that "federalism's success in the Kurdistan is the best example that the system works well in Iraq," and that "the Kurdistan experience may be used as an example throughout Iraq and for the next government."

The Kurdish president of Iraq, Jalal Talabani, for his part, also told Reuters in January that he "did not believe the constitution needed amending."[7] Kurdish legislative deputies have pointedly repeated this view in recent multiparty oil and gas seminars. There can be no doubt that Massoud Barzani, the Kurdistan Regional Government's president (and leader of the Kurdistan Democratic Party) and his followers are even less amenable than President Talabani to the prospect of concessions to a centralized Iraq in circumstances where, they allege, the only available Kurdish compromises have already been made. On the contrary, the Kurdish leadership is more keen than ever to support Shia regionalist movements with SCIRI, Fadhila, or wherever they can be found: the emergence of one or more Shia federal regions will, they believe, only strengthen Kurdistan's hand.

Matters are made still more difficult by the fact that any amendments ultimately proposed by the CRC will need to be approved by the Council of Representatives as a package, and they will probably require approval as a package as well by the people of Iraq in a referendum. To give Iraqis the ability to pick and choose from a menu of amendments will complicate the ballot. The necessity of an amendment package containing a compendious "yes" or "no" vote makes it all the more difficult for amendments to be passed: If voters reject one amendment in the package, they reject the entire package.

Indeed, the lowered parliamentary threshold that Article 142 offers to Sunni Arab and nationalist would-be constitutional reformers may be no concession at all in a parliament whose decisions on constitutional reform matters are always subject to a three-governorate veto. It is possible, if unlikely, that the new Iraqi parliament may prove to contain an absolute majority of constitutional reformists; there is no question that even within the Shia camp, for instance, there are politicians who might vote to strengthen Baghdad's central rule. Yet the veto means that any proposed reforms ultimately will need to meet the approval of the Kurdish and Shia party leaders who have regional power bases. Those leaders wrote the constitution only a few months ago, so why would they change it now? Those same leaders did not yield to Sunni Arab pressure in the weeks before the October 15 referendum, at a time when they had reason to believe that their inflexibility might have prompted a *successful* Sunni Arab veto of the constitutional text. Of course, the Sunni Arab veto was unsuccessful (although just barely: 85,000 more "no" votes in Ninevah would have sunk the entire constitution). So why would Kurdish and Shia leaders, with fears of a Sunni Arab veto behind them and the constitution having entered into force—and now armed with new parliamentary mandates—choose to surrender what they clearly see as hard-won constitutional gains to a relatively small group of Iraqi nationalists, many of them neo-Baathist, whose views of a unitary Iraqi state last year were unworkable and in some respects offensive?

Indeed, why should Kurdish and Shia leaders not go one step further and press for amendments that *continue to weaken* Iraq's central government, since they know from the October 2005 experience that Iraq's Sunni Arabs would probably not be able veto them?

A Constitutional Agenda for Sunni Arabs

Addressing these questions requires an understanding of the evolving nature of the Sunni Arab and Iraqi nationalist constitutional agenda—an understanding best grasped in light of the Shiite Arab and Kurdish agendas. During the August 2005 negotiations, the Kurdish and Shia constitutional positions, including their insistence on strong regional govern-

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ments, were relatively coherent. Those positions have not changed significantly since then.

There has been some speculation that Iraqi nationalist, or centralist, constitutional politics may have since come to the fore within the complex Shia United Iraqi Alliance (UIA), which now controls 130 seats in the 275-member parliament. Many political observers believe that Moqtada al-Sadr, whose party gained 30 seats within the Shia alliance, has Iraqi nationalist views, despite his reputation as a Shia partisan. Many also point to the apparent refusal of the Shiite Dawa and Fadhila parties to press the SCIRI regionalist position; and SCIRI member Adil Abdul Mahdi was defeated by centralist Dawa in February's UIA ballot for prime minister nominee. In the early days of his incumbency as Iraq's oil minister, senior independent UIA leader Hussain Shahristani expressed centralist views on Iraq's oil management.

Yet there has been no concrete formulation of an Iraqi nationalist or centralist constitutional position within the Shia camp, perhaps because Shia leaders know how hard such a position will be to sustain. A "Sadrist" constitutional position has not been articulated, and no meaningful alliances have been forged to date, as some international commentators predicted, between the nationalist agendas of the Shiite Sadrist and the Sunni Arab parties. Grand Ayatollah Ali al-Sistani, in recommending a "yes" vote in the referendum, seems to have accepted SCIRI's regionalization clauses. Although undoubtedly complicated by the electoral success of al-Sadr's party and that of Dawa for the prime ministership, the dominant Shia position, it seems, remains substantially unaltered since August 2005.

In contrast to the solidity of the Kurdish and Shia constitutional posture, Iraq's Sunni Arabs were disorganised in the August 2005 negotiations. To the extent Iraq's Sunni Arabs had a substantive position, it consisted of these items: a rejection of a federal model of Iraq, (though with some recognition for the existing Kurdistan Region); a rejection of provisions in the constitution that might punish Baath Party membership; and an assertion of Iraq's Arab identity, at the expense of multiethnic descriptions of national identity. Each proposal failed. Beyond these rudimentary substantive points, the Sunni Arab constitutional argument was directed at real or perceived procedural defects in the drafting process, including their exclusion from the negotiating room, the unlawful convening of the National Assembly beyond the August constitutional deadline, and, of course the taint of drafting while under U.S. occupation.

Substantive Sunni Arab positions were at no point articulated with unanimity, or with any strategic vision. When Kurdish and Shia leaders rejected these positions out of hand in August 2005, Sunni Arabs had no compromise positions on which to fall back. Part of the problem, of course, was that Iraq's Sunni Arabs had little or no experience in strategizing *as* "Sunni Arabs." They considered their views as being simply nationalist in the broadest sense, not seeing that post-Saddam secular Iraqi nationalism had an inevitably sectarian flavor. Iraq's Sunni Arabs were not helped by the fact that (in contrast to the other groups) they had no elected leadership, having largely declined to participate in the January 2005 elections. The Sunni Arab insurgency, too (presumably its radical Islamist component), was successful in targeting for assassination those Sunni Arab leaders who were formulating a credible constitutional position. Most prominently, Sheikh Mijbal Issa, one of the fifteen Sunni Arab members of the Constitution Drafting Committee, was shot dead on July 19, 2005. Members of the Iraqi Islamic Party in particular are routinely targeted for assassination, as in the case of leaders Ayad al-Izzi and Ali Hussein, who were killed in November 2005.

