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Elections and Government Formation in Iraq: An Analysis of the Judiciary's Role

Charles P. Trumbull IV

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Elections and Government Formation in Iraq: An Analysis of the Judiciary's Role

Charles P. Trumbull IV
Julie B. Martin*

ABSTRACT

In 2005, the people of Iraq ratified a permanent Constitution, a significant milestone in the journey from Saddam Hussein's authoritarian rule to democratic governance. Among the Constitution's fundamental guarantees are the separation and balance of powers, the selection of Parliament through regular and periodic popular election, and an independent judiciary empowered as the authority on constitutional interpretation. Iraq's commitment to democracy and the Constitution was put to the test five years later with the first parliamentary election under the new Constitution. The run-up to the elections was marred by political disputes, violence, and legal challenges, as Iraqis argued over controversial amendments to the Election Law and the disqualification of hundreds of candidates pursuant to the de-Ba'athification laws. Following the hotly debated elections, Iraqi leaders continued to argue over who had the first right to form the government, causing a political deadlock that lasted over six months. By the end of 2010, however, the newly elected Parliament approved a new Council of Ministers, concluding a largely peaceful transition of power in accordance with the Constitution.

This Article examines these historic events, focusing on the role of the Iraqi courts in resolving disputes throughout the electoral and government formation processes. After analyzing key decisions from Iraqi courts, it concludes that Iraq's judiciary is emerging as a reliable, independent, and neutral arbiter of disputes. Through its measured and careful jurisprudence, the judiciary is fostering a political culture that respects and upholds the rule of law.

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In 2002, Iraqis went to the polls to choose their nation's leader. The only hitch was that Saddam Hussein, the nation's President since 1979, was the only name on the ballot. Not surprisingly, Hussein was "elected" to another seven-year term. According to Government of Iraq officials, 100 percent of the 11,445,638 eligible voters cast their ballot in support of Saddam Hussein, up from the 99.96 percent who voted for Saddam in the previous referendum.¹

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The election results were widely dismissed by international observers and Iraqi opposition groups in exile. The government's claim that 100 percent of eligible voters went to the polls was absurd, and those voters who did turn out knew that they could be imprisoned, or worse, for voting "no" to another seven years of dictatorship. An Iraqi opposition leader living in Iran called the referendum "[t]otally fabricated, and a complete fiasco."² Ari Flescher, White House spokesman, commented, "Obviously it's not a very serious day, not a very serious vote and nobody places any credibility on it."³

Less than eight years later, Iraqis prepared for another election but under drastically different circumstances. The elections were the first to be held under the 2005 Constitution, which guaranteed all Iraqi citizens "the right to participate in public affairs and to enjoy political rights including the right to vote, elect, and run for office."⁴ Unlike in 2002, voters would be able to choose from among the six thousand candidates running for Parliament, which would then approve the Council of Ministers and elect the President. The Iraqi government invited numerous international observers, including officials from the United States Embassy and the United Nations Assistance Mission for Iraq (UNAMI), to monitor the elections, and it made provisions for "special [needs] voting" and out-of-country voting in sixteen countries.⁵

On March 7, 2010, approximately twelve million Iraqis went to the polls despite al-Qaeda's attempts to disrupt the elections.⁶ President Obama praised the elections, stating that the vote made it "clear that the future of Iraq belongs to the people of Iraq."⁷ UN Secretary General Ban Ki-Moon "welcomed the overall integrity and

the Legal Adviser of the U.S. Department of State. The authors have written this Article in their personal capacities, and the views expressed do not necessarily represent those of the U.S. Embassy, the U.S. Department of State, or the U.S. Government.

1. *Saddam Wins 100% of Vote*, BBC NEWS, Oct. 16, 2002, <http://news.bbc.co.uk/2/hi/2331951.stm>.

2. John Esterbrook, *Saddam Hussein Wins One-Man Race*, CBS NEWS, Oct. 16, 2002, <http://www.cbsnews.com/stories/2002/10/16/attack/main525770.shtml>.

3. *Saddam Wins 100% of Vote*, *supra* note 1.

4. Article 20, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005.

5. U.N. ASSISTANCE MISSION FOR IRAQ [UNAMI], UNAMI ELECTORAL ASSISTANCE OFFICE, FACT SHEET: 2010 IRAQ PARLIAMENTARY ELECTIONS: LEGAL FRAMEWORK AND OPERATIONAL PLANNING FACTS (2010), http://www.uniraq.org/documents/ElectoralMaterial/280110/UNAMI_EAO_Fact%20Sheet_2010%20CoR%20Elections_20100128_EN.pdf.

6. U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 6 of Resolution 1883 (2009)*, ¶¶ 3, 6, 55, U.N. Doc. S/2010/240 (May 14, 2010). According to the United Nations, approximately 62.4 percent of eligible voters cast a ballot in the elections. *Id.* ¶ 3.

7. Steven R. Hurst, *Analysis: For Obama, Iraq Elections Are Good News*, ABC NEWS, Mar. 8, 2010, <http://abcnews.go.com/Politics/wireStory?id=10038824>.

transparency of the electoral process, which was widely assessed as having been conducted according to international standards.”⁸ Iraqis celebrated in streets across the country, voters proudly displayed their purple ink-stained fingers, and Western diplomats expressed audible sighs of relief.

The March 7 election was a milestone for Iraq and the region, but it was just one step in the long and twisted path to a democratic Iraq. The months leading up to the elections were marred by political disputes, violence, and legal challenges, as Iraqi leaders bickered over controversial amendments to the Election Law.⁹ The disqualification of hundreds of candidates pursuant to the de-Ba’athification laws brought Iraq to the brink of renewed sectarian warfare. Following the elections, Iraqis faced the more daunting (and at times seemingly impossible) challenge of forming a government in accordance with the procedures set forth by the Constitution. Ayad Allawi’s predominately Sunni coalition won a slim plurality of parliamentary seats, leading to numerous legal challenges by Nouri al-Maliki, the incumbent Prime Minister, as to both the election results and individual candidate eligibility. Even after the results had been certified by the Iraqi Supreme Court, politicians continued to argue for months over who had the right to form the government, causing shifting alliances, a dangerous vacuum of power, and an ominous uptick in violence.

This Article examines the winding yet historic road to democratic elections in Iraq and the subsequent government-formation process. In particular, it discusses the legal challenges that Iraqi actors confronted and analyzes the judiciary’s approach to resolving these disputes. It demonstrates that throughout this process, the Iraqi courts showed a remarkable resilience to political pressure, and issued decisions that were both legally defensible and generally accepted by diverse political actors and the Iraqi public. Throughout the election saga, a precarious time in the nation’s history, courts reinforced judicial independence and the authority of the rule of law, cementing the judiciary’s role as a neutral arbiter of disputes pertaining to governance.

Part I places the March 2010 election in its historical and political context. Part II analyzes the passage of the controversial amendments to the Election Law, including the veto by Vice

8. U.N. Secretary-General, *supra* note 6, ¶ 8. Ad Melkert, the Special Representative of the Secretary General, similarly praised the Iraqi election officials for “their efforts to conduct elections in a well organized and professional fashion.” Press Release, UNAMI, Statement from the Special Representative of the Secretary General for Iraq, Ad Melkert, on the National Iraqi Elections (Mar. 9, 2010), available at <http://www.uniraq.org/newsroom/getarticle.asp?ArticleID=1286>.

9. See discussion *infra* Part II (providing an overview of the disruptions leading up to the elections, most of which centered around the Ba’ath party).

President al-Hashimi and the last-minute compromise that salvaged the elections. Part III examines the de-Ba'athification process that threatened to reignite a Sunni insurgency and the difficult appeals that the courts were required to resolve. Part IV discusses the legal challenges to the election results and the subsequent recount, and Part V examines the Federal Supreme Court's (FSC or the Court) interpretation of a constitutional provision at the center of the government-formation controversy. Finally, Part VI analyzes the judiciary's approach to dealing with these controversial legal questions and challenges the views of commentators who question the independence of Iraqi courts. Part VI ultimately concludes that the integrity of the judiciary throughout this process ensured the legitimacy of the elections and helped promote public confidence in the democratic process and the rule of law.

I. BACKGROUND

A. *The Transitional Period*

In 2003, a UN Multi-National Force (MNF-I) overthrew the regime of Saddam Hussein and placed Iraq on a long and bloody path to democracy.¹⁰ The United States and the United Kingdom assumed the role of occupying powers,¹¹ and they quickly established the Coalitional Provisional Authority (CPA), headed by L. Paul Bremer, as the governing authority.¹² Shortly after, Bremer formed the Iraqi Governing Council (IGC), which was composed of twenty-five prominent Iraqis who were selected primarily from the pre-war opposition groups.¹³ The IGC's principal functions were to advise the CPA, propose legislation, and draft an interim constitution (under close supervision by American officials).¹⁴ On March 8, 2004, the IGC adopted an interim constitution, called the Law of Administration for

10. See generally PATRICK COCKBURN, *THE OCCUPATION: WAR AND RESISTANCE IN IRAQ* (2006) (focusing on the invasion of Iraq and why it caused great resistance by the Iraqi population).

11. S.C. Res. 1483, pmb. para. 14, ¶ 4, U.N. Doc. S/RES/1483 (May 22, 2003) (recognizing these nations' authority as occupying powers and describing the specific responsibilities that accompany this role).

12. KENNETH KATZMAN, CONG. RESEARCH SERV., RS 21968, *IRAQ: POLITICS, ELECTIONS, AND BENCHMARKS 1* (2010).

13. The UN Security Council welcomed the formation of the IGC, which it described as "broadly representative" of Iraqi society. See S.C. Res. 1500, ¶ 1, U.N. Doc. S/RES/1500 (Aug. 14, 2003) (noting that the Council was an important step towards the formation of a "representative government").

14. Noah Feldman & Roman Martinez, *Constitutional Politics and Text in the New Iraq: An Experiment in Islamic Democracy*, 75 *FORDHAM L. REV.* 883, 890-91 (2006).

the State of Iraq for the Transitional Period (TAL).¹⁵ The TAL went into effect on June 28, 2004, the same day that the CPA dissolved and transferred governing authority to the Iraqi Interim Government, headed by Ayad Allawi.¹⁶

In January 2005, Iraq held its first national election since the fall of the Hussein regime to select the Transitional National Assembly, the body that would be responsible for drafting the permanent constitution.¹⁷ Pursuant to CPA Order 96, the country was composed of a single constituency, and Iraqis were required to vote for a single political party list rather than individual candidates.¹⁸ Seats were distributed to the political lists based on the percentage of votes received.¹⁹ Sunnis largely boycotted the elections, resulting in predominately Shia and Kurd membership in the Transitional National Assembly.²⁰

The Constitution was approved on October 15, 2005, in a national referendum following months of heated negotiations that “very nearly ripped the country apart.”²¹ The Constitution established a parliamentary democracy based on “the principle of separation of powers.”²² Members of the Council of Representatives (CoR or Parliament) serve four-year terms and are elected through a “direct secret general ballot.”²³ The Prime Minister, as head of the Council of Ministers (CoM), “is the direct executive authority responsible for the general policy of the State and the commander-in-chief of the armed forces.”²⁴ The Prime Minister is nominated by the largest parliamentary bloc and is responsible for forming the CoM, which must be approved by a majority of the CoR.²⁵ The President, elected by a two-thirds majority of the CoR, plays a largely

15. *Id.* at 895–96.

16. CHARLES TRIPP, A HISTORY OF IRAQ 292 (3d rev. ed. 2007).

17. Feldman & Martinez, *supra* note 14, at 897.

18. Coalition Provisional Authority Order No. 96, The Electoral Law, pmb. para. 7, Doc. No. CPA/ORD/7 June 04/96 (June 15, 2004).

19. *Id.* sec. 3.

20. Feldman & Martinez, *supra* note 14, at 897. The United Iraqi Alliance (UIA), an alliance of Shia religious parties, won over half of the seats. *Id.*

21. Feisal Amin Rasoul al-Istrabadi, *A Constitution Without Constitutionalism: Reflections on Iraq's Failed Constitutional Process*, 87 TEX. L. REV. 1627, 1627–28, 1641 (2007). The Constitution, which required approval by a majority of voters, was approved by a narrow margin. However, any three provinces could veto the Constitution if voters rejected it by a two-thirds majority. Two Sunni provinces voted against the proposed Constitution by an overwhelming majority. A third—predominately Sunni province—also rejected the Constitution, but fell short of the required two-thirds majority. *Id.* at 1641. For an overview of the negotiating history of the Constitution, see Ashley S. Deeks & Matthew D. Burton, *Iraq's Constitution: A Drafting History*, 40 CORNELL INT'L L.J. 1, 25 (2007).

22. Article 47, Doustour Joumhouriat al-Iraq of 2005.

23. *Id.* arts. 49, 56.

24. *Id.* art. 78.

25. *Id.* art. 76.

ceremonial role and acts as a “symbol of the unity of the country and represents the sovereignty of the country.”²⁶ Article 138, however, established a Presidency Council, composed of a president and two vice presidents, to serve in place of the President for the CoR’s first electoral term.²⁷ The Presidency Council was granted significantly more power than the President, including, within certain constraints, the authority to veto legislation passed by the CoR.²⁸ In addition, the Constitution stated that “there is no authority over [judges] except that of the law,” establishing an independent judiciary.²⁹ The FSC was granted jurisdiction over “overseeing the constitutionality of laws,” “interpreting provisions of the Constitution,” settling disputes between government entities, and certifying the final election results for Parliament.³⁰

Iraqis returned to the polls on December 15, 2005, to elect the first Parliament under the terms of the TAL, marking “the beginning of the last phase of the political transition process” set forth therein.³¹ Pursuant to the Election Law of 2005, each of the eighteen provinces constituted a separate electoral district and was awarded a share of the 275 parliamentary seats in proportion “to the number of registered voters in the governorate.”³² Forty-five of the

26. *Id.* arts. 67, 70. One notable exception to the figurehead role of the President is the authority to ratify death sentences issued by a competent court. *Id.* art. 73, sec. 8.

27. *Id.* art. 138. The Presidency Council resulted from a compromise struck by the drafters of the Constitution. The Shia religious parties, who predicted that they would likely control a majority of seats in Parliament, were opposed to institutional checks on the Parliament’s power. Conversely, the Sunni and Kurds wanted a strong Presidency Council with veto power that would help secure minority interests. In the end, the drafters arrived at an accord whereby the Presidency Council would be in place, but only for the first electoral term. Feldman & Martinez, *supra* note 14, at 912.

28. The Constitution sets forth the Presidency Council’s veto power as follows:

Legislation and decisions enacted by the Council of Representatives shall be forwarded to the Presidency Council for their unanimous approval and for its issuance within ten days from the date of delivery to the Presidency Council, except the stipulations of Articles 118 and 119 that pertain to the formation of regions.

Article 138, Section 5(A), Doustour Joumhouriat al-Iraq of 2005. Vetoed legislation is returned to the CoR for reevaluation of the disputed issues. *Id.* art. 138, sec. 5(B). After reevaluation, if the Presidency Council vetoes the legislation for a second time, the CoR can override the veto by a three-fifths majority. *Id.* art. 138, sec. 5(C).

29. *Id.* art. 88.

30. *Id.* art. 93. Since the Constitution’s enactment, the mechanism for petitioning the FSC for review generally takes the form of a letter submitted by an interested party.

31. U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 30 of Resolution 1546 (2004)*, ¶ 3, U.N. Doc. S/2006/137 (Mar. 3, 2006).

32. See Election Law No. 16 of 2005, art. 15 (“[E]ach governorate . . . shall be allotted a number of seats proportional to the number of registered voters in the governorate in accordance with the elections of January 30, 2005 based on the public distribution list.”).

parliamentary seats were reserved as “compensatory” seats,³³ which were distributed first to entities that obtained the “national average” of votes nationwide but not enough votes in a single electoral district to win a seat.³⁴ The remaining compensatory seats were distributed to winning lists based on their overall vote count.³⁵ Political parties were required to present a separate list of candidates for each province, and voters selected one of the competing lists of candidates rather than individual candidates.³⁶ Under this “closed-list” system, CoR seats were distributed to political parties based on vote counts, and parties were awarded seats to individual candidates based on their order on the parties’ respective electoral lists.³⁷ As a result, political parties could largely control which candidates would be elected to the CoR by ranking them higher or lower on the list.

The United Iraqi Alliance (a Shia-Islamist coalition composed of two main political parties, Dawa and the Supreme Council for the Islamic Revolution in Iraq (SCIRI)), winning a total of 46.5 percent of the vote and 128 of the 275 parliamentary seats, emerged as the largest political bloc, with a clear lead over the Kurdish coalition (53 seats) and the Sunni Iraqi Tawafuq Front (ITF) (44 seats).³⁸ Parliament was called into session on March 16, 2006, at which time the Constitution entered into force.³⁹ After a month of negotiation, Nouri al-Maliki (Shia), a compromise candidate and Deputy Prime Minister to Ibrahim al-Jaafari during the transitional government, was nominated as Prime Minister.⁴⁰ The Council of Representatives elected Jalal Talabani (Kurd) as President and Adel Abd al-Mahdi (Shia) and Tariq al-Hashimi (Sunni) as the two Vice Presidents.⁴¹

33. *Id.*

34. *Id.* art. 17. The national average is calculated by dividing the total number of votes in Iraq by the number of total CoR seats (275). Thus, an entity that failed to obtain sufficient votes in an electoral district could receive compensatory seats if the number of votes it received exceeded the national average.

35. *Id.*

36. *Id.* arts. 15, 18.

37. *Id.* art. 12. For example, if a party received five seats in a particular province, the seats would be awarded to the first five candidates on the list.

38. U.N. Secretary-General, *supra* note 31, ¶ 12; Adee Dawisha, *Iraq: A Vote Against Sectarianism*, J. DEMOCRACY, July 2010, at 26.

39. Compare Article 144, Doustour Joumhouriat al-Iraq of 2005 (“[The] Constitution shall come into force . . . [upon] seating of the government that is formed pursuant to this Constitution.”), with KATZMAN, *supra* note 12, at 4 (2006) (giving the date of the first meeting of the Council of Representatives).

40. Al-Istrabadi, *supra* note 21, at 1650. The UIA initially nominated al-Jaafari to continue as Prime Minister in the new government. However, this effort was twice defeated due to his unpopularity with Sunnis and Kurds, who blamed al-Jaafari for continued high levels of violence and sectarian strife during the transitional government period. When it became apparent that Sunni and Kurd opposition to al-Jaafari was insurmountable, the UIA selected al-Maliki. Marina Ottaway & Danial Kaysi, *Who Will Be the Next Prime Minister of Iraq?*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Apr. 5, 2010), <http://carnegieendowment.org/publications/?fa=view&id=40492>.

41. KATZMAN, *supra* note 12, at 4.

Barham Salih (Kurd) and Salam al-Zubaie (Sunni) were positioned as Deputy Prime Ministers.⁴²

B. Preparations for the 2010 Elections

In the second half of 2009, Iraq began to prepare for arguably the most important election in its history. The circumstances of this election were significantly different than the previous elections. It would be the first election under the permanent Constitution and would help gauge Iraqis' commitment to the democratic ideals enshrined therein. Iraqis would see for the first time whether their government leaders, who had been in power for four years, would peacefully transfer that power to a newly elected government in accordance with the Constitution.

