

Background

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The New Iraqi Constitution

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Benjamin Franklin spoke very little during the 1787 Constitutional Convention in Philadelphia. Like a similarly silent George Washington, his major contribution was in lending his name and prestige to the effort. On the last day, however, Dr. Franklin rose and delivered what may have been the most important speech of his life.

I confess that there are several parts of this constitution which I do not at present approve, but I am not sure I shall never approve them: For having lived long, I have experienced many instances of being obliged by better information, or fuller consideration, to change opinions even on important subjects, which I once thought right, but found to be otherwise. It is therefore that the older I grow, the more apt I am to doubt my own judgment, and to pay more respect to the judgment of others.¹

Accordingly, at the end of his address, Franklin urged all of his fellow delegates to sign the Constitution: "I can not help expressing a wish that every member of the Convention who may still have objections to it, would with me, on this occasion doubt a little of his own infallibility, and to make manifest our unanimity, put his name to this instrument."

It is in this spirit, and with this good counsel, that the merits of Iraq's proposed constitution should be considered.²

As is the way of constitutions, the proposed constitution has already become the center of controversy. In

Talking Points

- The proposed Iraqi constitution is different from the U.S. Constitution, but that is to be expected. It was drafted at a different time, in different circumstances, and reflects Iraq's traditions.
- Given the constitution's provisions, there is every reason to believe that Iraq will not fragment and that the federal government will be able to defend against interference by Iran or any other neighbor.
- Because the constitution combines Islam with the fundamentals of representative democracy and the rule of law, it can serve as an appealing example for the Islamic world, undermining the Islamist teachings' appeal.
- The positive synergy between the democratization of Iraq and the delegitimization of radical Islamist teachings provides compelling evidence that the Iraqi war was not a "distraction," but a key aspect of the war on terrorism.

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Iraq itself, objections have come primarily from the Sunni minority, afraid of being sidelined—or worse—in a new federal system that substantially reduces the central government’s power.³ Elsewhere, concerns have been raised about the proposed constitution’s treatment of religion and women.

Certainly, the document is not perfect. The text contains a number of jarring notes—at least to American ears—and leaves several important questions unanswered. However, this too is the way of constitutions.

On balance, Iraq’s proposed constitution has much to recommend it and deserves the support of the American people. First and foremost, this is because it was drafted by Iraqis for Iraqis. Second, Americans should support the proposed Iraqi constitution because it meets James Madison’s basic test of constitution drafting:

In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself.⁴

Third, the Iraqi constitution should be supported because its importance transcends Iraq, and it has important salutary implications for the United States’ ability to win the war on terrorism.

The war on terrorism is both a military and an ideological struggle. Although the conflict’s military dimension—prevailing on the battlefield and demonstrating American resolve⁵—remains critical to victory, equally important is the campaign to undermine the enemy’s ideology and morale. It is this ideological battle that strikes at the oft-mentioned root cause of the problem—the ideology

