

Testimony of Noah Feldman

Before the Senate Foreign Relations Committee

Hearing on Building Democratic Institutions in Iraq and the Middle East

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Mr. Chairman and Members of the Committee,

May I begin by saying how honored I am to be asked to appear before this Committee to discuss the important subject of the development of democratic institutions in the Arab and Muslim worlds, and particularly in Iraq. I have in recent months had the opportunity to participate firsthand in our early efforts to establish democracy in Iraq. I served as senior constitutional adviser to the Office of Reconstruction and Humanitarian Assistance, later renamed the Coalition Provisional Authority, between April and July 2003, and spent some five weeks in Baghdad in that position. I returned this past Friday from Bahrain, where I met with senior Iraqi officials including the Minister of Justice, the Chief Justice of the Supreme Court, and Judge Dara Nur al-Din of the Governing Council, and discussed the progress of the constitutional process with them. I also addressed the question of promoting democracy in the Muslim world at some length in my recently published book, *After Jihad: America and the Struggle for Islamic Democracy*. My testimony today reflects the views I developed in the course of researching and writing that book, revised in the light of our experiences thus far in Iraq.

There is a general question that looms over any discussion of democracy in the

Muslim or Arab world, namely the question whether Islam and democracy are compatible. I believe that the answer to this general question is yes, and in my book I explain why this is so. But my answer matters much less than the fact that the United States of America, by leading the Coalition for the liberation of Iraq, has now also answered this question in the affirmative. By removing Saddam Hussein and declaring our commitment to ensuring freedom and self-government for Iraqis, the government of the United States has committed itself to the viability of democracy in Iraq, a country which is predominantly Arab and overwhelmingly Muslim.

It is now in the vital national self-interest of the United States to prove that democracy can succeed in Iraq. If democracy does not succeed there, our liberation will come to be perceived as imperial occupation, and the deep skepticism throughout the Arab and Muslim worlds about our motives will turn into increasingly explicit condemnation of our intervention in the region. We also have a pressing moral duty to enable Iraqis to create a life for themselves that is better than the one they suffered under thirty-five years of oppression and tyranny. By taking the reins of government in Baghdad, we also took on the responsibility for leaving the Iraqi people better off than we found them.

Today, then, it would be academic in the worst sense of the word to ask whether democracy can succeed in the Arab world. Democracy *must* succeed in Iraq, and eventually elsewhere. Whether we supported going to war in Iraq or not -- and there were reasonable arguments to be made on both sides of the question -- we now must recognize the necessity of finishing the job that we started. I would like therefore to address my comments to the particularities of our efforts thus far to create lasting, stable,

democratic institutions in Iraq, and to recommend the course of action most likely to succeed there.

The basic state of affairs in Iraq today, I believe, can be summed up relatively straightforwardly. The Coalition is operating along two equally important tracks in Iraq: the security track and the political track. The security track is facing major challenges, while the political track is going to remarkably well. The setbacks we have faced on the security track have the capacity to undercut our progress on the political track. It is therefore of the utmost importance to achieve stability and security in Iraq: the future of democracy in that country depends upon it. The overwhelming majority of Iraqis have already begun to show themselves to be interested in democracy. But a small number of insurgents are capable of spoiling the possibility of law and order by disrupting the peace.

Daily reports of shootings and bombings in Iraq reflect the hard reality that the Coalition led by the United States does not yet exercise a monopoly on the use of force there. Assassination attempts, like the one against Governing Council member Dr. Aqila al-Hashemi last week, threaten the democratic project itself. Life for ordinary Iraqis cannot return to normal so long as sabotage impedes reconstruction.

But the Coalition's lack of progress on the security front in the last four months must not obscure the successes of the political process in that same time. The establishment of an Iraqi Governing Council; its takeover of the government ministries that deliver basic services; and its commencement of the constitutional process have proceeded apace despite significant security setbacks. Only by looking at the surprisingly smooth political track alongside the problematic security track can we shape a policy that will allow rapid transfer of sovereignty to an Iraqi government that can

actually rule the country.