Additionally, the American presence was much less visible in 2009 than in 2005. The UN Mandate for Multi-National Forces, Security Council Resolution 1790, expired on December 31, 2008,⁴³ leaving the Iraqi government solely responsible for the nation's security. U.S. forces remained in Iraq pursuant to the bilateral U.S.–Iraq Security Agreement,⁴⁴ but all U.S. military operations had to be agreed upon and coordinated with Iraqi authorities.⁴⁵ Furthermore, pursuant to that agreement, U.S. forces had withdrawn all combat troops “from Iraqi cities, villages, and localities” as of June 30, 2009.⁴⁶ Violence had receded from its 2006–2007 highs, but a weakened Sunni insurgency continued to “generat[e] bursts of bloodshed.”⁴⁷ Therefore, these elections would be an important test for the Iraqi security, military, and police forces as they attempted to prove that they were capable of providing security for the country in the absence of U.S. forces.

Finally, these elections would signal the direction of Iraq's future. A victory for the Shia religious parties would move Iraq closer to Iran, which financially backed the Islamic Supreme Council of Iraq (ISCI) and the Sadrist Trend, the two primary Shia religious

42. *Id.*

43. S.C. Res. 1790, ¶ 1, U.N. Doc. S/RES/1790 (Dec. 18, 2007) (extending authorization under its Chapter VII authorities for the multinational force in Iraq until December 31, 2008). After the expiration of Resolution 1790, foreign forces could remain in Iraq only at the invitation of the Iraqi government.

44. Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, Nov. 17, 2008, *available at* <http://www.globalsecurity.org/military/library/policy/dod/iraq-sofa.htm>.

45. *Id.* art. 4.

46. *Id.* art. 24.

47. HANNAH FISCHER, CONG. RESEARCH SERV., R40824, IRAQI CIVILIAN, POLICE, AND SECURITY FORCES CASUALTY STATISTICS 3 (2009).

parties.⁴⁸ Such an outcome could also alienate Sunnis and possibly precipitate renewed sectarian warfare. An elected government with significant Sunni, Kurd, and secular Shia representation, on the other hand, could help Iraq overcome its destructive sectarianism and promote national reconciliation.

New political alliances started to form in fall 2009. The main Shia alliance from the 2005 elections, the United Iraqi Alliance, had dissolved due to “political competition and armed combat.”⁴⁹ The Shia parties thus split into three main coalitions: the State of Law Coalition (SoL), the Iraqi National Alliance (INA), and the Iraqi Unity Alliance (IUA).⁵⁰ SoL, a quasi-secular and nationalist coalition, was dominated by Prime Minister al-Maliki and his Dawa Party but also included a few moderate Sunnis.⁵¹ The INA, a predominately Shia religious party, included ISCI members, such as Vice President Adel al-Mahdi, and candidates loyal to Moqtada al-Sadr, an anti-American cleric.⁵² The third party, the IUA, was headed by Minister of the Interior Jawad al-Bulani, a former ally of al-Maliki who formed his own party before the 2009 provincial elections.⁵³ The main Sunni party, Iraqiyya, was led by Ayad Allawi (a secular Shia himself), Vice President Tariq al-Hashemi, and Deputy Prime Minister Rafa al-Assewi.⁵⁴ Lastly, the two main Kurdish political parties, the Patriotic Union of Kurdistan and the

48. Dawisha, *supra* note 38, at 34 (describing ties between Iran and Shia parties); Michael R. Gordon, *Meddling Neighbors Undercut Iraq's Political Stability*, N.Y. TIMES, Dec. 6, 2010, at A11 (discussing Iranian influence prior to the elections).

49. Al-Istrabadi, *supra* note 21, at 1651.

50. KATZMAN, *supra* note 12, at 7–8 tbl.1 (providing an overview of the three major coalitions formed for the 2010 elections).

51. Dawisha, *supra* note 38, at 30.

52. *Id.*

53. The Iraqi Constitution provides for decentralized federalism, granting significant powers to both “regions,” such as the Kurdistan Region, and to a lesser extent to “provinces” that are not incorporated into a region. See Articles 116–23, Doustour Joumhouriati al-Iraq of 2005 (giving regions the power to adopt a constitution and a general mandate to exercise executive, legislative, and judicial power). In 2008, in accordance with Article 122 of the Constitution, the Iraqi Parliament passed the Law of Governorates Not Incorporated into a Region, more commonly known as the Provincial Powers Law (PPL) Law No. 21 of 2008. *Iraq Presidency Passes Provincial Powers Law*, REUTERS, Mar. 19, 2008, <http://www.reuters.com/article/2008/03/19/us-iraq-provinces-law-idUSL1926004520080319>. The PPL established popularly elected “provincial councils” in each province that would act as the “highest legislative and oversight authority” within each province. Provincial Powers Law No. 21 of 2008, art. 2. The Provincial Councils are authorized, among other things, to promulgate local laws, prepare the provincial budget, and monitor the performance of local executive authorities. *Id.* art. 7. The Provincial Council is also responsible for electing the provincial governor, the highest-ranking executive officer in the province. *Id.* art. 24. The first provincial elections took place on January 31, 2009, and al-Maliki’s SoL Coalition fared especially well, particularly in Baghdad province where it won twenty-eight of the fifty-seven seats on the Council. KATZMAN, *supra* note 12, at 4, 6.

54. *Iraq Opposition Names Candidates*, AL JAZEERA, Jan. 16, 2010, <http://english.aljazeera.net/news/middleeast/2010/01/2010116105225902503.html>.

Kurdistan Democratic Party, once bitter rivals,⁵⁵ reaffirmed their commitment to a single Kurdish alliance.⁵⁶

The administration of the elections was delegated to the Independent High Electoral Commission (IHEC), an independent electoral authority subject to the "supervision" of the CoR.⁵⁷ IHEC's primary responsibilities include establishing and updating voter registries, certifying political entities and candidate lists, adjudicating electoral complaints and appeals, and setting regulations for the electoral process.⁵⁸ It is also authorized by statute to promulgate rules for federal, regional, and local elections; to organize and oversee all federal and regional elections; and to settle disputes arising from elections.⁵⁹

II. AMENDING THE 2005 ELECTION LAW

The first obstacle to holding legitimate elections⁵⁵ was the Election Law itself. In September 2005, concurrently with its deliberation over the text of the Constitution, the Transitional National Assembly enacted the Election Law in anticipation of the December parliamentary elections.⁶⁰ The overlap between the Election Law and the constitutional deliberation was unavoidable. The Election Law's predecessor, CPA Order 96, was promulgated thirteen days prior to the CPA's dissolution and established a closed-list system with one national electoral district for the TAL's January 2005 election.⁶¹ The Transitional National Assembly, while recognizing that CPA Order 96 was "suitable in its time," sought in passing the 2005 Election Law to set in place a more representative multiple-district electoral system.⁶² Although it is arguably more representative than the CPA-imposed system, the multiple-district method of apportionment introduced an element of high-stakes political wrangling over how the seats would be allocated among the governorates.

55. See TRIPP, *supra* note 16, at 205 (describing the split between the Kurdish alliances, the Kurdistan Democratic Party, and the Patriotic Union of Kurdistan); see generally DAVID MCDOWALL, A MODERN HISTORY OF THE KURDS 302–27 (3d ed. 2004) (reviewing the history of the Kurds and their efforts to achieve independence, today primarily led by a single alliance).

56. KATZMAN, *supra* note 12, at 8.

57. Law of the Independent High Electoral Commission Law No. 11 of 2007, secs. 1–2.

58. *Id.* sec. 4.

59. *Id.* sec. 2.

60. Election Law No. 11 of 2005 (entered into the Iraqi Official Gazette in September 2005).

61. Coalition Provisional Authority Order No. 96, *supra* note 18, secs. 1, 3.

62. Election Law No. 11 of 2005, app. (Reasons for the Law).

A. Constitutional Challenge to the 2005 Election Law

In 2006, on the heels of the parliamentary election and the entry into force of the Constitution, the Iraqi Tawafuq Front (ITF), led by Vice President al-Hashimi, petitioned the FSC to review the constitutionality of Article 15 of the Election Law. It argued that Article 15, which stated that each governorate “shall be allotted a number of seats proportional to the number of registered voters in the governorate,”⁶³ presented a clear violation of the Constitution’s requirement that parliamentary seats be allotted on the basis of “one seat per every 100,000 Iraqi persons representing the entire Iraqi people.”⁶⁴ The ITF further argued that continued application of Article 15 would “cause damage and injustice to the provinces [of] Ninewa, Salah al Din, Diyala and Babil.”⁶⁵

The Court agreed, holding: “Article 49/first of the constitution adopted the criteria of (1) seat for each (100,000) of the Iraqi population unlike the criteria adopted in article 15/second of the elections law No. 16 of/2005 in which the criteria of the registered voters in each province was adopted.”⁶⁶ Noting that pursuant to Article 13(2) of the Constitution “any law that is in contradiction with the constitution . . . shall be invalid,” the Court opined that “the legislator may legislate a new law that is consistent with the provisions of article 49/first of the constitution.”⁶⁷

B. The November 8, 2009 Amendment and Subsequent Veto

Although the FSC rendered its opinion in 2007, Parliament did not propose new legislation until late 2009, when planning for the upcoming election was already underway.⁶⁸ The opinion posed a significant challenge: how to determine CoR representation under the terms of the Constitution without reliable population data. The last census dated back to 1997 and did not include data for the three

63. *Id.* art. 15.

64. Article 49, Section 1, Doustour Joumhouriat al-Iraq of 2005; Al-Mahkama al-Ittihadiyya al-'Ulya [Federal Supreme Court], decision No. 15/t/2006 of April 26, 2007, available at http://www.gpi.org/wp-content/uploads/tawafuq_vs_speaker-size-of-cor-eng.doc.

65. Al-Mahkama al-Ittihadiyya al-'Ulya, decision No. 15/t/2006. The populations of Ninewa, Salah al Din, and Diyala are mostly Sunni. It is noteworthy that the ITF, a Sunni Islamic coalition, singled out the mostly Shi'a province of Babil in addition to the three Sunni provinces. ANTHONY H. CORDESMAN, CTR. FOR STRATEGIC & INT'L STUD., THE UNCERTAIN SECURITY SITUATION IN IRAQ 4 (2010).

66. Al-Mahkama al-Ittihadiyya al-'Ulya, decision No. 15/t/2006.

67. *Id.*

68. See U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 6 of Resolution 1830 (2008)*, ¶ 14, U.N. Doc. S/2009/393 (July 30, 2009) (describing UNAMI's ongoing work with the Electoral Commission).

Kurdish provinces of Erbil, Dahuk, and Sulaymaniyah.⁶⁹ As a result, population statistics in several provinces were fiercely contested by Kurds and Arabs, especially in the oil-rich city of Kirkuk.⁷⁰ Moreover, a new census was not feasible for practical and political reasons. Even if a census could be orchestrated before January 2010, the soft target for an election date, it very likely would not be possible to tabulate reliable results within that timeframe.⁷¹ In light of these tensions, Iraqi leaders were deeply divided on the terms of new legislation since dictating the ultimate distribution of seats per province also dictated the distribution by religious sect and ethnicity.⁷²

After missing several self-imposed deadlines, the CoR finally approved several amendments to the 2005 Election Law on November 8, 2009, in a nationally televised session.⁷³ The bill made three salient changes to the 2005 Election Law. First, it repealed Article 15 and stated that the "CoR consists of [a] number of seats at a ratio of one seat for every hundred thousand people based on the latest statistics submitted by the Ministry of Trade."⁷⁴ The formula for distributing seats to governorates would thus be based on Ministry of Trade (MoT) ration card lists rather than the number of registered voters in each governorate.⁷⁵ The MoT statistics were unlikely to account for the actual Iraqi population because some Iraqis, especially those living overseas, did not receive food rations. Nevertheless, the up-to-date ration card registry was assessed to provide a better, or at least less controversial, approximation of the Iraqi population than the outdated voter registries, various iterations of which had been proposed and rejected as suitable proxies.⁷⁶ The

69. Press Release, United Nations, Press Briefing on Iraq Demographics (Aug. 8, 2003), available at <http://www.un.org/News/briefings/docs/2003/iraqdemobrf.doc.htm>; see also Dawisha, *supra* note 38, at 29 (listing the three Kurdish provinces).

70. *Iraq Aims to Conduct Census in a Single Day*, ASSYRIAN INT'L NEWSPAPER, July 26, 2004, <http://www.aina.org/news/20040726020450.htm>.

71. *Id.* In fact, plans for a new census had been revived in mid-2008, but were halted in the fall of 2009 out of concern that the census would lead to violence in areas along the disputed Kurdish border. At the time, the Iraqi government stated that it would take two years to release the results. *Iraq to Hold National Census in 2009*, REUTERS, May 28, 2008, <http://www.reuters.com/article/idUSL28863809>; Central Bureau of Statistics Plans for New Census, NIQASH (June 15, 2009), <http://www.niqash.org/content.php?contentTypeID=74&id=2464&lang=0>.

72. See KATZMAN, *supra* note 12, at 8–9 (discussing the Election Law dispute).

73. *Id.*; see also *Council of Representatives Passes Amendment to 2005 Elections Law*, GLOBAL JUSTICE PROJECT: IRAQ (Nov. 8, 2009), <http://www.gjpi.org/2009/11/08/council-of-representatives-passes-amendment-to-2005-elections-law> (detailing specific amendment provisions).

74. Amendment of Election Law No. 16 of 2009, art. 1.

75. See *id.* (describing the formula for distributing seats).

76. For instance, at one point, Arab contingents favored using the 2004 voter registry, Turks favored the 1957 registry, and Kurds the 2009 registry. Reaching an agreement that one of the existing voter registries accurately reflected the current

amendment did not explicitly state the number of CoR seats in the next Parliament, but the CoR informally agreed that the MoT data would increase the number of CoR seats to 323.⁷⁷

Second, the CoR reduced the number of “compensatory” seats from 15 percent of the total seats to 5 percent, which included eight minority group seats, five of which were designated for Christians and one seat was designated for the Yazidi, Sabi’I Manda’ian, and Shabaki groups respectively, to be allocated in provinces with a significant population presence.⁷⁸ The remaining compensatory seats would be allocated to national lists based on their total percentage, including out-of-country votes, of the national vote.⁷⁹

Third, the amendments provided that “nomination shall be according to the open list and the number of candidates shall be no less than three and not exceeding the double number of the seats allocated to the constituency.”⁸⁰ The open-list system gave voters (rather than political parties) significantly more influence in selecting their representatives, because they could vote for either individual candidates or the party’s electoral list.⁸¹ Regardless of their initial place on the party’s list, candidates would be awarded seats based on

Iraqi population would have been exceedingly difficult. Denise Natali, *Election Imbroglio in Iraq Kurdistan*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Feb. 22, 2010), <http://carnegieendowment.org/publications/?fa=view&id=31021>.

77. Jim Muir, *Will Disputes Derail Iraq’s Election?*, BBC NEWS, Nov. 18, 2009, http://news.bbc.co.uk/2/hi/middle_east/8367507.stm; Marina Ottaway & Danial Kaysi, *Election Law, Take Two*, CARNEGIE ENDOWMENT FOR INT’L PEACE (2009), <http://carnegieendowment.org/publications/index.cfm?fa=view&id=24251>. In a related amendment, the CoR provided that votes in the city of Kirkuk and “provinces with dubious registries” would be subject to a special review in order to correct voting registries if it was determined that large population increases in recent years undermined existing demographic data. Amendment of Election Law No. 16 of 2009, art. 6. The amendment defined locales with “dubious registries” as those whose annual population growth exceeds 5 percent. *Id.* To trigger the review mechanism, a petition signed by fifty CoR members had to pass by a simple majority of the CoR. *Id.* Underscoring the extreme political sensitivity attendant to holding polls in Kirkuk and certain key provinces, the amendment provided that results in those areas “shall not be considered a foundation for any future or past electoral process for making any political or administrative arrangements before concluding the inspection of the said registries.” *Id.*

78. Seats were allocated as follows: Christians (Baghdad, Ninewa, Kirkuk, Dahuk, and Erbil); Yazidi (Ninewa); Sabi’I Manda’ian (Baghdad); and Shabaki (Ninewa). Amendment of Election Law No. 16 of 2009, art. 1; Muir, *supra* note 77.

79. KATZMAN, *supra* note 12, at 9. According to UNAMI, approximately 264,000 and 368,000 out-of-country votes were cast in the January and December 2005 elections respectively. Sabah Abdul-Rahma, *Stage Preparations for the Out-of-Country Voting: Interview with Svetlana Golkina, Public Outreach Advisor, Office of Electoral Assistance*, UNAMI FOCUS, Jan. 2010, at 5. The Secretary General’s figures for the December 2005 election are slightly lower, recording the number of *valid* votes at 295,377. U.N. Secretary-General, *supra* note 31, ¶ 12.

80. Amendment of Election Law No. 16 of 2009, art. 3, sec. 1; U.N. Secretary-General, *supra* note 31, ¶ 12.

81. KATZMAN, *supra* note 12, at 9.

vote tallies and could move up the list to be awarded a seat if they received sufficient individual votes.⁸² This incentivized candidates to be more responsive to constituents' interests than political parties' interests. Candidates could also run as individuals unaffiliated with a party list.⁸³ As a result, the open-list system, which Grand Ayatollah Ali al-Sistani strongly supported,⁸⁴ significantly enhanced the democratic legitimacy of the elections as compared to the closed-list system utilized in the January and December 2005 elections.

The passage of the amendments to the Election Law was hailed as a major accomplishment for the CoR. President Obama declared the law "an important milestone" and congratulated Iraq's leaders for reaching agreement on such a controversial issue.⁸⁵ Prime Minister al-Maliki called the Election Law a "historic victory of the will of the people."⁸⁶

The victory was short-lived. The CoR was required to submit the approved amendments to the Presidency Council for ratification.⁸⁷ On November 15, Vice President al-Hashimi sent CoR Speaker Ayad al-Samarra'ie a letter requesting that the CoR return the percentage of compensatory seats to 15 percent instead of the 5 percent allocated by Article 1.⁸⁸ Al-Hashimi argued that this increase would do "justice to Iraqis residing abroad, especially those who were forcefully displaced."⁸⁹ He further argued that it was not equitable to decrease the number of compensatory seats "at a time when the number of those displaced abroad has doubled to more than four million residents and displaced Iraqis."⁹⁰ Al-Hashimi significantly overstated the impact of the amendment on Iraqis living abroad, who UNAMI estimated to be approximately two million in number.⁹¹ Of these two million persons, only 368,000 voted in the December 2005

82. Amendment of Election Law No. 16 of 2009, art. 3, sec. 3.

83. *Id.* art. 3, sec. 1.

84. Nimrod Raphaeli, *The Test of Democracy in Iraq—Bargaining and Compromise Over the Elections Law*, AL WAREF INSTIT. (Jan. 5, 2010), <http://www.alwaref.org/en/component/content/article/35-opinions-and-analysis/196-the-test-of-democracy-in-iraq-bargaining-and-compromise-over-the-elections-law>.

85. Qassim Abdul-Zahra, *Iraq Electoral Law Passes, Sets Up National Vote*, ASSOCIATED PRESS, Nov. 8, 2009, available at http://www.huffingtonpost.com/2009/11/08/iraq-electoral-law-passes_n_350052.html.

