

FINAL UPDATE ON IRAQ'S CONSTITUTIONAL PROCESS

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Note: Throughout the process of drafting the permanent Iraqi constitution, I have provided periodic analyses, translations, and updates. My most recent updates have been based primarily on public discussions of the constitutional process in the Iraqi press. This is my final update since I will be taking a personal vacation for two weeks, during which time the fate of the document should become clear. Should a final draft be approved by the parliament, I will provide a full analysis of its contents on my return.

As they enter the final weekend of constitutional negotiations, Iraq's leaders still are deeply divided on many basic constitutional issues. Those involved in the drafting process have indicated that most of the draft is complete but the most significant issues have not been decided. In this update I will provide an analysis of:

- The remaining points of contention
- The mechanisms for resolving these issues
- The path forward if the drafters resolve the points of contention successfully; and
- The path forward if they fail.

The eighteen points of contention

Those close to the drafting process have begun to refer to the existence of eighteen remaining points of contention (though the number sometimes varies). Earlier this week, one member of the drafting committee publicly named these points. The points (followed by my bracketed explications) are:

1. The name of Iraq [whether to describe it as federal and/or Islamic]
2. Religion [the precise formula by which the Islamic shari'a will be described as a source of law]
3. The constituent elements of the Iraqi people [whether various groups in Iraqi society should be named and, if so, which ones]
4. Language [whether Kurdish should be co-equal with Arabic or official only in the Kurdish region; the status of other languages]
5. Identity of Iraq [whether and how Iraq is described as Arab and Islamic]
6. The marja'iyya [Shi'i religious authority and whether it should be mentioned in the constitution]
7. Holy places [The word used ('*atabat*) generally refers to Shi'i holy places]
8. The president of the republic [whether to make the position purely ceremonial or allow it to have some executive responsibilities; the number of vice-presidents]
9. Ministers [whether ministers can or must also serve as members of parliament]
10. Matters related to natural resources [the distribution of oil revenues among various levels of government]

11. Personal status [family law—whether it will be governed by a single legislated code or whether it will be applied according to the sect of the litigants]
12. Voluntary union and the right of self-determination [a reference to a Kurdish demand that the federation be described as voluntary and that the Kurdish right of self-determination be affirmed]
13. [omitted from list; other versions of this list include the division of executive authorities between the president and the prime minister on this point]
14. Dual citizenship [Whether it should be allowed for ordinary citizens and for high officials]
15. The city of Kirkuk [Kurdish parties wish to have the procedure mentioned in Article 58 of the Transitional Administrative Law affirmed and implementation to begin immediately]
16. The borders of the Kurdistan region
17. Parliament [whether an upper house should be constructed with representation by province and/or region]
18. The Transitional Administrative Law [whether its validity will be explicitly—if somewhat retroactively—affirmed]

This is a very daunting list. It is a little misleading, however, for three reasons. First, there appears to have been progress on some of these issues, at least judging from the comments of some committee members. Second, it combines deeply divisive matters (Islam and federalism) with issues that are not controversial and easy to solve (whether ministers will also serve as MPs). Third, the list is not exclusive: there are some other matters of disagreement that are not on the list, such as whether to adopt a constitutional court or a constitutional council (constitutional councils generally are more political bodies and often are limited to reviewing laws before their promulgation).

But perhaps the largest problem with the list is that it obscures how much many of the remaining issues can be boiled down to one—often referred to as “federalism.” The word “federalism” does not indicate the depth and existential nature of the issues involved, however. (Even the word itself is a matter of contention—some Sunni Arabs involved in the process continue to push for “decentralization” rather than “federalism.”) The disputed questions would probably even strike a veteran Israeli-Palestinian negotiator as complicated and difficult. How will Iraq be divided into regions and provinces? What will the authority of the various units be? Is the union a voluntary matter or one that is incontestable? What will be the role of regional security forces? Will the units have authority to reach agreements with foreign states and other actors, and, if so, in what areas? How will revenue be divided? What will be the relationship between federal and regional law? How will disputes be settled? Will other areas of the country be able to form units that are as autonomous as the Kurdish region?

