

## A New Endgame in Iraq:

# Government Formation and Constitutional Renegotiation

By Andrew Arato | March 9, 2006

Even if an all out civil war is avoided now, it may not be as easy to avoid in the future if negotiations over either the formation of a coalition government or the constitutional settlement finally break down.

Since the bombing of the golden-domed Askariya Shi'a mosque in Samarra on February 22, Iraq has been close to the outbreak of open civil war. While Iraqi leaders tried to bring calm it was clear that the masses behind them were not marching in step. As in the case of the nationalist Shi'ite leader Moqtadah al-Sadr's movement, elites and militants pulled in opposite directions: while some of the most violent reprisals were apparently undertaken by his followers, al-Sadr and his top leaders sought to defuse tensions with the Sunnis throughout the conflict. Similarly, the legal political parties of the Sunnis and Shi'ites tried to limit the conflict while their followers were in the streets. The only thing common on all sides was placing blame on the American occupiers.

What seems to be true is that *for now* none of the main groups wish an all out civil war. Each apparently hopes to achieve its objectives without launching an open conflict, or thinks that it would have even more to lose in case it did. The Shi'ite's believe that they have the upper hand in the political process. They have the constitution they want, they won the election, and it is almost impossible to stop them from dominating the new government. At the same time, the three main Sunni groups, the Iraqi Islamic Party (IIP), the Iraqi Front for National Dialogue, and the Sunni Endowment, believe American support is now squarely behind them. They will push further for

their serious inclusion in a government of national unity, along with the renegotiation of the constitution. And al-Sadr thinks he can play exactly the key mediating role with any bargains to be made.

Given the hard line stance of the Shi'ites, and their advantageous position vis-à-vis the constitution, a grand compromise is nearly impossible. American pressure may not be enough to counteract Shi'ite intransigence. Al-Sadr may not control his followers both in and out of parliament in future Shi'ite and Sunni conflicts. Thus even if an all out civil war is avoided now, it may not be as easy to avoid in the future if negotiations over either the formation of a coalition government or the constitutional settlement finally break down.

### The Roots of the Current Conflict: The Iraqi Constitution

Iraq's constitutional process began when the U.S.-appointed Iraq Interim Governing Council approved the largely U.S.-drafted Transitional Administrative Law (TAL) on June 28, 2004. The process of writing the TAL, with its rules for the drafting an approval of the constitution, was rife with problems and the subsequent constitutional drafting was also deeply flawed. Nonetheless, parliament passed the constitution in late August of 2005 and it was ratified in a popular referendum on October 15, 2005.



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A few days before the referendum, a bargain was struck by the drafters in order to keep the Sunnis from rejecting the draft. Since a “no vote” by 2/3 of the voters of three provinces would defeat the constitution, Shi’ite and Kurdish leaders formed a coalition with one Sunni party, the IIP, to strike a compromise. The deal allowed in principle at least, for wide ranging amendments to the constitution during a four month period after the parliament is formed in 2006. With this deal, the IIP hoped to be able to change existing provisions for ethnically based federal regions (e.g. the Kurdish region in the North and a nine-province super region in the South) and the method of distributing oil revenues. While vague in nature, the constitution seems to leave income from future oil fields in the hands of the (Kurd and Shi’ite dominated) producer regions.

With the bargain, a window of opportunity was suddenly open, in principle at least, and a historical compromise of the main groupings became possible. At the same time that opening was kept small by a continuation of the veto process used during the constitution’s ratification: any new provisions can be defeated by “no votes” of 2/3 of the voters in three provinces. As in the case of the original constitution, the veto protects those who benefit from the current constitutional draft—namely the Kurds and the Shi’ites—since rejecting any new amendments simply returns Iraq to the constitution approved on October 15. Thus the constitution could be viewed as either provisional or permanent, depending on how one judged the likelihood of it being actually transformed.