1. Quoted in James Madison, *The Debates in the Federal Convention of 1787* (New Haven, Conn.: The Avalon Project at Yale Law School, 1996), entry for September 17, 1787, at elsinore.cis.yale.edu/lawweb/avalon/debates/917.htm (September 13, 2005).
2. It should be noted that the authors have analyzed the English translation of the August 28 draft of the Iraq constitution. By all accounts, this is the final draft of this document and the one that has been sent by the Iraqi government to the United Nations.
3. To be sure, a few Sunnis also appear distinctly nostalgic about the past and seem to desire the restoration of some form of Baathist rule under which Shiites and Kurds would be treated, at best, as second-class citizens.
4. James Madison, “Federalist No. 51,” in Alexander Hamilton, James Madison, and John Jay, *The Federalist*, ed. Jacob E. Cooke (Middletown, Conn.: Wesleyan University Press, 1961), p. 349.
5. Since much of the impetus for jihadist attacks against the United States stems from the combination of hatred for the distinctive American civilization and the belief that the U.S. lacks the ability to wage a long war and sustain combat losses—a sentiment famously captured in Osama bin Laden’s dismissive characterization of the United States as a “weak horse” and reinforced by his incessant repetition of the precipitous casualty-induced American retreats from Lebanon and Somalia—the need to demonstrate U.S. resolve and staying power is quite palpable. For a useful description of al-Qaeda’s ideological roots, see David Benjamin and Steven Simon, *The Age of Sacred Terror* (New York: Random House, 2002). For an excellent pre–September 11 description of the importance of a strong warrior spirit in confronting unconventional non-state enemies, see Robert D. Kaplan, *Warrior Politics: Why Leadership Demands a Pagan Ethos* (New York: Random House, 2002). Aside from their dismissive assessment of American modern culture and spirit, the jihadists’ view that they can outlast the U.S. is reinforced by their reading of history, whereby a Western presence in the Levant was eradicated after almost two centuries of intermittent warfare. There is, of course, the argument, advanced most recently by Mark Danner, that the U.S. engagement in Iraq impairs U.S. ability to win in the war on terrorism because it inspires more and more jihadists to join the fight and has the same revitalizing impact on them as Moscow’s failed Afghan war. See Mark Danner, “Taking Stock of the Forever War,” *The New York Times Magazine*, September 11, 2005. There are several fundamental problems with this set of arguments. To begin with, the critics assume as self-evident that the U.S. will indeed fail in Iraq, thereby gravely damaging our reputation and credibility. As to the notion that the use of military power against Islamic insurgents actually helps al-Qaeda, the problem with this argument is that, taken to its logical conclusion, it would mean that every robust use of military power, whether in Afghanistan or Iraq, is to be eschewed lest it makes our enemies hate us more. This, in turn, would mean that the United States should do very little to strike back at or preempt against its jihadist enemies and should revert to the failed pre–September 11 law enforcement-type policies. This extraordinary restrained posture, aside from its military disadvantages, would also, of course, help to reinforce the view that the United States is indeed a weak horse.

animating the jihadist movement. As during the Cold War, when the United States and its allies aggressively and successfully challenged the key philosophical premises underlying Soviet foreign and defense policy, the West today must confront the key doctrinal premises of the militant Islamists.⁶ These are twofold: (1) It is the duty of all Muslims to rebuild a global caliphate, which would be governed by Muslims and in which all others—even if tolerated—must be legally, politically, and culturally subordinate to the true believers, and (2) such a global caliphate could only be governed by the Sharia law.⁷

To the extent that the Iraqi constitution does not comport with these premises—in that it does not disfranchise non-Muslims, does not create legal distinctions between believers and non-believers or between Sunnis and Shiites, and treats Sharia as an important, but not the exclusive, source of authority—the document works to undermine the two doctrinal premises at the very heart of the jihadist movement. Notably, the fact that this is accomplished not through a purely “secular” constitution, like that of Turkey, but in an avowedly Islamic context—supported by the senior Shiite clergy at least—renders it that much more important.

It is not surprising that the ideologists of radical Islam, such as Abu Musab al-Zarqawi and Osama bin Laden, have readily grasped the doctrinal challenge posed by the Iraqi constitution. This is why they are fighting so hard against it and, more generally, against the construction of any viable polity

in Iraq that is built upon this constitution or any form of democracy that does not strictly conform to their twin doctrinal pillars of caliphate and Sharia.⁸ The Administration, unlike its critics, also understands the pivotal importance of democracy promotion in the Middle East and deserves full credit for making it the integral part of its foreign policy.⁹

The Framework of Iraq’s New Government

The proposed constitution, which will shortly be put to a vote of the Iraqi people, provides for a republic and a federal system comprised of the national capital (Baghdad), regions, decentralized provinces, and local administrations. A region can be one or more provinces. Each regional government will exercise legislative, executive, and judicial power in areas not otherwise exclusively reserved to the federal government. In general, federal authorities are responsible for ensuring the country’s unity and defense, as well as its foreign relations. Regional governments are given a significant amount of autonomy over their own local affairs, as are provinces that have not been formally organized as regions.

As might be expected, the Iraqi federal government will have the exclusive power to formulate foreign and international trade policy, to represent Iraq on the international level, to negotiate and sign debt agreements, and to control the armed forces. In addition, the federal government is responsible for the nation’s currency, its nationality and natural-