Most important, though, the insistence by the U.S. government that the Transitional National Assembly not exercise its right to extend the August 15, 2005 preliminary constitutional deadline denied Iraq's Sunni Arabs the time they needed to understand where their true constitutional interests lay. Under those circumstances, there was no chance for the Sunni Arabs to develop clear positions that might protect and advance those interests, and that might stand some chance of success at the negotiating table. Moving at breakneck speed means that, sometimes, necks get broken.

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There is evidence, however, that the Sunni Arab position has evolved since the 2005 constitutional negotiations. First, new leaders with new mandates have entered the field: Following the December 2005 parliamentary elections, a newly elected Sunni Arab leadership has emerged, with 55 parliamentarians from predominantly Sunni Arab parties and with a strong claim to be able to represent Sunni Arab interests. (The parties generally quibble with the "Sunni Arab" label—they are neither wholly Sunni nor wholly Arab—but the objections do not really conceal the fact that their constituents are overwhelmingly Sunni Arab.)

Although the Sunni Arab parties claim not to have control over the insurgency and are themselves victimized by its Islamist elements, they presumably have some ability to influence at least the neo-Baathist insurgency: after all, agreements were reached in December 2005 to cease insurgent activity in Sunni Arab areas of Iraq for long enough to get these politicians elected. Senior Kurdish and Shia leaders are increasingly open in their commentary on the terrorist credentials of some elected Sunni Arab leaders. Sunni Arab leaders, in turn, may also publicly deplore attacks on Shia civilians, but almost all members of the elected Sunni Arab leaders express support for the "heroic resistance" to U.S. occupation, most recently rejecting Prime Minister al-Maliki's reconciliation initiative. What might happen if this support were withdrawn? There is a possibility that some of the new Sunni Arab leaders, by virtue of their electoral mandate and connections to Ansar al-Sunna and other religious insurgents, have it within their power to restrain, if not eliminate, the insurgency.

In early 2006, Sunni Arab political leaders, together with diverse representatives of the Sunni Arab and nationalist academy, legal profession, and clergy, formulated a new, if unofficial, constitutional stance: the "February Position." This position was supported by members of Sunni Arab groups that had declined, and continue to decline, to participate in post-occupation Iraqi politics. The February Position implicitly accepted the validity of Iraq's U.S.-sponsored constitutional process and implicitly accepted Iraq's federal structure, including the existence of the Kurdistan Region, at least within certain doctrinal limits. The February Position also implicitly acknowledged the importance of representing in constitutional terms the corporate interests of Iraq's Sunni Arab communities, albeit cast as the views of "Iraqi patriots." The position remained unremittingly nationalist in its formulation but reached a level of detail sufficient to open up the possibility of real negotiation around constitutional amendment and implementation.

The essential eight points of the unofficial Sunni Arab position, articulated in a February 2006 roundtable discussion, are as follows:

1. It should be easier to amend the constitution. In particular, Article 142 of the constitution, which prescribes the method of constitutional amendment, should be amended so as to relax the criteria for amendment.
2. The implementation of federalism should be delayed. The provisions of the constitution that would create federal regions outside the Kurdistan Region should be suspended and reviewed after the lapse of one electoral cycle.
3. Natural resources should be nationally owned. The central government should be authorized in the constitution to manage and distribute natural resources, including oil.
4. The constitution should provide that the armed forces and security services will be formed of all Iraqis without discrimination or exclusion.
5. The provisions of the constitution dealing with de-Baathification, Articles 7 and 135, should be repealed because they breach the principle of equality before the law.
6. The status of the city of Kirkuk should be handled by returning displaced and excluded people by means of law. Kirkuk should not be annexed to any region.
7. Iraqi citizenship should only pass from the father; it should not, as the constitution currently provides, pass also from the mother.
8. The Arab and Islamic identity of Iraq should be asserted in the constitution.

It is this evolution in the Sunni Arab position, incidentally, which vindicates the view that the speed of the 2005 drafting timetable was probably a mistake.

These developments represent a potential shift in the Iraqi political terrain and make the prospect of a constitutional settlement all the more pressing. Though it seems very unlikely that there is a quick constitutional fix to the problem of peace in Iraq, the costs

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are sufficiently low, and the potential rewards sufficiently high, as to leave Iraq with no choice but to attempt such a settlement.

The New Sunni Arab Position: What Next?

If the February Position's eight succinct points represent the core of an Iraqi Sunni Arab constitutional position for the purposes of the amendment negotiations, the question is whether they could possibly be accommodated by Kurdish and Shia interests. The prospect seems unlikely. The issues that were expressly detailed in the February Position had already been examined at length during the 2005 Kurdish-Shia drafting sessions, and, in most cases, the outcomes were not at all casual; they were informed by core communal concerns—concerns that were endorsed both before and after the drafting session by popular democratic mandate from Shia and Kurdish voters.

There is some room for constitutional compromise within the terms of the eight points. Fortuitously, perhaps the most fertile ground for constitutional compromise lies with the most insistent Sunni Arab demand of all—a constitutional amendment to *delay* (rather than *prohibit*) the creation of a southern federal region. That demand would presumably involve extending the SCIRI-sponsored six-month deadline in Article 118 of the constitution, which reads: "The Council of Representatives shall enact, in a period not to exceed six months from the date of its first session, a law that defines the executive procedures to form regions, by a simple majority of the members present." Sunni Arabs believe that additional time would give them an opportunity to lobby their Shia Arab compatriots to abandon regionalist ambitions. This demand may find no opposition within the non-SCIRI parts of the UIA, including the Dawa and the Sadrist camps. Senior advisers to the Dawa and the Fadhila parties have indicated, at least in private, their support for slowing down the creation of a new federal region.