86. *Id.*

87. See Raphaeli, *supra* note 84 ("Under the Iraqi constitution, laws approved by parliament must be unanimously ratified by the Presidential Council, comprising the President of the Republic and his two vice presidents.").

88. Letter from Tariq al-Hashemi, Vice President of Iraq, to Iraqi Parliament (Nov. 18, 2009) (on file with authors).

89. *Id.*

90. *Id.*

91. UNAMI, HUMANITARIAN BRIEFING ON THE CRISIS IN IRAQ 3 (2007), <http://www.uniraq.org/documents/UN-Iraq%20Humanitarian%20Briefing%20Fact%20Sheet%20May%2007.pdf>.

election.⁹² Most of the Iraqis displaced outside the country since 2003 were thought to be Sunni, and al-Hashimi's objection was intended to curry favor with Sunni voters and increase the number of projected Sunni seats in Parliament.⁹³

Vice President al-Hashimi's letter was discussed at Parliament on the following day, but no action was taken.⁹⁴ There was some debate as to whether the letter had any legal effect, because it did not explicitly "veto" the approved amendment; instead, the letter only recommended that Article 1 of the amendment be changed.⁹⁵ The CoR ultimately determined that the form of al-Hashimi's letter was immaterial.⁹⁶ Article 138(5) of the Constitution states that legislation passed by the CoR must be forwarded to the Presidency Council for "their unanimous approval and for its issuance within ten days from the date of delivery to the Presidency Council."⁹⁷ Accordingly, al-Hashimi could effectively veto the legislation by not joining the other two members of the Presidency Council in unanimously approving it.⁹⁸ Rather than delve into the technical aspects of the veto letter, Iraqi politicians pragmatically focused on achieving consensus on an amended election law in order to avoid a delayed election.

The CoR, however, did not immediately return to the legislative drawing board. On November 18, the CoR petitioned the FSC for review of whether the "reasons upon which [al-Hashimi] based his abstinence to the first amendment for the election law #16 for the year 2005" were constitutional.⁹⁹ In an opinion rendered the following day, the FSC carefully addressed the most general reading

92. RHODA MARGESSON ET AL., CONG. RESEARCH SERV., RL 33936, IRAQI REFUGEES AND INTERNALLY DISPLACED PERSONS: A DEEPENING HUMANITARIAN CRISIS? (2009); U.N. Secretary-General, *supra* note 31, ¶ 12; Abdul-Rahma, *supra* note 79, at 5.

93. *Iraq VP Vetoes Election Law*, BBC NEWS, Nov. 18, 2009, http://news.bbc.co.uk/2/hi/middle_east/8365801.stm.

94. *Id.*

95. Hoda al-Jasim, *Q&A with Iraqi VP Tarik al-Hashimi*, ASHARQ ALAWSAT, Dec. 12, 2009, <http://www.aawsat.com/english/news.asp?section=3&id=19152>.

96. Article 138, Section 5, Doustour Joumhouriat al-Iraq of 2005.

97. *Id.*

98. Had the CoR chosen to bring a technical challenge to Hashimi's veto letter, the Court would have been presented with an opportunity to clarify the form that approval of legislation must take under Section 5 of Article 138. Although the text of the article could be read to create a requirement that the Presidency Council actively approve (or veto) legislation within ten days of delivery, it could also be interpreted to mean that legislation is deemed approved at the expiration of the ten-day period if the Presidency Council does not indicate a contrary intent. In practice, the Council has actively approved a small percentage of laws, and those not actively approved or vetoed have been deemed approved at the end of the ten-day period.

99. Al-Mahkama al-Ittihadiyya al-'Ulya, decision No. 72/federal/2009 of November 19, 2009, available at <http://www.gjpi.org/wp-content/uploads/fsc-opinion-72-of-2009.pdf>.

of the question posed to it.¹⁰⁰ In brief and obscure language, the Court stated that the Iraqi Constitution:

[D]id not differentiate between the Iraqis living inside Iraq or outside it. It requires that the choice of the members of the Council should be based on representing all the different constituents of the Iraqi people, their election is done by public secret ballot and that at least one fourth of them should be women.¹⁰¹

The FSC further stated that “the election system is the responsibility of the Independent High Commission for Elections.”¹⁰²

This simple opinion lent legitimacy to al-Hashimi’s threatened veto. The Constitution does not restrict the bases upon which the Presidency Council may veto legislation.¹⁰³ If the CoR expected the FSC to expound on the limits of the veto power or to assess the constitutionality of Article 1 of the amendments, it was disappointed. By referencing the Article 49(1) requirement that Parliament represent the entire Iraqi people, the FSC rendered a carefully limited view of the question posed: the Presidency Council is not required to approve legislation it deems subject to constitutional defect. The opinion did not expand into the larger question of whether the Article 1 process for determining the number and distribution of CoR seats comported with Article 49(1) of the Constitution. In an example of judicial restraint, the Court instead limited itself to reiterating the requirements of Article 49(1) and pointing to IHEC’s role in the electoral process.¹⁰⁴

C. Overcoming the Veto Challenge

The Iraqi government faced a political and constitutional crisis, with the possibility of a second veto still looming. On a political level, the veto destroyed a carefully crafted compromise and forced each party to reevaluate its position and second-guess the deal that had been struck. The Kurds, for example, renewed their initial opposition to the provincial seat distribution, which provided only three additional seats to the Kurd provinces.¹⁰⁵ The Kurdistan Parliament asked President Talabani to veto the legislation and to urge the CoR to increase the number of compensatory seats to 18 percent.¹⁰⁶

100. *Id.* Two conceivable readings of the CoR’s question could be: “Is al-Hashimi’s opposition to Article 1 on constitutional grounds unfounded?” and “May al-Hashimi veto legislation he believes is unconstitutional?” The Federal Supreme Court addresses the latter formulation.

101. *Id.* (emphasis added).

102. *Id.*

103. Article 49, *Doustour Joumhouriat al-Iraq* of 2005.

104. *Al-Mahkama al-Ittihadiyya al-Ulya*, decision No. 72/federal/2009.

105. *Iraq VP Vetoes Election Law*, *supra* note 93.

106. *Id.*

The veto also jeopardized IHEC's ability to hold the elections by the deadline mandated in the Constitution: "forty-five days before the conclusion of the preceding electoral term."¹⁰⁷ Initially, there was some confusion as to when the CoR's electoral term expired. The Constitution states that the CoR's electoral term is "four calendar years, starting with its first session."¹⁰⁸ The outgoing CoR met for the first time on March 16, 2006, to take the constitutional oath.¹⁰⁹ It immediately suspended proceedings until April 22, when it finally agreed on who to elect as CoR Speaker, a task that the Constitution required to occur during the "first session."¹¹⁰ Accordingly, it was unclear whether the CoR's first session was March 16 (the day it first convened) or April 22 (the date on which it performed its first session duties). In May 2009, CoR Speaker Samarra'ie asked the FSC to clarify when the CoR's electoral term ended, and he stated his opinion that the March 16 CoR meeting was the "opening session" rather than the "first session."¹¹¹ The FSC ruled that the electoral term started with the "first meeting of the CoR under the presidency of its oldest member," which had occurred on March 16, 2006.¹¹² The current CoR's electoral term thus expired on March 15, 2010, meaning that elections were required to be held prior to January 30, 2010.¹¹³

Iraqi leaders expressed concern about the constitutional implications of al-Hashimi's veto.¹¹⁴ President Talabani stated that although he had concerns with the Election Law, he and Vice President al-Mahdi endorsed it in order to avoid a crisis: "If the elections [were] postponed without a decision from parliament, there [would] be a constitutional vacuum in Iraq. The presidency, the prime ministry, and the parliament [would] lose their legitimacy."¹¹⁵

107. Article 56, Section 2, *Doustour Joumhouriat al-Iraq* of 2005. Moreover, by statute, the date of the elections has to be announced by presidential decree sixty days before the date of holding the elections. Election Law of 2005, art. 5 (entered into the *Iraqi Official Gazette* in September 2005).

108. Article 56, Section 1, *Doustour Joumhouriat al-Iraq* of 2005.

109. Al-Mahkama al-Ittihadiyya al-'Ulya, decision No. 29/Federal/2009 of May 13, 2009, available at http://www.gjpi.org/wp-content/uploads/fsc_next-elections.doc; see also *New Parliament Adjourns, Can't Agree on Speaker*, NPR, Mar. 16, 2006, <http://www.npr.org/templates/story/story.php?storyId=5283931> (discussing the new Parliament's first meeting).

110. Article 55, *Doustour Joumhouriat al-Iraq* of 2005.

111. Al-Mahkama al-Ittihadiyya al-'Ulya, decision No. 29/Federal/2009.

112. *Id.*

113. *Id.*

114. The U.S. media also picked up on the implications of holding an election after the deadline mandated by the Constitution. See *Iraq Fails to Resolve Vote Issue*, WALL ST. J., Nov. 23, 2009, at A14 (noting that breaching the deadline could set a "dangerous precedent" that might be exploited).

115. Al Arabiya TV Interview with Vice President Tariq Al-Hashimi (Nov. 20, 2006) [hereinafter Al-Hashimi Interview], available at http://www.linktv.org/scripts/episode_transcript.php?episode=mosaic20091118 (providing an English translation).

As a result of al-Hashimi's veto, IHEC suspended all preparatory work for the election.¹¹⁶

The CoR reopened deliberations and passed a second amendment to the text on November 23, following a week of intense negotiations.¹¹⁷ The new amendment stated that the number of parliamentary seats would be determined by MoT population statistics from 2005, increased for all governorates by 2.8 percent annually to account for population growth.¹¹⁸ The amendment preserved the number of compensatory seats at 5 percent.¹¹⁹ It stated, however, that the eight minority seats would be taken from the seats allocated to governorates with substantial minority populations (Baghdad, Ninewa, Kirkuk, Erbil, and Dohuk), meaning that all fifteen compensatory seats could be distributed to the national lists.¹²⁰ Lastly, the amendment stated, "Iraqis, regardless of their location, shall vote for the lists of their governorates or candidates."¹²¹ This amendment placed out-of-country voters on equal footing with resident Iraqis by granting them a voice in election outcomes for their home provinces; previously, out-of-country votes were simply added to the national total and used to determine the number of compensatory seats awarded to the national lists.¹²² The amendment did not, however, increase provincial seat allocations on the basis of anticipated out-of-country-voter returns, thus diluting representation in provinces with significant numbers of out-of-country voters.

The bill was sent to the Presidency Council on November 25, triggering the ten-day window for the Presidency Council's approval.¹²³ The CoR's amendment did not fully address al-Hashimi's concerns, and he indicated that he would again veto it.¹²⁴

116. Dawisha, *supra* note 38, at 32.

117. Amendment of Election Law No. 16 of 2009.

118. *Id.* art. 1.

119. *Id.*

120. *Id.*

121. *Id.* art. 1, sec. 2.; *see also id.* art. 4, sec. 5 (giving IHEC the power to develop instructions for out-of-country voting).

122. *Id.* art. 7.

123. Article 138, Section 5, Doustour Joumhouriya al-Iraq of 2005. The FSC was then asked to determine when the ten-day period expired, given that the tenth calendar day fell on Eid. The FSC noted that Section 5 of Article 138 did not qualify the term "days," but stated that the Court should be guided by Civil Procedure Code 83 of 1969, which provides that "in case the period ends during an official holiday, it is extended to the following working day." Al-Mahkama al-Ittihadiyya al-'Ulya, decision No. 76/Federal/2009 of December 3, 2009, available at <http://www.gipi.org/2009/12/03/federal-supreme-court-opinion-on-timescale-for-presidency-council-veto>. The FSC concluded that the period for approving the legislation ended on December 6, as December 4 (the tenth calendar day) was an official holiday, and December 5 fell on a weekend. *Id.*

124. Joel Wing, *VP Hashemi Shoots Himself in the Foot with Veto of Iraqi Election Law*, EDUC. FOR PEACE IN IRAQ CTR. (Nov. 29, 2009),

In light of al-Hashimi's veto threat, Speaker Samarra'ie called the CoR to meet in an extraordinary session to again examine the amendments.¹²⁵ After two failed attempts, the CoR finally reached a quorum on December 6 at 11:30 p.m., thirty minutes before the ten-day window for approval was to close.¹²⁶ At this point, it was clear that the parties had reached a political compromise that would prevent al-Hashimi from again vetoing the amendment.

At 11:49 p.m., the CoR passed a "decision" with an embedded "Clarification Memo" that detailed the distribution of the parliamentary seats.¹²⁷ Based on the 2005 MoT official population statistics and an annual growth rate of 2.8 percent, the CoR would be composed of 325 seats.¹²⁸ Three hundred and ten seats would be distributed to governorates based on MoT ration card data, and the remaining fifteen seats were designated as compensatory seats to be awarded to national lists based on their percentages of the vote.¹²⁹ The memo also clarified the number of seats allotted to each province based on these statistics.¹³⁰ The Presidency Council unanimously approved the law on December 9, 2010.¹³¹ IHEC announced that the elections would take place on March 7, 2010, over a month after the date the FSC had determined they must occur.¹³²

usa.org/2009/11/29/vp-hashemi-shoots-himself-in-the-foot-with-veto-of-iraqi-election-law.

125. The Constitution authorizes the Prime Minister, the President, or the Speaker to call an extraordinary session to discuss a specific matter. Article 58, Doustour Joumhouriat al-Iraq of 2005.

126. See KATZMAN, *supra* note 12, at 9 (noting that the new law passed just as the deadline was about to lapse).

127. Clarification Memorandum to Election Law No. 16 of 2005, available at <http://www.gipi.org/wp-content/uploads/cor-clarification-memo-eng.pdf>. It is unclear why the CoR decided to frame this as a "decision" rather than "legislation." Pursuant to Article 138, Section 5 of the Constitution, the Presidency Council must unanimously approve both "decisions" and "legislation." However, one explanation might be that the CoR determined that it needed a vehicle through which to amend the existing legislation before the Presidency Council. Because there was no clear mechanism for it to "take back" the amended law that it had submitted to the Presidency Council and it did not wish to submit superseding amended legislation and thus restart the ten-day approval window, a "decision" allowed the CoR, to re-amend, in effect, the existing amended text by clarifying its terms and the intent of the drafters.

128. Areej Al-Musttaf, *UNDP Supports Iraqis in Electing Their Future Government*, U.N. DEV. PROGRAMME NEWSROOM (Mar. 4, 2010), <http://content.undp.org/go/newsroom/2010/march/undp-supports-iraqis-in-electing-their-future-government.en>.

129. Amendment of Election Law No. 16 of 2009.

130. *Id.*

131. Presidency Council Decree No. 20 of 2009, available at http://www.uniraq.org/documents/ElectoralMaterial/020310/Presidential%20Decree%20on%20Amendments_Unofficial%20UNAMI%20Translation_EN.pdf. Although there is some debate as to the legal requirement for the Presidency Council to issue an express approval of legislation, as a practical matter, the Presidency Council rarely does so. As a political matter, however, the Presidency Council's decree was a clear signal of its desire that preparations for the coming elections continue without further delay.

132. Al-Musttaf, *supra* note 128.

III. THE DE-BA'ATHIFICATION FIASCO

U.S. and UN officials were relieved to see the amendment controversy resolved. The election drama, however, had only just begun. As the elections approached, Shia politicians lashed out against suspected former (predominately Sunni) Ba'ath party members, including parliamentary candidates, in an attempt to win over the Shia base. Prime Minister al-Maliki—who had successfully crossed the sectarian divide in the 2009 provincial elections by focusing on improved security—similarly blamed Ba'athists for a number of recent bombings that undermined his national security platform.¹³³ More ominously, Shia politicians took advantage of de-Ba'athification laws, first established by the CPA, to seek disqualification of prominent Sunni candidates. The ensuing legal struggles proved to be the greatest challenge yet for Iraq's fragile democracy and threatened to derail the elections and return the country to sectarian warfare.

A. *Brief History of De-Ba'athification*

The Ba'ath party was founded by Michel Aflaq and Salah al-Bitar in 1940 and embraced a secular, nationalist, pan-Arab ideology.¹³⁴ The Ba'athists first seized power in Iraq in 1963, but they were deposed shortly after.¹³⁵ In 1968, they returned to power in a mostly bloodless coup.¹³⁶ Saddam Hussein became President in 1979, after forcing the resignation of President Ahmad Hasan al-Bakr, a former ally.¹³⁷

Saddam used party membership to maintain complete control over the government. The Ba'ath party became a "countrywide organization, reaching down to the smallest village and most modest neighborhood in an unprecedented way."¹³⁸ A majority of lower level members joined solely out of necessity, as membership in the Ba'ath party was a prerequisite for obtaining mid-level to high-level government jobs.¹³⁹

133. Marc Santora & Abeer Mohammed, *After Blasts, Iraqi Officials Point Fingers*, N.Y. TIMES, Aug. 22, 2009, at A8.

134. Sylvia G. Haim, *The Ba'ath in Syria*, in PEOPLE AND POLITICS IN THE MIDDLE EAST 132, 132 (Michael Curtis ed., 1971).

135. See WILLIAM R. POLK, UNDERSTANDING IRAQ 114–15 (2005) (detailing the history of the Ba'athists rise to power); TRIPP, *supra* note 16, 164–69 (3d ed. 1999) (discussing the Ba'athists seizure of power).

136. TRIPP, *supra* note 16, at 184–85.

137. *Id.* at 213.

138. *Id.* at 217–18.

139. See MIRANDA SISSON, INT'L CTR. FOR TRANSITIONAL JUST., BRIEFING PAPER: IRAQ'S NEW "ACCOUNTABILITY AND JUSTICE" LAW 4 (2008) (noting that Ba'ath party membership was reportedly a condition of employment in certain professions).

Purging Ba'ath party officials became a top priority for the CPA. In its first two weeks, the CPA issued two orders that had profound consequences for Iraqi society. CPA Order 1, promulgated on May 16, 2003, dismissed from public service former Ba'ath members who held the rank of Udw Firqah (group member) and above.¹⁴⁰ CPA Order 2, issued a few days later, dissolved the Iraqi Army, intelligence services, and even the Olympic Committee.¹⁴¹

To help implement these orders, the CPA created an Iraqi De-Ba'athification Council (IDC).¹⁴² Members of the IDC were selected by the CPA Administrator and were responsible for investigating the location of Ba'ath party property, the identity and whereabouts of Ba'ath party officials and members allegedly involved in human rights violations, details of criminal allegations against Ba'ath party members, and "any other information relevant to" CPA Orders 1 and 2.¹⁴³ The IDC was also charged with advising the CPA on means of eliminating the Ba'ath party structure in Iraq, classifying Ba'ath party officials, and reclaiming Ba'ath party assets.¹⁴⁴

The de-Ba'athification process "quickly slipped out of control of the CPA."¹⁴⁵ In addition to the CPA-mandated IDC, the Iraqi Governing Council established its own committee, called the Higher National De-Ba'athification Commission (HNDBC).¹⁴⁶ The HNDBC was headed by Ahmed Chalabi, a controversial figure in both American and Iraqi politics.¹⁴⁷ Chalabi lived most of his life in exile in the United Kingdom and the United States, where he earned degrees from MIT and the University of Chicago.¹⁴⁸ After a successful career in banking, he became leader of the Iraqi National

140. Coalition Provisional Authority Order No. 1, De-Ba'athification of Iraqi Society, sec. 1, cl. 2, Doc. No. CPA/ORD/16 May 03/01 (May 16, 2003). CPA Administrator Bremer retained authority, however, to "grant exceptions . . . on a case-by-case basis." *Id.* sec. 1, cl. 6. CPA Memorandum 1 implemented the Order and set forth the process by which U.S. forces would identify Ba'ath party members. Coalition Provisional Authority Memorandum No. 7, Delegation of Authority Under De-Ba'athification Order No. 1, sec. 1, Doc. No. CPA/MEM/3 June 03/01 (Nov. 4, 2003).

