

*Full Transcript of Feisal Istrabadi's lecture*

Let me begin by describing, hopefully quickly, what Toby Dodge has called the “exclusive elite pact” in Iraq, which arose after the invasion in 2003 and began really to get its shape during the days of the Coalition Provisional Authority. That’s sort of a fancy word or fancy phrase for the sort of sectarian spoils-allocation system which has emerged and which there’s a pretty good case to be made that we have engendered that in Iraq. We used to say that in 2003 that we don’t want the “Lebanonization” of Iraq; by 2004 we were hearing from the Lebanese that we don’t want the “Iraqization” of Lebanon. We seem to have developed a custom in Iraq that the president is a Kurd, the prime minister is not only a Shi’a Arab, but a Shi’a Arab from the religious parties, and that the speaker of parliament (a post that I will argue in a moment is relatively unimportant, indeed I think you can take the word “relatively” out, and getting less important as I will describe in a moment) is a Sunni Arab. It’s not quite true that we worked it out as intricately down to the detail of directors-general and what have you as in Lebanon, but we’re headed in that direction. Very difficult to imagine the current dispensation in Iraq allowing a Kurd to be oil minister; at least that’s my view. Whether it would be a good idea or not is beside the point; it’s simply difficult to imagine that the Shi’a religious parties would surrender that post. But I will talk a little bit more about the ministers in a moment.

This distribution that I just described has been the same after every election that we have had. We have had three elections for national office starting with the first set of elections, which were held under the Transitional Administrative Law (TAL). And these are the results that we have obtained in Iraq, notwithstanding the conduct of the Arab Sunni. Let me say, by the way, that these are horrible short-hands that have become ingrained in talking about Iraq and I am very sorry for that and I am even sorrier to be using these descriptors, but they are ingrained. They are rough approximations of the facts, and it’s just much easier and much faster to use them, whatever harm it does to do so, than to try to be linguistically accurate. That’s just my disclaimer.

Whether the Arab Sunnis boycott the elections, as they did in January of 2005, or whether they vote for their own sectarian candidates, as they did in December of 2005, or whether they overcome their sectarianism and vote for a non-sectarian nationalist headed by a Shi’ite—thus again rejecting their own impulse towards sectarianism—the election results are same, down to the same person. Talabani was president after the 2005 elections, he’s president after the 2006 and 2010 elections. Al-Maliki is prime minister after the December 2005 elections, and he’s again prime minister. The only post that has changed is the speaker of parliament. That can rotate and we’ve had several of those but the other offices are fixed. Indeed, President Talabani, who is obviously incapacitated at this moment, and has been since December, said at one point before the 2010 elections, that the same people governing before the election will be governing after it. And he was right, even if it was a bit indelicate to mention it.

Put yourself in the position of a sheikh, or a technocrat or a doctor or an engineer in Anbar, or Salahuddin, or Nineveh, and contemplate, cogitate, what that tells you about the system in Iraq. Obviously the Sunni of Iraq have every reason in my view to conclude that they are a permanently disenfranchised minority and I’ll have more to say about that in a moment.

Institutionally, we have seen the dismantling of what scant political institutions were built after 2003 after Ambassador Bremer dismantled the state of Iraq—Parliament, for instance. We have a quasi-parliamentary system in Iraq: if you were a member of the government, you are deemed to have resigned from the Parliament. This I regard it as my single biggest mistake (I

introduced it in the TAL) in the post-2003 period because the end result of that has been to remove all responsibility, all de facto and even de jure responsibility on the part of the government vis-à-vis the Parliament. Now there's a provision of the Iraqi Constitution that is picked up from the TAL, which allows for the interpellation of the president, the prime minister, and the Council of Ministers. As a drafter of that provision, for those of you who are originalists, what I had in my mind when I drafted that provision [in the TAL] was that members of the cabinet would routinely appear before Parliament to explain policy and to explain their conduct. The executive has obtained a ruling from the Constitutional Court limiting Parliament's ability to interpellate ministers effectively only to when there's a criminal charge pending against them. Thus day-to-day oversight by parliament has been completely eviscerated by judicial ruling with no justification in the text. That's really important in a country like Iraq because we're a strictly positivist state where judges don't have the discretion to interpret that they do in this country or in a common law country.

The Constitution also created a set of independent commissions and actually the executive's first assault before it took on Parliament was with respect to these independent commissions. The Constitution stated that these commissions were independent but ultimately answerable to Parliament. The Constitutional Court issued a ruling saying "well this is ambiguous, what does it mean to be independent but responsible to Parliament? So we have room to interpret here and since it's ambiguous we decide that the independent commissions actually report to the prime minister's office directly."

