



# SPECIAL REPORT

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## ABOUT THE REPORT

Starting in August 2004, the U.S. Institute of Peace Rule of Law Program 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. USIP Rule of Law Program Officer Jonathan Morrow has been travelling frequently to Iraq over the last year. Through July and August 2005, he worked in Baghdad with Iraqi participants and with other international experts in the constitutional negotiations. In this report, he describes and analyzes the process of negotiating and drafting Iraq's constitution, and points to lessons for Iraq and for future constitutional processes.

*Jonathan Morrow*

## Iraq's Constitutional Process II

### An Opportunity Lost

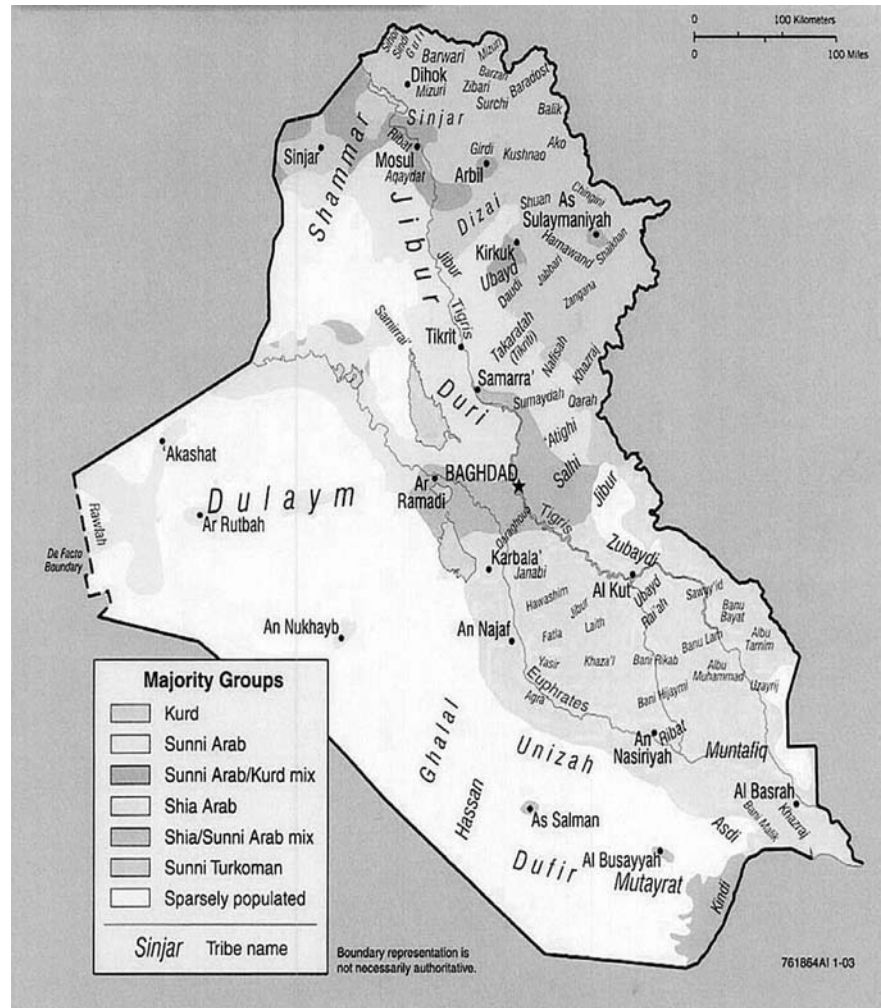
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NOVEMBER 2005

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## Timeline

<b>JAN</b>	<ul style="list-style-type: none"> <li>January 30: Elections</li> </ul>
<b>FEB</b>	
<b>MAR</b>	
<b>APR</b>	
<b>MAY</b>	<ul style="list-style-type: none"> <li>May 10: 55-member Constitution Drafting Committee formed (without Sunni Arab representation)</li> <li>May 23: Committee Chair appointed</li> </ul>
<b>JUN</b>	<ul style="list-style-type: none"> <li>Jun 16: Decision to expand Committee membership to include Sunni Arab representation</li> </ul>
<b>JUL</b>	<ul style="list-style-type: none"> <li><b>Jul 8: Constitution Drafting Committee work begins: Sunni Arabs attend first Committee meeting</b></li> <li>Jul 19: Sunni Arab Committee member assassinated; other members suspend participation</li> <li>Jul 25: Sunni Arabs rejoin Committee</li> </ul>
<b>AUG</b>	<ul style="list-style-type: none"> <li>Aug 1: Deadline to request Art.61(F) extension</li> <li><b>Aug 8: Constitution Drafting Committee work ends: negotiations moved to Leadership Council</b></li> <li>Aug 15: Deadline for draft constitution; National Assembly amends Transitional Authoritative Law for ad hoc one-week extension</li> <li>Aug 22: Ad hoc three-day extension</li> <li>Aug 25: Ad hoc unlimited extension</li> <li>Aug 28: Draft submitted to National Assembly</li> </ul>
<b>SEP</b>	<ul style="list-style-type: none"> <li>Sep 18: Draft submitted to United Nations for printing</li> </ul>
<b>OCT</b>	<ul style="list-style-type: none"> <li>Oct 15: Referendum</li> </ul>

## Summary

- Even with the approval of a permanent constitution in the October national referendum, Iraq's future is uncertain. Widespread Sunni Arab opposition to the new constitution has confirmed the existence of a fault line that profoundly divides Iraqi society.
- The Transitional Authoritative Law (TAL) envisaged a six-and-a-half-month, transparent, participatory, and orderly constitutional process. The TAL also provided the option, in Article 61(F), of a further six-month extension.
- Notwithstanding the preference of the Chairman of the Constitution Drafting Committee that the Article 61(F) extension be used—a view senior Kurdish and Shia negotiators, as well as other minority group and civil society leaders publicly and privately supported—the U.S. Government pressed for the drafting to be completed by August 15. The decision not to use Article 61(F) had the effect of minimizing Sunni Arab participation in the drafting process, and led the National Assembly to make a series of ad hoc moves after it missed the August 15 deadline, which exposed the body to charges of illegality.
- The Constitution Drafting Committee began its work late and was terminated early. Substantive discussions to include Sunni Arab representatives did not begin until late June. On August 8, the negotiations were removed from the Committee to a series of private and irregular meetings between Kurdish and Shia party leaders, from which Sunni Arab negotiators were often excluded.
- The National Assembly formed a Constitutional Outreach Unit to disseminate constitutional information and analyze public responses. The Unit, however, had no more

than eight weeks to engage Iraqi citizens on constitutional issues, and lacked the capacity to report to the Committee before the August 15 deadline.

- The rushed constitutional process hindered Sunni Arabs' emerging confidence in an Iraqi federal model; amplified imbalances in respective camps' technical negotiating competencies; removed opportunities for international mediation, in particular UN assistance; increased U.S. visibility as an agent and participant in the Iraqi negotiations; and excluded meaningful Iraqi citizen participation.
- Many Iraqi groups and parties criticized the draft constitution. While the reasons for opposition varied, they often included procedural complaints of exclusion from the negotiations and major substantive objections. By the end of August, opposition remained despite efforts to appease the Sunni Arab groups. Some women's groups, the parties of Ayad Allawi and Moqtada Al-Sadr, and ethnic minority groups continued to oppose the draft.
- This constitutional process was a unique opportunity lost to build new institutional legitimacy, and interethnic and intersectarian alliances. Additional opportunities to include Sunni Arabs and other groups within a federal Iraq still exist and should not be ignored.
- The Iraqi government, National Assembly, and international community should mobilize all efforts to encourage a popular commitment to democratic federalism. This should include educating the Iraqi people and bringing political elites closer to their constituents; helping Sunni Arab communities to strategize within a federal framework; and developing constitutional enforcement mechanisms to ensure that Iraqi citizens can protect their constitutional rights in the long term.

## Introduction

On Sunday September 18, 2005, Iraq's Transitional National Assembly approved a draft constitution and submitted it to the United Nations Assistance Mission for Iraq, which was to be published throughout Iraq prior to the October 15 national referendum. The Independent Electoral Commission has now confirmed that the Iraqi people approved the constitution in conformity with Article 61(C) of Iraq's interim constitution, the Transitional Administrative Law (TAL). Large sections of Iraq's Sunni Arab community and other groups in Iraq, however, opposed the constitutional text. Notwithstanding the strong support for the text in Iraq as a whole, 96.96 percent and 81.75 percent of voters from Sunni Arab-dominated Anbar and Salahaddin governorates voted no. Though there is evidence of some Sunni Arab support for the constitution in Ninevah and Diyala governorates, where the "no" vote was as low as 55.01 percent and 48.73 percent, respectively, it is clear that Sunni Arabs in Iraq generally voted against the constitution.

Even with the approval of Iraq's constitution in the October national referendum, the future of Iraq is uncertain. For Sunni Arab Iraqis, the constitutional text poses difficult questions. What are the consequences of the success of the draft in the referendum if it does not command the support of one large section of the Iraqi people?