141. Coalition Provisional Authority Order No. 2, Dissolution of Entities, Annex, Doc. No. CPA/ORD/23 May 03/02 (Aug. 23, 2003).

142. Coalition Provisional Authority Order No. 5, Establishment of the Iraqi De-Ba'athification Council, sec. 1, cl. 1, Doc. No. CPA/ORD/25 May 03/05 (May 25, 2003).

143. *Id.* sec. 3, cl. 1.

144. *Id.* sec. 3, cl. 2(a)-(c).

145. Eric Stover et al., *Justice on Hold: Accountability and Social Reconstruction in Iraq*, 90 INT'L REV. RED CROSS 5, 21 (2008).

146. *Id.* In November 2003, "[r]ecognizing that organizing and expediting de-Baathification is an urgent task that is necessary to put Iraq on the path towards reconstruction and renewal," Bremer delegated authority to implement CPA Orders 1 and 2 to the IGC. He also stated that the IGC was authorized to further delegate that authority to the HNDBC. Coalition Provisional Authority Memorandum No. 7, *supra* note 140, sec. 1.

147. See generally ARAM ROSTON, *THE MAN WHO PUSHED AMERICA TO WAR* (2008), at xiii ("Some revere [Chalabi], some despise him, and some fear him.")

148. *Id.* at 16, 18.

Congress, the main Iraqi opposition group to the Ba'ath party.¹⁴⁹ In the run-up to the invasion, Chalabi provided the Bush Administration with purported evidence of Saddam's weapons of mass destruction.¹⁵⁰ The Pentagon later realized that this evidence was fabricated, and Chalabi fell out of favor with the U.S. Administration.¹⁵¹ Chalabi revitalized his political career by championing the de-Ba'athification of Iraqi society and allying himself with Iran and religious Shia groups.¹⁵²

The CPA's de-Ba'athification agenda had fateful consequences for Iraq and was widely criticized as contributing to the rise of the insurgency.¹⁵³ The CPA's orders put approximately 300,000 armed men out of work, eliminated thousands of ex-officers' pensions, and purged the dilapidated ministries of roughly 30,000 employees, including the most experienced technocrats and administrators.¹⁵⁴ Iraqi soldiers, forced to find work in a country with 40 percent unemployment, soon became disenchanted with the American-led government.¹⁵⁵ De-Ba'athification also had a profound effect on the education system, as thousands of teachers were dismissed. In some Sunni-dominated areas, "entire schools were left with just one or two teachers."¹⁵⁶

Acknowledging that the de-Ba'athification laws had been applied "unevenly and unjustly,"¹⁵⁷ Bremer subsequently eliminated the Iraqi De-Ba'athification Council.¹⁵⁸ The TAL, however, preserved the HNDBC: "The establishment of national commissions such as . . . the Higher National De-Ba'athification Commission is confirmed. . . . The members of these national commissions shall continue to serve after this Law has gone into effect."¹⁵⁹ The HNDBC thus continued its

149. *Id.* at 89, 102.

150. Romesh Ratnesar, *From Friend to Foe*, TIME, May 31, 2004, at 28.

151. *Id.*

152. Tim Arango, *Early Backer of War Has Power Within His Grasp*, N.Y. TIMES, Mar. 20, 2010, at A6.

153. SISSON, *supra* note 139, at 5.

154. TRIPP, *supra* note 16, at 282.

155. See RAJIV CHANDRASEKARAN, *IMPERIAL LIFE IN THE EMERALD CITY* 265 (2006) (describing how thousands of dismissed soldiers gathered to protest Bremer's decision, and noting the opposition to the CPA's policy, both within the American government and the Iraqi public).

156. *Id.* at 73.

157. Sharon Otterman, *IRAQ: Debaathification*, COUNCIL ON FOREIGN RELATIONS (Apr. 7, 2005), <http://www.cfr.org/publication/7853/iraq.html>.

158. Coalition Provisional Order No. 100, Transition of Laws, Regulations, Orders, and Directives Issued by Coalition Provisional Authority, sec. 4, cl. 2, Doc. No. CPA/ORD/27 June 04/100 (June 28, 2004); Coalition Provisional Authority Memorandum No. 7, *supra* note 140, sec. 3.

159. Law of Administration for the State of Iraq for the Transitional Period of 2004, art. 4(A).

work, despite concerns that it was engaging in “political witch-hunts” and failing to provide due process to targeted individuals.¹⁶⁰

B. *The Post-Constitutional Legal Framework*

The 2005 Constitution permanently outlawed the Ba’ath party¹⁶¹ and enshrined the de-Ba’athification process initiated by the CPA.¹⁶² For example, Article 135 states that the “High Commission for De-Ba’athification shall continue its functions as an independent commission . . . attached to the Council of Representatives.”¹⁶³ Article 135 also mandates that “[a] nominee to the position[] of President of the Republic . . . [and] the members of the Council of Representatives . . . may not be subject to the provisions of De-Ba’athification.”¹⁶⁴ This provision could arguably be read as stating that the members of the CoR were immune from de-Ba’athification laws. The drafters intended the provision, however, to serve as a “continuing prohibition on an individual from holding one of those public positions if that individual, as a former Ba’ath Party member, fell within one of the categories outlined in the de-Ba’athification provisions in Iraqi law.”¹⁶⁵ The Election Law No. 16 of 2005 (as amended) reinforces that candidates for the CoR “[m]ust not be covered by the Deba’tification law.”¹⁶⁶

In 2008, the Iraqi Parliament revised the de-Ba’athification laws with the enactment of the Law of the Supreme National Commission for Accountability and Justice (AJC Law).¹⁶⁷ The law replaced the

160. Deeks & Burton, *supra* note 21, at 26.

161. Article 7 of the Constitution states that the “Saddamist Ba’ath in Iraq and its symbols, under any name whatsoever, shall be prohibited. Such entities may not be part of the political pluralism in Iraq. This shall be regulated by law.” Article 7, *Doustour Joumhouriat al-Iraq* of 2005. This provision was extremely controversial during the 2005 drafting sessions. A July 22 draft prohibited both “thought and practice relating the Ba’ath Party under Saddam Hussein.” Deeks & Burton, *supra* note 21, at 25. The final provision omitted this controversial clause due to concerns expressed by Sunni negotiators and U.S. Government representatives. *Id.*

162. According to commentators familiar with the constitutional drafting negotiations,

The resulting final provisions [of the Constitution] responded in limited ways to Sunni concerns that the de-Ba’athification program unfairly targeted Sunnis whose ties to the Ba’ath Party had been superficial, if not non-existent, but largely reinforced the Shia Alliance position that the government should continue to pursue a robust de-Ba’athification of Iraqi society.

Deeks & Burton, *supra* note 21, at 25.

163. Article 135, Section 1, *Doustour Joumhouriat al-Iraq* of 2005.

164. *Id.* art. 135, sec. 3.

165. Deeks & Burton, *supra* note 21, at 28.

166. Election Law No. 16 of 2005, art. 6, sec. 2.

167. Law of the Supreme National Commission for Accountability and Justice No. 10 of 2008.

HNDBC with the Supreme Commission for Accountability and Justice (AJC).¹⁶⁸ The AJC is made up of “seven politically and legally experienced members” who are nominated “through a proposal from the Council of Ministers, a simple majority approval by the Council of Representatives and ratification by the Presidency Council.”¹⁶⁹ The AJC’s purpose is to “[p]revent the return of the Ba’ath party to power or to the public life in Iraq” and to “[c]leanse state institutions, mixed sector institutions, civil society institutions and Iraqi society from any shape or form of the Ba’ath party system.”¹⁷⁰ In order to accomplish this mission, the AJC is authorized to “finalize the identification of individuals included in the De-Ba’athification procedures within the period of the Commission’s work.”¹⁷¹

Article 6 of the AJC Law sets forth the “De-Ba’athification procedures,” which provide different penalties and prohibitions for former Ba’ath party members depending on their former rank in the party.¹⁷² Of relevance to the elections is Article 6(8), which states that “[a]ny one who occupied the rank of [group] member [Udw Firqah] and above in the Ba’ath party and enriched himself at the expense of public funds shall not be allowed to hold special level posts [including Member of Parliament].”¹⁷³ Individuals identified by the AJC as subject to the de-Ba’athification procedures have a right of appeal to a panel of the Court of Cassation within thirty days.¹⁷⁴ This panel, called the Cassation Chamber, has sixty days to rule on the appeal, and its decisions are final.¹⁷⁵

C. De-Ba’athification Crisis

The AJC, headed by Ahmed Chalabi and Ali al-Lami,¹⁷⁶ started disqualifying candidates shortly after the amendments to the Election

168. *Id.* art. 2, sec. 1.

169. *Id.* art. 2, sec. 4.

170. *Id.* art. 3, secs. 1–2.

171. *Id.* art. 4, sec. 5(a).

172. *Id.* art. 6. The law also contained some provisions intended to reintegrate low-level Ba’ath party officials. For example, it permitted members at the “member” (Udw Firqa) level and below to return to their previous employment, so long as they did not occupy certain special level posts in the new government. *Id.* art. 6, secs. 5–6. It also provides pensions for dismissed employees at the shu’ba level and below, except for members of the Feda’iyeen Saddam and anyone proven to have committed crimes against the Iraqi people or gained wealth at the expense of public funds. *Id.* art. 6, secs. 1–4.

173. *Id.* art. 6, sec. 8.

174. *Id.* art. 15.

175. *Id.* art. 17.

176. Ali al-Lami’s participation in the AJC led many to believe that the AJC’s decisions were politically motivated. Al-Lami had previously been detained by U.S. forces for his suspected involvement in an attack against U.S. Embassy personnel. He was also a candidate for Parliament. See Rod Nordland & Sam Dagher, *Commander Says U.S. Will Release More Members of an Iraqi Shiite Militia*, N.Y. TIMES, Aug. 18,

Law were passed, casting new doubt on IHEC's ability to hold the elections without substantial delays. On January 7, the AJC informed IHEC that it had disqualified 496 nominees from running in the upcoming elections.¹⁷⁷ It increased this number to 511 on January 19.¹⁷⁸ The barred candidates included both Shia and Sunnis, but the AJC decision was widely perceived within Iraq—and in international press coverage—as specifically and disproportionately targeting Sunnis.¹⁷⁹ Significantly, among those barred was a prominent Sunni politician, Saleh al-Mutlaq.¹⁸⁰ Al-Mutlaq was admittedly a former member of the Ba'ath party, but he was expelled in 1977 after demanding that a group of Shia charged with plotting against the state be given a fair trial.¹⁸¹ The AJC decision to bar al-Mutlaq sparked outrage in Sunni communities, which viewed it as a Shia plot to disenfranchise Sunni voters.¹⁸² Al-Mutlaq, however, stated that he would appeal the decision through legal channels.¹⁸³ The AJC subsequently reinstated fifty-nine election candidates for technical reasons, such as mistaken identity, but al-Mutlaq's disqualification stood.¹⁸⁴

IHEC implemented the AJC decision and deleted the disqualified names from the electoral lists, leading to a heated debate on the

2009, at A4 (discussing al-Lami's suspected involvement with the bombing and his proposed release).

177. U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 6 of Resolution 1883* (2009), ¶ 7, U.N. Doc. S/2010/76 (May 14, 2010); Nada Bakri & Anthony Shadid, *Move Made to Bar Iraqi from Ballot*, N.Y. TIMES, Jan. 8, 2010, at A4.

178. U.N. Secretary-General, *supra* note 177, ¶ 7.

179. See Interview by Greg Bruno, Staff Writer, Council on Foreign Relations, with Reidar Visser, Research Fellow, Nor. Inst. of Int'l Affairs (Jan. 25, 2010), available at http://www.cfr.org/publication/21305/avoiding_crisis_in_iraqs_political_minefield.html (stating that the barred candidates include Shia, but the "largest single group . . . would be the secular nationalists").

180. Nada Bakri, *The Rise and Fall of a Sunni in Baghdad*, N.Y. TIMES, Jan. 19, 2010, at A4.

181. *Id.* Mutlaq was later named to the constitution drafting committee—he voted against the final draft, objecting to the provision that outlawed the Ba'ath Party. *Id.*

182. Ranj Alaaldin, *Ba'ath Saga Haunts Iraq's Future*, GUARDIAN (London), Jan. 13, 2010, <http://www.guardian.co.uk/commentisfree/2010/jan/13/baath-iraq-debaathification-elections> ("It is no surprise that Sunni officials consider this another plot by the Shia-dominated government to outmaneuver and marginalize the Sunnis, who this time round are expected to come out and vote en masse."). U.S. officials were also concerned that the disqualifications could reignite sectarian violence and jeopardize the self-imposed August 30 deadline for withdrawing U.S. combat troops. KATZMAN, *supra* note 12, at 11–12.

183. Bakri & Shadid, *supra* note 177, at A4. Mutlaq stated: "Banning us lacks credibility, is illegal and is wrong. Iraqis will not accept this. We will not give up, and we will appeal." *Id.*

184. *Iraq Reinstates 59 Election Candidates*, AGENCE FRANCE-PRESSE, Jan. 25, 2010, available at <http://www.google.com/hostednews/afp/article/ALeqM5iJGz55dJrnOzzejqmBj6QTolydg>.

legitimacy of AJC decisions.¹⁸⁵ The Shia parties (INA and SoL) supported the AJC, while Sunni parties declared that the AJC was corrupt and illegitimate.¹⁸⁶ Al-Maliki, who had previously attempted to appeal to Sunni voters, was forced to support the AJC in the run up to the elections or jeopardize losing his Shia base.¹⁸⁷

The debate focused on whether the Commission had authority to implement the de-Ba'athification laws.¹⁸⁸ As noted above, the 2008 AJC Law established the Commission and set forth the process for appointing the commissioners.¹⁸⁹ Specifically, the statute stated that the seven commissioners must be proposed by the CoM, and their nominations must be approved by a simple majority of the CoR and ratified by the Presidency Council.¹⁹⁰ As of 2009, neither Chalabi nor al-Lami, the sole AJC commissioners, had been approved by the CoR, and they arguably lacked statutory authority to implement the AJC Law.¹⁹¹ Observers were also concerned by the lack of transparency in the AJC's decision making.¹⁹² Candidates were not notified of the charges against them and were not given the opportunity to rebut the evidence that the AJC relied on.¹⁹³

As tensions mounted, a number of senior government officials publicly registered their concerns and put the AJC on notice that the legitimacy of its activities was in question. On January 17, 2010, the General Secretariat of the CoM sent a letter informing the AJC of the illegality of its actions: "Due to disapproval of the Council of

185. Anthony Shadid, *Iraqi Commission Bars Nearly 500 Candidates from Parliamentary Election*, N.Y. TIMES, Jan. 15, 2010, at A4 ("Western officials and some Iraqi politicians have questioned whether the decisions by the Accountability and Justice Commission are even binding, and critics have accused its director, Ali Faisal al-Lami, of carrying out agendas of various Iraqi politicians and of Iran.").

186. Nada Bakri, *Move to Bar Candidacy Stirs Iraqis*, N.Y. TIMES, Jan. 9, 2010, at A6.

187. As Professor Hamoudi noted, "[Al-Maliki is] not scared of Mutlaq, he's scared of looking like a friend of Mutlaq, which would be electoral disaster for him." Haider Ala Hamoudi, *The Real Electoral Crisis in Iraq*, ISLAMIC LAW IN OUR TIMES (Jan. 23, 2010), <http://muslimlawprof.org/2010/01/23/the-real-electoral-crisis-in-iraq.aspx>.

188. Shadid, *supra* note 185, at A4 ("[S]ome Iraqi politicians have questioned whether the decisions by the Accountability and Justice Commission are even binding, and critics have accused the director, Ali Faisal al-Lami, of carrying out agendas of various politicians and of Iran.").

189. *See supra* Part III.B (discussing the 2008 revision of the de-Ba'athification laws).

190. Law of the Supreme National Commission for Accountability and Justice No. 10 of 2008, art. 2, sec. 4.

191. Edward Hameed, *Talabani Asks Federal Supreme Court to Ascertain Commission's Legitimacy*, AL-SHORFA, Jan. 22, 2010, http://www.al-shorfa.com/cocoon/mei/xhtml/en_GB/features/mei/features/main/2010/01/22/feature-01.

192. Reidar Visser, *Blacklisted in Baghdad*, FOREIGN AFF., Jan. 27, 2010, <http://www.foreignaffairs.com/articles/65939/reidar-visser/blacklisted-in-baghdad?page=show>.

193. *Iraq: Candidate Ban Jeopardizes Election*, HUM. RTS. WATCH (Jan. 26, 2010), <http://www.hrw.org/en/news/2010/01/26/iraq-candidate-ban-jeopardizes-election>.

Ministers' decision no. 385 for the year 2009 proposing the establishment of the [AJC], we would like to inform you that the action taken by the formed Commission . . . is illegal."¹⁹⁴ President Talabani also voiced displeasure with the AJC: "[W]e must respond to it with legal measures by going through the Court of Cassation to challenge the decision."¹⁹⁵

In addition to calls for a general appeal challenging the AJC's legitimacy, a number of disqualified candidates filed individual appeals.¹⁹⁶ In other cases, the political parties decided to replace disqualified candidates with new nominees.¹⁹⁷ On February 3, the Cassation Chamber issued a decision on one of these appeals, through which it took the opportunity to opine on the appeals process generally.¹⁹⁸ The court explained that a ruling on appeals from AJC decisions:

[R]equires first to examine the legal status of the entity who issues them in the first place, also it [is] required to verify the evidence and documents used as a foundation for including the relevant protestors with the above mentioned procedures, furthermore, it is also required to verify the protestors' proofs to nullify what they were accused of.¹⁹⁹

The court stated that it would not be able to complete such a review prior to February 7, the start of the election campaign.²⁰⁰ It thus decided to "postpone deciding on this and the other submitted appeals, and to allow the protestors to participate in the election as [] candidate[s] for the purpose of practicing their constitutional right for the electoral term starting in 2010."²⁰¹ The court further stated that it would review the appeals of any winning candidate after the election, and winning candidates would not be entitled to take a seat in the CoR or enjoy the rights and privileges associated with CoR membership until the Cassation Chamber decided those appeals.²⁰²

The court's declaration that it did not have enough time to review the appeals was unusual but prudent under the circumstances. The AJC had "delay[ed] the examination of candidates' credentials until so late in the day, and disqualified too

194. Letter from Ali Muhsin Ismail, Acting Gen. Sec'y of Council of Ministers, to the Nat'l Commission for De-Ba'athification (Jan. 17, 2010) (on file with authors).

195. Hameed, *supra* note 191.

196. U.N. Secretary-General, *supra* note 177, ¶ 7.

197. *Id.*; see also Steven Lee Myers, *Few Barred Candidates Are Restored to Iraqi Ballot*, N.Y. TIMES, Feb. 13, 2010, at A19 (reporting that 171 disqualified nominees appealed the AJC ruling).