### Box 1: Creating the Iraqi Government

While the constitution clearly outlines a political timetable, officials from Iraq’s newly-elected parliament have chosen to ignore the constitutional provision on setting the date for their first meeting which should have been 15 days after the certification of the election on February 10, 2006. Given this development, it is difficult to assess when the government will be formed.

The rules agreed upon to form the government stipulated in the constitution are the following:

#### Article 70:

The Council of Representatives to convene within 15 days from the date that election results are ratified.

#### Article 73:

First: The President of the Republic shall name the nominee of the Council of Representatives bloc with the largest number to form the Cabinet within fifteen days from the date of the election of the president of the republic.

Second: The Prime Minister-designate shall undertake the naming of the members of his Cabinet within a period not to exceed thirty days from the date of his designation.

Third: In case the Prime Minister-designate fails to form the cabinet during the period specified in clause “Second,” the President of the Republic shall name a new nominee for the post of Prime Minister within fifteen days.

Fourth: The Prime Minister-designate shall present the names of his Cabinet members and the ministerial program to the Council of Representatives. He is deemed to have gained its confidence upon the approval, by an absolute majority of the Council of Representatives, of the individual Ministers and the ministerial program.

Fifth: The President of the Republic shall name another nominee to form the cabinet within fifteen days in case the Cabinet did not gain the confidence.

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The compromise maintained the dramatic inequality of the Sunni Arabs with the other two main groupings. Even if the Sunnis used the three-province veto to defeat a new proposal they opposed, they would still be left with the original constitution. Their weak position leaves them prey to the good will, if any, of their partners to amend the constitution.

### The January Elections and the Problems of Coalition Formation

It is very likely that Sunni parties as well as most armed groups of the insurrection counted on one more card to play: holding the formation of the new government hostage if changes to the constitution seemed unlikely after the December 2005 elections. If Sunnis, along with possible allies like Ayad Allawi's secular Iraqi National List, gained 1/3 of the seats of the National Assembly, they could have held the formation of the three person Presidency Council hostage to a constitutional deal and the formation of the government itself.

However, through a combination of low electoral quotas for the Sunni in relevant provinces, and possible fraud with respect to Allawi's list, the numerical and political weight of Sunni parties and the secular grouping only totaled 83 seats, falling far short of the 1/3 (out of 275) necessary to stall formation of the government. But the Shi'ite block represented by the United Iraqi Alliance (UIA), comprised of The Supreme Council for the Islamic Revolution in Iraq (SCIRI), the Dawa party, and the Sadrist Current, won only 128 seats, leaving it just shy of an majority, giving the Sunnis several small opportunities to influence the process.

Two possibilities remain for the Sunnis to challenge the UIA, though both of them are remote. Support from the Kurdish parties would enable the formation of an anti Shi'ite coalition with enough

strength to form a government (141 seats, with the dissident Islamic Union of Kurdistan's 5 Seats). Or enough deputies of al-Sadr might detach themselves from the UIA. Their number would however be too small to be able to form a government, or could do so only in consort with the Kurds, making the constellation even less likely.

In the next weeks, if Iraq does not fall apart due to pressures from below, there are three factors which the actors will have to confront together to move the political process forward:

1. **A three person presidency council has to be agreed upon**, on a single slate by a two-thirds vote of parliament.
2. **This council must put forth a candidate for prime minister.** Under the constitution, the Shi'ite UIA, the largest bloc in parliament, gets the first crack at forming a government. The UIA has chosen Iraq's transitional prime minister, Ibrahim al-Jaafari as its nominee for prime minister.

But the UIA has too few seats to act alone. And it is facing stiff opposition from Sunni, Kurdish and some secular parties that favor current Vice President Adil Abd al-Mahdi (also a member of the UIA) for the position of prime minister.

In a battle between the two largest parties in the UIA, al-Jaafari (supported by the Dawa party and al-Sadr's followers) defeated al-Mahdi, (backed by SCIRI and Shi'ite leader Abdul-Aziz al-Hakim), by just one vote in the Shi'ite caucus, relying on al-Sadr's support to secure the nomination.