This Special Report traces the events that led to the creation of the draft constitution, and identifies both the strengths and shortcomings of Iraq's constitution-making efforts. It argues that the refusal of the Iraq National Assembly to extend the constitution-drafting process by using the mechanism provided in Article 61(F) of the TAL was a mistake. Under U.S. Government pressure, the National Assembly insisted that the August 15 deadline be met, allowing the Constitution Drafting Committee, which included Sunni Arab members, to operate for only one month—a plainly inadequate period of time. The truncation of the constitution-drafting process

- precluded the real possibility that the confidence of Sunni Arab Iraqis might have been built around the model of a federal Iraq;

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- amplified imbalances in the technical competency of the respective negotiating camps;
- removed opportunities for international mediation, in particular by the United Nations;
- increased U.S. visibility as an agent and participant in the Iraqi negotiations; and
- excluded meaningful Iraqi citizen participation in the constitution-making process.

This Special Report identifies Iraq's constitutional process as a unique opportunity lost to build new institutional legitimacy, as well as interethnic and intersectarian alliances. Further opportunities to include Sunni Arabs and other groups within a federal Iraq still exist and should not be ignored.

## Background: Iraqi Constitutionalism

### *Participatory Constitutionalism*

Since the March 2003 occupation, those in Iraqi political circles, the Iraqi media, the U.S. administration, and the United Nations have shared the assumption that a constitutional democracy would be the hallmark of success in post-Saddam Iraq. Well before Iraq's first national election on January 30, 2005, there was a real expectation that the completion of a permanent constitution would represent an important, perhaps critical, turning point in Iraq's fortunes.

Moreover, the TAL unequivocally signaled that a constitution on its own would not be sufficient. Also necessary would be a participatory, transparent, and well-ordered drafting process: a process that would display the virtues of democracy that the constitutional text itself was expected to embody. As one influential Iraqi civil society organization, the Iraq Prospect Organisation, put it in December 2003: "This process in itself will help root democratic values and set Iraq on a course to freedom." The TAL stipulated in some detail the means by which a permanent constitution would be prepared. TAL Article 60 states that the National Assembly should write the text, "in part by encouraging debate on the constitution through regular general public meetings in all parts of Iraq and through the media, and receiving proposals from the citizens of Iraq as it writes the constitution." Security Council Resolution 1546 mandated the United Nations to "promote national dialogue and consensus-building on the drafting of a national constitution by the people of Iraq," as requested by the Iraqi government. To achieve this broad national dialogue, the TAL provided an ambitious timetable from the January 2005 election until August 15, 2005, with the option of a further six-month extension as stated in TAL Article 61(F).

### *Sources of Constitutionalism*

Where, precisely, did these expectations of constitutionalism come from? Internal and external factors contributed to the desire and goal for a permanent constitution. In part, the desire was distinctly nationalist, including a popular Iraqi yearning for a level of stability and justice unknown in the Saddam period, a period characterized by conspicuously "interim" constitutions. A senior independent Shia intellectual and one of the deputy speakers of the National Assembly, Dr. Hussain Shahrastani, recounts one of Saddam Hussein's favorite *bons mots*: "A constitution is written by men so that another man can tear it up." Since 2003, this desire for a truly permanent constitution was compounded by a growing frustration with the operational shortcomings of the U.S.-led Coalition occupation and appointed interim government, for which an elected constitutional government seemed the obvious remedy.

A demand for constitutionalism within Iraq was consolidated by a survey of the international scene. In particular, there was an appreciation of the post-Cold War "new

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constitutionalism” and the symbolic significance of popular constitution-making in the democratization of countries as diverse as Poland, Hungary, and South Africa. It also arose in part from more recent postconflict experiences in Afghanistan and East Timor, where international programs supporting peacekeeping and governance culminated, almost triumphantly, in the entry into force of newly drafted constitutions. These comparative constitutional experiences are now well documented, and contain lessons for Iraq that USIP, among others, has identified. (See “Iraq’s Constitutional Process: Shaping a Vision for the Country’s Future,” USIP Special Report 132, February 2005.)

Moreover, the overwhelming U.S. political and cultural influence in post-2003 Iraq brought to bear the specific U.S. vision of a constitution as the centerpiece of stability and democratic independence of post-Saddam Iraq. Constitutionalism is at the heart of the U.S. vision of its own democratic identity; thus, it may not be surprising that this vision was rhetorically projected onto the massive democratization project in Iraq. In a dynamic familiar to observers of transitional governments, over time the idea of a permanent constitution for Iraq became more and more closely linked, in the U.S. imagination, with nation-building success and a plausible exit strategy.

Finally, and more pragmatically, many Iraqis—particularly, but not exclusively, Iraqi Kurds—perceived that in a multisectarian, regionalized country, a permanent constitution would be desirable, if not necessary, as a kind of an intercommunal peace treaty. This constitution-as-treaty would not be a principled discussion leading to the consolidation of Iraqi political identity, it would, more modestly, represent a *modus vivendi* to settle competing interests surrounding religious law, local self-governance, and resource management. As far as this last source of “constitutionalism” was concerned, the relevant analogies were less to the United States or even Afghanistan and East Timor, and more to Bosnia-Herzegovina, Sri Lanka, and Sudan.

### ***Expectations of Citizen Involvement***

Each of these intellectual origins for Iraqi constitutionalism—nationalist, “new constitutionalist,” and pragmatist—were to some extent popular. That is, each derived from a demand from nonelite Iraqis for a new social contract. Each presupposed that the Iraqi citizenry would have some opportunity to directly influence the constitution-making process. As one young Baghdadi man put it in late 2004, “When we hear talk of a permanent constitution, our eyes light up.” Early ambitions of the Coalition Provisional Authority for a constitution to be drafted by U.S. appointees quickly gave way to pressure from Shia religious leader Grand Ayatollah Sistani for a constitution to be drafted by elected representatives. Even the minimalist, pragmatist approach was premised, for instance, on the importance of Kurdish popular opinion and a Kurdish popular desire for a large degree of autonomy, if not independence, from Baghdad.

This demand for citizen involvement in constitutionmaking was increased by the widespread criticism of the process by which the TAL had been drafted in early 2003 during the period in which the Coalition Provisional Authority exercised the rights of an occupying power. The TAL process, though it involved some senior Iraqi political figures, was notoriously, if unintentionally, hasty and secretive, and was heavily influenced by U.S. political interests. The buildup of popular constitutionalism in Iraq during the occupation added considerable significance to the task of the future elected National Assembly in writing the constitution by an initial deadline of August 15, 2005, or, if the National Assembly considered that an extension using Article 61(F) was needed, by February 15, 2006. The National Democratic Institute (NDI) found that by April 2005 “almost every participant” in national focus group research “is of the opinion that the Iraqi citizens should be involved in the preparation of the constitution.”

If transitional Iraq was always in need of a credible constitutional process, by late 2004 this need was made acute by Iraqi electoral politics and the dynamics of a predominantly Sunni Arab insurgency. In December 2004, it became clear that the January

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2005 election outcome would be dictated by ethnic and sectarian politics, and that large sections of Iraq's Sunni Arab community would not participate.

## The Process: Sunni Arab Exclusion

### *The Threat to Constitutionalism: January Election Boycott*

Sunni Arabs, a minority that enjoyed favor in pre-2003 Iraqi governments and that had traditionally managed the state apparatus of unelected Iraqi governments, had the least to gain from an election. Sunni Arabs supply the most promising recruiting ground for insurgents and terrorists, but they are also the most vulnerable to violence, which escalated during the campaign period leading up to the January 2005 elections. In November 2004, Sunni Arab leaders, including the umbrella Iraqi National Foundation Congress, rejected the election on the grounds that it was taking place under Coalition "occupation," and was therefore illegitimate and likely, in the words of the Muslim Scholars Association leader Harith al-Dhari, to be "faked." The more moderate Iraqi Islamic Party, led by Mohsen Abdul Hamid, also boycotted the election.

The Sunni Arabs' January 2005 election boycott and the simultaneous campaign of intimidation of Sunni Arab voters by the insurgency resulted in only seventeen Sunni Arabs elected to the 275-member Assembly—a very low number compared to the proportion of Sunni Arabs in Iraq, conventionally estimated at 15 to 20 percent. By contrast, the Kurdistan Coalition List won seventy-five seats and the predominantly Shia United Iraqi Alliance won 140—an absolute majority that in theory, if not in fact, gave the Alliance the ability to write a constitution without the involvement of any other political grouping.

In practice, however, the strength of Iraqi Shia majoritarianism was doubtful in the context of a future Iraq constitution. Neither the Shia nor Kurdistan parties could afford to ignore the interests of Sunni Arabs completely. The Sunni Arabs pointed to the TAL provision—Article 61(C)—that gave any three of Iraq's eighteen governorates the ability to veto any constitutional draft by a two-thirds majority. Sunni Arabs are believed to constitute a majority of residents in at least three Iraqi governorates: Anbar, Salahaddin, and Ninevah. It was always seen as at least possible that Sunni Arabs might have sufficient numbers and cohesion to invoke the Article 61(C) veto successfully. It is well known that Article 61(C) had been included in the TAL text as a last-minute modification of a demand from the Kurdish parties. Many commentators have remarked on the irony that it was now the Kurds, likely to do well in the constitutional negotiations, for whom Article 61(C) posed the greatest threat.