198. Mahkamat al-Tamiez [Tamiez] [Court of Cassation] [Cassation], decision No. 108 of February 3, 2010, available at <http://www.gpi.org/2010/02/03/appeal-panel-overturns-election-ban-and-postpones-de-baathification-examination>.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

many people for its decision not to appear excessive so close to the elections.”²⁰³ This put the Cassation Chamber in a difficult position. On the one hand, the Constitution expressly prohibits nominees covered by the de-Ba’athification laws from being nominated to the CoR.²⁰⁴ On the other hand, the AJC’s decision on the eve of the election made it exceedingly difficult for the court to thoroughly examine the appeals without delaying the elections. A cursory review of AJC decisions would violate the candidates’ due process rights and potentially deprive them of the constitutional right to “enjoy political rights including the right to . . . run for office.”²⁰⁵ This compromise “achieved a Pyrrhic victory that save[d] the elections, but only if its writ [was] widely accepted by the country.”²⁰⁶

The Pyrrhic victory, like so many before it, was short lived. Shia political groups openly criticized the court’s decision²⁰⁷ and threatened to seek legislative action. The SoL Coalition, for example, issued the following statement:

We are astonished that the decision of the Appeals Commission that was issued today did not carefully examine the issue of the disqualified from the parliamentary elections. For even those whose hands are stained with the bloods of Iraqis from the elements of Saddam’s Fedayeen benefited from it. The Commission should have at least prevented the members of Saddam’s Fedayeen and his intelligence apparatus from taking part in the parliamentary elections.²⁰⁸

As political pressure mounted,²⁰⁹ the Cassation Chamber reversed its decision to postpone review of the appeals until after the

203. Chibli Mallat, *A Solomonic Judgment on Elections in Iraq*, JURIST (Feb. 8, 2010), <http://jurist.law.pitt.edu/forumy/2010/02/solomonic-judgment-on-elections-in-iraq.php>.

204. Article 135, Doustour Joumhouriat al-Iraq of 2005.

205. *Id.* art. 10.

206. Mallat, *supra* note 203.

207. The fact that the U.S. Government had previously urged the Cassation Chamber to postpone ruling on the appeals might also have contributed to criticism against the court. See Visser, *supra* note 192 (noting that Washington appears to favor solving the crisis by postponing the de-Ba’athification process until after the elections). Ali al-Lami, for example, declared that the Cassation Chamber’s decision was a result of U.S. pressure: “For the past two days I saw American embassy officials inside the court and they clearly put pressure on the [judiciary]. This is the direct result of [U.S. Vice President] Joe Biden.” Marin Chulov, *Iraqi Government Lifts ‘Anti-Sunni’ Ban on Next Month’s Election*, GUARDIAN, Feb. 3, 2010, <http://www.guardian.co.uk/world/2010/feb/03/iraq-lifts-candidates-election-ban>.

208. Statement from the State of Law Coalition Regarding the Decision of the Appeal Panel to Sanction the Participation of the Ba’athists (on file with authors).

209. Letter from 240 Iraqi Lawyers, to the President of the Iraqi Supreme Judicial Council Medhat al-Mahmoud (Feb. 13, 2010) (on file with authors) (stating that “during the past few days we saw a noticeable increase in the political pressure on the appeal commission in hysterical way,” and urging the Chief Justice to “take a stand against this blatant intervention” in the independence of the judiciary); see also Myers, *supra* note 197, at A19 (“[C]onsiderable political pressure has been brought to bear on [the Cassation Chamber’s] members as they tried to navigate the utter legal chaos that

election. On February 7, Speaker al-Samarra'ie announced that "an agreement was reached between legal advisers to the parliament and the [Cassation Chamber] about the possibility of completing all the files before the electoral campaigns on February 12."²¹⁰ He also called on the AJC to "accelerate the submission of all documentation in its possession."²¹¹

Several days later, the Cassation Chamber issued a decision that resolved the underlying doubts about the AJC's legitimacy.²¹² The court noted that the AJC Law of 2008 changed the name of the High National Committee for De-Ba'athification to the Supreme National Commission for Accountability and Justice and provided that the commissioners should be nominated by the CoM and approved by a majority of the CoR.²¹³ The court stated, however, that the law did not clearly dissolve the HNDBC.²¹⁴ Accordingly, the court held that the commissioners were authorized to continue their functions as "a regular care taker committee" and that the work of the committee "acquired legitimacy based on the above mentioned reasons."²¹⁵ The court then proceeded to review the merits of individual appeals and ultimately reinstated twenty-six of the candidates disqualified by the AJC.²¹⁶

The Cassation Chamber's reversal of its decision to postpone review was generally perceived as a sign that the judiciary was susceptible to political pressure.²¹⁷ This may not adequately explain the court's reasoning. The court's initial decision to postpone review of the disqualified candidates was largely attributed to the AJC's reticence to provide the files on the disqualified candidates.²¹⁸ The court's threat to reinstate the disqualified candidates pending the

is the Iraqi de-Baathification process." (quoting Reidar Visser, Norwegian Inst. of International Affairs) (internal quotation marks omitted)).

210. *Iraq in Statement of Appeals Commission*, AKNEWS, Feb. 8, 2010, <http://www.aknews.com/en/aknews/4/112321>.

211. *Id.*

212. See Tamiez Court of Cassation, decision No. 225 of February 11, 2010 (translation on file with authors) (applying Accountability and Justice Law No. 10 of 2008 to identify and bar former Ba'ath party members).

213. *Id.*

214. *Id.*

215. *Id.*

216. KATZMAN, *supra* note 12, at 11.

217. See, e.g., Dawisha, *supra* note 38, at 39 ("Another worrisome problem is the continued ability of the executive to sway the opinions and judgments of the supposedly 'independent' judiciary."); Ranj Alaaldin, *Iraq's Troubled Elections*, GUARDIAN, Feb. 15, 2010, <http://www.guardian.co.uk/commentisfree/2010/feb/15/iraq-elections-baath-ban> (noting that the Cassation Chamber's decision "was made after judges, as a result of an outcry among the great and powerful of Iraq's political actors, reversed their earlier, U.S.-sponsored decision to postpone the appeals process until after the elections").

218. See *Iraq's 2010 National Elections*, HUM. RTS. WATCH (Feb. 25, 2010), <http://www.hrw.org/node/88800> (noting that the Iraqi appeals court postponed all the disqualifications since it did not have sufficient time to review the individual evidence).

election may have been calculated to force the AJC to disclose the information necessary for the court to conduct its review. Once the AJC provided this information and IHEC agreed to postpone the start of the election campaign period,²¹⁹ the court had a legitimate reason to reconsider its initial decision. Furthermore, the court may have been understandably inclined to help defuse a potentially explosive situation.

The court's ultimate holding was legally defensible, especially when viewed in context.²²⁰ Article 135 of the Constitution states that the "High Commission for De-Ba'athification shall continue its functions as an independent commission" until dissolved by the CoR "by an absolute majority after the completion of its functions."²²¹ This constitutional mandate gave the Cassation Chamber a legitimate basis to determine that the AJC was authorized to continue its duties absent a clear decision by the CoR to dissolve it.

The court was also understandably reluctant to hold that the AJC lacked authority due to the CoR's failure to confirm the commissioners. The CoR similarly failed to fulfill its constitutional obligation to pass a law to govern the selection, qualifications, and work of the FSC.²²² It likewise failed to ratify the judges of the Cassation Chamber, as required by Article 2(9) of the AJC Law.²²³ The Cassation Chamber's decision thus took into account the reality that strict enforcement of procedural requirements was not pragmatic under these circumstances and would potentially cast doubt on the legitimacy of a number of other institutions, including the FSC.

The Cassation Chamber asserted its authority over the AJC, but it did not slow down the AJC commissioners. The AJC proceeded to

219. IHEC agreed to postpone the beginning of the election campaign until February 12, giving the Cassation Chamber four extra days to finalize its review of the appeals. See *De-Baathification Saga Continues*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Feb. 9, 2010), <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=24834>.

220. Critics of the decision could argue that the CoR intended to suspend the Commission's work pending approval of new commissioners. Article 20 of the AJC Law states: "Measures taken by the Commission prior to the date of coming into force of this Law shall be considered valid as long as they comply with the provisions of the laws in force when they were taken and do not violate the provisions of this law." Law of the Supreme National Commission for Accountability and Justice No. 10 of 2008, art. 20. By implication, this provision could be read to mean that all actions taken after the law entered into force were invalid unless they were in accordance with the procedures set forth in that law, including the requirement for CoR ratification of Commission members.

221. Article 135, Sections 1–2, Doustour Joumhouriat al-Iraq of 2005.

222. The Constitution provides that the FSC "shall be made up of a number of judges, experts in Islamic jurisprudence, and legal scholars, whose number, the method of their selection, and the work of the Court shall be determined by a law enacted by a two-thirds majority of the [CoR]." *Id.* art. 92, sec. 2.

223. Law of the Supreme National Commission for Accountability and Justice No. 10 of 2008, art. 2, sec. 9.

review the list of candidates who had been selected to replace many of those disqualified in its January decision.²²⁴ On March 3, it informed IHEC that fifty-two of these candidates were also ineligible.²²⁵ IHEC ignored the AJC ruling and kept the names on the ballots.²²⁶

After the March 7 elections, discussed *infra*,²²⁷ the SoL Coalition appealed IHEC's decision to the Electoral Judicial Panel (EJP), a three-judge panel established to rule on appeals of IHEC decisions.²²⁸ IHEC explained that it disregarded the AJC's disqualifications for two reasons. First, the AJC disqualified candidates the day before special needs voting was scheduled to begin.²²⁹ This, IHEC explained, was a "very critical period as IHEC had already prepared the candidates lists and organized the electronic system for data entry, which would make it difficult to introduce any changes."²³⁰ Second, it would not be "fair to disregard votes for candidates whose case concerning whether they are covered by the AJC procedures is yet to be settled, especially since they have the right to appeal before the Cassation Chamber."²³¹

The EJP ruled in favor of the SoL Coalition on April 26, holding that "IHEC [was] not entitled to refuse to implement the decision which ban[ned] candidates included in AJC decisions from participating in the parliamentary elections."²³² The panel explained that "IHEC is an executive body with no jurisdiction to discuss whether a candidate is included in the measures stipulated in [the AJC] Law No. 10 of 2008."²³³ Moreover, the EJP explained that the Cassation Chamber, not IHEC, was the entity authorized to review AJC decisions.²³⁴ The panel then ordered that the votes received by the newly disqualified candidates would not be counted and that those disqualified candidates who won a seat, according to preliminary results, would not be entitled to membership in the CoR.²³⁵ Finally, the EJP ordered that the affected candidates be notified of the AJC decision in order "to enable them to challenge these decisions" before the Cassation Chamber.²³⁶ Those candidates

224. Ammar Karim, *Iraq Vote Panel Invalidates 52 Candidates*, MIDDLE E. ONLINE, Apr. 26, 2010, <http://www.middle-east-online.com/english/?id=38649>.

225. *Id.*

226. U.N. Secretary-General, *supra* note 6, ¶ 10.

227. See *infra* Part IV (discussing the controversy surrounding certification of the election results and the EJP's decision to order a recount).

228. Law of the Independent High Commission No. 11 of 2007, art. 8, sec. 4.

229. Electoral Judicial Panel, decision Nos. 38 and 39/47/Appeal/2010, April 26, 2010 (translation on file with authors).

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

who successfully appealed their disqualification would have their votes reinstated.

The decision added more uncertainty to the election certification process, which will be discussed in greater depth *infra*.²³⁷ Iraqiyya members criticized it: "We consider the decision [to disqualify fifty-two candidates] a clear politicizing of the judiciary. It's impossible to protect democracy without an independent judicial system."²³⁸ For the first time, U.S. Embassy officials publicly expressed concern over the delays in certifying the election results.²³⁹

The EJP decision further delayed certification of the election results, but there is no evidence that it was driven by improper political considerations. To the contrary, the EJP's decision carefully balanced statutory authorities and individual rights. The EJP, an administrative appeals court with limited jurisdiction, did not have authority to review AJC decisions; its jurisdiction was limited by statute to reviewing decisions of the IHEC Board of Commissioners.²⁴⁰ Similarly, the EJP correctly determined that the Cassation Chamber, not IHEC, had exclusive jurisdiction to review the merits of AJC decisions. IHEC thus acted improperly by ignoring the decision of another executive body that had authority (as determined by the Cassation Chamber²⁴¹) to issue such decisions. The underlying problem in this case was poor statutory drafting, not corruption of the judiciary. The AJC Law, which was enacted after the IHEC Law, required IHEC to implement the AJC's decisions,²⁴² but neither the AJC Law nor the Election Law imposed a deadline for the AJC to act prior to the elections. Thus, as IHEC noted in its argument to the EJP,²⁴³ candidates who were disqualified immediately prior to the election would suffer an irreparable injury if they were stricken from the ballot without having an opportunity to have their appeals heard by the Cassation Chamber.

The EJP addressed this concern by ordering that the affected candidates be informed of the AJC decision and given the opportunity

237. See *infra* Part IV.

238. Jane Arraf & Mohammed al-Dulaimy, *US Expresses First Concerns over Iraq Elections Results*, CHRISTIAN SCI. MONITOR, Apr. 26, 2010, <http://www.csmonitor.com/World/Middle-East/2010/0426/US-expresses-first-concerns-over-Iraq-election-results>.

239. Ambassador Christopher Hill stated, "We have an election that took place on March 7. We are now approaching the two-month period and we are concerned that the process is lagging." *Id.*

240. Law of the Independent High Commission No. 11 of 2007, art. 8.

241. *Id.*

242. See Law of the Supreme National Commission for Accountability and Justice No. 10 of 2008, art. 13, sec. 1 ("[I]ndependent bodies . . . shall be obliged to implement the decisions and instructions of the Commission.").

243. Electoral Judicial Panel, decision Nos. 38 and 39/47/Appeal/2010, April 26, 2010.

to appeal to the appropriate forum, the Cassation Chamber.²⁴⁴ Those candidates who succeeded in their appeal would have their votes reinstated, thereby avoiding an irreparable harm.²⁴⁵ The EJP was thus able to reach a decision that respected the statutory framework that limited IHEC's authority and that, at the same time, upheld the due process rights of the affected candidates.

An AJC attempt to disqualify eight CoR nominees after the election posed another challenge for the judiciary. On April 4, the AJC informed IHEC that it had disqualified six candidates who had been elected in the March 7 elections.²⁴⁶ On April 7, IHEC responded that the "amended Electoral Law no. 16 of 2005 authorized the Electoral Commission to review the competency of candidates instead of election winners (i.e., elected candidates)."²⁴⁷ IHEC added that the CoR is the only body that has the "authority to review the competency of the winners."²⁴⁸ IHEC concluded that the AJC's decision should be considered as an appeal against the election results and referred to the EJP, which has jurisdiction to review such challenges.²⁴⁹ On May 3, the EJP stated that it had "temporarily stopped looking into [the joint appeals] according to article (83/1) of the amended civil code procedure (83) for 1969" until the Cassation Chamber decided the appeals from the eight disqualified nominees.²⁵⁰

The Cassation Chamber ruled in favor of the disqualified candidates.²⁵¹ The Chamber noted that two of the candidates had been initially disqualified in January.²⁵² Their disqualifications had been overturned by the Cassation Chamber, and they were thus permitted to run in the elections.²⁵³ The Chamber reiterated that its previous ruling "according to Article 2(9) of Law No. 10 of 2008 [was] considered a final decision . . . and [was] not subject to refute."²⁵⁴ As

244. *Id.*

245. *Id.*

246. *See, e.g.* Tamiez Court of Cassation, decision No. 2231/Appeal Committee/2010 of May 16, 2010, Al-Nashra al Qadaiah (translation on file with authors) (citing AJC memorandum); *see also* Hannah Allam, *Iraq Election: Victorious Candidates May Be Purged, Boosting Maliki*, CHRISTIAN SCI. MONITOR, Mar. 29, 2010, <http://www.csmonitor.com/World/Middle-East/2010/0329/Iraq-election-Victorious-candidates-may-be-purged-boosting-Maliki>.

247. Independent High Electoral Comm'n [IHEC], Secretariat of the Council of Comm'rs, Sec. of Comm'r Aff., No. SH.M/2/Regular 34, Apr. 7, 2010 (on file with authors).

248. *Id.*

249. *Id.*

250. *Id.*

251. Tamiez Court of Cassation, decision No. 2224/Appeal Committee/2010 of May 16, 2010, Al-Nashra al Qadaiah (translation on file with authors).

252. *Id.*

253. *Id.*; Tamiez Court of Cassation, decision No. 2231/Appeal Committee/2010.

254. The court should have cited to Article 17, which states that its decisions shall be "final and definitive." Law of the Supreme National Commission for Accountability and Justice No. 10 of 2008, art. 17.

to the other six disqualified candidates, the Cassation Chamber found that the AJC lacked authority to disqualify candidates after the elections.²⁵⁵ The court stressed that an “appellant’s status should not be on indefinite hold just for the sake of new evidence that might be surfaced to include him in Law No. 10 of 2008, especially after winning a seat in the election.”²⁵⁶ In a stark rebuke to the AJC, the court remarked that “the committee should conduct background investigation on the candidate before the election date in accordance with Article 6 of the [amended Election Law].”²⁵⁷

IV. ELECTIONS AND THE LONG ROAD TO CERTIFICATION

Rockets and mortars exploded across Baghdad even before polling stations opened on the morning of March 7, as al-Qaeda attempted to intimidate voters and disrupt the elections.²⁵⁸ Voter turnout was nevertheless strong.²⁵⁹ Approximately 12 million of 18.9 million eligible voters (62 percent) cast a ballot in the 49,630 official polling stations across the country.²⁶⁰ Ballots included eighty-six political entities, twelve coalitions, and 6,292 candidates.²⁶¹ Thousands of international observers monitored polling stations and unanimously applauded IHEC’s administration of the election.²⁶²

Preliminary reports released later that night revealed that al-Maliki’s SoL Coalition and Allawi’s Iraqiyya were neck and neck, causing a rare “election cliffhanger” in a region dominated by

255. Tamiez Court of Cassation, decision No. 2231/Appeal Committee/2010.

256. *Id.*

257. *Id.* Article 6 of the Election Law sets forth the qualifications for CoR candidates, one of which is that the candidate “must not be covered by the De-Ba’athification law.” Election Law No. 16 of 2005, art. 6, sec. 2.

258. Steven Lee Myers, *Iraqis Defy Bombs in Strong Turnout for Pivotal Vote*, N.Y. TIMES, Mar. 8, 2010, at A1. There were forty documented explosions in Baghdad alone. As one journalist noted, “the intensity of the barrage was reminiscent of the worse days of bloodshed in 2006 and 2007, when Iraq teetered on the precipice of civil war.” *Id.*

259. “Special needs” voting for security forces, inmates, and invalids started a few days earlier, on March 4. U.N. Secretary-General, *supra* note 6, ¶ 5. Out-of-country polling centers were also established in sixteen countries: Australia, Austria, Canada, Denmark, Egypt, Germany, Iran, Jordan, Lebanon, Holland, Sweden, Syria, Turkey, the United Arab Emirates, the United Kingdom, and the United States. *Electoral Technical Assistance for Iraq for Out of Country Voting*, INT’L FOUND. FOR ELECTORAL SYS. (Mar. 5, 2010), <http://www.ifes.org/Content/Publications/Papers/2010/Electoral-Technical-Assistance-for-Iraq-for-Out-of-Country-Voting.aspx>.