Whomever the UIA picks can be stopped by a vote of no-confidence by a simple majority, though this is highly unlikely unless there is a major split in the UIA. But stopping al-

Jaafari seems to be the current project uniting many groups. Even without a split in the UIA, opposition parties may have enough numbers to stop the formation of a presidency council while not being united on an alternative. So while the parties negotiate the persons of the three presidents (each have vetoes on legislation, and are therefore not simply ceremonial), the position of prime minister remains a critical issue.

**3. Devise a process to amend the constitution during the next four months.** To agree to any coalition government there must also be an agreement on the process for amending the constitution. The future of the constitution is a problem for a grand coalition uniting all the parties, or for any other combination other than the continuation of the status quo of the current coalition between the Shi'ites and Kurds. Even this scenario may present problems, as there are significant splits with in the UIA alliance. And renewing the current coalition, especially under SCIRI

dominance, runs into serious American opposition, as it should.

#### A New Direction: Changes to the Constitution

The resolution of the current crisis hinges on the possibility of a constitutional compromise. While some outside observers like Peter Galbraith argue that the current language of the constitution can produce a stable country, the immense majority of analysts support the view that its so-called “federalist” provisions and its method of dealing with oil resources are a recipe for an ugly breakup, one that cannot be clean and will likely involve open descent to full scale civil war with the possibility of involving outside powers.

While there are many possibilities for changing the constitution, there are two options that could resolve the situation:

**Option A: Establish provincially-based federalism in the Arab part of Iraq,** keeping the Kurdish enclave as is with is present regional government.

#### Box 2: Amending the Iraqi Constitution

The rules agreed upon to amending the constitution in Article 141 are the following:

First: The parliament shall form, at the start of its work, a committee from its members, representative of the main components of the Iraqi society. The task of the committee is to present a report to the parliament, in not more than four months, including a recommendation of the necessary amendments that could be made to the constitution. The committee is dissolved after a decision about its suggestions is taken.

Second: The amendments suggested by the committee shall be presented, in one bulk, to the parliament to be voted on, and it is considered to be passed by the approval of the absolute majority of the members of the parliament.

Third: The articles amended by the parliament according to what came in provision (second) of this Article shall be put to the people for a referendum, not more than two months after the passing of the amendments in the parliament.

Fourth: The referendum on the amended articles is successful, by the approval of the majority of voters, and if not refused by two thirds of the voters in three governorates or more.

Fifth: The effect of Article (125) (related to amending the constitution) of this constitution is stopped, and its effect starts again after the amendments in this article are decided on.

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**Option B: Keep the present structure of Iraq as defined by the TAL,** and have a moratorium on discussions of federalism for a period of two parliamentary cycles, more or less as suggested first by al-Sadr in his writing, “Pact of Honor.” Coupled with either of these solutions should be the central management of oil resources.

It would be difficult to get agreement on either of these approaches leading to compromise and government formation, but not impossible. Ironically, the linchpin for change lies in U.S hands. It will be almost impossible to get the agreements ratified in the end unless U.S. actions and pressures are used in a particularly intelligent way.

The U.S. Role: Moving Beyond the Impasse

Agreement on the government formation and changes to the constitution will be difficult to achieve. Options for compromise are few as the natural compromise for the presidency council, one Shi’ite, one Kurd, and one Arab Sunni is hard to oppose. And even if the hot button candidate, al-Jaffari could be stopped from becoming PM, the most likely replacement, SCIRI’s candidate al-Mahdi would be more hard-line on constitutional issues. Al-Jaffari, his Da’wa party, and especially al-Sadr who sponsored him, are in fact not hard line on the constitutional package. If pushed hard by the Americans they may be open to renegotiation.