Kurdish political leaders may also choose not to oppose such a demand; after all, they face no great loss if Arab parts of Iraq remain, for the time being, free from de jure regionalization. When the time comes for a referendum on the matter, the same may be said of the Kurdistan voters themselves. Presumably, SCIRI would resist a long delay, but even a modest delay—for one electoral cycle—would appear to give to the Sunni Arabs and nationalists the time that they feel they need. This amendment would also coincide with the views and wishes of the United States and its coalition partners, with Iraq's Arab neighbors, and with the balance of international legal scholarship, all of which recognize that Shia regional institutions are embryonic (certainly as compared to those in Kurdistan). There is no guarantee that SCIRI would comply, and even less assurance that the Shiite population would consent in a referendum to delay a southern region. Nor is there a guarantee that Sunni Arab anger at the partition of Iraq in, say, two years' time would be less than if a Shia region appeared one year from now. Given the stakes, however, it must be worth the attempt.

On other issues, however, the Sunni Arab demands to amend the constitution are less likely to gain purchase, and the limitations of the February Position's eight-point amendment agenda become quite stark. On oil, Sunni Arabs are generally opposed to the constitutional provisions contained in Article 112 that effectively provide that fields other than "present fields" are to be managed by regional governments. The Sunni Arab contention is that a decentralized national oil sector cannot function properly and will lead to the breakup of Iraq. On its merits, the argument may have some validity, and it certainly has no shortage of international experts to back it up. The obvious problem with the Sunni Arab objection, however, is that Article 112 was a very deliberate construction of the Kurdish and Shia constitutional authors, on whose territory most of Iraq's significant oil reserves lie and who have much less interest in the integrity of a nationally managed oil sector—or, indeed, in the integrity of Iraq itself. The authors of the relevant provisions in Article 112 point to the numerous federal models around the world in which producing

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regions have a stake in oil management. In particular, the Kurdistan Regional Government has disclosed no intention of letting an Iraqi government allow the Kurds to wait for revenue-sharing checks to arrive from Baghdad. At least as far as the Kurds are concerned, what Sunni Arabs want, it seems, is exactly what they cannot have. Even the centralist comments of Shia oil minister Hussain Shahristani do not challenge the right of regions to make management decisions with respect to future oil fields.

The same may be said for the first of the eight points from the February Position: the demand that the constitution be made easier to amend. Politicians with regional power bases are unlikely to surrender to Baghdad-based Sunni Arab and nationalist interests the ability to amend the constitution. The three-governorate veto provision has been the lynchpin of Iraqi politics ever since the TAL, and, for better or worse, there is no sign that this will change. Similarly, the February Position's demands regarding the armed forces and de-Baathification trespass on the core constitutional concern of Kurdish and Shiite negotiators to ensure that the new Iraqi state cannot be dominated by secular Arab nationalists. The Sunni Arab demand that Iraq's Arab identity be confirmed in the constitution, although superficially acceptable to Shia Arabs, crosses a very clear—and understandable—Kurdish red line. The remaining demands, including the banning of matrilineal passing of citizenship and the handling of resettlement in Kirkuk, are potentially capable of compromise, but it is not clear that they would either require or permit an agreed-upon constitutional amendment. Nor is it clear that these remaining demands are critical to Sunni Arab acceptance of the constitution: over time, these stakes have become symbolic, with little real political weight.

The prospects are generally grim, then, for agreement on the eight-point Sunni Arab February Position on constitutional amendment. With the possible exception of the proposed delay in the creation of a new Shia federal region, the chances seem very high that Kurdish and Shia negotiators will reject the eight points out of hand, much in the same way they rejected in toto Sunni Arab demands in 2005. Kurdish and Shia negotiators will always perceive the possibility that concessions on these points may dampen the insurgency, but their refusal to act on this perception prior to the October 15, 2005 referendum, when the insurgency was of course already raging, suggests that they will refuse again. Kurdish and Shia leaders know, too, that in the end there is no guarantee that constitutional concessions to centrist Sunni Arab political leaders would appease a violent Sunni Arab insurgency. The fact of the insurgency seems to have hardened, not softened, Kurdish and Shia constitutional dogma.

In this forbidding negotiating environment it is worth considering whether the recent eight-point Sunni Arab position is a necessary extension of the Sunni *interest*, or whether in fact Sunni interests could be equally well served—or better served—by a modified position. What, indeed, *are* the interests of Iraq's Sunni Arabs? Do they reside simply in the resuscitation of strong national Iraqi institutions, including an oil ministry and a military?

Although they do not conceive of themselves as a national minority, Iraq's Sunni Arabs most likely 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 should perhaps 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 that is proportional to their share of the national population—that is, a capitation. Too little attention has been paid to the provision of the constitution in Article 111 that stipulates, "Oil and gas are owned by all the people of Iraq in all the regions and governorates." This provision was not controversial in the drafting sessions and clearly enshrines national equity, if not national strength, as a principle on which a new Iraq might depend. Nathan Brown of the Carnegie Endow-

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ment for International Peace suggests that Sunni Arab Iraqis can expect the Kurdistan Regional Government to argue that the phrase "in all the regions and governorates" implies popular ownership at the regional—not national—level; such an interpretation means that Sunni Arabs cannot rely on the willingness of the oil-rich regions to share oil revenues.[8] Indeed, a recent statement from Kurdistan Regional Government oil minister Ashti Hawrami suggests that the Kurds are asserting management rights even over the extraction of oil from current fields.[9] Brown is undoubtedly correct in his assumptions, but it will be necessary for Sunni Arabs and other nationalists to argue the constitutional point. It is an irony of Sunni Arab politics that, with only around 20 percent of the population, Iraq's Sunni Arabs can never hope to dominate the institutions of a central government that will, by virtue of demographic and military reality, be overwhelmingly in Shia hands. Logic dictates that an equitable solution for the country's Sunni Arabs must be found elsewhere.