In these circumstances, the low Sunni Arab turnout at the January election raised the discomfiting spectre of a draft constitution that would explicitly exclude Sunni Arab views and that, in an already deteriorating security environment, would cement Sunni Arab opposition. This exclusion presented immediate problems: first, the possibility that the constitution would be blocked at the referendum; and second, in the event of the constitution's success at the referendum, a still more profound failure—the failure of Iraqi nationalist, "new constitutionalist," and pragmatist ambitions for a constitutional compact including all three of Iraq's major groups. The constitution might fail to deliver on the promise of true Iraqi consensus.

### *A Possible Solution: Constitutional Engagement*

No doubt anticipating the problem, a number of Sunni Arab leaders publicly indicated in November 2004 that though they would likely boycott the election, they would be willing to engage in the postelection constitutional discussions. Statements of boycott often contained an implication that future constitutional discussions for a democratic

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Iraq could be relatively free from coalition influence and, as a sovereign Iraqi process, could therefore be supported.

In the weeks before the election, Shia and Kurdish party leaders were reciprocating these Sunni Arab advances. Dr. Hussain Shahristani, charged with assembling the Shia Alliance, stated on January 23: " If the people of [any area of Iraq] are not represented in the elected National Assembly—and we hope and pray the issue will not be so—we will call for a national dialogue with the real representatives of all these areas. We will not write a constitution that does not satisfy all sectors of the Iraqi society." This rapprochement came with the clear encouragement of the centrist, nonsectarian parties, including the Iraqi List, the party of then Prime Minister Ayad Allawi. He stated on January 24: "We know that the [TAL] does not mean that only the ones who voted will write the constitution. It is possible for anyone to participate in writing the constitution." On January 27, Wamidh Nadhmi, a secular spokesman of the Iraq National Foundation Conference, echoed the views of the Muslim Scholars Association that notwithstanding the electoral boycott, "[i]f we were invited by respectable committees [in the National Assembly] I don't see why we wouldn't say what we think of the constitution."

Party leaders reaffirmed their rapprochement after the election results were announced in February. At that time, Iraqi lawyers and political advisers discussed the question of Sunni Arab inclusion in detail in a cross-factional working session, convened by USIP and the American Bar Association in Jordan. These discussions set the stage for a constitutional process that might rescue Iraq's transitional governments from the perception of illegitimacy among Sunni Arabs and other nationalists. The International Republican Institute's (IRI) polling conducted in April showed a large public desire across Iraq to include Sunni Arabs in the constitutional process.

### ***Sunni Arab Opposition to Constitutional Draft***

As events transpired since the January elections, however, the spectre of an exclusionary constitution has become real. The substantive criticisms of the draft by Sunni Arabs also included serious procedural complaints.

### ***Elements of the Draft Constitution***

The terms of the constitution itself, though quite different from the TAL language, are fairly familiar to Western eyes: a parliamentary, republican, asymmetrical federal democracy that posits a central government with certain enumerated exclusive powers, including foreign affairs, defense, and fiscal policy. Executive, legislative, and judicial powers are balanced, if not with great precision. The exclusive powers of the federal government are very limited and do not include, for instance, an explicit power of taxation, though, it seems clear that the central government has the power to legislate outside the list of enumerated powers. As for Iraq's all-important hydrocarbons, the constitution explicitly gives management control over existing petroleum production to the federal government, "with" the producing regional government, and implicitly gives control over future petroleum production to the regional government, with revenues to be shared throughout Iraq. Regional governments enjoy wide residual powers, with regional law overriding nonexclusive federal law to the extent of any inconsistency between the two. The constitution gives recognition to Iraqi Kurdistan as a region, and allows for one or more governorates to come together as new federal regions in the future.

The constitution provides for a fairly modern bill of rights, but also provides for many of the rights to be elaborated through legislation, under which these constitutional rights could be reduced. Though the constitution purports to preserve the essence of these rights, conservative Islamic law can clearly qualify them. The constitution describes Islam as "a fundamental source of legislation," prohibits legislation that contradicts "the established provisions of Islam," and inscribes a role for "experts in Islamic juris-

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prudence”—generally understood as Islamic clerics—on the constitutional court. Perhaps less obvious is the large scope the constitution gives regional legislatures to prevail over federal law in those areas in which Islamic jurisprudence conventionally holds sway, including family law and criminal law. A referendum by the end of 2007 will resolve the outstanding status of multiethnic Kirkuk.

### ***Substantive Opposition to the Draft Constitution***

The draft constitution attracted criticism from a range of Iraqi groups and parties, and in particular Sunni Arab groups. After the National Assembly adopted the draft constitution on August 28, influential secular and religious Sunni Arab political groups, including the Iraq Islamic Party, the National Dialogue Council, and the Muslim Scholars Association, publicly indicated that they would oppose the draft at the national referendum.

The stated reasons for opposition were not uniform. For instance, secular and religious Sunni Arab groups were divided on the statement in the draft that Islam “is a fundamental source of legislation.” Secularists thought this was too much religion; clerics thought it was not enough. There were common themes, however. Typically, the Sunni Arabs objected to the regional federalist model for Iraq and, in particular, the prospect of a southern, predominantly Shia, federal region. In many cases, there was a specific rejection of regional control of petroleum production, a demand for a stronger statement of an Arab identity for Iraq, and an objection to provisions in the draft condemning Ba’athism. Later efforts to bring the August 28 text closer to the Sunni Arab position eventually led, to a statement of support by the more moderate Iraq Islamic Party for the constitutional text. The majority of Sunni Arab representative groups, however, maintained these objections up to the date of the referendum.

Significantly, opposition to the text was not confined to Sunni Arab groups. Former Prime Minister Ayad Allawi had also publicly opposed the model of regional federalism in the constitutional draft. The influential Shia cleric Moqtada al-Sadr and Ayatollah Mohammed al-Yaqoubi indicated their opposition to the draft at the referendum, for reasons that likely stem from hostility toward the Iranian ties of the Supreme Council for the Islamic Revolution in Iraq (SCIRI). SCIRI is the powerful Shia party and major proponent of constitutional provisions that facilitate a southern federal region, which they wish to be composed of as many as nine existing governorates. Some women’s groups and certain ethnic minorities also opposed the draft on grounds that the text insufficiently promoted and protected their interests.

### ***The Problem: Time Pressures***

These substantive Sunni Arab criticisms of the draft were also accompanied by procedural complaints. Sunni Arab representatives said that they were not sufficiently included in the constitutional negotiations.

The creation of the Committee was promising in some respects. In particular, Sunni Arab negotiators nominated fifteen new representatives to join the National Assembly’s fifty-five-member Constitution Drafting Committee (the Committee) in late June 2005, and the following weeks saw the participation by those representatives in the Committee’s activities. (The enlarged body was notionally renamed a “Commission” (*hay’a ‘ameh*) but was continually referred to as the “Committee” (*lajneh*), and this report follows the common practice.)

The Assembly had elected a SCIRI member, Sheikh Humam Hamoudi, to chair the Committee. He was not appointed until May 23, after negotiations over the formation of an Iraqi Cabinet extended to April 28, and the negotiations over Committee membership continued until May 11. Once appointed, Sheikh Hamoudi heard evidence from international experts from constitutional commissions in South Africa, Albania, Kenya, Afghanistan, East Timor, and elsewhere. He agreed to bring Sunni Arab members into the Committee structure and to take decisions by consensus. This principle of consensus was adopted to

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provide some assurance that Sunni Arab Committee members would not be sidelined in a Committee on which, because they were not elected to the Assembly, they had no vote. In finalizing the Committee composition in this way, the Assembly implicitly rejected earlier proposals in February suggesting that the constitution be drafted by a commission that would be independent of the government and the Assembly. The Assembly also rejected the possibility that the drafting body contain, as members, Iraqi civil society representatives or constitutional experts. As a result, additional, unelected Committee members were limited to the Sunni Arab political leadership.

The extent to which the Committee was able to operate as a forum for the expression of Sunni Arab constitutional positions, however, was marginal at best. First, the period during which Sunni Arabs were able to take part in the Committee activities was very short. It was late June before the fifteen Sunni Arab members of the Committee had been invited onto the Committee, and it was later still, July 8, before they attended their first meeting. Matters were tragically complicated on July 19 when a Sunni Arab Committee member, Sheikh Mijbil Issa, was assassinated in the Baghdad suburb of Karrada—presumably by Sunni Arab insurgents. As a result, some Sunni Arabs on the Committee suspended their membership until the government could assure them a higher level of security protection.

The Committee leadership, having made repeated public commitments that they would meet the default TAL constitutional deadline of August 15, remained under intense time pressure to produce a draft. Public and private statements of senior U.S. officials, including the Secretary of State, the Secretary of Defense, and the President himself, dramatically increased this pressure. These officials made it clear that any move to extend the constitutional deadline beyond August 15 would earn the displeasure of the U.S. and U.K. governments. The standard U.S. pronouncement was: “The [United States] supports the Iraqi people in their desire to complete a constitution by August 15,” in circumstances in which an expression of that desire was far from universal within Iraq, and did not precede the statement by the United States of its position.