260. Dawisha, *supra* note 38, at 26–27, 35.

261. *Id.* at 35. IHEC ultimately printed twenty-six million ballots, even though the total number of eligible voters approximated nineteen million, fueling subsequent charges of fraud and corruption in the vote-tallying process. *Id.*

262. *Id.*; see also *supra* notes 4–5 and accompanying text (discussing the election and its international observers).

authoritarian rule and rigged elections.²⁶³ After additional reports indicated that Iraqiyya had a two-seat lead, al-Maliki took to the offensive, stating that his party had uncovered widespread fraud in several provinces.²⁶⁴ He demanded a countrywide recount in order to “safeguard the political stability and to prevent the slipping of the security situation in the country and the resurgence of violence.”²⁶⁵ President Talabani supported the request for a recount to “preclude any doubt and misunderstanding” about the results.²⁶⁶ Iraqiyya dismissed al-Maliki’s demand for a recount and echoed international observers’ assurances that there was no evidence of widespread fraud.²⁶⁷

On March 21, the IHEC Board of Commissioners officially rejected al-Maliki’s request for lack of “justifying reasons.”²⁶⁸ IHEC’s Commissioner, Faraj Haidari—who had previously refrained from entering the public debate—openly denounced al-Maliki’s demand: “To come now and make allegations against IHEC, I don’t think this serves the interests of that person, or the elections process, or even political progress in its entirety.”²⁶⁹ On March 26, IHEC released the official preliminary election results, which still required certification by the FSC.²⁷⁰ Iraqiyya won a plurality with ninety-one seats, followed by SoL (eighty-nine seats), INA (seventy-one seats),²⁷¹ and the Kurdish Alliance (forty seats).²⁷²

Al-Maliki appealed IHEC’s decision to the EJP, while U.S. officials urged Iraqi leaders to “refrain from inflammatory rhetoric or

263. Myers, *supra* note 258, at A1.

264. Ned Parker & Caesar Ahmed, *Iraq Vote May Spark Turmoil*, L.A. TIMES, Mar. 22, 2010, at A1.

265. *Id.* Other SoL candidates warned that violence would escalate if the ballots were not counted by hand. *Poll Body Rejects Iraq Recount*, AL JAZEERA, Mar. 22, 2010, <http://english.aljazeera.net/news/middleeast/2010/03/2010321163545857542.html>.

266. *Iraq President Calls for Election Recount*, CBS NEWS, Mar. 21, 2010, www.cbsnews.com/stories/2010/03/21/world/main6319989.shtml.

267. See Jane Arraf, *Iraq Election: Baghdad Recount Begins with a Hitch*, CHRISTIAN SCI. MONITOR, May 3, 2010, <http://www.csmonitor.com/World/Middle-East/2010/0503/Iraq-election-Baghdad-recount-begins-with-a-hitch> (“[The] US, the UN and many other organizations which sent observers to the elections . . . all attested to an election that was free of widespread systematic fraud.” (quoting Gary Grappo, former ambassador to Oman and current political counselor to the U.S. Embassy in Baghdad) (internal quotation marks omitted)).

268. Electoral Judicial Panel, decision No. 37/66Appeals/2010 of April 19, 2010 (translation on file with authors).

269. Parker & Ahmed, *supra* note 264, at A1.

270. Timothy Williams & Rod Nordland, *Former Premier Wins Narrowly in Iraq Election*, N.Y. TIMES, Mar. 27, 2010, at A1.

271. The Sadrists received a majority of INA’s seats, giving them significant leverage in the government formation negotiations. Anthony Shadid, *Radical Cleric Regains Sway in Iraqis’ Vote*, N.Y. TIMES, Mar. 17, 2010, at A1.

272. U.N. Secretary-General, *supra* note 6, ¶ 11. Signaling its frustration with the current government, the Iraqi public reelected only sixty-two members of the CoR. Dawisha, *supra* note 38, at 27.

action.”²⁷³ On April 19, the EJP ordered IHEC to conduct a manual recount in the Baghdad electoral district, giving al-Maliki a partial victory.²⁷⁴ The EJP found that some of the 501 and 502 forms (the forms that certified that the number of ballots in each box equaled the number of voter signatures) had not been signed by the election station chief.²⁷⁵ Citing Evidence Law No. 107 of 1979, the EJP stated that “it goes without saying that [public] documents have to be signed by the employee or person who has the legal authorization to do a public service” and that such documents “shall lose [their] characteristic of being a public document” if not properly signed.²⁷⁶ The EJP also noted that “ten secret informers working within the Independent High Electoral Commission . . . pointed to many violations that they were eyewitness to and about which they informed the competent officials but were not listened to.”²⁷⁷ The EJP thus ordered IHEC “to recount manually all results of all electoral stations in the electoral centers . . . in the Province of Baghdad for the general election.”²⁷⁸ The EJP rejected al-Maliki’s request for a manual recount in the provinces of Salah al-Din, Anbar, and Ninewah.²⁷⁹

The effect of the EJP’s decision would be to delay certification of the election results by at least a month because it required IHEC to recount more than two million votes, 20 percent of the total votes cast.²⁸⁰ International observers were concerned by the prospect of delay and worried that the recount could cause SoL to overtake Iraqiyya in seat distribution, a result that would further stoke Sunni frustration and lead to additional challenges to the election results.²⁸¹ Nevertheless, the EJP’s decision to order the recount is understandable given the extremely narrow margin of victory for Iraqiyya (0.5 percent), and recounts are not uncommon in democratic electoral processes.²⁸² Granting al-Maliki’s petition for a recount in a pivotal province was also an important step in defending the legitimacy of the electoral results.

273. Williams & Nordland, *supra* note 270, at A1.

274. *Iraq Election Panel Orders Baghdad Vote Recount*, MIDDLE E. ONLINE, Apr. 19, 2010, <http://www.middle-east-online.com/english/?id=38508>.

275. Electoral Judicial Panel, decision No. 37/66Appeals/2010 of April 19, 2010.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. Arraf, *supra* note 267.

281. *See id.* (stating that at least one UN observer “hoped the final results could be declared as soon as possible”).

282. Many states in the United States, for example, require automatic recounts if the margin of victory is below a certain percentage point. *See, e.g.*, FLA. STAT. § 102.141(7) (2011) (mandating a recount if a candidate is defeated by 0.5 percent or less).

As IHEC started the recount, al-Maliki returned to the courts in an attempt to prolong the certification process. In addition to the manual recount ordered by the EJP, al-Maliki requested that IHEC compare voters' signatures on voter records against each of the ballots cast in Baghdad.²⁸³ IHEC rejected al-Maliki's request,²⁸⁴ again demonstrating its independence from political pressure. IHEC explained that it would conduct the recount by first comparing the number of ballots in each ballot box against the number of voter signatures listed on the 501 form; if the signatures equaled the number of ballots, IHEC would reseal the ballot box and write "matching" on a new 501 form.²⁸⁵ "If they [did] not match, the register [would] be opened and the signatures [would] be totaled and . . . compared again with the number of [ballots] in the box."²⁸⁶ Al-Maliki appealed IHEC's decision to the EJP. Two days later the EJP stated: "Whatever the merit of either IHEC's opinion or the Appellant's claim, this Panel does not have competency to decide that point, because the decisions of the [IHEC] Board of Commissioners . . . are procedural in nature and non final."²⁸⁷ The EJP added that al-Maliki could challenge only a final decision by IHEC, "namely announcing the final results."²⁸⁸

IHEC completed its recount on May 16, announcing that there would be no change in seat allocation and largely putting to rest any doubts about the integrity of the election results.²⁸⁹ Al-Maliki chose not to mount yet another challenge to the results and focused his efforts on courting other blocs to form a majority alliance. Meanwhile, IHEC forwarded the results to the FSC for certification. Two weeks later, after the EJP and Cassation Chamber completed the de-Ba'athification appeals, discussed *supra*,²⁹⁰ the FSC certified the election results,²⁹¹ thus concluding an electoral process that left many Iraqis frustrated with the lack of progress and the deteriorating security situation.²⁹²

283. Arraf, *supra* note 267.

284. *Id.*

285. Electoral Judicial Panel, decision No. 390/391/Appeals/2010 of May 5, 2010 (translation on file with authors).

286. *Id.*

287. *Id.*

288. *Id.*

289. U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 6 of Resolution 1883 (2009)*, ¶ 4, U.N. Doc. S/2010/406 (July 29, 2010). Two candidates were replaced by other candidates from the same list due to a change in the number of individual votes cast. *Id.*

290. *See supra* Part III.C.

291. U.N. Secretary-General, *supra* note 289, ¶ 6.

292. *Id.* ¶ 50; *see also* Khalid al-Ansary, *Iraq Election Recount Over, No Fraud Found*, REUTERS, May 14, 2010, <http://www.reuters.com/article/2010/05/14/us-iraq-election-idUSTRE64D3Y220100514> ("Dozens have died in attacks carried out since the

The real challenge, however, lay ahead. As one commentator noted, "An election does not a democracy make."²⁹³ No single political alliance won the majority of seats necessary to unilaterally form the CoM, meaning that the deeply divided alliances would have to reach an agreement on who would occupy positions of power in the new government. It also remained to be seen whether Iraqi political leaders' commitment to democracy would be contingent on democracy serving their own interests.²⁹⁴

V. GOVERNMENT FORMATION

The surprisingly strong electoral showing for Iraqiyya precipitated another constitutional showdown, as Prime Minister al-Maliki refused to concede that Iraqiyya had the right to form the government, and the CoR failed to form a government in accordance with the timeline set forth in the Constitution.

A. *The Largest Bloc*

Pursuant to Article 76 of the Constitution, "[t]he President of the Republic shall charge the nominee of the largest Council of Representatives bloc with the formation of the Council of Ministers within fifteen days from the date of the election of the President of the Republic."²⁹⁵ The ensuing debate focused on the meaning of "the largest Council of Representatives bloc." Allawi asserted that Iraqiyya won more seats than any other pre-electoral alliance and was therefore the largest CoR bloc.²⁹⁶ Al-Maliki, on the other hand, asserted that the President was required to select the nominee from the largest post-election bloc.²⁹⁷

On March 25, pursuant to a request by al-Maliki, the FSC clarified the meaning of Article 76:

[T]he expression 'the largest bloc' means either the bloc formed after the election through the electoral list which ran for the election under one number and won the largest number of seats or the bloc which is

ballot by suspected Sunni Islamist insurgents seeking to exploit the political vacuum and tensions between Sunnis and Shi'ites.").

293. Thomas L. Friedman, Op-Ed., *It's Up to Iraqis Now. Good Luck.*, N.Y. TIMES, Mar. 10, 2010, at A27.

294. See Dawisha, *supra* note 38, at 39 (noting that the political leaders suggest that the commitment to democracy is contingent on some benefit accruing to their personal capacity, such as obtaining the prestigious position of Prime Minister).

295. Article 76, Doustour Joumhouriat al-Iraq of 2005.

296. *Iraqi Court Seals Secular Bloc's Election Margin but Shiites Still Likely to Form Government*, FOXNEWS.COM, June 1, 2010, <http://www.foxnews.com/world/2010/06/01/iraqs-court-ratifies-election-results-declares-secularist-iraqiya-bloc-biggest/>.

297. *Id.*

formed of two or more lists which ran for election under different names or numbers and then coalesced into one entity in the Council of Representatives. Either of these that has the largest number of seats is the bloc whose nominee the President must call upon to form a government at the first meeting of the Council of Representatives.²⁹⁸

Thus, according to the FSC, the election results did not necessarily determine which party had the first right to form a government. That privilege would go to whichever party was able to form a coalition with the largest number of seats by the time the CoR was sworn in. This result left the door open to both al-Maliki and Allawi and further prolonged the government-formation process.

Allawi publicly dismissed the FSC opinion and even alleged that the FSC did not have jurisdiction to answer the question posed by al-Maliki.²⁹⁹ In an op-ed in the *Washington Post*, Allawi wrote: "As the winner of the election, our political bloc should have the first opportunity to try to form government through alliances with other parties. Yet Maliki continues seeking to appropriate that option for his party, defying constitutional convention and the will of the people."³⁰⁰

The FSC opinion was largely perceived, both in Iraq and internationally, as politically motivated.³⁰¹ The Court did not explain how it reached its interpretation of Article 76, and this failure to explain undoubtedly contributed to the criticism. The meaning of Article 76, however, was hardly clear at the time the Constitution was enacted. Records from the constitutional committee contain few clues as to the drafters' intent,³⁰² and the provision, as with many

298. Al-Mahkama al-Ittihadiyya al-'Ulya, decision No. 25 of 2010, available at <http://www.gpi.org/2010/03/28/federal-supreme-court-opinion-on-article-76-of-the-constitution-concerning-the-nomination-of-the-prime-minister>.

299. Reidar Visser, *Iraqiyya Challenges the Jurisdiction of the Federal Supreme Court*, IRAQ & GULF ANALYSIS (Mar. 31, 2010, 7:52 PM), <http://gulfanalysis.wordpress.com/2010/03/31/iraqiyya-challenges-the-jurisdiction-of-the-federal-supreme-court>.

300. Ayad Allawi, *The Risk of Losing Iraq*, WASH. POST, June 10, 2010, at A19.

301. One commentator stated: "In a disappointing reversal of the earlier (and more democratically principled) understanding of Article 76, the Supreme Court adopted al-Maliki's reading of Article 76." Jason Gluck, *A Step Backwards for the Iraq Judiciary*, COMPARATIVE CONSTITUTIONS (Mar. 31, 2010, 8:13 AM), <http://www.comparativeconstitutions.org/2010/03/step-backwards-for-iraqi-judiciary.html>. A *New York Times* article similarly implied that the Court had succumbed to political pressure: "[A] day before the results were announced, [al-Maliki] quietly persuaded the Iraqi [S]upreme [C]ourt to issue a ruling that potentially allows him to choose the new government instead of awarding the right to the winner of the election, the former interim prime minister, Ayad Allawi." Rod Nordland, *Maliki, Trailing in Iraq Vote, Is Contesting the Result*, N.Y. TIMES, Mar. 28, 2010, at A4. It added "there could be widespread dissatisfaction if Mr. Maliki were given the first opportunity to form a government." *Id.*

302. Reidar Visser, *The Hamudi Files and Article 76*, IRAQ & GULF ANALYSIS (June 10, 2010, 3:05 PM), <http://gulfanalysis.wordpress.com/2010/06/10/the-hamudi-files-and-article-76>.

other contested articles, was likely left intentionally vague.³⁰³ After the Constitution was enacted, politicians continued to debate the meaning of this provision.³⁰⁴ Ironically, prior to the elections, Sunni politicians argued for the interpretation ultimately given by the FSC.³⁰⁵

There are reasons to believe that the Court reached the more reasonable interpretation of Article 76. First, the premise of parliamentary democracy is that the executive is linked and responsible to the legislature.³⁰⁶ The chief executive is chosen by Parliament and can ultimately be dismissed by it.³⁰⁷ In practice, this means that unless one party wins an outright majority, election results generally leave open a number of different coalition possibilities, requiring parties to negotiate among themselves to form a government that will gain the support of a majority of Parliament.³⁰⁸ A party's bargaining power generally increases with the number of seats that it wins in the elections,³⁰⁹ but a mere plurality of seats does not guarantee that a party will have the right to form the government.³¹⁰

The FSC's opinion reinforces the principle that the executive's right to govern is derived from parliamentary approval rather than the percentage of votes it receives in the national election (as is the

303. See Feldman & Martinez, *supra* note 14, at 916 ("In many cases, the imprecision of the final text was not the result of sloppy drafting or carelessness, but rather the product of conscious strategies by competing drafters to defer certain contentious political issues for resolution in the future.").

304. *Id.*

305. Haider Ala Hamoudi, *The Iraqi High Court's Understated Rise to Legitimacy*, JURIST (Apr. 23, 2010), <http://jurist.law.pitt.edu/forumy/2010/04/iraqi-high-courts-understated-rise-to.php>.

306. Jean Blondel, *Introduction to CABINETS IN WESTERN EUROPE* 1 (Jean Blondel & Ferdinand Müller-Rommel eds., 2d ed. 1997).

307. See *id.* (noting the inability of the "government" to exist absent the consent of Parliament).

308. MICHAEL LAVER & NORMAN SCHOFIELD, *MULTIPARTY GOVERNMENTS: THE POLITICS OF COALITION IN EUROPE* 89 (1998).

309. *Id.* at 175.

310. See generally *CABINETS IN WESTERN EUROPE*, *supra* note 306 (providing an overview of cabinet government functions in several European countries). The May 2010 elections in the United Kingdom provide a timely example. In those elections, the Conservative Party won a plurality of the seats in Parliament. See Alan Travis, *Hung Parliament: David Cameron Has Momentum, but Brown Still Has Power*, GUARDIAN, May 7, 2010, at 6. Gordon Brown's, the incumbent Prime Minister, Labour Party won the second greatest number of seats, while the Liberal Democrats came in third. *Id.* Prime Minister Brown stated that he would respect the Conservative's right to enter into discussions with the Liberal Democrats to form a ruling coalition, but left open the possibility of a Labour-Liberal Democrat alliance if discussions between the Conservatives and Liberal Democrats failed. *Id.* Such a result would have excluded the Conservatives, the single largest party, from the government.

case in presidential systems).³¹¹ It would be pointless—not to mention a waste of time—for the President to charge the nominee of the largest pre-election bloc with forming a government if another bloc has succeeded in establishing a post-election majority alliance. In such a circumstance, the majority alliance would refuse to approve the proposed CoM, thereby obliging the President to charge the nominee from the alliance with government formation. The FSC opinion thus acknowledged that, from an operational standpoint, whichever pre-election bloc is able to form a post-election majority alliance will ultimately form the government, and there is little point to go through the formality of having a minority bloc propose a CoM that will not be confirmed. For this reason, in most other parliamentary democracies, the head of state does not nominate a Prime Minister until it is clear that the nominee will be able to survive a vote of confidence.³¹²

The FSC opinion is also supported by a textual argument. Article 76 specifically refers to the largest “Council of Representatives” bloc.³¹³ There arguably cannot be a “Council of Representatives bloc” until the CoR is convened by the President and sworn in. If the framers of the Constitution had wanted to inhibit post-election alliances, they could have given the right to form the government to the “electoral list” or “electoral bloc” that won the most seats.

B. *The (On Again Off Again On Again) First Session of the CoR*

As the debate between al-Maliki and Allawi raged, President Talabani called the CoR to session on June 14, 2010, as required by Article 54 of the Constitution.³¹⁴ In the first session, the CoR’s primary constitutional duty was to elect the Speaker and two Deputy Speakers.³¹⁵ When the session was called, however, there was no

311. Chibli Mallat, *Supreme Court’s Opinion of Article 76 of the Iraqi Constitution*, DAILY STAR (Beirut), Apr. 1, 2010, <http://www.mallat.com/LawPageDS/Note1April2010a.pdf>.

[T]he choice of the prime minister is premised on his chances to form a government that gets a vote of confidence, and this always depends on the coalition he is capable of forming after the election. There is no point in nominating the head of the largest bloc if he is incapable of getting his government past the vote of confidence which ultimately determines in a parliamentary system such as Iraq’s the validity of the Council of Ministers and the beginning of its rule.