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6. President George W. Bush grasped early on the ideological challenge posed by al-Qaeda and linked it to the other ideological challenges that the U.S. has faced before. In his September 20, 2001, speech to Congress, the President stated, “We are not deceived by their pretenses to piety. We have seen their kind before. They are the heirs of all the murderous ideologies of the 20th century. By sacrificing human life to serve their radical visions—by abandoning every value except the will to power—they follow in the path of fascism, and Nazism, and totalitarianism. And they will follow that path all the way, to where it ends: in history’s unmarked grave of discarded lies.” George W. Bush, “Address to a Joint Session of Congress and the American People,” September 20, 2001, at www.whitehouse.gov/news/releases/2001/09/20010920-8.html (September 14, 2005). Arguably, the need for a strong ideological offensive is even more compelling now because the jihadist movement is heavily driven by the Islamist ideology. By contrast, in the case of the Cold War, by the 1950s, most of the Soviet people and even much of the governing Communist Party elite had lost any genuine faith in Marxist ideology.
 7. As Tony Blankley has noted in his recent book, the threat facing the U.S. and its allies is “not merely from Osama bin Laden and a few thousand terrorists,” but from a philosophical and political struggle that is roiling the whole Islamic world: “a fifth of mankind—in turmoil, and insurgent as it has not been in at least five hundred years, if not fifteen hundred years. The magnitude of this cultural upheaval cannot yet be measured.” Tony Blankley, *The West’s Last Chance: Will We Win the Clash of Civilizations?* (Washington, D.C.: Regnery Publishing, 2005), p. 23.

ization laws, regulation of broadcasting and mail service, and the census. Those powers not exclusively vested in the federal government are reserved to Iraq's regional and provincial governments.

Shared powers include the authority to administer and organize customs and to administer electricity resources, as well as to establish environmental, health, education, childrearing, and planning and development policies. In cases of a regional–federal dispute over these shared powers, the constitution gives the regional law priority. (Article 111.)

The Legislature. The Iraqi federal government will operate on a modified parliamentary system. The national legislative power is vested primarily in the parliament or Council of Representatives, which will be composed of one seat per 100,000 Iraqis. (Article 47(1).) Each member of the Council will be charged with representing the entire Iraqi people and, evidently, will be elected at large.¹⁰ Elections must be held every four years.

In addition to adopting federal laws, the Council of Representatives will enjoy general oversight

8. It is worth noting that placing the Iraqi constitution within the context of the necessary ideological struggle between Western democracy and radical Islam should help to quell the ongoing debate between the “neoconservatives” and the foreign policy “realists” that has contributed to the erosion of popular support for the Iraq war. Some realists accuse the neoconservatives of pushing, for ideological reasons, to build democracy in Iraq, even though such democracy-building is allegedly unnecessary from an American national interest perspective as well as horrendously difficult. For a good sample of the opposing arguments in this debate, see David D. Kirkpatrick, “Fukuyama Makes History: War Heats Up in the Neoconservative Fold,” *The New York Times*, August 22, 2004, Section 4, p. 3; Charles Krauthammer, “Democratic Realism: An American Foreign Policy for a Unipolar World,” 2004 Irving Kristol Lecture, Washington, D.C., February 10, 2004, at www.aei.org/publications/pubID.19912.filter.all/pub_detail.asp (September 12, 2005); and Gary Rosen, “Bush and the Realists,” *Commentary*, September 2005. For an excellent argument that many of today's critics of the Iraq war used to be the strong and articulate supporters of ousting Saddam Hussein and are engaged in historical revisionism, see Robert Kagan, “On Iraq, Short Memories,” *The Washington Post*, September 12, 2005. The partisanship of some critics aside, the only new factor driving their disaffection with the Iraq war is that it turned out to be a more difficult enterprise than they had expected. The difficulty of execution does not, of course, diminish the strategic merits of the underlying enterprise, especially since the vigor of the insurgency and the foreign jihadists' support for it readily attest to their belief that Iraq is of pivotal importance in the global war on terrorism. To the extent that democracy-building in Iraq can be properly viewed as a pivotal part of the U.S.-led effort to undermine the ideological foundations of radical Islam, this effort, instead of being purely Wilsonian in nature, can be justified on *realpolitik* grounds. Articulating the positive synergy between democratization of Iraq, with the adoption of the constitution being a pivotal step, and the delegitimization of radical Islamist teachings, which animate the jihadist movement, also provides a compelling rejoinder to those critics of the Administration's policy who argue that, even if the democratization of the Arab world were to succeed, “the data available do not show a strong relationship between democracy and an absence of or a reduction in terrorism. Terrorism appears to stem from factors much more specific than regime type.” F. Gregory Gause III, “Can Democracy Stop Terrorism?” *Foreign Affairs*, Vol. 84, No. 5 (September/October 2005), p. 62. A democratic regime in the Middle East may indeed be plagued by terrorism for years to come, as is likely to be the case even in a robustly democratic Iraq. Yet its very existence would provide a long-term strategic counterbalance and a way to undermine the very ideology that nurtures and shapes the jihadist threat. For a useful discussion of the contending views on whether democracy can indeed be built in the Arab countries and the impact of democratic transformations on the course of the war on terrorism, see Fouad Ajami, “Iraq and the Arabs' Future,” *Foreign Affairs*, Vol. 82, No. 1 (January/February 2003); David C. Hendrickson and Robert W. Tucker, “The Freedom Crusade,” *The National Interest*, Fall 2005; and Marina Ottoway and Thomas Carothers, “Think Again: Middle East Democracy,” *Foreign Policy*, November/December 2004.
9. For an excellent description of the Administration's pro-democracy strategy by one of its principal authors, see Paula J. Dobriansky, Under Secretary of State for Democracy and Global Affairs, “Advancing Democracy,” *The National Interest*, Fall 2004. See also Condoleezza Rice, interview by Charlie Rose, *Charlie Rose*, Public Broadcasting System, June 9, 2005, at www.state.gov/secretary/rm/2005/47616.htm (September 12, 2005), and George W. Bush, inaugural address, January 20, 2005, at www.whitehouse.gov/inaugural (September 12, 2005).
10. An at-large system may pose significant problems in the future. It would make provision of basic constituent services difficult—on the principle that, if everyone is responsible, no one is responsible—which could easily undercut popular support for the system. Of course, this can be remedied by later legislation.