### ***Defunct Constitution Drafting Committee***

As it turned out, however, the Committee was effectively scrapped, or rendered defunct, by the meeting of political party leaders that began in the Baghdad International Zone on August 8. Scrapping the Committee on August 8 meant that in effect the Sunni Arab Committee members, after no more than one month of trying to develop and assert a coherent constitutional position, were retired *en masse*.

After August 8, constitutional negotiations took place in a series of private, ad hoc meetings between Kurdish and Shia party leaders—the “Leadership Council,” as it was termed by the international press, or more informally by Committee members, “the kitchen” (*matbagh*). In its basic form, the Leadership Council consisted of SCIRI leader Abdul Aziz al-Hakim, Shia Dawa party leader Prime Minister Jaafari, Kurdish PUK party leader President Jalal Talabani, and Kurdish KDP party leader Masoud Barzani. These meetings took place at irregular intervals at a number of private residences and compounds in the International Zone. These were meetings at which the Sunni Committee members had no right of attendance, to which they frequently requested attendance, but were not often invited. The expectation was quite clear: the Shia and Kurdish parties would agree to a constitutional text, which would then be presented as a *fait accompli* to the Sunni Arabs, who would be asked to take it or leave it.

### **Timeline: A Better Process?**

The question arises, then, as to whether before the Leadership Council began meeting on August 8, a more extended time period for constitutional deliberations within the

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***The question arises, then, as to whether before the Leadership Council began meeting on August 8, a more extended time period for constitutional deliberations within the Committee would have produced a better result, and specifically would have created the conditions for Sunni Arab acceptance of a constitutional draft.***

Committee would have produced a better result, and specifically would have created the conditions for Sunni Arab acceptance of a constitutional draft. The answer to this question has implications for any post-constitutional Iraq strategy.

***Many—probably most—of those Iraqis closest to the negotiations clearly favored a more extended timeline, including the Chairman of the Constitution Drafting Committee himself.***

***The U.S. Government's strong demarches stand out as the principal reason for the Assembly ultimately declining the TAL extension provision on August 1.***

### ***Iraqi Support for 61(F) Extension***

At the outset, it should be noted that many—probably most—of those Iraqis closest to the negotiations clearly favored a more extended timeline, including the Chairman of the Constitution Drafting Committee himself. Under the terms of the TAL, if the provisions to extend the constitutional process were to be invoked, such action had to be taken by the Assembly before August 1, presumably on the advice of the Committee.

On July 31, Sheikh Hamoudi indicated to the Committee his wish to extend the process to September 15. In early June, he had sought independent advice from USIP consultants on timeline extension options; the work needed to reach true consensus weighed heavily on his mind. This preference for an extension was shared by Mahmoud Othman and other senior Kurdish negotiators, international advisers to the Kurds, and senior Shia List officials on the Committee, including Abbas Bayati. This preference also had private support among senior independent Shia leaders in the Assembly, from Committee member and Chairman of the Council of Iraqi Minorities Dr. Hunain Al-Qaddo, and from Dr. Younadam Kanna, Committee member and leader of an independent Chaldo-Assyrian Christian party. The leaders of most, if not all, important civil society organizations expressed their desire for an extension. NDI focus group research in April 2005 revealed strong reservations across Iraq regarding the value of a hasty constitutional process. On August 1, Speaker of the Assembly Hajim Al-Hassani was expecting to receive a request from Sheikh Hamoudi for an extension. Some observers in the international community, including the International Crisis Group, had publicly doubted the possibility, and desirability, of meeting the August 15 deadline, and these views had been influential in the Iraqi political class.

The United States, however, maintained its policy. In the days prior to August 1, U.S. Ambassador Khalilzad convened meetings with political party leaders to impress upon them the importance of meeting the August 15 deadline. He issued similar messages to members of the international community. The U.S. government's strong demarches stand out as the principal reason for the Assembly ultimately declining the TAL extension provision on August 1.

### ***Committee Shortcomings***

Given the shortcomings of the Committee, the proposition that an extension would have helped is, at first glance, doubtful. First, through June and July, the Committee lacked the ability to identify constitutional differences and reach common ground across factions. As one Iraqi observer put it: "These days, if someone wishes you good morning, you are suspicious." Committee drafting work was slow, and discussions at Committee meetings were frequently abstract and academic. The discussions were not characterized by the practical bargaining and trading clearly necessary to produce the consensus that the Committee had rightly established as its goal. Political party leaders did not provide their Committee representatives with clear mandates, inhibiting true consensus. Committee meeting minutes were not taken.

Second, the Committee did not implement a set of rules and work plan to clearly define, for all participants, the stages in the constitutional process. There was no protocol to address the fact that crucial off line bilateral negotiations among the three major political blocs of Shia Arabs, Kurds, and Sunni Arabs would be needed at each step of the way. In Iraq's difficult security environment, these constitutional discussions were always fated to take on the nature of peace treaty talks, as if among three sovereign governments. (Indeed, as late as June one senior Kurdish negotiator, Dr. Saedi Barzinji, was arguing Kurdish autonomy be protected in the constitution by a set of international guarantees.)

The life of the Committee was characterized by frequent resignations and walkouts by Sunni Arab, Kurdish, and other representatives. Also, no protocol provided for Committee interaction with the Iraqi public. Occasional press conferences were held in the heavily guarded Convention Center to update the media on the Committee's drafting work, but these did not involve serious dialogue on constitutional issues.

Sunni Arab Committee membership was continually criticized for being drawn largely from the Baghdad political elite and insufficiently representing its constituency. Some also felt that Sunni Arab civil society leaders, including tribal leaders, had been largely overlooked to the peril of the final constitution. For example, in early June, Shia and Kurdish Committee members rejected a proposal to identify Sunni Arab constitutional drafters through a multiweek, regional caucus process. The Iraq Institute of Peace, a nongovernmental interfaith dialogue organization with strong Sunni Arab tribal connections, had tested the idea, but the Shia and Kurdish members thought the process would be too time-consuming.

### ***Insumountable Differences?***

Even with all the time in the world, the gap between the Sunni Arab and Shia constitutional positions on federalism may not have been reconcilable. There was arguably little chance for the Sunni Arabs to reach an accommodation with SCIRI, which over the course of July started pressing for a constitutional right to create a new southern federal unit to mirror that of the Kurdistan Region. The model of federalism the Kurdish and Shia "kitchen" finally offered to Sunni Arab negotiators would not only consolidate a large degree of autonomy to the Kurdistan Region, but would also allow for other future federal regions, including a southern, predominantly Shia, federal unit.

In rejecting this model, the Sunni Arabs took a stance that bluntly and fundamentally contradicted the bilateral Kurd-Shia agreement on the terms of federalism, in circumstances where that agreement was apparently not open to modification. The terms of that Kurd-Shia agreement give to one or more of Iraq's eighteen governorates the right to "organize into a region" following a referendum in the respective governorate(s). The central Sunni Arab objections as stated lay with the prospect that a southern federal unit would radically challenge a Sunni Arab conception of the integrity of the Iraqi nation, and that would (or so it is imagined) isolate Sunni Arab nationalists between two sectarian and strong and oil-rich provincial powers of Iraqi Kurdistan and a new Iraqi "Shiastan."

As constitutional rhetoric amplified toward the end of August, adherents of the Kurdistan and Shia parties made private allegations that the Sunni Arab negotiators had no intention of finding common ground. They stated a belief that the Sunni Arab negotiators had as primary objective a failure by the Assembly to meet the August 15 deadline. Under the relevant TAL provisions, a failure to meet—or extend—the August 15 deadline would automatically precipitate the dissolution of the Assembly and mandate new constituent elections for a new Assembly, to which more Sunni Arabs would be presumably be elected. In their darker moments, Kurdish and Shia negotiators ascribed this "nuclear option" to the ambition of the Sunni Arabs.

### **Reasons for Extension**

Several indicators suggest, however, that Sunni Arab positions had not hardened against federalism, and were not as intractable as some have suggested. For several reasons, an extended constitutional process would have produced better results.

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

First, it is a fact that influential sections of the Sunni Arab community in June and July, in evolving discussions on the terms of Iraqi federalism, were beginning to produce more

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moderate constitutional positions. There were signs that some influential Sunni Arabs were coming to accept the possibility that federalism might work to their benefit. They were already accepting, for instance, a governorate-based federalism that would imply self-government in Sunni Arab areas of Iraq. As one Sunni Arab lawyer put it: “When you ask a Sunni if they want Anbar to rule Najaf they say no; if you ask if they want Najaf to rule Anbar, they say no. They want federalism without realizing it.” Moreover, at no point was there a strong statement by Sunni Arab negotiators against the existence of a relatively autonomous Kurdistan Region.

USIP was in close contact with some of these Sunni Arab opinion makers, who were working with their constituents to bring about credible and acceptable Sunni Arab positions. A large part of the problem among Sunni Arab elites was the fact that the Kurdish and Shia parties overlooked Sunni Arab technical constitutional expertise. Sunni Arab leaders pointed to a professional class of lawyers who had been kept away from the constitutional negotiations. The leaders often stated their ambition as no greater than to have these lawyers conduct a technical review the text negotiated between the Kurdish and Shia parties. In this way, much Sunni Arab hostility to the terms of federalism as they were developed in the August negotiations was due to this sense of professional pride and a belief in constitution-making as a technical, not only political, exercise.