An accurate assessment of the security situation must begin with the fact that essentially all Iraq's 60% Shi'is and 20% Kurds were happy to see Saddam go, and want the Coalition to remain long enough to prevent the Ba'th party from re-emerging. The Sunni Arabs, on the other hand, who comprise another 15% or so of the population (the rest are Turkomans and miscellaneous Christian and other religious minorities), are the inevitable losers in any even quasi-democratic reallocation of power, since they took a grossly disproportionate share of the country's resources under Saddam. Of these Sunnis, many want the U.S. out, but only a few are presently willing to take up arms -- otherwise we would be seeing thousands, not dozens of incidents each week. Sunnis do not necessarily want Saddam back, but many think they can only benefit from the failure of democracy and the rebirth of some kind of autocratic Sunni state that would restore their privileges. Some have begun to frame their opposition in terms shaped by Islamic radicalism.

It is also possible that some of the bombing attacks on targets like the United Nations headquarters have come not from disaffected Sunnis but from terrorists who have infiltrated easily over Iraq's long and unguarded borders. Iran has an interest in keeping the U.S. presence costly to discourage it from trying to replicate regime change next door. Al Qaeda, for its part, needs no excuse to attack the West, and would like nothing better than to make Iraq into the site of a new, Afghan-style jihad against foreign occupation of Muslim lands.

The realities of anti-Coalition violence, both known and unknown, suggest a strategy for reducing the violence to a level compatible with exercising ordinary

government in Iraq. Only Iraqi police and soldiers, knowledgeable about local conditions and populations, and with access to high-quality local intelligence, stand a chance of breaking Sunni resistance cells and identifying out-of-towners who might be Iranian or Al Qaeda agents. The call to internationalize the Coalition forces is an excellent idea for reasons of American foreign policy and cost-reduction. International help could speed up reconstruction and take some of the security load off hard-pressed U.S. troops. But Indian troops would likely have no better luck than U.S. troops in combating terrorism. Broadening the Coalition will have no measurable effect on violence in Iraq, be it local or foreign-bred.

French and German suggestions to speed up the process of transferring sovereignty to an Iraqi interim government would be just as unlikely to produce security gains. The terror and resistance is not coming from Iraqis who would be sympathetic to such an interim government. Worse, without a re-constituted police force and military at its disposal, an interim body would be a travesty of a sovereign government. Actual control is the indispensable hallmark of sovereignty. Nothing could be worse for the future of democracy in Iraq than the creation of a puppet government unable to keep the peace and susceptible to the charge that it was sovereign in name only.

The easily overlooked progress of the political process thus far points the way to a legitimate, elected Iraqi government that can actually rule. Since the fall of Saddam's regime in May, those Iraqis participating in organized politics have shown a maturity and unity of purpose that pre-war critics would scarcely have credited. The two most important Kurdish parties, the KDP and the PUK, have subordinated their historical rivalry and have acted in concert, casting a steadying light over the rest of the political

scene and often taking the lead in coordinating policy among the members of the Governing Council. Far from insisting on secession and Kurdish independence, as some in the region feared, the Kurdish leaders are sticking to the vision of a federal Iraq, and urging their sometimes impatient community not to falter so close to achieving long-awaited freedom from autocratic Arab rule.

More importantly for Iraq's democratic future, the Shi'i religious elites, and the political parties loosely associated with them, have consistently eschewed divisive rhetoric in favor of calls for Sunni-Shi'i unity. Emerging as Islamic democrats, they have repeatedly asserted their desire for democratic government respectful of Islamic values, rather than government by mullahs on the failed Iranian model. As a result, they have been largely successful in marginalizing younger radicals like the rejectionist Muqtada Sadr, whose late-spring play for leadership of the national Shi'i community seems to have faded over the course of the summer. When Sadr wanted to organize an anti-Coalition protest in the holy city of Najaf, he was forced to bus in supporters from Baghdad, three dusty hours away. The Coalition has wisely declined to arrest Sadr, and, his hopes for a living martyrdom denied, he increasingly looks more like a small-time annoyance than the catalyst of a popular movement of Shi'i anti-Americanism.

The emergence of democratic attitudes among religiously committed Shi'is was underscored on Saturday in Detroit, where Da'wa Party leader Dr. Ibrahim Ja'fari, the immediate past Governing Council president, addressed the second annual Iraqi-American Conference. The largely Christian audience of Iraqi-Americans spent the morning fretting about the dangers of a constitution declaring Islam the official religion of Iraq, but treated Ja'fari to a standing ovation after he argued for a pluralistic, tolerant

Iraq, in which full rights of citizenship would be exercised by Muslims and non-Muslims, men and women. The same proud insistence on the compatibility of a democratic, pluralist Iraq with Islamic values was sounded by forty Shi'is from southern Iraqi cities at a session on religious liberty I conducted last week in Bahrain as part of an ABA-sponsored program on constitutional values. Skeptical of arguments for strong separation of religion and state, they nonetheless took as a given that a country as religiously diverse as Iraq must ensure religious freedom -- mandated, they said, by the Qur'an -- and equality for all citizens regardless of religion.