The various parties remain far apart and some leaders have staked out more rather than less conciliatory positions over the past couple weeks. Some of this grandstanding stridency might reflect a last-minute attempt to force as favorable an outcome as possible. The negotiations have not been completely fruitless: they have sketched out a very clear agenda and set of options. But that is all they have done. Compromise is still possible, but there are few public signs of any common understanding of the future of the Iraqi political system.

Ad hoc mechanisms for resolution

Formally, the constitution drafting process involves a Constitutional Drafting Commission—consisting of 55 parliamentarians joined by 16 representatives of extra-parliamentary groups—that is to forward a draft to the National Assembly prior to an approval that must take place by August 15. Beginning two weeks ago, some Commission members began to admit that the issues dividing them might not be easily resolved and should be referred to senior political leaders. But it took some time to arrange the appropriate meetings; those have only begun in earnest for the past few days. While some earlier comments suggested there would be a well-defined committee (or set of committees) that would discuss and decide outstanding issues, the process has actually been more ad hoc, with shifting groups of leaders coming together in a series of bilateral and multilateral discussions.

It is difficult to imagine a political solution to Iraq's crisis that does not involve such inclusive talks, and there is much credit here to be shared among the American leadership (which has been forceful on the issue); Iraq's Shi'i political leaders (who have often acted with restraint despite their parliamentary majority); and the Arab Sunni participants (some of whom have paid for their involvement with their lives).

It may therefore seem churlish to point to two drawbacks that emerge from this approach—or rather that emerge from combining the inclusive approach with a fetish for the August 15 deadline. First, while elite bargaining is an essential element to any successful outcome, it has largely supplanted any participatory process. Most communication has been one way: many participants have spoken in detail about the content of the negotiations, making the process less secretive but also risking the hardening of positions. Only a very small number of Iraqis will be able to contribute to the process with anything other than a “yes” or “no” vote.

Second, since the bargains are political—and struck by politicians—there will not be sufficient opportunity to pay careful attention to legal drafting or draw on technical expertise. The drafts that have been leaked thus far give a very good sense of the political logic of the constitution, but there are inevitable shortcomings—accidental ambiguities, inconsistencies, elements that are omitted because of neglect, and elements that are slipped in when others are not paying attention. The Transitional Administrative Law—for all the criticisms that can be made on procedural grounds of its composition and adoption—nevertheless showed some signs of careful drafting, especially in its rights provisions. The authors of the current document may have (perhaps unintentionally) drafted rights protections that are less robust and full of loopholes.

While the Commission has drawn on some technical expertise, at this late date it is simply impossible to give the constitution the sort of full vetting and technical review that is desirable. It is even quite possible that the National Assembly will be asked to approve a draft that few of its members have had much of a chance to read, much less ponder and discuss.

Coping with success

If the negotiators are successful in writing a complete draft and having it approved by the August 15 deadline, the next steps are very clear. First, the constitution must be submitted to a plebiscite by October 15. The National Assembly has already passed a

law for the referendum, and the electoral commission has begun making preparations. There has been some sniping between the commission and Kurdish political leaders about arrangements in Iraqi Kurdistan, but assuming that there is broad agreement among leaders on the constitution, this should not affect the credibility of the plebiscite. Some Sunni leaders—especially those engaged in the constitution-drafting effort—have indicated that they hope for a far higher Sunni turnout this time, and indeed there are signs of a bitter dispute among Arab Sunnis about participation in the political process. The possibility of election day violence is once again quite real.

As long as the constitution draft has consensus support from the current Iraqi political leadership, passage seems quite likely. The constitution's harshest opponents in the insurgency are far more likely to abstain or disrupt the balloting; they are not likely to vote against it. Muqtada al-Sadr has hinted at the desirability of a boycott, but since the constitution can pass with a simple majority, such abstentions cannot make the constitution fail. The constitution can fail if 2/3 of the population in any three Iraqi provinces vote against the constitution. But unless the Kurdish leadership abandons the constitution or the Arab Sunni leaders urge a negative vote (and not a mere boycott), it is difficult to foresee a negative outcome.