authority over the executive—which includes the President, Prime Minister, and Cabinet—and power to approve treaties by a two-thirds majority. It will also have the right to approve the appointment of certain judicial officers, ambassadors, and high military officers. Although the Cabinet will have the initiative in budgetary matters, the Council's approval must be obtained. Moreover, the Council will have the authority to reallocate funds among budget items and to reduce the total amount spent. However, the Council can only propose a spending increase to the Cabinet. (Article 58.)

Iraq's federal legislature will also include a Council of Union or "Federation Council." This body will include representatives of Iraq's regions and provinces. Its membership, institutional framework, and specific authority are left to be established by later legislation.

The Executive. The new government's executive authority will be exercised by the President and Council of Ministers or "Cabinet," including the Prime Minister. The President will be elected by a two-thirds vote of the Council of Representatives and serve for no more than two four-year terms. As a transitional measure, a Presidency Council (also selected by the Council of Representatives) will serve as "president" for one term after the constitution takes effect. (Article 134.)

The President will be head of state and "safeguards the Constitution and the preservation of Iraq's independence, sovereignty, unity, [and] the security of its territories in accordance with the provisions of the Constitution." (Article 64.) In addition, the President must invite the candidate of the majority in the Council (the Prime Minister) to form a Cabinet. Once the Prime Minister selects his Cabinet, his nominees—along with the government's program—must be presented to the Council of Representatives for approval by an absolute majority. Once that vote of confidence is obtained, the government is lawfully established in power.

The Prime Minister is vested with day-to-day executive power and is commander in chief of the

armed forces. He presides over the Cabinet's sessions. However, it is the Cabinet as a group that formulates and implements policy, proposes draft laws, issues regulations to implement the laws, and drafts the budget. The Cabinet also has the authority to nominate—subject to confirmation by the Council of Representatives—ministerial undersecretaries, ambassadors, others with special ranks and high-ranking military officers. In addition, the Cabinet will be responsible for negotiating and signing treaties and other international agreements, although these must also be submitted to the Council of Representatives for ultimate approval.

The Judiciary. The constitution guarantees an independent judiciary, which will be supervised and administered by a Higher Juridical Council. (Article 87.) This body will nominate the Chief Justice as well as the heads of certain lower judicial bodies and the chief prosecutor.¹¹ All are subject to confirmation by the parliament. A Federal Supreme Court also is established. The members of the Supreme Court must include a number of judges and experts in Sharia. Otherwise, their number and manner of selection will be further defined by law, which must be passed by two-thirds of the parliament's members. (Article 89.)

The Supreme Court will have the authority to review the constitutionality of federal laws, to review the legality of federal regulations, and to interpret the constitution's text. It also has the authority to rule in disputes between the federal government and the regional and provincial governments, in disputes among the regional and provincial governments, and in cases arising from the implementation of federal laws. (Article 90.) Its decisions are final. (Article 91.) Other courts and the means of appointing judges and prosecutors are to be established by law. Judges may be removed from office only for reasons established by law. The creation of "[s]pecial or exceptional" courts is specifically prohibited. (Article 92.)