Well, that means that agencies such as the independent electoral commission are subject to executive control. The bank, the Central Bank of Iraq, is now subject to executive control. By the way, the same term which describes independence of these commissions, is also used in the Constitution—the same words almost verbatim—to describe the independence of the judiciary. And indeed while there has been no formal executive action over the judiciary, one more point about Parliament I should make and that is that the Constitutional Court also issued an opinion interpreting the Constitution, stating that Parliament does not have the right to propose legislation. It can only act on legislation submitted by the executive, by the Council of Ministers. There is no textual justification for this position, but Parliament has slowly been totally stripped of all its oversight—and even some of its legislative—functions.

As to the courts: I wish I had two or three hours to talk about the courts, but I will just make one or two points. The Constitutional Court has really become an extension of the executive. There has not been since 2009 an important decision relating to the power of the executive vis-à-vis other agencies that the executive has lost, including as I have said some textually unjustifiable losses of power by Parliament in particular. And indeed, in an interview with the *Financial Times* marking the 10<sup>th</sup> anniversary of the war in Iraq Foreign Minister Hoshyar Zebari said that the executive is compromising the judiciary and is interfering with its decisions. Recently there have been articles about that in the Iraqi press, particularly the Kurdish press, as well. That's a real problem if anybody in here represents somebody who is interested in investing in Iraq. If you can't trust the courts, that's a real problem aside from the contribution to the ongoing chaos that is unfolding.

As to a third institution, the Council of Ministers, they still have de jure powers, but de facto, particularly the key ministries, what in Iraqi parlance is called the "sovereign ministries," have come increasingly under control of the office of the prime minister. Iraqi foreign policy is not principally set or even principally executed by the Foreign Ministry, but by a small cadre of advisors in the prime minister's office. When I was at the United Nations negotiating extensions

for the multi-national force mandate, for instance, we would negotiate, acting on instructions from the Foreign Ministry. We would negotiate a text and then the text would percolate through the channels to the prime minister's office and the whole negotiation would be started all over from scratch. It would be conducted directly by the prime minister's office and the American Embassy in Baghdad and we would be presented with the text that came, and there it was. My point in saying all of this is that these are acts that reveal what is happening in terms of institution building and where we are in terms of this sort of journey towards democracy or obviously I am arguing "not democracy."

There was a moment, when it was conceivable to imagine of Iraq getting out of this exclusive elite pact and that was in 2010 when against all odds and all predictions the al-Iraqiyya List won a bare plurality of two seats over the governing State of Law List. This engendered a tremendous response in opposition to it, because this was a real threat—and Toby Dodge writes about this—to the post-2003 dispensation in Iraq. Here you had a list which was able elect members from Basra to Mosul and Kirkuk. The only places they where they were completely shut out and had no representatives whatsoever was in the Kurdish regions where al-Iraqiyya didn't field any candidates. So they had elected members in not quite all the other 15 governorates but in most of them, whereas State of Law in 2010 had not one single deputy north of Baghdad. Not one.

That was a moment, for all of the difficulties, to reverse this pact, but of course the entities that were invested in the pact responded accordingly. One of those entities was the United States. It is unexplainable to me why the United States took the view that the pact should have been reinforced. And over the years what has occurred with al-Iraqiyya is that it's been systematically taken apart by its own members, but also through U.S. policy. It has been by this point, in my view at least as an observer from some distance, wholly isolated diplomatically as far as the American Embassy is concerned.

I don't think we're likely to see another moment of this sort—an assault on the pact again. What has happened in the election of 2013 for local offices is that turnout has dramatically decreased. We used to hear about 78 percent turnout and so on. What we now had in the local governorate elections of 2013 was certainly under 40 percent turnout, and probably somewhere in the 30s, according to the U.N. (The Iraqi government inflated the numbers). That's a huge drop off in turnout for a people unaccustomed to voting. I think that a part of it is that people see that, number one, the government's not working. And indeed in places like Basra and the southern governorates of Iraq, which sit on 90 percent of its wealth, there are absolutely no government services 10 years on.

This isn't merely angering local populations. It is, in fact, affecting the legitimacy of the state itself. If you're sitting in Basra and you can look down across the Gulf and see Dubai and Abu Dhabi, whether they're charming places or gaudy or not, the garbage gets picked up, the streets are paved, the lights are on, the air conditioning works, and hospitals are staffed with first-rate physicians. Or indeed if you look up and see the building in Kurdistan, and compare it to a lack of services, lack of electricity, lack of garbage pick-up—it's beginning to affect the legitimacy of the state, even in southern Iraq.