Id.

312. See LAVER & SCHOFIELD, *supra* note 308, at 208–10.

313. Article 76, Doustour Joumhouriat al-Iraq of 2005.

314. U.N. Secretary-General, *supra* note 289, ¶ 7.

315. Article 55, Doustour Joumhouriat al-Iraq of 2005.

agreement on whom to elect as Speaker.³¹⁶ This position would likely be part of a larger package that would include the Prime Minister, President, and key ministers.³¹⁷ Accordingly, the Acting Speaker, Fuad Massoum, suspended the first session nineteen minutes after the COR convened.³¹⁸

Negotiations continued throughout the summer with little progress. Allawi and al-Maliki each asserted that they had the right to form the government,³¹⁹ and discussions on a unitary government went nowhere. Instead, both sides worked furiously to gain the support of the INA and the Kurdish Alliance in order to reach the magic number of 163.³²⁰ In May, SoL and INA struck a tentative deal to form a new alliance, the National Alliance, giving them 159 seats, 4 short of a majority.³²¹ The formation of this alliance, however, did not end the deadlock. INA and SoL were unable to agree on the alliance's candidate for Prime Minister.³²² ISCI distrusted al-Maliki's secular tendencies and was concerned about his attempts to consolidate power in the executive branch throughout his first term.³²³ The Sadrists were even more opposed to nominating al-Maliki for a second term as Prime Minister, because they still resented al-Maliki for his decision to forcefully disarm the Mahdi Army, a Sadrist paramilitary group.³²⁴ Allawi continued to argue (especially to predominately Sunni countries and Western diplomats) that his party had the right to form the government and that Sunnis would resist any government that did not include a significant role for Iraqiyya.³²⁵

316. Jane Arraf, *Iraq Parliament Sits; Politicians Say New Government Months Away*, CHRISTIAN SCI. MONITOR, June 14, 2010, <http://www.csmonitor.com/World/Middle-East/2010/0614/Iraq-parliament-sits-politicians-say-new-government-months-away>.

317. *Id.*

318. Ned Parker, *Iraq's New Parliament Holds Its First Session as Political Deadlock Continues*, L.A. TIMES, June 15, 2010, at A7.

319. *See, e.g.*, Arraf, *supra* note 316 (noting that Allawi argued that the two-seat lead in the election entitled him to form government; conversely, al-Maliki contends that his alliance's greater number of seats gave it that right).

320. Marina Ottaway & Dania Kaysi, *Iraq: Movement Without Progress*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 18, 2010), <http://carnegieendowment.org/publications/index.cfm?fa=view&id=41743>.

321. Steven Lee Myers, *Shiite Blocs Unite, Bolstering Their Parties and Ensuring Continued Control in Iraq*, N.Y. TIMES, May 5, 2010, at A5.

322. *Id.*

323. KIRK H. SOWELL, NURI MALIKI, THE SHIA FACTIONS AND IRAQ'S PROVINCIAL COALITIONS 2-3 (2009), <http://www.kirksowell.com/Content/Documents/Maliki,%20Shia%20Factions%20and%20Iraq's%20Provincial%20Elections.pdf> (detailing ISCI uneasiness at al-Maliki's power consolidation measures and, although the extent that ISCI religious objections exceed political objections remains unclear, their eventual depiction of al-Maliki as an ally of the "infidel occupier").

324. Basim al-Shara, *Sadrists Seek Role as Kingmakers in Iraq*, MIDDLE E. ONLINE, Sept. 14, 2010, <http://www.middle-east-online.com/english/?id=41320>.

325. U.N. Secretary-General, *supra* note 289, ¶ 8.

Amid an ominous surge in violence and the planned departure of U.S. combat troops by August 31, the international community stepped up its efforts to broker a deal that would establish a national unity government.³²⁶ Ad Melkert urged leaders to work together “with a higher sense of urgency” to form a government.³²⁷ The United States supported a proposal to establish a new position for Allawi as the head of a “council on national strategy,” which would provide a check on the Prime Minister’s powers and potentially facilitate a satisfactory power sharing arrangement.³²⁸

Al-Maliki’s chances of gaining the premiership improved in October when the Sadrists dropped their opposition to a second term, reportedly in return for control over key ministries.³²⁹ Al-Maliki still lacked support, however, from ISCI (who supported Vice President Adel al-Mahdi) and the Kurds (who demanded concessions regarding Kurd autonomy before backing a candidate for Prime Minister).³³⁰

The FSC was required to intervene in the moribund government-formation process again after an independent watchdog group requested that the Court order the CoR back to work.³³¹ The plaintiff argued that the Interim Speaker’s decision to keep the first session open indefinitely “violated the Constitution and caused the delay in the government formation for a long time which caused, and [was] still causing, a direct harm to the interests of the citizens in general.”³³²

The FSC noted that the Constitution requires the CoR to elect the Speaker and two Deputy Speakers in its first session.³³³ The CoR is also required to elect the President within thirty days of first convening, so that the President can assume constitutional duties, “particularly, tasking the nominee (of the parliamentary bloc with the

326. Sam Dagher, *Iraq Weighs Solution to Logjam: Politicians Discuss New Federal Post that Would Balance Power, Clear Way to Form a Government*, WALL ST. J., Aug. 16, 2010, at A7.

327. Press Release, UNAMI, Sec. Council Extends UN Presence in Iraq for Another Year (Aug. 5, 2010). Secretary-General Ban Ki-Moon also expressed his concerns: “I am concerned that continued delays in the government formation process are contributing to a growing sense of uncertainty in the country.” *Id.* “Not only does this risk undermining confidence in the political process, but elements opposed to Iraq’s democratic transition may try to exploit the situation.” *Id.*

328. Dagher, *supra* note 326, at A7.

329. Jane Arraf, *Iraqi Prime Minister Nouri Al-Maliki: Iraq Within Days of Ending Political Stalemate*, CHRISTIAN SCI. MONITOR, Oct. 8, 2010, <http://www.csmonitor.com/World/Middle-East/2010/1008/Iraqi-Prime-Minister-Nouri-al-Maliki-Iraq-within-days-of-ending-political-stalemate>.

330. Ottaway & Kaysi, *supra* note 320.

331. *Iraqi Court Orders Parliament to Meet Amid Stalemate*, AL ARABIYA, Oct. 24, 2010, <http://www.alarabiya.net/articles/2010/10/24/123500.html>.

332. Al-Mahkama Al-Ittihadyya Al-Ulya, decision No. 56/federal/2010 of October 24, 2010 (translation on file with authors).

333. *Id.*

highest number) to form the Council of Ministers.”³³⁴ The FSC held that the CoR’s failure to perform these duties “within the constitutional time limits” and the indefinite suspension of the first session “constitute[d] a breach of [the CoR’s] mandate.”³³⁵ Accordingly, the FSC decided to “compel the Defendant, in his official capacity as the Interim Speaker of the CoR, to invite the CoR to convene and resume the tasks of its first session as stipulated in Article 55 of the Constitution.”³³⁶ In a departure from its customary practice, the Court also took the opportunity to rebuke the CoR by stating that its failure to act “signal[ed] a deficiency in the pillars of the republican parliamentary system . . . [and moved] governance away from the democratic path chosen by the people when they voted on the Constitution and when they expressed their choice through ballot boxes to elect their representatives in the legislative authority.”³³⁷

Interim Speaker Massoum stated that he had no choice but to follow the Court’s order. He would “call the leaders of the political blocs for a counselor’s meeting and expect[ed] to announce the date for the first session by the end of [the] week.”³³⁸ The CoR reconvened on November 11, 2010, after the main political blocs reached a tentative power-sharing agreement that promised to end the political gridlock.³³⁹ Allawi agreed to concede the premiership to al-Maliki, who had solidified political support from the Shia blocs in recent months. In exchange, Allawi would assume a new post as head of the National Council for Higher Strategies, whose powers and responsibilities would be set forth later in implementing legislation.³⁴⁰ In addition, the CoR would exempt three prominent candidates of the Iraqiyya Alliance, including Saleh al-Mutlaq, from the de-Ba’athification process.³⁴¹

The CoR proceeded to elect members from the three main sects to top posts. Jalal Talabani (Kurd) was reelected as President and

334. *Id.*; see also Article 72, Section 2(B), Doustour Joumhouriat al-Iraq of 2005 (providing that the President shall continue to exercise duties until the election of the new President).

335. Al-Mahkama al-Ittihadiyya al-'Ulya, decision No. 56/Federal/2010.

336. *Id.*

337. *Id.*

338. Hamid Ahmed, *Iraqi Court Forces Parliament Back to Work*, ASSOCIATED PRESS, Oct. 24, 2010, available at <http://www.washingtontimes.com/news/2010/oct/24/iraqi-court-forces-parliament-back-work>.

339. U.N. Secretary-General, *supra* note 289, ¶¶ 3–4; see also Steven Lee Myers, *Reversing Course, a Former Holdout Pulls Iraq Toward a Political Anchor*, N.Y. TIMES, Dec. 16, 2010, at A20 (detailing how Allawi’s decision to join the alliance paved way for the formation of a new government).

340. U.N. Secretary-General, *supra* note 289, ¶ 4.

341. *Id.*; see also Jack Healy, *Parliament Vote Puts Iraq Closer to a New Government*, N.Y. TIMES, Dec. 19, 2010, at A10 (discussing the change in political dealings following the reinstatement of the disqualified candidates).

Osama al-Nujafi (Sunni) was elected as Speaker of the Parliament. Immediately following his reelection, President Talabani asked Nuri al-Maliki (Shia), the Prime Minister designate, to form a new government. On December 21, the CoR approved the CoM proposed by al-Maliki (albeit with a few key ministers yet to be determined), ending a nine-month political saga that sorely tested Iraq's commitment to democracy.³⁴²

VI. AN EMERGING JUDICIAL INDEPENDENCE: REALIZING "THE GREATEST CHALLENGE"³⁴³

The 2010 elections provide an opportunity to reflect on the Iraqi judiciary's progress in establishing the rule of law and its commitment to judicial independence. On both counts, there are reasons to be cautiously optimistic. Throughout the elections saga, the FSC has diffused politically charged controversies, promoted political dialogue and consensus, and issued decisions that are legally defensible.

To realize the concept of an independent judiciary envisioned in the Constitution, the Court has had to act as the consummate politician, encouraging consensus and political compromise through earnest dialogue and fostering public confidence in the rule of law and the democratic process, while ensuring that the true political branches comported with the letter and spirit of the Constitution. This was, and remains, no easy task. The Court has succeeded in this endeavor remarkably well, navigating the most delicate issues in an infant democracy in a way that has enhanced its legitimacy as an independent and neutral arbiter of issues pivotal to national cohesion.

Courts in new democracies, particularly in post-conflict societies, must proceed cautiously, casting opinions to develop political support and refraining, to the extent possible, from moving ahead of public opinion as they work to establish the judiciary as an impartial body through which to resolve disputes regarding governance.³⁴⁴ The FSC

342. John Leland & Jack Healy, *After Months, Iraqi Lawmakers Approve a Government*, N.Y. TIMES, Dec. 22, 2010, at A6.

343. See John G. Roberts, Jr., *William H. Rehnquist: A Remembrance*, 31 VT. L. REV. 431, 436 (2007).

[E]stablishing an independent judiciary is the greatest challenge for emerging democracies. In some sense, getting to the point of a free election is the easy part. What is hard is establishing a judiciary that is capable of enforcing the rule of law against the government as well as against the governed.

Id.

344. Jonathan Zasloff, *The Tyranny of Madison*, 44 UCLA L. REV. 795, 862 (1997).

appears to understand these dynamics well. Its opinions throughout the electoral saga evince a focus on adherence to the Constitution and the fundamental rights enshrined therein, an effort to avoid direct engagement with the substance of highly sensitive political issues, a commitment to drafting narrowly tailored opinions, and an operating theory of judicial restraint geared toward promoting political dialogue. Although much room for growth remains, the FSC can find the fruits of its labor thus far in the executive and legislative branches' compliance with its decisions and in lower and administrative courts that practice the same philosophy of judicial restraint.

A. Upholding the Constitution: The FSC's Charge and Chief Objective

The Court has not shied away from demanding compliance with the Constitution. Perhaps no case is more illustrative than the decision invalidating Article 15 of the 2005 Election Law.³⁴⁵ On the heels of the elections establishing the first post-invasion Parliament, the Court was presented with a potentially explosive question: was a provision of the law by which the new government was elected invalid under the terms of the new and narrowly approved Constitution? To invalidate Article 15 of the Election Law could risk undermining the legitimacy of the new government at a critical juncture in the country's development. To uphold it could weaken respect for the country's foundational document and subject the Court to claims that it had bowed under political pressure to support the nascent leadership.

The Court also must have understood how difficult it would be to adhere strictly to the terms of Article 49(1) of the Constitution, which requires one parliamentary representative for every "100,000 Iraqi persons representing the entire Iraqi people."³⁴⁶ As discussed in Part II.B, accurate census data was not available or feasibly attainable for resident Iraqis, let alone for Iraqis abroad.

Amid these challenging circumstances, the Court rendered a clear and forceful opinion: "article (15/second) of the elections law No. 16/2005 presents clear violation to article (49/second) of the constitution" and is therefore invalid under Article 13(2) of the Constitution.³⁴⁷ The Court's opinion furthered Iraq's long-term interest in preserving the Constitution's mandate that all Iraqi people wherever situated are entitled to the same degree of democratic representation. As was later demonstrated in the 2010 electoral process, a challenging political environment and limited resources do

345. Al-Mahkama al-Ittihadiyya al-'Ulya, decision No. 15/t/2006 of April 26, 2007.

346. Article 49, Section 1, Doustour Joumhouriat al-Iraq of 2005.

347. Al-Mahkama al-Ittihadiyya al-'Ulya, decision No. 15/t/2006.

not excuse the need to work towards realization of the constitutional mandate.

The Court also addressed a second challenge that Article 15 was incompatible with Article 31(A) of the TAL, the body of law that governed the country during the elections and until the new Parliament was seated.³⁴⁸ The Court, denying the petitioner's claim, found that there was no contradiction between the two provisions, which were "[i]n fact . . . consistent," and the claim accordingly was not "based on [a] sound legal basis."³⁴⁹ Although critics could argue that the newly seated government would not be representative of the people under the new Constitution, the Court firmly backed the legitimacy of the process by which the government was elected under the relevant law at the time, and it thereby issued a reasoned opinion that both upheld the Constitution as the law of the land and preserved the legitimacy of the elected government.

The Court's dedication to upholding the Constitution is also evident in its opinion clarifying the election deadline date.³⁵⁰ Interpreting relevant articles of the Constitution, the Court had plausible arguments for holding either that the first session began on the date that the CoR first convened or that the first session occurred five weeks later on the date that the CoR performed its first session duties.³⁵¹ Although the latter conclusion would have given the CoR more time to resolve the immediate crisis, it would also have cut against Iraq's long-term interests in establishing a stable and reliable form of government, a fact that is readily apparent in light of the six-month stalemate on government formation. Reflecting the Constitution's mandate for peaceful transition of governments with set electoral terms, the Court's decision to use the earlier date provided an incentive for the CoR to act in a timely manner or risk the political cost of being perceived to unconstitutionally extend its mandate.

The Court also focused the public eye on the CoR in its October 24 opinion determining that the CoR's indefinite open session was unconstitutional.³⁵² Despite the dangers of wading into a political controversy of this magnitude, the Court issued a forceful decision, clearly stating that the CoR cannot alter or act beyond the

348. *Id.* Article 31(A) provides: "The National Assembly shall consist of 275 members. It shall enact a law dealing with the replacement of its members in the event of resignation, removal, or death." Law of Administration of the State of Iraq During the Transitional Period of 2004. The new Parliament did in fact consist of 275 members under Article 15's calculus of registered voters. *Id.*

349. Al-Mahkama al-Ittihadiyya al-'Ulya, decision No. 15/t/2006.

350. Al-Mahkama al-Ittihadiyya al-'Ulya, decision No. 29/Federal/2009 of May 13, 2009.

351. *Id.*

352. Al-Mahkama al-Ittihadiyya al-'Ulya, decision No. 56/Federal/2010 of October 24, 2010.

constitutional parameters of its term and calling for the CoR to reconvene.³⁵³ This decision indicated the Court's growing confidence as the ultimate interpreter of the Constitution.

B. *The FSC's Methodology*

As this Article demonstrates, the Court was presented with many difficult and critical issues in the run-up to the 2010 election. Its opinions, perhaps intentionally, have not always evinced the same measure of firmness or included a detailed analysis. The FSC is a young court in a country where judges who dared to flout instructions from Saddam's regime were often removed or imprisoned.³⁵⁴ In developing democracies generally, judges face threats to their physical safety and job security, and it is far from certain that political officials will comply with judicial orders.³⁵⁵ Under such conditions, "[s]trategic self restraint is the best course for judges in new democracies when faced with cases in which major state actors show considerable interest."³⁵⁶ The FSC has demonstrated such restraint, as well as a sophisticated political acumen, through opinions that are process focused, narrowly tailored, and pragmatic.

1. Judicial Restraint

Where possible, the Court has refrained from opining on matters of substance in controversial issues. The FSC has not formally developed a political question doctrine, which would be difficult given the Court's advisory jurisdiction.³⁵⁷ Nevertheless, its opinions have concentrated on the precise issue under debate and have refrained from opining on constitutional issues that do not require immediate resolution. Moreover, the FSC has relied on judicially manageable standards for resolving issues brought before it, which has helped to mitigate criticism that its opinions are politically motivated. Just as judges seeking to protect their courts in new democracies will sometimes seek to avoid deciding cases against powerful political

353. *Id.*

354. *See, e.g.*, A. Kevin Reinhart, Professor of Religion, Dartmouth Coll., Reconstruction and Constitution Building in Iraq, Address at Vanderbilt Univ. Law Sch. (Jan. 23, 2004), in 37 VAND. J. TRANSNAT'L L. 765, 781 (describing an Iraqi judge who had been jailed for invalidating one of Saddam's edicts on property as unconstitutional).

355. Peter Vondoepp, *Politics and Judicial Assertiveness in Emerging Democracies: High Court Behavior in Malawi and Zambia*, 59 POL. RES. Q. 389, 390 (2006).

356. *Id.* at 391.

357. *See, e.g.*, Al-Mahkama al-Ittihadyya al-'Ulya, decision No. 29/Federal/2009 of May 13, 2009. This opinion was issued in response to a direct request by the Speaker of the Council of Representatives.

actors,³⁵⁸ if a court must decide such cases, it benefits from framing the issue so that the outcome does not appear to merely favor one political actor over another.³⁵⁹

The Court's opinion on the constitutionality of Vice President al-Hashimi's veto of the Election Law amendments provides a good example. The question presented by the CoR—whether the “reasons upon which [al-Hashimi] based his abstinence to the first amendment for the election law” were constitutional³⁶⁰—could have provided the Court with an opportunity to reinforce its opinion invalidating Article 15 of the Election Law or to otherwise comment on the constitutionality of the content of the proposed amendment, thereby choosing sides between the legislative and executive branches. The Court also could have opined on the contours of the veto power, an issue upon which the Constitution itself is silent but which was not necessary to resolve the instant political debate.³⁶¹ The Court chose to steer clear of these potential minefields in an opinion that provided simply, if somewhat obtusely, that the amendment raised a constitutional question and that members of the Presidency Council could refrain from approving legislation that they thought to be in conflict with the Constitution.³⁶²

In 2007, the Court again took this approach, limiting its holding on the constitutionality of Article 15 of the Election Law to a determination that the text of Article 15 was incompatible with

358. Vondoepp, *supra* note 355, at 391.

359. Zasloff, *supra* note 344, at 843.

The judicial system in an emerging democracy must act in such a way that citizens will look to *it* and not to violence as a way of resolving social and even political disputes. Judges in a fragile democracy, then, must self-consciously act with a political goal in mind: enhancing their own authority. Their rulings must be calculated to attract favorable opinion about the judiciary as an institution.