Independent Associations. In addition to the three traditional branches of government, the Iraqi

11. As is typical of civil-law systems, the prosecutor is generally treated as an official of the judicial branch of government rather than as an executive officer, as is the case in the United States.

constitution effectively creates a fourth branch in the form of “Independent Associations.” These include, among others, the High Commission for Human Rights, the Independent Electoral High Commission, the Commission on Public Integrity, the Central Bank of Iraq, and the Board of Supreme Audit. (Articles 99 and 100.)

A public agency also must be established to ensure that Iraq’s regions and provinces participate fairly in the administration of federal institutions, missions, fellowships, delegations, and conferences. (Article 102.) It appears that these entities are meant to operate more or less as independent agencies do in the United States, although they will be subject to the supervision of the Council of Representatives rather than the Iraqi executive.

Islam

One of the principal objections to the proposed Iraqi constitution involves the role of Islam in the new government. The document does not provide for a separation of church and state. Indeed, its preamble begins with the traditional Islamic invocation: “In the name of God, the Compassionate, the Merciful,” and Article 2 declares that “Islam is the official religion of the State and is a fundamental source of legislation.” Obviously, these provisions are a far cry from what Americans take for granted as acceptable constitutional norms. However, they are not necessarily undemocratic or oppressive, or at odds with the constitutional arrangements of many democratic countries.

In fact, some of the world’s leading democracies have included similar religious statements and institutional arrangements in their constitutions. For example, the preamble to the Irish Republic’s constitution begins: “In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred.” The constitution of Denmark provides that “[t]he Evangelical Lutheran Church shall be the Established Church of Denmark, and as such shall be supported by the State.” Similarly, there are (or recently have been) established state churches in Iceland, Norway, and Finland (all Lutheran); Great Britain (the Church of England and the Church of Scotland); Italy (Roman Catho-

lic); and Greece (Orthodox). All are recognized, mature democracies, and most are members of the European Union.

For the future, the most important question will not be whether Iraq has an established religion. Rather, it will be whether the rights of religious dissenters—those who do not choose to associate themselves with the state church—will be respected. In this regard, the Iraqi constitution plainly states: “This Constitution guarantees the Islamic identity of the majority of the Iraqi people and guarantees the full religious rights of all individuals to freedom of religious belief and practice.” (Article 2(2).) The fact that Islam is identified as “a basic source of legislation” does not inherently undercut this guarantee.

The proposed constitution also provides that no law can be enacted that “contradicts the established provisions of Islam,” or that “contradicts the principles of democracy,” or that “contradicts the rights and basic freedoms stipulated in this constitution.” (Article 2(1).) Among those freedoms are the “freedom of thought, conscience and belief,” and the freedom of the followers of “all religions and sects” to practice their rites. The state must guarantee “the freedom of worship and the protection of places of worship” (Articles 40 and 41), as well as “the protection of the individual from intellectual, political and religious coercion.” (Article 35(2).)

In other words, although the Iraqi constitution references Islam and establishes it as the state religion, the document’s guarantees of democracy and religious freedoms are treated with equal dignity. On that basis, both Iraqis and the larger global community can expect—at least until there is good and sufficient proof to the contrary—that religious pluralism will be taken seriously and respected under the new constitution.

In addition, to insist on a modern, European-style “secularism”—which in practice tends toward a hostility to religious belief or practice—is not realistic in Iraq. Nor, for that matter, is an extreme secularism desirable—at least from the perspective of the United States. Since the collapse of Saddam Hussein’s government in the spring of 2003, the United States has been

engaged in one of the largest and most important “nation-building” exercises in its history. For that project to succeed, Iraq must be reconstituted as a stable, strong, and democratic state, which can then serve as a catalyst—by its example—for democratic change in its region.

It is doubtful whether or not an aggressively secular democracy can succeed in Iraq, given the religious convictions of most Iraqis. Moreover, a secular democracy will certainly not serve as an appealing example of reform to the greater Islamic world or help to undermine the ideological appeal of Islamist teachings. Rather, it would be dismissed by many Muslims—both in Iraq and abroad—as a foreign, imperialist interposition. Only a regime that combines Islam with the fundamentals of representative democracy and the rule of law can serve this critical purpose. The proposed Iraqi constitution, at least on paper, creates the first genuine Muslim democracy. It is that democracy that must succeed.