The logic of regional self-governance in Iraq is, often tragically, becoming more and more compelling. There are no signs that Shia death squads, which make incursions into Sunni Arab neighborhoods, are being disbanded. It seems possible, but not certain, that some Shia leaders will invoke the TAL's Article 58 (originally designed solely for Kirkuk) and press for changes in Shia governorate boundaries at the expense of the authority of the traditionally Sunni Arab governorates of Anbar and Salahaddin. There have been reports of protests among members of predominantly Sunni Arab national military units over being stationed outside Sunni Arab areas.[10] Tribal leaders in Sunni-dominated Anbar province have agreed with the U.S. military to establish local police forces. The Kurdistan Regional Government's moves to consolidate its regional strength and prosperity—including the formal unification of the two Kurdish administrations and the issuing of oil contracts—probably would have proceeded regardless of the nature of a central government in Baghdad, but it must be giving Sunni Arab strategists some ideas about some kind of model for their political future. Even Iraq's small minority groups, including Christian, Yazidi, and Shabak, are themselves coming to believe that an autonomous region in the Ninevah plain may be the best means of protecting their interests. And, as if to underscore the futility of Sunni Arab ambitions to dominate a strong national government, the prospect of a SCIRI-backed southern Shia region, or a breakaway Basra region, or an autonomous Najaf and Karbala central region, remains a constant challenge to the already limited constitutional power of Baghdad.

Will the elected Sunni Arab leaders then avert the collision with the regionalists, take the next step, and move toward local self-governance in Sunni Iraq? In other words, will Iraq's elected Sunni Arabs adopt the same pragmatic strategy as their Shia and Kurdish counterparts, effectively eliminating local bases for radical Islam and the insurgency, consolidating local revenue streams, and establishing the conditions for regional governance? Will they put a price on their discontent? That is, will they formulate their position on oil in terms of the fiscal well-being of Sunni Arab populations? If so, they would be truly advancing the interests of their constituents, rather than grasping for unattainable dominance in a unitary Iraq that no longer exists.[11] On this decision very likely rests the possibility of peace and stability in Iraq.

At this point, though, the prospect of Sunni Arab self-governance seems remote. Some Sunni Arab leaders, particularly those from the moderate end of the political spectrum, are ready to address, in private if not in public, the prospect of Sunni Arab local self-government. Most, however, are not. Conspiracy theories regarding U.S. and Israeli designs to break up Iraq are pervasive among members of the Sunni Arab intelligentsia. In the February Position, Sunni Arab leaders rejected the notion that they should press for their proportional share of petroleum receipts and expressed a preference to confront the terms of the constitution and attempt to wrest all oil management powers back to Baghdad. When international military experts suggested in February that the elected Sunni Arab leaders should create their own regional security force, the suggestions were met with hostility.

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Thus, although the Sunni Arab position has certainly evolved, it is hard to see an imminent shift. The Sunni Arab eight-point constitutional agenda apparently is still a "nonstarter" for Kurdish and Shia leaders and, as such, raises the question squarely: Do the Sunni Arabs really *need* constitutional amendments to achieve their stated objectives? Could not their stated goal of giving greater strength to the Iraq central government be achieved through means other than constitutional amendment? Could they not attain greater national coherence for the oil sector, the judiciary, and the military without a direct confrontation with the Kurdish-Shia constitutional text? The answer to these questions is, at least in principle, yes.

What makes this conclusion interesting is that a Sunni Arab strategy to bring coherence to the central government through nonconstitutional means may be the makings of a deal. Although it will not serve Sunni Arabs' immediate political interests, their strategy may coincide with the desire of Shia and Kurdish leaders—and, indeed, the desire of much of the international community—to ensure that the central government of Iraq is, if not strong, then at least viable *and equitable*. It is the possible convergence of these views that offers the greatest—and perhaps the only—chance for political and legal stability in Iraq.[12] Such a convergence of views does not advance the explicit Sunni Arab constitutional agenda to its full extent, but it may in fact better serve short- and long-term Sunni Arab national interests.

A Convergence of Interests: The Weak Viability Agenda

What, then, are these points of convergence? They are, essentially, three: (1) a delayed Shia federal region; (2) a coherent and equitable oil sector, and (3) an agreed division of governmental powers and responsibilities, including the jurisdiction of federal courts and related human rights institutions. To these three points can be added a fourth: a compendious set of relatively minor and "noncontroversial" technical amendments to the constitution to improve the functioning of the Baghdad government. As well as representing the easiest way of attaining political consensus, this three-point agenda would address the problem of viability by averting the three most likely catastrophes that would affect Sunni Arabs, Shiite Arabs, and Kurds alike: the worsening of the Sunni Arab siege mentality leading to full-scale civil war; the breakdown of the oil sector, which underpins Iraq's economy and is the most obvious indicator and guarantor of interregional equity; and the collapse of a negotiating space for the regional/center division of power.

Delay the creation of any new federal region (constitutional amendment or legislation)

A constitutional amendment to extend the six-month deadline in Article 118 would give a significant political concession to Sunni Arabs without preventing SCIRI and the Shia regionalists from moving forward to create a new region at some point in the future. This move should enable the Shia leadership to extract commitments—possibly flimsy, possibly not—from the Sunni Arab leadership to restrain anti-Shia violence. It is unlikely that this move would in fact prevent the creation of a southern federal region—as the Sunni Arabs and Iraqi nationalists obviously hope—but it would allow time for debate as to the nature and size of that region, and for institutions to evolve. Although Sunni Arab politicians are not likely to acknowledge it in public, the delay will also allow space for those politicians to weigh the merits of creating a new Sunni Arab federal region. The governments participating in the coalition, the United Nations, and international legal scholarship all support a gradualist approach to regionalization in Iraq. For reasons described above, Kurdish and Shia parties may consent to this approach, which will be necessary if the Sunni Arab amendment is to succeed.

There are two variations to this amendment approach. The first would rely on legislative, not constitutional, means. Instead of amending Article 118, the legislation contem-

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- Establish respective Organization of Petroleum Exporting Countries production quotas for Iraq's central government and regional governments.
- Establish the commission described in Article 106 of the constitution to audit and appropriate federal revenues, and do so consistent with principles of transparency and accountability in accordance with international best practices.

