During the September 2005 CPRF, we took an insider’s look into the drafting of the Iraqi constitution. Paul Williams, Vanessa Jimenez, and William “Spence” Spencer presented a behind-the-scenes examination of the drafting of the Iraqi constitution. Over the course of the summer Paul, Vanessa, and Spence, working through the Public International Law & Policy Group and American University’s Center for Global Peace, advised the Iraqi Constitution Drafting Committee.

Paul Williams gave some background information on the process. He said they were invited to help by the constitutional drafting committee, and that they were partially supported by USAID. The drafting committee wanted to know how other countries drafted their constitutions, and how constitutional courts and other institutions functioned in other places.

The committee operated through six different committees, which provided opinions, options, and some draft language. The drafters worked using a consensus process, and were for an Iraqi constitution for all Iraqis. But Paul believed that the outside world was forcing the Iraqis into the three groupings of Kurd, Shiite, and Sunni.

Vanessa Jimenez said that the entire process (not just the end result) of drafting the constitution using the consensus process was an essential step in resolving the conflict. The document itself is an incredible achievement. It’s not perfect, but it’s a start. It is a delicate balance between pluralistic democracy and Islamic values. It sets up checks and balances and a judiciary, includes women’s rights, and recognizes Islamic values. There is a lot of creative ambiguity. They postponed many key decisions, such as details of federalism and how judges will be chosen. A lot of items say “as provided by legislation,” but we still don’t know who will implement and interpret the constitution, so, we still don’t know if the constitution will be a framework or just empty promises.

Islam and its role is a very delicate issue. The drafters asked for examples of how other countries have dealt with it. They finally included a repugnancy clause, which states that no law can contradict the fixed principles of Islam, and made Islam the official religion of Iraq. But it is not known exactly what effect this will have. There were also problems with calling Iraq part of the Arab nation, because of the many Kurds and Persians in the country. It was resolved by saying that the Arab people of Iraq are part of the Arab nation.

The drafters weren’t keen on listing specific human rights and international treaties on human rights, because this felt like something imposed from the West. In the end they accepted human rights language, as long as it did not conflict with Islam.

There was much concern with maintaining twenty-five percent of representation for women, and for ensuring that language did not take away rights from women.

Spence Spencer said that the good news was that people were registering to vote, instead of boycotting the process. The Sunnis recognized that boycotting was a mistake, because it did not give them any say in the process.

It is important to note that drafting the constitution took place in an atmosphere of declining infrastructure, with no water and no electricity. It is worse than it was right
after the fall of Saddam. The people negotiating the constitution are real heroes; there are constant threats against their safety.

The constitution was drafted in record time: two months. But the consultative process was sacrificed. The Iraqi people were supposed to be consulted in the process, but it was not possible to do this. It will be hard to sell to the Iraqi people. The UN has the lead on the consultative process, but is not having a lot of success. It would take thirty days just to print five million copies of the draft constitution, not to mention the problems of delivering it in the middle of a war, when post offices are closed. Another problem is that there will be many less polling stations open this time around, so the problems will be more related to voter disenfranchisement rather than mass violence. There will also be a lack of international monitoring, because it is hard to get people in the field.

Spence noted three goals:
   1. Iraqi citizens need to have a say in this: there needs to be some way of getting a dialogue going.
   2. We need to make sure enabling legislation gets our help to get set-up.
   3. A common vision for Iraq as a nation has to be articulated.

Spence predicts that the constitution will pass, but barely.

Ambassador Peter Galbraith was in the audience, and as one of the participants in the official constitution negotiating process, had some additional comments. He noted that the unofficial drafting process in July was very different from the official negotiating process in August. He feels that the constitution, as it is now, will divide up the country. But he does not think this is bad, because the country is already divided. The constitution will slow down the process and will help it happen without violence. There is already a civil war going on right now, with thousands of deaths, but without the constitution it would be much worse. The regions have their own armies, and regional laws supercede the national law for all but a very narrow set of issues. There is no meaningful Iraqi army (it is not allowed to enter Kurdistan). The federal government controls the currency, but doesn’t have the power to tax. The real danger is that the country will break down into more violent civil war. The constitution is a road map for the slow partition of the country.