In the final days of August, some leading Sunni Arab negotiators were privately sympathetic to some models of Iraqi regional federalism, but were unable to move because of their constituent institutions and populations. In Sunni Arab populations, evidence collected by NDI and others shows that hostility to the concept of federalism stems not from principle or an informed self-interest, but rather from a perception that “federalism” (*ittihadiyyah*) is code for Kurdish separation and, more generally, the partition of Iraq. There was little recognition in the Sunni Arab heartland that federalism is an internationally recognized way of structuring a state that can be neutral, or at least mutually beneficial, as to the respective interests of different regional and ethnic groups. Interviews conducted by the United Nations Office for Project Services in late July showed that of the Sunni Arabs in the interview group, 51.7 percent believed federalism would lead to a divided Iraq, and 46.8 percent believed it would lead to civil war. By way of contrast, a year earlier Shia popular opinion reflected a similarly limited understanding of federalism, including a belief that federalism simply meant Kurdish separation. Over several months of Shia strategizing on constitutional matters, the position of popular Shia sentiment moved significantly—if not uniformly—toward an acceptance federal constitution models. Similarly, if Sunni Arab constitutional negotiators were to accept the terms of a federal Iraq, their constituents would need to empower them to do so.

By July that dialogue had clearly begun, but the deadline of August 15, did not allow it to produce results. To this extent, the Sunni Arab position as articulated in July and August was premature, hastily crafted, and without the benefit of an informed debate among the broader Sunni Arab population. While it is arguable that convening a party leaders summit—in the form of the Leadership Council—in early August was necessary, it was neither necessary nor desirable for the Committee to be disbanded at the same time.

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### ***Imbalanced Negotiating Capacity***

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

By August 2005, the Kurdistan Region parties were well prepared for ad hoc negotiations. They had developed constitutional positions and even draft Iraqi constitutional texts that, over time, became increasingly ambitious and firm. Most recently, the Kurds

had internally agreed on their nonnegotiable “red line” positions, which Committee members from the Kurdistan Coalition were not at liberty to modify. During the January election, the Kurdistan parties were able to orchestrate a region-wide poll that predictably showed a popular preference for independence over integration into Iraq. This result sent the message to non-Kurdish parties that the Kurdish leaders had little room to retreat from maximalist constitutional positions. Similarly, in late July, the Kurdistan National Parliament gave the Kurdistan parties a clear mandate on these red line positions, which were made public. Street demonstrations across the Kurdistan Region on August 15 also showed support for the Kurdish parties. Last, the Kurdish parties were able to invite into the ad hoc meetings experienced non-Iraqi international negotiators and constitutional lawyers, including former U.S. diplomat Peter Galbraith and University of Maryland Professor Karol Soltan, to advance the Kurdish case.

The Shia parties, for their part, did not have clear mandates from their constituencies, and did not choose to deploy international negotiators. The Shia Alliance position during the final days of the Shia-Kurd negotiations was subject to radical changes and reversals, frequently wavering on the basic terms of federalism, petroleum management, and the constitutional status of Shia clergy. Somewhat surprisingly, no Shia party tabled a ready-made draft constitution for Iraq. (An earlier, very Islamist draft circulated in early 2005 by the Islamic Dawa Party of Iraq did not arrive at the negotiating table). Strong factions within the Shia Alliance, however, clearly had resources to use as soon as their strategic interests became clear. In particular, on August 11, in the final days of negotiations, SCIRI leader Abdul Aziz al-Hakim was able to mobilize the well-organized SCIRI base to stage large public demonstrations in Najaf and other southern Iraqi cities in favor of the formation of a southern federal unit, a move even the Kurds declared to be surprising. Anecdotal evidence suggests also that the government of Iran was channeling financial and in-kind support to SCIRI's position.

The Sunni Arab negotiators, though not without institutional affiliation and support, lacked the ability to rally constituents and resources around a coherent constitutional strategy. Iraq's Arab neighbours have little practical experience with constitutional matters and were of little practical help. Indeed, at least until August, there was no clear Sunni Arab constitutional position of any sort. Again, Sunni Arab competence, negotiating mandates, and ability to organize their constituents could have coalesced with adequate time, but time was the resource least available to them.

This capacity imbalance further isolated and radicalized Sunni Arab positions. A definitive Sunni Arab denunciation of regional federalism came after, not before, the Committee dissolution. As the July and August discussions progressed, it became increasingly commonplace for Iraqi leaders to identify themselves and act according to ethnic and sectarian politics. The Sunni Arab participants, who typically saw themselves as nationalists, were not well versed in these practices and did not succeed in pressing a coherent constitutional position. As with any negotiation, all parties were likely hurt by the relative lack of competency of one of the parties. Under these circumstances, it was always much more likely that Sunni Arab negotiators would quickly move away from the negotiating table and revert to a strategy hinging on threats of nonparticipation and opposition to the referendum.

### ***Lack of International Mediation***

The compressed time frame also forestalled the United Nations and independent international constitutional experts from mediating between the parties to the negotiations as well as providing options and alternatives for bridging factional divides.

Nicholas Haysom, who led the constitutional support team of the United Nations Assistance Mission in Iraq (UNAMI), arrived in Baghdad in May to begin the task of supporting the Constitutional Committee. UN headquarters had been slow in starting to discharge its mandate under Security Council Resolution 1546, waiting to formalize its role with the Transitional Iraq Government, and taking time to assemble its constitutional

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team. As in East Timor and Afghanistan, the United Nations in Iraq suffered from the lack of a ready roster of experts for rapid deployment to the field in support of postconflict constitution-making.

The Iraqi Government did not issue a formal invitation to the United Nations until early June. Further, Sheikh Hamoudi was clearly skeptical of the value and propriety of any international involvement, however enlightened and unobtrusive, in the Iraq constitution. Even before this invitation had been issued, Haysom, a veteran of the South African constitutional negotiations, was working behind the scenes to help the Committee incorporate Sunni Arabs as members. He developed a consensus model of decision-making that would avoid the question of whether Sunni Arab appointees would have full voting rights. He later worked with the Committee in designing the arrangement of thematic and technical subcommittees. He also helped develop federal models that might be sufficiently flexible to allow for future federal units, and to balance regional and national interests in natural resources. A paper he circulated on August 10 titled "A Framework for Decentralised Government in Iraq" was particularly influential in setting out a scheme of exclusive federal powers, a mechanism for the creation of new federal units and joint federal/regional oil management.

International experts brought to Iraq by the United Nations and USIP, including constitutionalist Professor Yash Ghai, worked directly with Sheikh Hamoudi beginning in early June. They gave particular attention to the Sunni Arab Committee members, spending much time illustrating the value of federalism in multiethnic states. Specifically, Professor Ghai referred extensively to comparative constitutional models, explaining that federalism, far from precipitating the breakup of the state, in fact might hold Iraq together. "Iraq does not face a choice between a unitary or federal/autonomous system," he advised, "but between federalism/autonomy and bitter civil war (and ultimately no Iraq)." During this time, Committee members paid a great deal of attention to the Spanish constitution. More than any other model, the Spanish constitution provided the conceptual basis for the gradual federalism negotiated in the final Iraq text.

These important colloquies with Sunni Arabs were broken, however, when the Committee dissolved in August. Even though Haysom had quite properly formalized a role for UNAMI with the Committee, as of August 8 that role became unclear and informal. Haysom and other UN officials were sometimes called on to speak to the party leaders and perform secretarial functions. The UN officials worked especially hard with Saleh Mutlaq of the National Dialogue Council, who had emerged as the leading Sunni Arab negotiator, to reconcile his views with those of the Kurdish and Shia leadership. By this stage, however, there was no longer a negotiating table to which the United Nations had a standing invitation. The United Nations' position was considerably weakened, especially by U.S. intervention in the negotiations. The UN position in the Leadership Council was never clarified or assured.

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

The compressed timetable allowed, and probably required, much heavier and more visible involvement of U.S. officials at the negotiations than would otherwise have been the case. The visible involvement of a foreign power in something so uniquely sovereign as the writing of a constitution is probably always regrettable. Especially with Iraq, even moderate Sunni Arab nationalists would frequently express the fear that the Iraq constitution would be written in Washington, D.C., and, as one Baghdad University political science professor put it, only half-joking, "dropped from a helicopter onto Baghdad." Prior to August 8, the U.S. Embassy had kept some distance from the Committee, referring to the need for the Iraqi constitution to be settled with Iraqi, not American, solutions. It was apparently not possible, however, to maintain this distance and at the same time to insist, as a matter of U.S. policy, that the August 15 deadline be met. From the time the Leadership Council was formed, U.S. Ambassador Zalmay Khalilzad attended meetings regularly, and U.S. Embassy officials were engaged in less-than-subtle efforts to accelerate a final constitution. Several

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of the early meetings of the Leadership Council took place at the U.S. Embassy. By August 10, the United States was strongly expressing its views on substantive constitutional issues to reach fast compromises that resembled the terms of the TAL. For example, the United States clearly favored an entirely centralized petroleum sector even though UNAMI had, in its August 10 paper, identified shared regional and central control as the only way of reaching a compromise.