Further, a set of intergovernmental oil *agreements*, supported by legislation if possible, could achieve even more:

- Establish a *voluntary system* in which regional and central governments agree that management decisions on *all* fields (current *and* future), including the awarding of Production Sharing Agreements, are to be made with the knowledge and approval of *both* governments, without prejudice to regional petroleum regimes and, in general, to the constitutional right of regions to exclusive control over future fields.
- Establish the appropriate intergovernmental institutions—an Oil Commission, perhaps—required for the joint regional/federal management and regulation of current oil fields, the marketing of Iraqi oil, and negotiation with international oil companies. (One of the major pitfalls of the rushed 2005 constitution drafting timetable was that promising Shia-Kurd plans for an intergovernmental Oil Commission were sidelined).
- Establish a five-year renewable oil revenue–sharing protocol, which would ensure that Iraq's Sunni Arab areas receive their portion of all oil revenues (from current and future fields) commensurate with their proportion of the population, perhaps to be overseen by the Article 106 Revenue Commission. This would probably involve a "top-up" mechanism that would distribute oil-producing regions' excess revenues. This agreement would ensure that regions share, on equitable terms, the revenues they handle by virtue of being the managers of Iraq's future fields. (It will probably first be necessary, though, to address the Kurdish complaint that they are receiving less than the 17 percent of federal budget revenues to which they are entitled.)

These initiatives stand some chance—perhaps a good chance—of finding favor with Kurdish and Shia parties. Although the Kurds, who were the principal sponsors of Article 112, are unlikely to brook any constitutional amendment, they are aware that the absence of a coherent and benign national oil regime will jeopardize their own ability to access the national oil infrastructure (such as pipelines, shipping terminals, and refineries) and to attract international investment from the major international oil companies, which they value as guarantors not only of wealth but also of security. Even if the independence of Kurdistan is a long-term Kurdish goal, the pursuit of that objective will rely, for the time being, on access to pipelines that cross into non-Kurdish territory. Commentators frequently overlook the fact that the Kurds have indicated their preparedness to help develop a national oil regime to attract the major international oil companies, as well as their preparedness to share oil *revenues* nationwide, even if they reserve *management* rights to future fields within the region. Although Kurdish authority over oil should be respected, their attempts to open up a dialogue with Baghdad over the oil issue should also be taken seriously.

Agree on division of powers between governments. Establish a meritocratic judiciary and human rights institutions (intergovernmental agreement and legislation)

If the Iraqi federation, like most other federations, is characterized by tension between central and regional governments, it will need a means to resolve this tension other than by force. There is no doubt that this tension exists in Iraq and that it was not fully resolved in the constitution draft. The constitution foreshadows the creation of an upper house of the legislature, to be known as the Federation Council, which might provide the forum for center-regional discussion, but that body will not come into existence for some

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time and, in any event, being a creation of the Council of Representatives, it is likely to be weak.

The tension arising from Iraq's current center-regional dynamic will be difficult to resolve. On the one hand, the regional governments—represented, for the time being, by only the Kurdistan Regional Government—consolidated a great deal of power within Iraq's federal structure, practically guaranteeing regional priority over the central government. On the other hand, notwithstanding the meager list of exclusive federal powers listed in Section Four of the constitution, the federal government could, if it wished, invoke a list of implied powers that are impressive: the ability to review regional law for compliance with the constitution under Articles 13 and 92(1); the power to ensure the civil, political, social, and economic well-being of the Iraqi people (a power that stems from the responsibilities set out in the constitution's Bill of Rights); and a mandate under Section Four for the federal government to "preserve the unity, integrity, independence [and] sovereignty" of Iraq, a phrase that could be open to broad interpretation. Baghdad could also wield explicit federal powers, including foreign policy, monetary policy, treaties, trade policy, and customs, all of which are typically used in federal systems to augment central government control and could be used by an Iraqi federal government perhaps even to the point of asserting a federal right to tax, even when no such right has found explicit statement in the constitution. It is also clearly arguable that the federal government has the power to make law on any subject whatsoever, whether there is an implied power or not, and that the effect of such a law would be curtailed only where it did not fall within the list of exclusive powers and where there was a countervailing regional law.

However these matters are resolved, it is certain that protracted tension will endure between the central government in Baghdad and regional governments—and this tension is only natural in a federal system. What is important is not that one or the other level of government wins the contest; rather, it is that this tension is resolved *peacefully* and in such a way that all the peoples of Iraq are able to enjoy good governance. For that reason, and in the absence of a strong judicial system and settled constitutional jurisprudence in which judicial decisions are enforced, regional governments and the central government should agree on a threefold strategy:

Intergovernmental agreement on division of powers. This proposed agreement should be for a long but finite duration (at least five years) and should be without prejudice to the final determination of respective governmental powers by judicial decision or otherwise. Insofar as they remain regionalist in nature, political parties from the UIA would stand in for the interests of a southern federal region that does not yet exist.

Such an agreement also should use the existing provisions of the constitution on federal and regional authorities (contained in Section Four of the constitution) as a basis for ensuring that good governance is delivered to all Iraqis, wherever they may live. For each government service, the agreement should identify essentials item by item, including security, electricity, water, health, education, sewerage, and roads. The agreement should also identify areas of jurisdiction where there is currently overlap, including the shared competencies set out in Article 114 and those other areas of jurisdiction where there is likely to be the emergence of competing center-regional assertions of authority, including human rights, personal status law, and criminal law. The agreement should identify which level of government—central, regional, governorate, or local—would meet specific needs and with what resources. Ideally, the agreement should also contain the express acknowledgment by the Kurdistan Regional Government that the central government has the ability to raise income or consumption tax revenue within the region, perhaps to a prescribed limit; even if the Kurdistan Regional Government does not surrender its constitutional powers, it is crucial that it demonstrate its commitment to a viable Iraqi state. The agreement could conceivably lead to the establishment of the commission on the rights of regions and governorates described in Article 105 of the constitution.