The Rights of Women

The proposed constitution specifically guarantees the legal equality of women. (Article 14.) Nevertheless, its references to Islam as a source of legislation and the injunction that laws contradictory to Islam’s established provisions cannot be enacted have raised serious concerns that the rights of women will not be respected in the new Iraq.

In truth, only time will tell whether these concerns are justifiable. Even apart from its Islamic heritage, much of Iraq remains a highly traditional and hierarchical society in which men are viewed as the natural leaders. However, there are important reasons to believe that the rights of women will be protected under the proposed constitution.

Indeed, the constitution itself creates the best possible circumstances for empowering Iraq’s women because it gives them the tools of power—equality before the law (Article 14), the right to vote, and the right to hold office. In this regard, Article 20 states that “[c]itizens, men and women, shall have the right to participate in public affairs

and to enjoy political rights, including the right to voting election and nomination,” and Article 47(4) makes clear that Iraq’s election law will aim to achieve a 25 percent female membership in the Council of Representatives. In addition, the constitution requires that “[v]iolence and abuse in the family, school and society shall be prohibited” (Article 29(4)), as is “trafficking of women and children, and [the] sex trade.” (Article 35(3).)

Thus, the proposed Iraqi constitution makes women fully a part of the political nation with specific guarantees of legal equality. Where this has been the case, as it now is in the West, women have proven fully able to ensure that their needs and concerns are taken into account by the government, to compete economically and socially, and to achieve leadership positions. Experience has proven that there is no guarantee of equality as effective as the vote. It was not by accident that the “Women’s Movement” in the United States began in the 19th century as the Women’s Suffrage Movement or that the greatest strides toward legal, economic, and social equality for women were made in the decades after ratification of the 19th Amendment to the U.S. Constitution in 1920. As Thomas Paine wrote when the issue was still in doubt for men:

The right of voting for representatives is the primary right by which other rights are protected. To take away this right is to reduce a man to slavery, for slavery consists in being subject to the will of another, and he that has not a vote in the election of representatives is in this case.¹²

Federalism

As noted above, the proposed constitution provides for a federal system in which the government in Baghdad will manage Iraq’s foreign affairs, but in which regional, provincial, and local governments will have a great deal of autonomy over internal matters. In fact, the document’s federal nature is probably its most controversial aspect within Iraq.

12. Thomas Paine, “Dissertation on First Principles of Government,” in *The Writings of Thomas Paine*, Vol. 3, ed. Moncure D. Conway (New York: 1895), p. 267.

As a concession to Iraq's Sunni minority, the drafters did not include much detail in the constitution on the regions and provinces.¹³ Regions have very considerable autonomy. Under Article 117, the regions have authority in areas not reserved exclusively to the federal government, and regional law will prevail over contradictory national law in those areas. National revenues must be shared with the regions and provinces in a manner sufficient to permit them to discharge their duties and obligations. (Article 117(3).)

Like the Iraqi federal government, the regional governments will also have legislative, executive, and judicial components. Regions must adopt constitutions defining the actual structure and authorities of their governments that do not conflict with the national constitution. (Article 116.) Provinces that are not incorporated into regions are guaranteed "broad administrative and financial authorities to enable [them] to manage [their] affairs in accordance with the principle of decentralized administration." (Article 118(2).)

As suggested above, many in the Sunni minority are hostile to federalism because they oppose a devolution of power to Iraq's regions. In this connection, two principal concerns are (1) that the regions, especially the Kurdish areas in the north and Shiites in the south, will be so powerful that Iraq will effectively be partitioned along these ethnic/religious lines and (2) that the Shiite region, which borders Shiite Iran, will be dominated by the Tehran government. Neither of these considerations can be dismissed lightly. However, there are aspects of the constitution that should guard against either of these eventualities actually happening.

First and foremost, the constitution itself makes clear that no law can be passed, whether on the federal or regional level, that is inconsistent with its terms. Article 106 requires the federal government to "preserve the unity of Iraq," and Article 13(2)

makes clear that laws or regional constitutions that contradict the national constitution shall be "deemed void."

Second, the Iraqi armed forces are a national institution, controlled by the federal government, and national defense is among its exclusive powers. (Article 107(2).) The creation of any military militia "outside the framework of the armed forces" is expressly prohibited. (Article 9(1)(b).) Other critical "national" institutions include the Iraqi central bank, the financial audit office, and a media and communications agency. (Article 100.) The freedom of movement among provinces is also guaranteed. (Article 24.)