The next step in the constitutional process is for the Constitutional Preparatory Committee, named by the Governing Council, to complete its canvass of the country and propose a mechanism for naming the members of an Iraqi constitutional convention. The Committee needs to find a workable solution, short of a general election, to choose a legitimate and representative body. It is considering proposals such as a mixed election/selection procedure or a national referendum to approve or disapprove a complete slate nominated by the Governing Council.

The Coalition is right to be wary of a national election to select the delegates to a constitutional convention. Iraq is not yet ready for such a national election. Political parties have not yet had enough time to develop. Organizing voter rolls would take time. To make matters even more complicated, voting districts would require deciding even before the election what districting would be fair. This would be very difficult to accomplish in the absence of a recent census. What is more, one of the main issues for a constitutional convention to discuss will be the creation of just rules for drawing districts, so it would be putting the cart before the horse to use existing districts, gerrymandered by

Saddam to disenfranchise the Kurds, to select a constitutional convention.

On the other hand, the Coalition should not automatically reject suggestions for a national referendum to approve or vote down a slate of candidates selected by the Governing Council. Without some component of public affirmation, there is the risk that the constitutional convention would be seen as illegitimate from day one. A widely distributed fatwa, authored by moderate Shi'i cleric 'Ali Sistani, demanded some sort of public participation in the process of selecting the convention, and asserted that a convention handpicked by the Coalition would not represent the values of the Iraqi people. Although it is not certain that Sistani would actively condemn a convention selected by the Iraqi members of the Governing Council, a general sense among Iraqi elites is that some sort of public affirmation process would do much to enhance the legitimacy of the constitutional process. I am confident that a solution can be reached, and that the constitutional convention, once named, can begin its work of drafting a constitution for ratification by the Iraqi people.

It is difficult to imagine elections being held under a new constitution before next autumn at the very soonest -- and perhaps later still. The constitution will have to resolve complex questions of the boundaries of the provinces in a new, federal Iraq, not to mention ensuring religious liberty and equality and finding the right form of government to manage Iraq's distinctive ethno-religious mix. Getting the wrong answers to these questions quickly would be much worse than taking some time to get the right answers. But rushing would be a mistake in any event, because an elected Iraqi government would come too soon if it predated effective control of the country.

Let me speak briefly to the constitutional structure and the difficulties it must



resolve to establish stable and democratic institutions. Iraqis are coming to the realization that their government will have to be federal in order to accommodate the various regional ethnic and religious differences in their country. Many Iraqis would like to see eighteen federal states, corresponding to the currently existing eighteen governorates. It is difficult, however, to find even a single Kurd who is prepared to accept the division of the Kurdish region into several distinct states or provinces. Kurds are more likely to say that the Kurdish region must be a unified province. As for the rest of Iraq, the Kurds are prepared to leave it to Arab Iraqis to decide whether they want to have a single Arab region, separate central and southern regions, or a dozen different provinces. It will be extremely difficult to convince Kurds to accept the division of the Kurdish region. At present, the Kurdish region is governed by a centralized Kurdish Regional Government, and the Kurds can realistically boast at least 40,000 men at arms. It is therefore increasingly likely that constitutional negotiations will yield a unified Kurdish federal region. In any event, the shape of Iraq's federalism will be the single greatest and most complicated issue to be addressed in constitutional negotiations. It will take time to reach a workable consensus, and all parties will have to compromise. But the federal arrangement is far and away the most important for achieving the long-term goal of keeping Iraq is a single, unified country.

It will be relatively easy for Iraqis to agree that their constitution should guarantee basic rights of liberty and equality for all citizens, regardless of religion or sex. The Islamic democrats who increasingly represent the Shi'i community believe that Islam guarantees such liberty and equality. The constitution will certainly guarantee religious liberty for everyone in Iraq. At the same time, it is unlikely that the majority of Iraqis

would agree to the omission from their constitution of a provision describing Islam as the official religion of the state. Every Arab constitution has such a provision. The hundreds of Iraqis I have spoken to about this issue in Iraq, both Sunnis and Shi'is, balk at the idea that their constitution would declare the formal separation of religion and state. To ensure long-term democratic stability in Iraq, we need to focus on making certain that the constitution guarantees effective liberty and equality regardless of religion or sex. If these provisions are firmly enshrined in the constitution and broadly accepted by the public, there is no reason that Iraq cannot be poor and democratic even as it treats Islam as an official religion.