Courts. There should be a law for the federal judiciary that preserves existing regional autonomy but also establishes a coherent national legal system in which the constitu-

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tional and human rights of all Iraqis can be addressed to a professional national court system. The principal constitutional problem with the establishment of a national judiciary is the fact that the jurisdiction of the national courts is unclear, largely because of disagreement among the constitutional negotiators. In particular, the constitution does not specify whether Iraq's Supreme Federal Court has the power to review decisions of regional courts—specifically, at this point, the courts of the Kurdistan Region—on constitutional or other grounds. The constitution also does not specify whether the Supreme Federal Court has the power to review the legislation of regional governments on constitutional grounds. Article 13, which deems void any text in a regional constitution *"or any other legal text"* (emphasis added) that contradicts the constitution, might be thought to imply that this power exists, although it is difficult to see how the provision would operate in a real world in which the Kurdistan Region could easily frustrate the enforcement of Supreme Federal Court decisions.

In short, any proposal for a law on the judiciary must proceed from the understanding that the central government cannot prevail in any open confrontation with a regional government; the writ of Baghdad does not extend into the Kurdistan Region and probably will not extend into a southern region either.

The proposed law would also require regions to make temporary without prejudice concessions to a Sunni Arab position. The proposed federal judiciary law would do the following:

1. Establish minimum legal qualifications for members of the Supreme Federal Court and other national courts.
2. Confirm that the Supreme Federal Court has the jurisdiction to hear all cases in which a breach of human rights is alleged, and to order appropriate remedies; the rules of standing must be liberal.
3. Confirm that parties have a right to appeal from regional courts to the Supreme Federal Court at least on constitutional human rights matters, and that the Supreme Federal Court has no authority to diminish the level of protection or compensation awarded to a complainant by a regional court.
4. Confirm that the Supreme Federal Court may review all regional law for consistency with the federal constitution on matters of human rights as set out in the constitution.

It is true that the judiciary does not rate high on the Sunni Arab agenda. The Sunni Arab parties explicitly address the constitution on the question of the judiciary only to express concern at the provision allowing a role for "experts in Islamic jurisprudence" on the Supreme Federal Court (Article 92), a concern motivated by a fear that Iraq's highest court will be dominated by Shia clerics. However, the development of a meritocratic and coherent legal system may pay greater dividends to Sunni Arabs and Iraqi nationalists than they realize. Iraq's smaller minorities and women's groups, for their part, have identified judicial institutions as the highest priority, and their position is supported by the programming (and the considerable resources) of international governmental and nongovernmental organizations (NGOs). The central problem is that in the absence of a coherent national judicial system, debates regarding the structure of the Iraqi state will continue to be resolved by force and facts on the ground. Even the Kurdistan Regional Government, which has been one of the primary beneficiaries of this state of affairs, should be shown that cooperative national arrangements in the judiciary will not be inimical to their interests.

High Commission for Human Rights. For much the same reason as noted above, another law should establish the High Commission for Human Rights, as mentioned in Article 102 of the Iraqi constitution. The law should prescribe the minimum qualifications for membership on the commission, and the commission mandate should explicitly set as a goal the protection and advancement of the interests of women and ethnic and religious minorities. The commission should have the power to initiate investigations regarding all

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fundamental human rights, the rights identified in the constitution, and rights set out in treaties to which Iraq is a signatory. The commission should also have arbitral powers.

During the 2005 constitutional negotiations, human rights discussions in the Constitution Drafting Committee were cast to one side at the ad hoc "Leadership Council" talks in favor of the main action—the federalism negotiations. As an afterthought, the Kurdistan Regional Government resisted the creation of a strong Human Rights Commission in Baghdad, for fear that Shia clerics would erode Kurdistan's significant (but far from complete) advances in human rights protection. In the 2006 review process, the Constitution Review Committee must persuade the Kurds to permit the establishment of a robust Human Rights Commission, with assurances that no federal human rights regime will have the power to erode rights and liberties in the Kurdistan Region.

Other technical amendments

Several other constitutional amendments should be on the Constitution Review Committee's agenda, none of which offer direct political solutions to the problem of Sunni Arab alienation but each of which would make for an Iraqi national government that will govern better. On those grounds, these amendments should be advanced by both Sunni Arabs and, indeed, the Constitution Review Committee itself. None of these amendments should be opposed by intelligent Kurdish or Shia interests. The amendments, in order of significance, are as follows:

1. Clarify the status of governorates as distinct from regions. Article 115 implies that laws issued by governorates (as with regions) have priority over laws issued by the central government, whereas Article 122 implies that governorates are subordinate to the central government and Articles 112 (on oil) and 114 (on concurrent powers) do not give to governorates the powers that regions enjoy. Under these circumstances, Article 115 should probably be brought into line.
2. Strengthen and clarify the enforcement mechanisms in Section Two of the constitution ("Rights and Liberties"), which enumerates constitutional rights.
3. Clarify the circumstances in which executive emergency powers are exercised (Article 61).
4. Remove the "public order and morality" qualification from the provision on the freedoms of expression, publication, and assembly (Article 38).
5. Reintroduce the provision deleted from an earlier draft of the constitution that granted Iraqis the rights set out in the international human rights agreements ratified by Iraq.
6. In the section dealing with freedom of religion and belief, provide a specific right of conversion from one belief to another.
7. Remove the legislative oversight of the Human Rights Commission (Article 102).
8. Provide for participation rights for minorities in all parts of the national government, not just the military.
9. Extend the provision on equality before the law (Article 14) to the disabled.
10. Provide for a right of the citizen to information from the government.
11. Make specific provision for the independence of the civil service, and reference to a code of conduct for civil servants.

Modalities: The Constitution Review Committee and Secretariat

All of the foregoing are the basic elements of a constitution review agenda that might both seal a hitherto elusive political compact around the constitution and maximize the

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viability—and equity—of the Iraqi state. As suggested, the key to its success will be (1) moderating Sunni Arab *constitutional* ambitions that were raised by the October 12 agreement; (2) encouraging the continued evolution of the Sunni Arab position so that it can take care of genuine Sunni Arab *interests*; and (3) persuading Kurdish and Shiite leaders to make at least *one* significant constitutional amendment (perhaps the delay for new regions) and to make at least temporary and limited "without prejudice" concessions on oil, governance, and the judiciary, in the interests of a viable Iraqi state, to Baghdad and the Sunni Arabs.