Id.

360. Al-Mahkama al-Ittihadyya al-'Ulya, decision No. 72/Federal/2009 of November 19, 2009, available at <http://www.gpi.org/wp-content/uploads/fsc-opinion-72-of-2009.pdf>.

361. Article 138, Section 5, Doustour Joumhouriat al-Iraq of 2005.

362. See *supra* Part III.B. This strategy is reminiscent of that successfully employed by the U.S. Supreme Court in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). In *Fletcher*, the Court had to choose between affirming a Georgia legislature's rescission of title to land grants originally made by the State in exchange for bribes, which had since changed hands, and affirming the prior legislature's transactions. *Id.* at 87–88. Rather than examine legislative motivations, which Chief Justice Marshall opined could only be undertaken “with much circumspection,” the Court centered its opinion on the established principle of vested rights, distilling the issue to simply “a question of title.” *Id.* at 130, 133. Like the Marshall Court, the FSC in the Hashimi veto case “diffused a heated political controversy and evoked little negative comment because it avoided dealing with the politics of the issue.” Zasloff, *supra* note 344, at 858.

Article 49(1) of the Constitution.³⁶³ Finding that voter registration records were not a suitable proxy for determining parliamentary representation under the Constitution, the Court did not opine further on what mechanisms would comport with Article 49(1) (for instance, a new and wholly representative census), leaving that issue to the political branches.³⁶⁴ This strategy reaped dividends in the al-Hashimi veto case: if the Court had specified criteria for voter representation, it would have been called upon to determine whether the new amendment comported with those parameters, potentially igniting an already controversial issue and casting doubt on Iraq's ability to hold legitimate elections.

2. Promoting Political Dialogue

The Court's opinions have underscored the need for political consensus and accommodation within the bounds of the Constitution. In issuing such opinions, the Court has demonstrated its long-term outlook on the development of a democratic system by creating case law that resolves the core legal questions necessary for resolution of a dispute while providing space for the political process to move forward.

The Court's opinion determining the method for calculating the ten-day veto window provides a useful illustration.³⁶⁵ Once the Court affirmed that al-Hashimi's veto was constitutional, the CoR returned to session to address his concerns.³⁶⁶ However, some members still argued that the window for a veto had passed and al-Hashimi's threat was therefore inconsequential.³⁶⁷ On December 3, 2009, the Court, noting that Article 138(5) of the Constitution was silent on this question, extrapolated from the method set forth in the Civil Procedure Code of 1969 to determine that the ten-day window could not expire on a holiday and therefore would expire on December 6.³⁶⁸

The Court's opinion relied on established legal procedures, reinforcing the general rule outlined in the Civil Procedure Code.³⁶⁹ In doing so, the Court implicitly acknowledged—as had its earlier opinion on the veto itself³⁷⁰—that the underlying basis for al-

363. Al-Mahkama al-Ittihadiyya al-'Ulya, decision No. 15/t/2006 of April 26, 2007.

364. *Id.*

365. *See supra* Part III.B.

366. Hamoudi, *supra* note 305.

367. *Id.*

368. Al-Mahkama al-Ittihadiyya al-'Ulya, decision No. 76/Federal/2009 of December 3, 2009. Article 25, Section 2 of the Civil Procedure Code 83 of 1969 provides: "[I]n case the period ends during an official holiday, it is extended to the following working day."

369. Al-Mahkama al-Ittihadiyya al-'Ulya, decision No. 76/Federal/2009.

370. *Id.*

Hashimi's and other Sunni politicians' opposition would have to be reconciled through political dialogue and consensus building. To foreclose the legal avenues enabling such compromise could upset the entire electoral process and alienate a significant portion of the population. The Court's opinion, set out in neutral terms that—to the extent it was not already so—made the result appear preordained, drew political actors back into the dialogue at a critical juncture, further establishing the judiciary as an independent branch with a particular, well-defined role to play in the process of governance.³⁷¹

The Court's pragmatic approach to these divisive political issues may best be exemplified by its post-electoral interpretation of the Constitution's instruction that the government be formed by "the nominee of the largest Council of Representatives bloc."³⁷² Whether this provision referred to the largest pre-election or post-electoral coalition was a hotly contested issue even before the elections, with SoL and Iraqiyya both flipping their positions once the election results were announced.³⁷³ This question became critical to post-electoral government formation because of the narrow margin separating SoL and Iraqiyya.³⁷⁴ Without the Court's blessing, a prevailing opinion by either party would be subject to serious question, and yet by taking up the issue, the Court took the very real risk that it would be maligned or undermined by one side or the other.³⁷⁵

Taking a Solomonian approach, the Court opined that the "largest Council of Representatives bloc" could refer to either the largest electoral bloc or a post-electoral majority alliance, whichever "of these ha[d] the largest number of seats."³⁷⁶ This opinion left the door open to both Allawi and al-Maliki, promoting further political dialogue on who would ultimately make up the CoM. Although the Court may be criticized for equivocating and thus contributing to a prolonged, contentious, and potentially destabilizing government-formation process, the Court's opinion underscores that the Constitution's requirement that the CoM be approved by a majority of Parliament makes political compromise an inevitable necessity.³⁷⁷

371. Zasloff, *supra* note 344, at 850–51; Article 76, Doustour Joumhouriat al-Iraq of 2005.

372. Article 76, Section 1, Doustour Joumhouriat al-Iraq of 2005 ("The President of the Republic shall charge the nominee of the largest Council of Representatives bloc with the formation of the Council of Ministers within fifteen days from the date of the election of the President of the Republic.").

373. Hamoudi, *supra* note 305 (noting that for months prior to the election "[t]he provision had been deeply and seriously debated in legal and political circles").

374. See *supra* Part V.

375. Hamoudi, *supra* note 305.

376. Al-Mahkama al-Ittihadiyya al-'Ulya, decision No. 25 of March 25, 2010.

377. See *supra* Part V. It would be pointless for the President to charge the nominee of the largest pre-election bloc with forming a CoM if another bloc has succeeded in establishing a post-election majority alliance since the majority alliance

The Court's opinion was framed in a politically neutral manner, thereby avoiding the appearance that it favored one political party over the other. Although Iraqiyya initially voiced displeasure at the ruling,³⁷⁸ this measured decision, which perhaps took into consideration the spectrum of anticipated reactions³⁷⁹ and which was "of potentially enormous consequence," was accepted by the major parties.³⁸⁰ The Court was thus able to defuse a potentially incendiary debate and further reinforce its position as a neutral arbiter of critical disputes.

The Court's October 24 opinion was also designed to break the political stalemate that was threatening to undermine the democratic process. By rebuking the CoR for its failure to comply with its constitutional mandate, the Court pressured political leaders to negotiate a compromise and increased the costs for those politicians who were perceived to be dragging out negotiations or making unreasonable demands.³⁸¹ At the same time, the Court did not demand that the CoR meet by a specific date, perhaps out of awareness that a violation of such an order could undermine the Court's legitimacy in the long-term.

B. *The Court's Legitimacy as Head of an Independent Third Branch of Government*

As the cases concerning Iraq's 2010 parliamentary elections illustrate, the Federal Supreme Court, under challenging circumstances, has done a remarkable job of strengthening its position as Iraq's independent, impartial, and capable high court. The Court's growing stature is further evidenced by executive and legislative branch compliance with its decisions, some of which required decisive action on critical issues in divisive political climates. It is also evident in lower and administrative court emulation of the Court's judicial posture, especially in the context of

would simply refuse to approve the proposed CoM, thereby requiring the President to charge the alliance's nominee with forming the government.

378. See Allawi, *supra* note 300, at A19 (admitting the political necessity of a coalition government); Visser, *supra* note 299 (making a structural argument for the benefits of coalition building).

379. See Vondoepp, *supra* note 355, at 389 ("[S]cholars have indicated that judges make decisions based significantly on the anticipated reactions to those decisions by other institutional and political actors.").

380. Hamoudi, *supra* note 305.

381. See Anthony Shadid, *Iraqi Court Issues Ruling for Parliament to Return*, N.Y. TIMES, Oct. 25, 2010, at A4 (commenting on the Court's order for Parliament to resume its sessions or face further court action); *Iraqi Court Orders Parliament to Meet Amid Stalemate*, *supra* note 331 (quoting interim Speaker Fuad Massoum's belief that the decision "will accelerate the government formation," and that he expects to schedule a session within days of formal receipt of the Court's opinion and consultation with parliamentary blocs).

the de-Ba'athification crisis and the vote recount in Baghdad Province.

1. Compliance with FSC Decisions

“Executive noncompliance with judicial review is a particularly acute problem in younger constitutional systems and in the systems of less-developed countries.”³⁸² In such systems, a judiciary’s “assertions of binding judicial review often bring more constitutional harm than constitutional benefit, particularly when executive or governmental noncompliance provokes constitutional or political crisis that the fragile, emergent constitutional order is not yet strong enough to weather.”³⁸³ Judges in transitional democracies must accordingly seek to avoid the potentially destabilizing effects of an executive challenging the court to enforce its opinions against the government.³⁸⁴

Fortunately, such a scenario has not played out in Iraq. Government actors and political candidates largely have complied with FSC decisions, due in large part to the manner in which the FSC has addressed the delicate issues brought before it.³⁸⁵ Far from overreaching, the Court provided political actors with a critical framework within which to negotiate by structuring its opinions to require adherence to the Constitution while leaving open maximum space for resolution of these difficult issues. In this manner, the Court has facilitated the pre-electoral and post-electoral political process and has encouraged Iraqi politicians to continue to bring such matters before it for resolution.³⁸⁶

One potential outlier to the general compliance with the FSC’s opinions is the Iraqi government’s failure to hold the elections on or before January 30, 2010.³⁸⁷ The election took place more than one

382. Michael William Dowdle, *Of Parliaments, Pragmatism, and the Dynamics of Constitutional Development: The Curious Case of China*, 35 N.Y.U. J. INT’L L. & POL. 1, 28 (2002).

383. *Id.*

384. Zasloff, *supra* note 344, at 858 (citing as an example Andrew Jackson’s reported reply to the U.S. Supreme Court’s decision in *Cherokee Nation v. Georgia*, “Justice Marshall has written his opinion—now let him enforce it”).

385. Shannon Roesler, *Permutations of Judicial Power: The New Constitutionalism and the Expansion of Judicial Authority*, 32 LAW & SOC. INQUIRY 545, 558 (2007) (noting that federal government compliance with court decisions adverse to the government’s interest can be an important indicator of judicial independence, particularly when those decisions have profound effects on political power).

386. *Id.* at 557 (“Constitutional drafters create constitutional courts with broad review powers when they cannot guarantee their reelection in order to ensure they have a forum in which to challenge adversaries.”).

387. Al-Mahkama al-Ittihadyya al-Ulya, decision No. 29/Federal/2009 of May 13, 2009.

month later, on March 7, owing to the combination of the veto controversy and the AJC's de-Ba'athification efforts. In post-conflict societies, however, "partial deviation from strict adherence to democratic norms might be justified based on certain conditions that often prevail in transitional societies."³⁸⁸ In Iraq's case, reaching political consensus on the Election Law—and thus avoiding a boycott similar to the Sunni boycott in 2005—was arguably more important to the democratization process than holding the elections by the deadline mandated by the Constitution. Furthermore, the delay in the elections is not a sign that Iraq's leaders disregarded the FSC's decision. Iraqi politicians took the prospect of a delay seriously and openly acknowledged that the political deadlock was constitutionally problematic, implicitly affirming the validity of the FSC's opinion. President Talabani, for instance, voiced his concern that postponement would create a constitutional vacuum and delegitimize the sitting government.³⁸⁹

In the midst of the veto and de-Ba'athification issues—either of which, if handled differently, could have destroyed hope for a popularly accepted, credible election—the government recognized that the stakes were too great to press on with the election before first resolving the questions that could undermine its legitimacy. It is notable that government actors again turned to the courts to help them address the Election Law and de-Ba'athification challenges. Rather than intentionally and blatantly flouting the FSC's holding, government actors sought the judiciary's assistance to move forward with an election as soon as possible. In this sense, the pressure to avoid an unconstitutional delay of the election strengthened the role of the judiciary, as the political branches turned to the courts for help in guiding the country through a number of difficult and weighty issues.

2. The FSC Model in Lower and Administrative Courts

The FSC's efforts to establish itself as a neutral and independent arbiter have further cemented the judiciary's role in Iraq. Throughout the events preceding and following the election, Iraqi political actors relied heavily on the EJP and Cassation Chamber, in addition to the FSC, for necessary guidance. Iraq's lower courts did not disappoint. Like the FSC, they rendered clear and focused opinions that reflect a nuanced understanding of difficult issues and a measured approach in resolving conflicts without alienating interested parties, with the effect of keeping political actors engaged

388. Emily Berman, *Democratizing the Media*, 35 FLA. ST. U. L. REV. 817, 834 (2008).

389. Al-Hashemi Interview, *supra* note 115.

in dialogue to further the electoral and government-formation processes.

In addressing the AJC's disqualification of fifty-two additional candidates just days prior to the election, the EJP provided a salient example of Iraqi lower courts' skill at crafting legally sound and equitable holdings. As more fully discussed in Part III, the EJP determined that IHEC lacked the statutory authority to disregard the AJC's disqualification of candidates.³⁹⁰ Notwithstanding logistical difficulties, the EJP held that IHEC should have crossed off the disqualified names from the printed ballots, as instructed, and notified the candidates of the AJC's action so that they could appeal their disqualifications to the Cassation Chamber.³⁹¹ The EJP engaged in a rather extensive treatment of the question to provide firm statutory support for its holding.³⁹² In instructing IHEC to refrain from counting votes for the disqualified individuals, however, the EJP also indicated an available avenue for relief: candidates whose disqualifications were overturned by the Cassation Chamber would have their votes reinstated.³⁹³ The EJP was able to grant SoL's petition to invalidate IHEC's unauthorized action without prejudicing the rights of the newly disqualified candidates, thus maintaining equilibrium among the political parties at a time when every vote was of critical importance.

The EJP also skillfully balanced competing interests in its decision to order a recount in Baghdad Province. Once initial election results had been announced, al-Maliki sought full recounts in four critical provinces.³⁹⁴ The EJP, however, determined that evidence did not support the need for recounts in Salah al Din, Anbar, and Ninewah Provinces.³⁹⁵ In responding to a subsequent al-Maliki petition, the EJP held that the method by which IHEC chose to conduct the recount was not ripe for review until the recount results were announced.³⁹⁶ With the election results at a virtual tie between SoL and Iraqiyya, the EJP demonstrated a remarkable agility in responding to al-Maliki's demands in a manner that provided

390. See Electoral Judicial Panel, decision Nos. 38 and 39/47/Appeal/2010 of April 26, 2010; *supra* Part III.C.

391. See Electoral Judicial Panel, decision Nos. 38 and 39/47/Appeal/2010; *supra* Part III.C.

392. See Electoral Judicial Panel, decision Nos. 38 and 39/47/Appeal/2010; *supra* Part III.C.

393. See Electoral Judicial Panel, decision Nos. 38 and 39/47/Appeal/2010; *supra* Part III.C.

394. See Electoral Judicial Panel, decision Nos. 37/66 Appeals/2010; *supra* Part IV.

395. See Electoral Judicial Panel, decision Nos. 37/66 Appeals/2010; *supra* Part IV.

396. Electoral Judicial Panel, decision No. 390/391/Appeals/2010 of May 5, 2010.

necessary and justified recourse to review yet maintained the integrity of IHEC's review process.

The Cassation Chamber's opinion upholding the current AJC as a caretaker commission further illustrates the Iraqi judiciary's ability to help resolve political deadlocks. As more extensively discussed in Part III, at the height of the de-Ba'athification controversy, the Cassation Chamber was asked to address the legitimacy of the AJC—a question of enormous importance for the elections and the perceived legitimacy of those who would be elected—and to vet the appeals of candidates that the AJC had disqualified from running for office. Although the Cassation Chamber initially decided to consider these issues after the elections, public concern over de-Ba'athification vetting continued to mount and threatened to derail or delegitimize the elections unless resolved.³⁹⁷ At the urging of Parliament and after receiving the necessary evidence from the AJC, the Cassation Chamber determined that it would conduct an immediate review.³⁹⁸

The Cassation Chamber's opinion took a careful and focused approach in noting that the AJC law, which replaced the HNDBC law, did not clearly dissolve the HNDBC, although it did change the commission's name and institute certain new procedures.³⁹⁹ Accordingly, the Cassation Chamber determined that Chalibi and al-Lami were acting legitimately as caretaker commissioners until the seven-member panel required by the law could be confirmed by the CoR.⁴⁰⁰ This opinion, supported by principles of statutory construction, furthered the electoral process in confirming a necessary, though not ideal, framework for meeting the constitutional requirement that candidates for Parliament be screened for ties to the Ba'ath party.⁴⁰¹ It also went a step further to review individual appeals of AJC disqualifications and to provide appropriate redress for candidates against whom there was insufficient evidence of disqualifying Ba'athist activity.⁴⁰² By calming the AJC controversy in a manner that ensured both that constitutionally mandated de-Ba'athification review would proceed and that candidates' constitutional rights would be protected, the Cassation Chamber achieved an appropriate balancing of competing interests that political parties could endorse.

397. See Tamiez Court of Cassation, decision No. 108 of February 3, 2010, available at <http://www.gpi.org/2010/02/03/appeal-panel-overturns-election-ban-and-postpones-de-baathification-examination>; see also *supra* Part III.C.

398. Tamiez Court of Cassation, decision No. 225 of February 11, 2010.

399. *Id.*

400. *Id.*

401. Article 135, Doustour Joumhouriat al-Iraq of 2005.

402. Tamiez Court of Cassation, decision No. 225.

VII. CONCLUSION

Since its establishment in 2006, the FSC has played an integral role in Iraq's nascent democracy, positioning itself as the authority on constitutional interpretation and as an independent, neutral arbiter of intergovernmental disputes. In the past year, FSC and lower court opinions have guided Iraq through the organization and execution of its first parliamentary elections under the 2005 Constitution. These elections were accepted by the Iraqi people and the international community as fair and credible, and they have furthered political dialogue in facilitation of the post-electoral government-formation process. In rendering these opinions, Iraqi courts have demonstrated judicial restraint and conservative balancing of competing interests, and these skills have furthered the ability of political actors to reach necessary agreements at critical junctures.

Democracy in Iraq has made great strides in a brief period of time, yet much remains to be accomplished and many significant challenges remain for the Iraqi people and their government. Despite the difficulties that lay ahead, Iraq has cultivated a significant resource in its strong and independent judiciary, which will assist Iraq as democratic governance continues to take shape.