Third, the constitution declares categorically that Iraq's all-important oil and gas resources belong to all of its people, regardless of the region or province in which they live. (Article 108.) Moreover, the federal government enjoys the senior role, in cooperation with the producing regions, in managing the exploitation of currently producing fields. (Article 109(1).)¹⁴ In return, the federal government must ensure that the resulting revenues are distributed fairly throughout the country and must establish a temporary quota to benefit regions that did not receive a fair share of these revenues under the Baathist regime.

In light of these provisions, there is every reason to believe that Iraq will not fragment into several states and that the federal government will be able to defend itself from any effort by Iran or any other neighbor to interfere with its internal affairs. To the extent that continuing Sunni opposition to a federal structure for Iraq is based on other concerns—especially having, as a community, to adjust to a less influential voice in Iraq's internal affairs—these must be balanced against the concerns of Iraq's Kurdish and Shiite communities, who suffered extensively under the Baathist (Sunni) regime. From their perspective, a federal Iraq is the best guarantee that they

13. Robert F. Worth and James Glanz, "Assailing Draft, Sunnis Still Seek Charter Changes," *The New York Times*, August 28, 2005, Section 1, p. 1. As noted above, the constitution offers little detail regarding the Council of Union, which will generally represent the interests of the regions and provinces.

14. The regions are granted a somewhat greater role, on an equality basis with the federal government, with respect to future development of these resources. (Article 109(2).)

will not again be subject, as they were throughout most of the 20th century, to a dictatorial Sunni regime governing from Baghdad.

Indeed, the intensity of some Sunni opposition to a federal system suggests that the United States should vigorously oppose centralization rather than accommodate it. From the Sunni perspective, a highly centralized Iraq makes practical sense only if based on the assumption that Sunnis will again be able to control the entire country—for which centralization of power in Baghdad would be essential—despite their minority status. Otherwise, strong autonomy for local affairs would make sense from the Sunni perspective, as it would for Iraq's other ethnic and religious communities. As a minority community in Iraq, the Sunnis are entitled to guarantees for their basic human and civil rights and to participate fully in the national political process. However, they are not entitled to rule, and they cannot reasonably expect the Iraqi constitution to preserve such a role for them.¹⁵

In particular, any suggestions that the constitution should be reopened and that the upcoming constitutional referendum should be postponed¹⁶—all allegedly in order to coalesce more Sunni support—are misguided and should be decisively rejected.

First, any effort to reopen the constitution would only encourage additional Sunni intransigence;

indeed, there are good arguments to be made that the Administration has already sought to placate the Sunnis too much.

Second, it is difficult to imagine any other resolution of the key constitutional issues—federalism, the role of religion, the balance between federal and provincial governments—that would be substantially more to Sunni liking and yet would not provoke strong opposition from the Shiites and Kurds.

Third, the notion that the United States should support the centralization of power in Iraq, or that it should encourage granting an effective veto power to an intransigent minority, is fundamentally at odds with its own constitutional tradition and history.¹⁷

In this connection, Sunni opposition to a continuing “de-Baathification” process should not be permitted to undercut American support for the proposed constitution. Both the “Saddamist Baath Party” and its symbols will be banned by the new constitution. The Western Allies insisted on a similar ban of the Nazi Party and its symbols after World War II, and that ban has served both the Federal Republic of Germany and today's united Germany well. The Iraqi ban will be further fleshed out by legislation.¹⁸ In that context, it should be possible to ensure that individuals who may, at one point or another, have joined the Baath Party from

15. Indeed, as argued by Gary Schmitt of the Project for the New American Century, “By any realistic metric for the Muslim Middle East, the constitution put forward by Iraq's constitutional drafters is about as good as it gets, and far better for the country's minorities than the Sunnis should have expected, given the ruthlessness of their own rule over the past several decades. But whatever the constitution's merits, that is not how the majority of Sunni leaders sees things today. And only when they see that the insurgency stands no chance of succeeding and, equally important, they personally are not in danger of losing life and limb if they publicly support the new political order, will they come around to accepting a federal, democratic Iraq.” Gary Schmitt, “Why Iraq's Sunnis Won't Deal,” *The Washington Post*, September 13, 2005, p. A27, at www.washingtonpost.com/wp-dyn/content/article/2005/09/12/AR2005091201461.html (September 14, 2005).