Yet this compact will not be achieved unless the CRC is able to adopt the right modalities. The very unsatisfactory handling of the Constitution Drafting Committee in 2005 stands as a striking counterexample—what *not* to do. The following principles should be established from the very beginning:

1. The CRC must be brought into existence. It is mandated in Article 142 of Iraq's constitution, and it would be the worst possible result—politically and legally—for Article 142 to be ignored. Deep anxieties in Iraq about the structure of the state cannot be addressed by a mere "government of national unity," of which there have now been four.
2. The CRC must have sufficient time to do its work. The four-month review period should not begin until the committee is fully established and has an adequately staffed secretariat. Once the CRC has reported to the Council of Representatives, the Council should take all the time necessary to consider, discuss, and debate the CRC's proposals, with as much public deliberation as possible. The national referendum is required not more than two months after the Council approves any amendments. However, there is no time limit prescribed *between* the CRC's submission of its report and any Council vote of approval; this presents an obvious opportunity to extend discussions, if necessary, without needing to extend the CRC timetable (as some have recommended).
3. The CRC mandate should not be confined to proposing constitutional amendments; the question of "constitutional review" is both pressing and complex. Progress will not be made if disparate and possibly unelected bodies handle different aspects of the problem. In particular, the CRC should have the power to recommend and design legislative and other instruments to bring about consensus on the constitution, including Sunni Arab support, and to ensure the viability of the Iraqi state. Article 142 does not limit the CRC's mandate in any way. Broadening the CRC's mandate will both lend the Committee greater credibility and, at the same time, have the effect of moderating unrealistic expectations for constitutional change.
4. The CRC should not function separately from other consensus-building initiatives in Iraq. On the contrary, the CRC could help set the agenda for other peacebuilding initiatives. Conflict in Iraq is in large part the result of clashing visions on the structure of the Iraqi state, and state-structure negotiations represent one important way to bring about peace. The CRC offers a way to ensure that negotiated solutions have a domestic, democratic, and inclusive mandate. Interaction among party leaders on constitutional matters should be through the CRC; although there will always be a crucial role for interaction between elected leaders, the practice of last-minute, ad hoc, and secret leadership meetings should be ended. Where party leaders need to make political decisions on CRC matters, the decisions should be referred back to the CRC for implementation.

There are certainly peacebuilding opportunities in Iraq that will likely fall outside the purview of the CRC, including the negotiations on the role of militias and regional security forces, preparations for the 2007 Kirkuk referendum to protect the rights of Kirkuk's non-Kurdish citizens, and the role of Iraq's neighboring states. Arab League reconciliation meetings, UN peace conferences, U.S.-sponsored Dayton-style meetings, and so on must not trespass on the work of the CRC and

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the Council of Representatives, whose responsibilities have democratic backing and should take center stage if there is to be peace in Iraq.

5. The CRC must have a diverse membership, which is mandated by the requirement in Article 142 that the CRC represent "the principal components of the Iraqi society." Article 142 describes the committee as being created by the Council of Representatives "from its members," but that provision need not preclude CRC members being chosen from outside the Council. The rules of procedure of the CRC could, as with the Constitution Drafting Committee in 2005, prescribe that decisions be made by consensus, thereby avoiding the question as to the status of non-Council committee appointees. Non-Council appointees could come from those groups that were most disenfranchised by the 2005 constitutional negotiations, including women's groups, and groups representing the smaller ethnic and religious minorities, the disabled, and children's interests. Non-Council appointees could also include academic representatives, including legal scholars and political scientists who are prepared to find practical solutions to constitutional and intergovernmental problems. The CRC must be large enough to be representative but small enough to be efficient; it should probably consist of no more than thirty persons.

6. The CRC must have proper offices, and it must have professional staff members who themselves are representative of Iraq's political, ethnic, and religious diversity. Professional staff with good public relations expertise could realize the great missing element in the 2005 drafting sessions: a proper and organized public discussion throughout Iraq. The CRC should also be equipped with professional legal staff to help organise the CRC's work and to analyze submissions. In 2005, the Constitution Drafting Committee was crippled by lack of office space and a lack of staff, a failure of the Iraqi political leaders, U.S. government agencies, and the United Nations that severely reduced not only the Constitution Drafting Committee's ability to interact with the public (including, conspicuously, the Sunni Arab public) but also, in turn, the legitimacy of the drafting process. Despite the limitations, the small Drafting Committee staff was very hard working and managed to communicate with a large number of Iraqis. However, the staff was not diverse and did not have time to make sure that the constitution drafters absorbed the results of its work.

These mistakes are costly in terms of resources and political capital. They should not be made again. As the principal peacebuilding consultants to the new Iraqi government, the United Nations, the National Democratic Institute, the International Republican Institute, and the United States Institute of Peace have the ability, if given the chance, to amplify the reach of the CRC in leading public discussion and debate, which will certainly generate their own dividends at the community level. If the review process is confined to a mere four months, it is unlikely that serious public debate can take place—and that would be an even costlier mistake.

Recommendations

To the Iraqi Council of Representatives:

- Establish a Constitutional Review Committee as soon as possible, with diverse membership and a strong mandate to include constitutional reform, legislative recommendations, and recommendations on intergovernmental agreements. Solicit international funding for the committee, but provide most of the funds from the domestic budget.
- Agree that the four-month timeline for the CRC does not start until the committee is fully established, with office space, a secretariat, and a sufficient budget to conduct public discussions.

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- If necessary, take all the time that Article 142 affords, including the period between receipt of the CRC report and the approval of its recommendations.

To the Constitution Review Committee:

- Broaden the scope of recommendations beyond the narrow realm of constitutional amendment. Assume responsibility for finding new solutions to the problem of Sunni Arab alienation, with consideration of the legislation and agreements set out above, and for making the Iraqi state viable if not strong.
- Establish and use a robust secretariat of professionals to generate public debate in Iraq. Journalists and NGO officials with media training would be ideal. There should also be a team of professional constitutional lawyers.