Should the constitution be approved, Iraq's third elections of the year would be held in December. Unless there is some sudden change in the draft, Iraqis will only elect a new parliament. The parliament has been working on an electoral law and it seems likely—though not inevitable—that the December elections would be held on a different basis than the parliamentary elections that took place in January of this year. Instead of making the entire country a single electoral district, the law will probably treat each province as an electoral district, apportioning parliamentary seats in accordance with its proportion of the provincial vote. Such an arrangement will likely result in greater Arab Sunni representation, since predominantly Sunni provinces will be represented in accordance with their share of the general population, not (as in the January elections) in accordance with their share of the turnout.

A successful election will be a major milestone, but it is not likely to end Iraq's political crisis. The federal structure is likely to be tested early and often; many constitutional structures will remain inchoate; and an insurgency that is uninterested in the constitution is unlikely to be mollified (the best that can be hoped is that their support base in the Arab Sunni population will gradually shift to support participating parties).

Coping with failure

The path is far less clear if the constitutional process fails, partly because it could fail in different ways.

First, the drafters might decide that they simply cannot solve all the problems that are confronting and decide to write a skeletal text reflecting only what has been agreed. Unless there are clear and agreed upon mechanisms for resolving the outstanding issues, such an approach might be deeply problematic. There are many different political fault lines in Iraq, but the combination of Ba'athist rule, Kurdish autonomy, chaos, occupation, and constitutional negotiations has highlighted a single set of divisions—ethnic and sectarian—to a dangerous extent. If issues are not explicitly addressed in the constitution, they may be left to the parliament to decide. Since parliament is a tool of

the majority, Kurds, and Arab Sunnis could find constitutional silence working very much to their disadvantage. Therefore, should they choose a path of a skeletal constitution, Iraq's leaders would also be well advised to devise a consensual method to fill the gaps.

Second, the drafters might react to failure by clever legal maneuvering. They might ask the parliament to approve the document in principle but fill in the final wording in subsequent days or weeks. Or if they are convinced that they merely need another few days, they could simply ignore the deadline altogether and ask the parliament to adopt the constitution shortly after the August 15 deadline. Either path would be a fairly clear violation of the Transitional Administrative Law, but if the stratagem had consensus support there may be no political or legal consequences that follow from the violation. Finally, the drafters could amend the text of the Transitional Administrative Law itself, an easy procedure provided there is strong support among the leadership for the amendment—and provided the rest of the timeline is not delayed. The Transitional Administrative Law forbids any extension of the transitional period. However, an extremely audacious amendment might amend even that provision—a constitutionally dubious move but one that might be seen as legitimate since the National Assembly is an elected body, while the Governing Council that issued the Transitional Administrative Law was appointed by an occupier.

If they do not succeed in any of these devices, the drafters will find that they have forced the dissolution of the National Assembly and new elections. Interestingly, the Transitional Administrative Law does not explicitly state the date on which the Assembly is considered dissolved. Some political and legal benefits might result from allowing the Assembly to remain in session after the August 15 deadline has passed—perhaps until the October 15 deadline for the referendum or (still less plausibly) until the new elections in December. Such a move would be constitutionally questionable—and in fact would be contrary to parliamentary practice throughout much of the world. But it would prevent a legislative vacuum at a crucial time. Most notably, it would allow the National Assembly to finalize the election law that will govern the balloting for its successor. After starting very slowly, the Assembly is finally working on some other critical legislation, and the absence of a legislative authority would come at a very inconvenient time.

Whether elections were held as a result of constitutional success or failure, the results might be different but may not fundamentally change Iraq's political dynamics. The Kurdish alliance would likely hold together and perform as well. The ruling Shi'i alliance would probably do quite well, but would also be saddled with its lackluster record on reconstruction, economics, and security. The main change would be the participation of some Sunni parties. While there has been some talk of a secular alliance, the past year has made multi-ethnic and cross-sectarian alliances less plausible. And that may be the biggest problem for the Iraqi political system, whether a constitution is adopted or not.

Earlier writings on Iraqi constitution drafting

- [“Constitution Drafting Update,”](#) August 8, 2005
- [“Iraq’s Constitutional Process Plunges Ahead,”](#) An overview of the issues and process, July 2005

- [“Constitution of Iraq: Draft Bill of Rights,”](#) translation and commentary, July 2005
- [“Debating Islam in Post-Baathist Iraq,”](#) a consideration of issues related to Islam and politics in Iraq, March 2005
- [“Post-Election Iraq: Facing the Constitutional Challenge,”](#) an overview of the process, February 2005