16. For an argument along these lines, see Joseph R. Biden, Jr., “For Success in Iraq, Change Course,” *The Washington Post*, September 14, 2005.

17. This is certainly not the way the “loyalists” were treated during the Revolutionary War, or the opponents of the U.S. Constitution during the ratification debates.

18. It is true that, in addition to the Baath Party, entities or programs that “adopt racism, terrorism, the calling of others infidels, ethnic cleansing, or incite facilitate, glorify, promote, or justify” any of these things are also banned. (Article 7(1).) Much of this clearly goes further than would be permissible under the U.S. Constitution (although sectarian cleansing would, at a minimum, violate the First Amendment's Free Exercise Clause), but it is not very different from laws in Europe that punish a wide variety of “hate speech.”

compulsion or expedience are not permanently banned from public life.

Rights Guaranteed by the Constitution

The proposed Iraqi constitution also guarantees the most fundamental rights of the individual vis-à-vis government. All individuals regardless of race, religion, color, nationality, or sex are equal before the law. (Article 14.) The state cannot take life or liberty without due process of law. (Article 15.) Private property is recognized by the constitution and can be taken only “for the purposes of public benefit in return for just compensation.” (Article 23(1)(2).) Homes cannot be entered or searched “except by a judicial decision in accordance with the law” (Article 17(2)), and methods of communication, mails, telegraph, telephone, and other electronic means are secured from government monitoring “except for legal and security necessity and by a judicial decision.” (Article 38.)

With respect to the criminal justice system, the constitution forbids arbitrary detention (Article 19(12) and Article 35(1)(B)) and guarantees the right to judicial trial. (Article 19(3)(6).) (As a civil-law country, Iraq will not guarantee the right to trial by jury.) Similarly, the constitution will forbid ex post facto punishments (Article 19(2)) and contains civil-law protections against double jeopardy (Article 19(5)), which are admittedly not as robust as in common-law countries. Those accused of a crime will also have the right to counsel (Article 19(11)), to a presumption of innocence (Article 19(5)), and to make a defense (Article 19(4)).¹⁹

At the same time, it must be conceded that certain important freedoms are qualified under the proposed constitution. Thus, the Iraqi constitution would guarantee freedom of expression, freedom of the press, and freedom of assembly, but only “in a way that does not violate public order and morality.” (Article 36.) In this regard, however, it should be recalled that the U.S. courts

have long held that the constitutional guarantees of free speech, free press, and freedom of assembly can be regulated and even limited by the government where a sufficiently compelling interest can be found.

Here, a great deal will depend on how these rights are interpreted and applied by the courts in actual practice. Indeed, much the same can be said of the proposed constitution as a whole: It will work if Iraqis are determined to make it work.

Conclusion

Overall, the proposed Iraqi constitution deserves American support. The document is obviously very different from the Constitution of the United States, but that is to be expected. It was drafted at a different time, in different circumstances, and for a country with legal and political traditions that are different from those enjoyed by the infant United States in 1787. Nevertheless, the Iraqi constitution will protect the most critical rights of political participation, freedom of speech, freedom of religion, equality before the law, and due process of law.

Only time will tell whether this constitution can successfully create a genuine Iraqi democracy. The most that can be said now is that the document creates a framework that can establish and nurture a constitutional and democratic republic in which both the rights of the individual and the needs of society can be accommodated.

One thing is certain: The constitution can and will work if Iraqis want it to work. This is the great, if too often unspoken, secret of the U.S. Constitution. Although there doubtlessly is genius in that document, it has ensured a stable and representative government for more than two centuries because the American people and their political leaders were determined to make it work.

In the end, that is the test of any constitution. As Benjamin Franklin is reported to have

19. The Iraqi constitution will also guarantee various social and economic “rights.” These include the rights to work (Article 22(1)), education (Article 34(1)), social and health security (Article 30), and health care (Article 31), as well as the “right to live in a safe environment.” (Article 33(1).) In addition, the state must protect and preserve “environment and biological diversity.” (Article 33(2).)

remarked to a curious bystander after having finished his speech and signing the Constitution despite his doubts, “[You have] A republic, Madam, if you can keep it.”²⁰

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20. Quoted in ConstitutionFacts.com, “Fascinating Facts About the U.S. Constitution,” at www.constitutionfacts.com/constitution/Const_facts.htm (September 13, 2005).