To the Kurdish and Shia leaders:

- Be prepared, and prepare Kurdish and Shia constituents, for a constitutional concession to Sunni Arabs and Iraqi nationalists by amending Article 118 and delaying the timeline for the creation of new federal regions.
- Be prepared to make without prejudice concessions in legislation and intergovernmental agreements regarding oil, governance, and the judiciary, as described in this special report.
- Empower Kurdish and Shia delegates to the CRC, and advance party views through the CRC process.

To the Sunni Arab leaders:

- Advance Sunni Arab *interests*, not a Sunni Arab position. In particular, distinguish between those interests and the ideal of a strong centralized Iraqi government.
- Adopt a negotiating strategy that does not hinge solely on constitutional amendment but, rather, includes other instruments that are more effective and available.

To the U.S. government:

- Having brokered the October 12, 2005 agreement on constitutional amendment, ensure that the constitutional review proceeds. Try to moderate Sunni Arab and nationalist expectations of the amendment process. Support the CRC in efforts to find creative solutions to Iraq's constitutional impasse, including those described previously in this special report.
- Support United Nations and other efforts to bring about realistic constitutional compromises between the parties.
- Neither assume nor accept any formal role in the review negotiations. If there is to be a constitutional consensus in Iraq to endure beyond the U.S. presence, the United States should have no formal role. If there is to be a third-party underwriter, it should be the United Nations.

To the United Nations:

- Continue to serve as a mediator among constitutional factions. Continue to provide negotiating advice and issue-specific technical assistance to Iraqi politicians and civil society leaders in multiparty dialogues.
- Direct the efforts of international constitutional experts away from cataloguing perceived deficiencies in the Iraqi constitution. A comparative approach should be

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used positively and realistically, not as a negative way of measuring the difference between the Iraqi constitution and some ideal. Engage experts on peacebuilding and the creation of viability and equity within the new Iraqi federation.

NOTES

1. The full English text of the Iraqi constitution can be found on the United States Institute of Peace website at http://www.usip.org/ruleoflaw/projects/unami_iraq_constitution.pdf.
2. The author's previous instalment on Iraq's constitutionalism, *Iraq's Constitutional Process II: An Opportunity Lost*. Special Report, No.155 (Washington, D.C.: United States Institute of Peace, November 2005), describes the circumstances in which this exclusion was effected.
3. http://iraq.usembassy.gov/iraq/101305_compromise.html.
4. http://abcnews.go.com/International/PollVault.
5. "Al-Hakim Renews His Demand To Establish the 'Province of Southern and Central Ira," *Al-Sabah* (Baghdad), June 12, 2006.
6. See Gareth Smyth, "SCIRI Official Defends Shia Record on Security," *Financial Times* (London), June 9, 2006.
7. Ross Colvin, "Sunnis Back Goverment Talks but Say Demands Must Be Met," Reuters, January 22, 2006.
8. See Nathan Brown, *The Final Draft of the Iraqi Constitution: Analysis and Commentary* (Washington, D.C.: Carnegie Endowment for International Peace, September 2005).
9. Ashti Hawrami, "Oil and Gas Rights of the Regions and Governorates," www.kurdmedia.com, June 14, 2006.
10. See, for example, Nelson Hernandez, "Iraqis Begin Duty with Refusal," *Washington Post*, May 6, 2006.
11. See Jonathan Morrow, "Oil—the Curse—Might Also Be the Answer," *USA Today*, January 19, 2006.
12. See Jonathan Morrow, "Federalism Could Hold Iraq Together," *Newsday*, October 21, 2005.

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Jonathan Morrow

Weak Viability

The Iraqi Federal State and the Constitutional Amendment Process

About the Report

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- Iraq's new legislature, the Council of Representatives, is now considering the process of constitutional amendment described in Article 142 of the constitution. Prime Minister Nouri al-Maliki has announced the constitutional review as part of his government's platform. This amendment process, assuming it proceeds, will come in the wake of widespread opposition to the constitution from Sunni Arab Iraqis in the October 2005 referendum. It is expected that a Constitution Review Committee (CRC) will soon be appointed, in line with Article 142.
- To the extent that it was opposed by Sunni Arabs, the constitution lacks the essential criterion of any constitution: the consent of *all* major national communities. The 2005 Iraqi constitution may nonetheless, as a *legal* text, be a sufficient and necessary framework for the radically regionalized Iraqi polity that the constitution drafters envisaged.
- The constitutional challenge in Iraq is first about peacemaking, not state building. As the Iraqi parliament faces the challenge of appointing, mandating, and staffing a CRC, the first, and essential, set of questions is therefore *political*: How can the amendment process be used as a vehicle to remedy the political failure of last year's constitution drafting process? How can consensus be built, and in particular how can Iraq's Sunni Arabs be encouraged to give their assent to the new federal Iraq? How

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SPECIAL REPORT

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PURDUE UNIVERSITY
AUG 28 2006
U.S. DEPOSITORY

Jonathan Morrow

Weak Viability

The Iraqi Federal State and the Constitutional Amendment Process

About the Report

Starting in August 2004, the U.S. Institute of Peace Rule of Law Program, one of the Institute's Centers of Innovation, has been providing in-country support on constitution making to Iraqi political, governmental, and civil society actors. The goal of this program is to maximize the transparency and inclusiveness of Iraq's constitutional process, enabling Iraqi citizens to engage directly with the drafters, and ensuring domestic ownership of the constitution.

Jonathan Morrow, senior adviser in the Rule of Law Program, has been traveling frequently to Iraq over the past two years to observe and report on Iraq's constitution-making process and constitutional implementation. In this report, he makes recommendations for Iraq's upcoming constitutional amendment process that could make for a viable, if weak, Iraqi state and that could help to arrest the current decline in the country's security situation.

The views expressed in this report do not necessarily reflect the views of the United States Institute of Peace, which does not advocate specific policy positions.

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