On August 12, in efforts to accelerate the drafting process, the U.S. Embassy circulated its own draft constitution in English. This took the form of a “track changes” version proposing amendments to the Committee’s draft text, offering extensive U.S. views on the terms of federalism, the judiciary, human rights protections, de-Ba’athification, and other matters. It is somewhat ironic that the U.S. government, having encouraged an early Shia-Kurd deal to the exclusion of Sunni Arabs, expended a great deal of effort in the final days of negotiations urging a speedy settlement of outstanding issues by pressing the Shia parties to accommodate Sunni Arab concerns. This effort included a telephone call from President Bush to SCIRI leader Abdul Aziz Al-Hakim on August 25. The American press and the Baghdad-based *Al Sabah* newspaper reported this telephone call, raising the U.S. profile in Iraq to a point that might confirm Sunni Arab suspicions that the constitution would be a U.S. product—without any observable softening of the SCIRI position. Ambassador Khalilzad took the unusual step of attending the meeting of the National Assembly on August 15 where the Assembly leadership moved for a seven-day extension, and again on August 22 when a further extension was sought. Domestic Iraqi television channels broadcasted his attendance in the Assembly, predictably attracting criticism from Iraqi nationalists and sections of the Arab media.

### ***Charges of National Assembly Illegality***

Finally, and perhaps most obviously, the unrealistic decision on August 1 not to extend the timetable beyond August 15 using Article 61(F) led to a series of ad hoc decisions by the Assembly after the deadline was missed on August 15. This exposed the Assembly to charges that it was operating illegally. Sections 61(E) and (G) of the TAL treat the eventuality of a missed August 15 deadline in the same way as a failed referendum. In both cases the TAL prescribes that “the National Assembly shall be dissolved. Elections for a new National Assembly shall be held no later than 15 December 2005.” Had the Assembly behaved lawfully, so the argument goes, it should have automatically dissolved and the government would plan for new elections.

The precise nature of the Assembly’s proceedings on the evening of August 15 are unclear, though it seems arguable that the Assembly, by a show of hands that exceeded the necessary 75 percent majority, amended the TAL to change the deadline to August 22. In doing so, it seems that the Assembly acted lawfully, albeit in a way that the TAL drafters may have thought eccentric. It is less clear, however, if the Speaker’s August 22 announcement stating three additional days were needed, or the August 25 press conference announcing that still more time was needed, conformed either to the letter or the spirit of the TAL. It seems that after August 15, the Assembly did not make any formal amendment of the TAL deadline; after August 1, formal amendment of the TAL deadline was the only legal mechanism by which to avoid the mandatory provisions of clauses 61(E) and (G). The Leadership Council was clearly unwilling to submit a series of rolling amendments of the TAL deadline to the Assembly, in circumstances where the negotiating text of the constitution was being withheld even from Assembly members.

Indeed, the Iraqi constitutional process was remarkable in the way in which members of the Assembly, though legally charged with responsibility for writing the draft, were not involved. Rank and file National Assembly members had no access to constitutional drafts from August 8 to August 22. The Assembly leadership denied requests by Assembly members to address constitutional issues on the floor. For their part, the U.S. and U.K. Embassies had always been somewhat vague as to the legal consequences of a failure to meet the August 15 deadline, being unwilling to strategize around the probable scenario

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that the deadline would not be met. In any event, criticisms from the Sunni Arab community and elsewhere stating that the Assembly acted contrary to the interim constitution continued, and added some force to claims that the current Assembly, and the document it later produced, lack legitimacy. It is likely, of course, that had the United States allowed the Assembly to adopt a more realistic deadline—a deadline which the Assembly could reasonably meet—the Assembly would not be exposed to these claims.

***The breakdown of the process also worked against the interests of women, Iraqi ethnic and religious minorities other than Sunni Kurds, as well as liberal and centrist political interests.***

## **Exclusion of Civil Society: Women, Minorities, and the Center**

The breakdown of the process also worked against the interests of women, Iraqi ethnic and religious minorities other than Sunni Kurds, and liberal and centrist political interests. From the time of the occupation, the continued rise of sectarian and ethnic political parties fragmented and marginalized these groups. It is doubtful whether any constitutional process would have delivered them the constitutional recognition they sought, including strong statements of equality and human rights protections that were contested by the Shia Muslim religious conservatives, now clearly in the ascendancy. Smaller segments in Iraqi society had not had the chance to group together under strong civil society institutions.

### ***Forgone Civil Society Influence***

For that reason, some of the most promising initiatives in the post-election period came from civil society leaders who wanted to form umbrella organizations to represent civil society in constitutional discussions. From a centrist, more secular perspective, Dr. Ghassan Al-Atiyah of the Iraq Foundation for Development and Democracy developed a proposal for an Independent Constitution Commission (ICC). The stated purpose of the ICC would be to work alongside the “official” Constitution Drafting Committee, and to “bombard” it with civil society constitutional views—under the oversight of a board composed of senior political party members. The ICC membership would consist of a large number of Iraqi nongovernmental organizations (NGOs) that were active in canvassing popular views on the constitution through 2005.

Similarly, the Thaqalayn Research Institute, an independent Shia religious NGO, started up a “Civil Constitutional Forum” of NGOs working on the constitution under the leadership of Dr. Sallama al-Khafaji and Sheikh Fateh al-Ghitta. The Forum was designed to educate religious Shia communities on the value of constitutionalism, the separation between church and state, and to bring consolidated civil society views to the Committee. Both the Iraq Foundation for Development and Democracy and the Thaqalayn Research Institute were, in the end, able to play a role in bringing civil society views to the Committee. Neither organization, however, was able to realize its goal of creating the institutions necessary to strengthen civil society’s influence on the draft. Both Ghassan Al-Atiyah and Sheikh Fateh al-Ghitta pointed to the lack of time as the primary reason for failure.

### ***Women’s Groups Ignored***

The truncated time frame problem also affected women’s groups. At meetings of women’s groups in late July, many participants identified an unmet need for a greater level of coordination if they were to successfully represent women’s views to the Committee, for instance proposing the creation of an Iraqi women’s “Coordination Committee” to manage this relationship. Again, it was clear that lack of time was the major constraint. Hanaa Edwar, leader of one very active women’s group, the Iraqi Women’s Network, recounts her meeting with the Committee in late July: “We’ve expressed our worry about the very short time behind the drafting committee to accomplish its work in a close doors. We’re still demanding for prolonging the deadline of writing the constitution in order to get the chance for Iraqi people to be involved actively in this very serious process. This will



enhance peaceful dialogue and bridge trust on national reconciliation among all Iraqi society constituencies.” Women’s groups were particularly concerned about provisions in the draft that would apparently erode the secular basis for Iraqi family law.

### ***Committee Participation***

The Committee itself represented a way of partially correcting the lack of minority and women’s participation. Some care had been taken by the Kurdish and Shia blocs to ensure that women were represented on the Committee—with a total of nine—as well as representatives of the Assyrian, Shabak, and Yazidi communities. One of the Committee members, Hunain Al-Qaddo, was also serving as Chairman of the Council of Iraqi Minorities, a body formally established on July 2, 2005, by eight ethnic minority groups to advocate for their concerns in the constitutional discussions. One of the deputy chairmen of the Committee, Adnan Al-Janabi, was a representative of the centrist party of Ayad Allawi.

The demise of the Committee on August 8 dramatically reduced the ability of these groups to participate in negotiations. The ad hoc Leadership Council meetings included no women and no non-Kurdish minorities. Centrist party representatives, when they attended, played a minor role, having moved closer to Sunni Arab skepticism. As a result, the constitutional provisions that these groups were seeking in the text were frequently removed from the Committee text, diluted, or modified in ways that bore little relationship to the views of the groups concerned. For example, the Council of Iraqi Minorities had been seeking a provision that would recognize several of Iraq’s many ethnic and religious minorities by name. Such a provision was included in Article 3 of the Committee draft: “The Iraqi people is comprised of two major nationalities, Arabs and Kurds, and from basic nationalities: the Turkmen, the Chaldeans, the Assyrians, the Syriacs, the Armenians, the Shabak, the Yazidis, and the Mandaean Sabeans, all of whom are equal in rights and citizenship obligations.” This provision was removed from the draft after August 8 without consultation with the Council of Minorities or individual minority groups, and was replaced by different minorities language that does not, for instance, explicitly recognize the Shabak or Armenians.

### ***Civil Society Need for International Support***

The removal of the drafting responsibility from the Committee resulted in smaller groups, including Iraq’s ethnic and religious minorities, turning immediately to international institutions for lobbying support and patronage, where previously they had been able to access Iraqi members of the Constitution Drafting Committee directly. Hoping to influence the draft after August 8, these groups had an incentive to seek the backing of the U.S. Embassy, and to a lesser extent the United Nations, since there were no longer accessible or sympathetic Iraqis close to the drafting action. The United States and the United Nations clearly welcomed this role. For instance, the UN Special Representative, Ambassador Ashraf Ghazi, defined his own role as that of the protector of human rights and minority rights in the constitution. The press releases he issued in August reveal a series of meetings with Iraqi supplicants looking for UN help when apparently none was available elsewhere.