The best written constitution in the world would be useless without effective institutions to guarantee its enforcement. The new Iraqi constitution must and will guarantee the separation of powers and must vest the spending power in the legislature, not the executive. It must guarantee an independent judiciary with the strength to stand up to the other branches. We must devote significant resources to encouraging the development of independent, nongovernmental civil society organizations that will take up the all-important task of monitoring the government to make sure the constitution is followed, and telling the world if it is being violated. Islamic groups have a natural head start in forming such organizations, so secular alternatives need to be encouraged. Right now, Iraq has what might be called the empty shell of secular civil society.

Organizations like the National Lawyers Association or the National Physicians Association were highly organized under Saddam, but were in effect organs of the state. New elections have brought new leaders into power, but these organizations are still far from beginning to function as advocates for basic rights and democracy. They need to be

assisted and trained in fulfilling this crucial role.

In oil-rich states, government has long had the capacity to dominate society by paying off potential critics and suppressing others. To help save Iraq from reentering this destructive pattern, it is possible that the constitution should guarantee per capita distribution of oil revenues to individual Iraqi citizens. If this course is chosen, however, the constitution should also make it clear that the state can tax citizens on their income, including income derived from the government itself. The government of Iraq will have huge revenue needs in the years ahead, both for reconstruction and security. It would be a serious mistake to hamstring a future Iraqi government by depriving it of its most steady source of revenue.

Let me emphasize that solving the security problems by rebuilding the Iraqi police and army must be the Coalition's highest priority in the months ahead. This will cost a great deal of money, and create the long-term risk that reconstituted Iraqi armed forces might some day make their own grab for power, as the army has done repeatedly in Iraq's history. But this risk must be taken, because if the security situation is not brought under control, it has the capacity to destroy the political track. Leaders like the assassinated Ayatollah Muhammad Baqer al-Hakim, willing to work with the Coalition despite initial reservations, are not easily replaced. The enemies of the democratic process, whether Sunni-Iraqi or foreign, know that by violence they can deny the Coalition the stability that is prerequisite to law and order.

With progress on the security track, democracy in Iraq remains achievable. Without it, America's pragmatic and moral duty to help Iraqis to democracy will be almost impossible to fulfill. Iraqis are already on the track to self-government -- but we

need Iraqi security forces, not just international help, so we can establish the rule of law and restore sovereignty to Iraqi hands.

Once security is restored, however, there is reason for cautious optimism about the capacity of the constitutional process to bring about a democratic, federal settlement in Iraq, one that will ensure individual liberties and equality for all Iraqis regardless of religion or sex. By devoting our resources not only to the governmental process but also to the development of a vigorous civil society, we can help create conditions for democracy to flourish. With almost no outside help, there are well over one hundred newspapers being published in Iraq today. Much of what they publish is unreliable or worse, but that is, in its very nature, the free marketplace of ideas. Democratic ideas will win the day in Iraq so long as security exists on the ground there -- not because anybody puts a thumb on the scale, but because in today's world, democracy is the only form of government that has shown the capacity to give its citizens liberty, equality, and a decent way of life. Iraqis already understand this fact, and they want democracy. They need our assistance to let democracy take hold and make it stick.

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From 1999 to 2002, Feldman was a Junior Fellow of the Society of Fellows at Harvard University, researching issues of religion-state relations in Islam and in the U.S. Before that he served as a law clerk to Associate Justice David H. Souter of the U.S. Supreme Court in the 1998-99 term, and as a law clerk to Chief Judge Harry T. Edwards of the U.S. Court of Appeals for the D.C. Circuit in 1997-98.

Feldman received his J.D. from Yale Law School in 1997. He earned a D.Phil. in Islamic Political Thought from Oxford University (Faculty of Oriental Studies) in 1994, where he studied as a Rhodes Scholar. He received his A.B. summa cum laude in Near Eastern Languages and Civilizations from Harvard University, finishing first in the Class of 1992.

Relevant recent publications on constitutional design and religion-state issues include:

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