If there is to be a chance for agreement, with or without al-Jafaari, the role of the Kurds will be central. With the Kurds against al-Jafaari, SCIRI’s leader, al-Hakim could offer the carrot of the disputed city of Kirkuk to the very soon. And the Kurds are constrained by their contempt for the neo-Baathists with whom they would have to ally to form a government outside the UIA. The Kurds have reasons of their own to wish to keep the constitution as is, as they fear the re-emergence of a

strong central state. But they may also fear the creation of a Shi’ite mega-region, and are open to American pressures. If there is to be a chance for some kind of deal to be struck, the Americans, and especially Ambassador Khalilzad, would have to play a key role, acting primarily through the Kurds. They would have to act especially wisely, and much more firmly than before. They must realize that the Kurds in particular need them to stay until the situation is fully solidified.

While there is a clear role for the U.S. to be playing with all three groups, there are dangers with a too-open and aggressive public role for the U.S. ambassador. Mr. Khalilzad has finally come around to the right formula of providing both public and private pressure with the double threat Iraqi disintegration and the new challenges posed by Iran. But public pressure by the U.S. invites counter responses and in particular further hardening of Shi’ite positions. Whatever actions are to be taken should be done quietly and also by more distant agencies of the U.S. government. The Iraqis should not be directly told what to do, but U.S. policy goals should be made clear. The U.S. should share its concerns, offer suggestions on how to avoid civil war, promote some kind of settlement, and let them know exactly what the U.S. will do if a minimally plausible road is not followed. This should be accomplished in terms of a timetable, linked to Iraqi actions given the clear political timeline for the formation of the Iraqi government and for revision of the constitution.

A New U.S. Policy of Accountability

If the political benchmarks of government formation and changes to the constitution are achieved, then 2006 truly will be a “period of significant transition to full Iraqi sovereignty” as hoped by the President and Congress. At that point, to further Iraqi sovereignty, the next steps must be the phased

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redeployment of U.S. troops. Redeployment, done in a graduated 18 month timeframe, allows for continued training of Iraqi soldiers, gives time to bring militias under control of the Iraqi national government, and fulfills the repeated requests of Iraqis for the U.S. to withdraw.

The U.S. should commit to stay and carry out a very gradual but in the end absolutely complete drawdown of forces in 18 months only if:

1. A presidency council of one Shi'ite Arab, one Kurd, one Sunni Arab is formed from the largest grouping of each in parliament;
2. An all-inclusive government of National Unity is formed with the Sunnis having more than just token ministries;
3. A constitutional package is renegotiated and passed in parliament in terms of either option A or option B above;
4. The amendments are ratified, and passed in the national referendum.

If the first two steps do not happen in the next two months, or if the remaining steps are blocked in the next four or five months the U.S. should put in motion at that time an accelerated six month plan for the withdrawal of all American troops.

The President and State Department have argued over the past five months that an integrated approach is needed in Iraq, one that sees political progress and progress on training Iraqi soldiers as equally important. Without a political solution, there can be no military solution. If the political process fails to create a broad-based solution, the U.S. cannot and should not be intervening in what will clearly be a civil war. U.S. troops will be

increasingly under fire from all sides, reconstruction efforts will be stopped, and chances for a political solution will be very remote. Given those dire circumstances, the only option left will be to bring the troops home on an accelerated timeline for their safety.

In either scenario, the U.S. should also sponsor a UN Security Council resolution concerning the territorial inviolability of Iraq, with built in sanctions, to forestall the possibility of another outside power (Iran or other regional actors) replacing our departing troops. If additional security forces are needed to supplement Iraqi forces, they should only be deployed under the guise of the United Nations upon the request of the Iraqi government.

It is very important to keep all steps in mind. If things go only relatively well, it is perfectly possible for the hard line Shi'ite faction to be outvoted in the new constitution amending committee, and by the absolute majority of parliament, but be able to reject the terms in the subsequent national referendum. The U.S will have to carefully monitor the compliance of actors with any preliminary bargain, and how their subsequent actions to steer the actual amending and ratification processes. If an overwhelming campaign for rejection takes off, or if a full civil war breaks out at any stage during the process, it is very important to be able to actually activate an already worked out scenario of withdrawal. Only a credible threat of this type has a chance of actually influencing the process.

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