It is far from clear that the adopted roles of the United States and UNAMI as human rights lobbyists were successful. There is no doubt that some of these Iraqi actors found the meetings with the U.S. Embassy and United Nations to be useful, if only so that they could determine the status of the latest drafts of the constitution. By August, it became very difficult even for participants in the negotiations to follow the drafting work, with at times two or even three different drafts being circulated by different negotiators as the “latest draft.” Competing “authoritative” texts were variously held by Dr. Hajim Al-Hassani, the Speaker of the Assembly, Sheikh Humam Hamoudi, the U.S. Embassy, and the United Nations. Although on two occasions these drafts were leaked to the Iraqi press, none of

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these successive drafts were officially released to the Iraqi public for comment. Very few, if any, were released to members of the Committee or to the National Assembly.

### ***United States and Civil Society Patronage***

This absence of drafting and consultation protocols made it extremely difficult for non-expert Iraqis to follow the process. This background of confusion and the desire for patronage by smaller Iraqi interests led, in turn, to the U.S. Embassy gaining still greater public involvement in Iraqi constitutional politics. The Embassy also became the most obvious agent for a range of international lobbying and advocacy institutions based outside Iraq, including the U.S. Commission for International Religious Freedom, Freedom House, and a range of U.S.-based Iraqi expatriate and women's groups. Regardless of the value of these efforts to improve the constitution, the time pressure increased the likelihood that Iraqis would see foreigners as dominating their constitutional process, minimizing the popular legitimacy of the text.

### **The Committee Secretariat: Engaging the Iraqi Public**

If relatively well-organized and well-connected women's and minority groups found it difficult to interact with the constitutional drafters, these difficulties were greater for ordinary Iraqi citizens. Every meeting of the Committee, the National Assembly, and the Leadership Council took place behind the blast walls, barbed wire, and gun turrets of Baghdad's International Zone. Iraqi citizens could gain entry to the International Zone only after time-consuming and dangerous queuing and multiple body searches. Phone lines and internet connections were uniformly bad. The opportunity for Iraqis to communicate, either formally or informally, with their constituent representatives was practically nil. In one sense, the national dialogue and debate on constitutional matters were widespread, covered extensively in the Iraqi media. However, notwithstanding the enormous efforts of the Constitution Drafting Committee staff, very little of this dialogue was formally presented to the Committee in time for it to influence the constitutional text.

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### ***Creation of the Outreach Unit***

In early June, Chairman Sheikh Hamoudi established, under the management of Dr. Adnan Ali, a skeleton Secretariat for the Committee. The Secretariat was to include an Outreach Unit, responsible for disseminating constitutional information to the public and for receiving and analyzing the public response. The Outreach Unit structure and mandate were prepared with the assistance of UN and USIP experts, including Scott Carlson, who advised the successful Albanian Constitutional Commission.

There was great difficulty in starting the Outreach Unit, however. Prior to June, neither the United States nor the United Nations had taken steps to prepare office space for the Committee Secretariat. As a result, it was working in an ad hoc fashion out of a cramped space in the Convention Center through late July. Several weeks were lost while recruiting the Iraqi staff.

At the end of July, the Outreach Unit issued a constitutional questionnaire with seven questions in total, which were designed to be disseminated throughout the country and returned to the Outreach Unit for entry into a computer database. The UN, NDI, and USIP each provided practical support to the Outreach Unit, including funding and staffing. By late July, USIP visited the newly established Outreach Unit offices in downtown Baghdad. A staff of fifty was working around the clock in precarious security conditions to enter piles of public submissions into a computerized database and to prepare a report to the Committee.

### ***Constraints: Time, Resources, and Security***

Despite the professionalism and bravery of the Outreach Unit staff, the shortcomings of the process were striking. From its inception in early June, the Outreach Unit had no more than eight weeks to complete its work.

The attempt to conduct a serious national constitutional dialogue in such a short space of time was probably unprecedented. By way of comparison, the East Timorese and Afghan constitutional processes, widely regarded as overly hasty, took around six and fifteen months, respectively. The effort in Iraq was all the more remarkable, given the poor and deteriorating security situation and the nationwide difficulties in delivering basic government services, including power and water. Therefore, it is not surprising that public participation did not work well.

In particular, there was no period of public education on constitutional issues, so that nonelite Iraqis had little chance to understand even the simple questionnaire. The Outreach Unit had no clear ability to receive substantial input from Sunni Arab and Kurdish regions of Iraq, arguably the most important in building true constitutional legitimacy. By July 28, the Outreach Unit had received only 20,300 submissions. By August 10, the Outreach Unit had received 126,000 submissions, with none from Kurdistan or the Sunni Arab regions. As of August 15, it had received around 150,000 submissions, of which only around 20,000 had been received from the Kurdistan Region and only around 10,000 from Sunni Arab regions—indeed, all 10,000 were from Fallujah. This was an imbalance which the Outreach Unit was ultimately unable to correct.

Largely because of the SCIRI chairmanship of the Committee, the staff of the Outreach Unit were drawn mainly from religious Shia social networks, and the networks put in place to receive submissions were biased toward Shia areas of Baghdad and other cities. It is unclear whether there were any Sunni Arabs on the Outreach Unit staff, though in early August the Unit did recruit some Iraqis from smaller ethnic and religious minorities. Submission boxes were distributed by the Outreach Unit in government buildings in Baghdad to allow citizens to submit completed questionnaires and written submissions for later collection by the Outreach Unit; however, the distribution of these boxes was uneven at best. There was no ability to enter non-questionnaire submissions into the database, obviously limiting the range of views that the public could express on constitutional issues. The results of the extensive constitutional awareness programs run throughout Iraq by international organizations, including NDI and IRI, either were not presented to the Outreach Unit, or were presented too late for those results to have an impact on the draft, or to strengthen the Outreach Unit's own analysis.

### ***Little Review of Public Input***

Most important, perhaps, the Outreach Unit did not have the ability to circulate a report to the Committee members before August 13. Interviews conducted with various Committee members in early August confirmed that they had not received reports from the Outreach Unit. This was hardly surprising given the time constraints. This meant that there was little or no chance for the views of the public, as expressed to the Committee, to be taken into account in the preparation of the constitution. By August 13, a mature negotiating draft had existed for some time with no political will within the political blocs to reopen settled agreements within that draft. In very precise terms, then, the National Assembly failed to meet the obligation imposed by Article 60 of the TAL of "receiving proposals from the citizens of Iraq as it writes the constitution."

### ***Inadequate Public Outreach***

In summary, the activities of the Outreach Unit further suggest that the finalization of Iraq's constitution was premature, and that another opportunity was lost. It was not until late July that the Outreach Unit was fully operational, with a multiethnic staff and

***From its inception in early June, the Outreach Unit had no more than eight weeks to complete its work.***

***Had the process allowed them even just a few more weeks, the Committee might have been in a position to take the views of the public, and in particular the views of Sunni Arabs, into account; and might have been seen to take them into account.***

adequate equipment, security, and reporting protocols. Had the process allowed them even a few more weeks, the Committee might have been in a position to take the views of the public, and in particular the views of Sunni Arabs, into account, and might have been *seen* to take them into account. Indeed, there is a danger that a widely advertised, but ultimately unsuccessful, constitutional participation campaign may have marginally worsened conditions in Iraq. Iraqis expected that their views would be taken into account, but clearly saw that they were not.

It is unlikely that a properly conducted public participation campaign in Iraq would, on its own, have bridged the large constitutional divides that now confront Iraq following the referendum. Public participation typically does, however, have the effect of moderating constitutional views, both in the general public and among the drafting elites. From NDI focus groups conducted in April 2005, it was clear that Iraqi citizens had not withdrawn their demands for transparency and participation in constitutional matters. The fact that these demands were not met almost certainly affected, in particular, Sunni Arab perceptions of the final constitution. Had the Iraqi Government and the international community worked harder and longer with Sunni Arab groups on issues surrounding federalism, and had Sunni Arabs been given a chance to express to the Committee their unmediated, individual views on constitutional issues, the results would almost certainly have been encouraging, perhaps surprisingly so.

## **Conclusions: The Referendum and Iraq's Constitutional Future**

The merits and demerits of the constitutional text that resulted from this Iraqi process have been the subject of extensive Western press, academic, and policy commentary, particularly in respect to the provisions of the text that favor, or are seen to favor, the new conservative Shia establishment. The fact that the constitution also contemplates a fairly weak central government has also attracted much commentary and criticism. The arrival of this draft will no doubt encourage continued international policy discussions that revolve around competing conceptions of consociation and integration. Some commentators, including the International Crisis Group, catalogue the ambiguity of certain constitutional provisions, seeing in the ambiguity the "seeds of future discord." Others, including Professor Yash Ghai, have serious reservations as to "whether the constitution as it stands can be fully and effectively implemented without grave danger to state and society."