From a Sunni perspective, what I believe is happening is that the Sunni are giving up on Baghdad. Now remember, we went through what is appearing to have been round one of a civil war. Most of us say that the civil war was ignited in February of 2006. Fanar Haddad, who is just a marvelous young Iraqi scholar, believes that it began in fact in 2004 but was exacerbated in 2006. Be that as it may, the nature of the civil war, whenever it started, in my view, it involved a

Sunni (and again I'm speaking in broad terms) rejection of the new federalist dispensation. The new Iraqi constitution creates a government in Baghdad with no power; it assumes there will be a symmetric federation of states in the country on the model of the Kurdistan regional government.

Now that constitution passed a referendum in October of 2005 with 78 percent of the population voting in its favor; a fact that I noted to the Security Council at the time. But I didn't note that the 22 percent who voted against it were the Arab Sunni. Three of Iraq's governorates which are overwhelmingly Arab Sunni voted against the constitution by large margins. A shift in Nineveh governorate of 85,000 would have defeated the Constitution because of the rules that were set up and that I don't have time to go into. 85,000 votes out of 11 million cast, if that had occurred in Nineveh, the Constitution would have been defeated and we would have had to have drafted a different constitution from the one we have now. This was a clear rejection of the notion of federalism. But where are we now? In those same three Sunni governorates that rejected federalism in 2008, the governorate councils in each of them have voted to hold referenda to create regional (federated) states in those governorates.

Now the Constitution of 2006, which the Sunni rejected 2005 was a pact by the Shi'a religious parties principally driven by what was then called the Supreme Council of the Islamic Revolution in Iraq and the Kurdish parties. There have been several published accounts of the drafting of the permanent constitution point out, among them Ali Allawi, as well as several American officials who published what I think I can refer to as a quasi-official account of the negotiations in various law journals. The Sunni, who were in fact unelected, were thrown out of the room because they wouldn't agree to these provisions on federalism. So, it's an Arab-Shi'a and Kurdish pact that we're going to have regionalism in this country and the Sunnis rejected it—now we've got three Sunni governorates, the same three that rejected it, now want to establish regions. They have not stated that they want to establish one Sunni region, by the way. Each one has voted to have a referendum on creating a region within the governorate.

The Shi'a prime minister from the Dawa Party has refused to allow these referenda to go forward. He has intimidated the Electoral Commission, which he now controls, into ensuring that these referenda do not take place. Kane et al. wrote these motions for referenda were only "symbolic."<sup>1</sup> Well there's nothing symbolic about them: read the Constitution. The Constitution says that by a simple majority, the governorate councils can force referenda on the creation of federal regions.<sup>2</sup> And they did, by a simple majority. There's nothing advisory or symbolic about that, unless you consider the Constitution advisory, which may be appropriate in Iraq.

So what we have is a switch in 2013 in the positions of the two largest ethno-confessional groups in the country. You have the Shi'a who established with their Kurdish counterparts this regionalist model for Iraq, over which the Sunni fought a civil war. I think it was no accident that the al-Askari shrine was blown up four months, in February of 2006, after the referendum of the Constitution. But they have switched sides. My view in the current civil war, which I believe is underway in the early days—I hope I'm wrong, but Ken Pollock has been saying for years that it's going to be ignited again. I believe that this time the Shi'a will be fighting to keep the state centralized, because they have now have tasted power, perhaps for the first time in Iraqi history, and the Sunni will fight to decentralize the state.

I don't have time to go into the way in which the government in Iraq has been dismantling or going after those whom the Sunni elected to "represent" them in 2010, but the list

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<sup>1</sup> See Sean Kane, Joost R. Hilterman, & Raad Alkadiri, "Iraq's Federalism Quandary," *The National Interest*, (March-April 2012), <http://nationalinterest.org/article/iraqs-federalism-quandary-6512>.

<sup>2</sup> Iraq Constitution (2006) art. 119 (First).

is growing. Tariq al-Hashemi was first. Saleh al-Mutlaq saw he was in the crosshairs and decided he would make nice with al-Maliki. Rafi al-Issawi has been gone after. Of course Tariq al-Hashemi is technically the sitting vice president of Iraq, which he will tell anyone listening even though he's now in self-exile in Turkey, as he is under five death sentences, death by hanging. As I sit here, Rafi al-Issawi, the former finance minister, is being investigated for similar charges. There was an arrest warrant issued for Atheel al-Nujaifi, the brother of Osama al-Nujaifi, the speaker, on corruption charges. Atheel went down to Baghdad and Osama went to Tehran to express his condolences on the death of Qasim Suleimani's mother. [Suleimani is the head of the Quds Brigade of the Iranian Revolutionary Guards]. Dr. Esfandiari and I were talking about this earlier: when al-Nujaifi saw Suleimani, he kissed him on the forehead. Those of you that know Middle Eastern culture know what that means. After that, the charges against Atheel were withdrawn.