These criticisms have force; however, this constitutional text will be difficult to change. Given the mutually intersecting interests that now characterize Iraqi politics, it seems the major Shia and Kurdish political blocs will willingly revise very little in this constitutional text. Despite the very serious problems of constitutional process that have accompanied this text, the constitution as written may represent a reasonable approximation of a workable constitution for Iraq. It is certainly not the comprehensive constitutional document that some may have wanted, and given the Sunni Arab rejection of the text at the referendum, it probably does not satisfy even the modest goal of an Iraqi constitution-as-treaty. By way of comparison, however, the TAL was hardly more detailed. It is difficult to imagine a very different constitutional text for an Iraq that is already highly regionalized and in which, for better or worse, the majority of the citizens see a role for Islam in public decision-making. As with any treaty text, most of the ambiguities in the draft constitution are neither casual oversights nor the result of deliberate evasiveness. The text is silent because the parties could not agree. Significantly, it is difficult to see any substantive change to the text that would guarantee Sunni Arab support, nor indeed the support of all women, secularists, and ethnic and religious minorities.

In the case of Iraq, it may be that it is the process, more than the substance, that has created the current predicament. The recent Iraqi constitutional experience illustrates all too clearly the practical importance of the distinction, usually made by comparative constitutional specialists and academics, between constitutional substance and constitu-

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tional process. It would be difficult to describe the process by which that text ultimately emerged from the National Assembly as meeting either the expectations of Iraqis, international standards, or the TAL itself. Specifically, it has been the dynamics of Sunni Arab opposition, more than mutually conflicting constitutional arguments, that has created Iraq's constitutional crisis. Even allowing for some intransigence on the part of Sunni Arab negotiators, the fact remains that Iraq's constitutional process was seen, with some justification, as an insult to Sunni Arab Iraqis.

Those familiar with recent postconflict constitution-making processes, including in East Timor and Afghanistan, are all too aware of the price—paid in stability, legitimacy, and the rule of law—when constitutional discussions are rushed. Unfortunately for Iraq, the consequences of a rushed constitutional process will not simply manifest themselves, as in so many other countries, by misunderstandings or legitimacy deficits in the medium-to-long term. Because of the peculiarly violent scene in contemporary Iraq and the polarization around the October constitutional referendum, it is reasonable to speculate that the deficiencies in constitutional process are having an immediate and violent effect on the lives of Iraqis.

It was a mistake on the part of some in the Iraqi leadership and the U.S. government to insist on an adherence to the August 15 deadline. The constitutional discussions began much later than the framers of the TAL envisaged. The terms of the TAL itself clearly foresaw the possible need for a six-month extension. The pressure-cooker approach that the United States adopted might conceivably have been effective if the central problem was that Iraqi parliamentarians were simply being slow in moving to consolidate their Iraqi identity and shared vision of government in constitutional terms.

The problem, however, was more profound. Iraqi constitution-making always required a complex three-way negotiation in circumstances where nothing—not even a residual shared Iraqi identity—could be taken for granted. Conventional wisdom presented Iraq as a centralized state undergoing a form of decentralization, when the reality was almost diametrically opposite. Regional powers were, in effect, negotiating the terms of a possible delegation of powers to the center. The three major negotiating blocs—Shia Arab, Kurd, and Sunni Arab—derived their authority from de facto regional interests, and the power of central government during the negotiating phase was marginal at best. For each of the three major blocs, the attractions of a constitution were not necessarily greater than living with no constitution at all, a fact that made the process even more delicate. The complexity of the negotiations and the backdrop of increasingly sectarian violence in Iraq meant that the meetings increasingly resembled peace talks, where peace was clearly elusive. The insurgency timed its mortar and car bomb attacks in Baghdad to coincide with National Assembly sessions. It was probably no coincidence either that the final stages of the negotiations were interrupted by violent intra-Shia clashes between loyalists to the Iranian-backed SCIRI and the nationalist followers of Moqtada al-Sadr.

Sadly, there is no obvious policy solution to Iraq's constitutional predicament. The challenge is no longer the building of governmental and institutional legitimacy so much as it is a challenge of conflict management. The finalization of the constitution coincided with a statement plausibly attributed to insurgent leader Musab al-Zarqawi that he had "declared war against all Shiites in Iraq," and with a significant rise in Sunni-Shia violence. We should confront the reality that Sunni Arab opposition to the constitution that emerged during the negotiations will continue, and that a national "yes" vote may have consolidated Sunni Arab isolation and moved Sunni Arabs still further toward an unrealistic insistence on a centralized state. This leaves only a medium- to long-term hope that Sunni Arab moderates might learn to embrace their federal constitution, and that in the meantime Shia and Kurdish political leaders might implement the constitution in a way that does not work to Sunni Arabs' disadvantage.

Efforts to bridge the Sunni-Shia divide by tinkering with the constitutional text are unlikely to be fruitful, and a pre-referendum agreement to consider amending the text after the December 2005 election may well prove to be hollow. It is not clear that a constitutional consensus could be attained that is different from the terms of the current

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constitutional draft. In particular, there is no evidence from the Kurdish or Shia camps that new electoral politics would soften their core demands that apparently cause so much offense in Sunni Arab Iraq. Even with active Sunni Arab participation in a new election, Shia and Kurdish factions will likely still command a large enough majority in a new National Assembly to force through their positions. Additional time for constitutional negotiations would have been useful before the current draft hardened Sunni Arab positions; but now, the prospect of continued unfocused “reaching out” to Sunni Arabs and continued constitutional negotiations is a fairly arid one. The fact is that Sunni Arabs’ alienation has been amplified by procedural problems in July and August. The damage has already been done; continued constitutional negotiations will simply confirm the existing divisions. This has been shown already in the continued eleventh hour negotiations in September, which made some minor adjustments to the “final” text, stating that Iraq is “a founding and active member of the Arab League,” moderating the language treating the Ba’ath party, confirming the “unity” of Iraq, and adjusting provisions relating to international covenants and water resources. It is apparent from the referendum results that these efforts, however well intentioned, did not significantly mollify Sunni Arab opposition to the text.

### ***Back to the Grassroots***

In the absence of an obvious immediate solution to Iraq’s constitutional crisis, what should Iraqis do? How can the international community help? How can Iraqi expectations of constitutionalism possibly be met?

The answer may be simply to redouble efforts on the less glamorous, grassroots work that so many Iraqis—and so many international organizations—have begun. This work includes bringing the political elites in closer contact with their constituents, enlarging the circle of constitutional debate, and finding new ways of cultivating cross-ethnic and cross-sectarian coalitions on constitutional issues and new forms of Iraqi identity.

Certainly there is much technical work to be done in order to resolve the many ambiguities and silences in the constitutional text. Implementing legislation is needed, in particular, to ensure human rights protections, and protocols are needed for inter-governmental relations within the federal system. The central problem remains, however, with Sunni Arab alienation. Working in concrete ways with Sunni Arab elites and local communities to strategize within the terms of an inevitably federal Iraq—including the securing of oil revenues for the Sunni Arab governorates and the possible establishment of a new federal region in the Sunni Arab areas of Iraq—may yet pay dividends. It is this work that has some chance of producing results in years to come. Out of this work, a nationwide popular commitment to democratic federalism may emerge, not as a reaction to a rushed Kurdish-Shia negotiation, but as a genuine and pragmatic expression of the peoples of Iraq.

### ***Recommendations***

- **Public education:** the Iraqi Government, National Assembly, and the international community should make every effort to educate the Iraqi people, particularly those in the Sunni Arab areas, on the contents of the constitution and the next stages of the transition.
- **International mediation:** the United States, the United Nations, and the international community should support initiatives for reconciliation and understanding among Iraqi communities on constitutional issues.
- **Sunni Arab strategies:** the United States, the United Nations, and the international community should help Sunni Arab communities strategize within a federal framework, and in particular, help moderate and progressive Sunni Arabs to identify ways of securing oil revenue, self-government, and political alliances.

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- **UN office of constitutional expertise:** the United Nations should establish a permanent office of constitutional advice and support within the Secretariat, analogous to the Electoral Assistance Division.
- **Constitutional implementation:** the Iraqi government, National Assembly, and international community should develop a strategy for constitutional implementation that focuses on intergovernmental relations and the enforceability by Iraqi citizens of their constitutional rights.
- **Nonpartisanship:** the international community, in assisting the Iraqi government on constitutional implementation, should not engage in the selection of political favorites, recognizing that any initiative must have broad political support.
- **Equal representation:** the institutional vehicles for constitutional implementation, including courts and Commissions, should visibly include Sunni Arabs, women, and members of ethnic and religious minorities.
- **Public views report:** the Outreach Unit of the Constitution Drafting Committee needs support in preparing a final report on Iraqi views on the constitution to form part of the public record.
- **Permanent Center for Constitutional Dialogue and Research:** the Iraqi government, with the support of the international community, should transform the Outreach Unit of the Constitution Drafting Committee into an independent Center for Constitutional Dialogue and Research established by national legislation.
- **Benchmarks:** the Iraqi leadership and the United States should adopt a strategy for Iraq's transition that prioritizes Sunni Arab engagement with the constitution, rule of law, and democracy-building benchmarks instead of adherence to the TAL or other timetables.

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