So I think that at this point I need to bring my remarks to a close. I haven't talked about U.S. policy yet. It seems to me there are two or three options that the U.S. has before it. One, which is unrealistic to expect, is to look at the situation in Iraq and say we have not spent a trillion dollars incurring besides the direct costs also the opportunity costs, not to mention having spilt the blood of 5,000 lives of America's finest and tens if not hundreds of thousands of Iraqis, in order to set up the next albeit relatively light dictatorship in Iraq. It can help to usher al-Maliki out in 2014. I think expecting that is akin to expecting the tooth fairy to give us our... it was a quarter when I was a kid, it's much more than that these days, so I dismiss that as a realistic option. I don't think the American administration at this point wants to put enough thought into figuring out how to do that.

The second option is what I called in 2012 when I was here at a different forum, the Hippocratic option, "*primum non nocere*"—"first, do no harm." This is to say, let the Iraqis sort it out, something which demonstrably the United States did not allow to occur in 2010. It weighed in very heavily along with Iran to ensure that Allawi did not have the opportunity to form a government. Not that I necessarily believe he could have done so, I take it if he could have formed a government, he would have. But it seemed to me for institutional reasons since he won a plurality of the vote he should have been asked first to form one, and in the likely event of his failure to do so, it would actually have strengthened al-Maliki, who instead of going around and begging for a seat here and a seat there, would have come in with some strength as the second candidate. In any event, that didn't happen, so what I think I see happening in 2014 given the extent of the control of State of Law and al-Maliki have on the institutions of the state, I expect that al-Maliki will do quite well, shall we say, in the upcoming elections. I expect that the United States policy will be to secure a third term for al-Maliki as prime minister. Indeed, the rumors in Baghdad are that Brett McGurk was in Baghdad last week trying to make sure that very eventuality comes to pass. There are several problems with that obviously; perhaps we can get to that in the question and answer period.

Two final points I'd like to make. Somebody in this town should notice that there have been a number of delegations of tribal sheiks who made their way from Nineveh governorate to Erbil to meet with Masoud Barzani and to say to Barzani that they want to be integrated into the KRG (Kurdistan Regional Government). Now that is something nobody could have predicted 10 years ago. I don't know what is going to happen in that regard and whether these offers are serious or, to put it bluntly, whether Masoud Barzani wants those problems. And there's every reason why he would not. But on the other hand why would Masoud be tempted by this? In my view, he could well be tempted by it as a strategy for independence. An independent Kurdistan is

a problem for everybody in the region. True, it's not the existential ontological problem for Turkey that it was 10 years ago, but it's still a problem and it's a problem in Turkey probably for the foreseeable future. But what about a Republic of Northern Iraq that was multi-ethnic and multi-religious? It would encompass Sunni Arabs, and Sunni and Shii Kurds, the Feylis, the Turcomans, the Assyrians, etc. Is that the same problem for Iran, Turkey, and Syria? Well, let's put Syria out of the equation, they've got different problems now. Is that the same problem for Iran and Turkey? I don't think so, but again, I don't know if Masoud Barzani would be tempted by this. But it's a plausible scenario it seems to me, at least not, or at least it's not implausible, as a lawyer might say.

The last word I have to say is a very quick one. Everyone has been talking about the effect that the conflict in Syria has been having, and I have to say something about Syria since it's been in the news the last couple of weeks in Iraq: It's exasperating the sectarian tensions, etc. No one seems terribly concerned with the opposite; what effect has the Iraqi experience in Iraq had and what effect is it having on the Alawite minority in Syria? In this narrative, the analogy is clear enough. There was a minority ruling in Iraq, the Sunni, that was oppressing the majority. It lost power in 2003, demonstrably. And it has been, from its perspective, wholly unaccommodated. It has lost power permanently. Even when it bests its opponents in elections, it cannot actually get the levers of power as they have developed in Iraq in its hands. Even through its proxies. Why isn't that a lesson for the Alawites in Syria? That they better hang on to what they have now because there is no bargain to be had later. There is no power sharing. There is only an exclusive pact in which you're a permanently disenfranchised minority because the pact is based on sect and ethnicity and you're a minority. So I think that I have no doubt that the events in Iraq are influenced by the region but I don't understand why that orthodoxy has taken hold to the exclusion of the effect that events in Iraq are having on the region.