WITHHOLDING DEMOCRACY:
THE TIMELINESS OF SELF-GOVERNANCE
IN A POST-CONFLICT OCCUPATION

L. Amber Brugnoli*

Abstract

In December 2017, the Human Rights and Election Standards initiative at the Carter Center, in collaboration with United Nations Office of the High Commissioner for Human Rights (OHCHR), issued a Plan of Action that was the culmination of two years of analysis and debate regarding a human rights approach to elections. Part of their plan recognized the need for well-written and targeted recommendations for implementing a transition to democracy. This article is a first step towards drafting such recommendations.

The right to free and fair elections is a well-established norm in international law; some scholars even argue it is a fundamental human right. Research and scholarly works in this area focus heavily on elections in newly-formed democracies within the developing world following civil war or other internal strife; little-to-no attention is paid to the responsibility an occupying power has to implement free and fair elections after it is victorious in armed conflict. While it is generally recognized no single electoral method is suitable to all nations and peoples, significant international and regional treaties, including the International Covenant on Civil and Political Rights, The Universal Declaration of Human Rights, The European Convention on Human Rights and Fundamental Freedoms, and the Charter of the Organization of American States, protect the claim of citizens to

* Assistant Dean, West Virginia University College of Law & Adjunct Professor, West Virginia University Department of Political Science. J.D., Ph.D. and M.A., West Virginia University; M.S., Troy University; B.A. & B.A., West Virginia University; United States Air Force JAG Corps: Active Duty 2004-08 with tours in Okinawa, Japan and Baghdad, Iraq; Reserves 2008-Present, currently assigned to Air Force Administrative Law Division, Pentagon. This article includes research conducted for completion of the author’s doctoral dissertation; therefore, acknowledgement and thanks go to Professors Jim Friedberg and Scott Crichlow and Associate Dean Greg Elkins for their support during that process. Also, many thanks to Professors Jena Martin and Amy Cyphert for their first-reading of this article, and to Professors Kirsha Trychta, Elaine Wilson, Atiba Ellis, and Josh Fershee for their advice and recommendations during the drafting and submission process.

1 The Carter Center was founded by former U.S. President James “Jimmy” Carter. Its mission, in partnership with Emory University, is guided by a fundamental commitment to human rights and the alleviation of human suffering. It seeks to prevent and resolve conflicts, enhance freedom and democracy, and improve health. The Center is based in Atlanta, GA.


4 See CARTER CENTER, supra note 2 for the partnership between the Carter Center and several offices of the UN on Human Rights and Election Standards.
universal and equal suffrage.\textsuperscript{5} What is not established are the obligations on a victor and occupier, post-conflict, to enact free and fair elections for the people they now govern, even when the purpose of the conflict was to promote a democratic way of life.\textsuperscript{6} The issue is particularly salient when a long-term occupation is established, effectively removing the defeated nation’s ability to govern itself. And if the occupier is a long-standing democratic nation, even less attention is given to whether their decisions regarding electoral methods meet internationally-established norms.\textsuperscript{7}

As a cornerstone of democracy, self-rule should be enacted as soon as possible, even if it results in new and less-experienced political leaders, but even the most basic question surrounding an alleged human right has yet to be answered: How soon post-conflict should the election process begin? Timeliness of elections for transitioning democratic nations is a new area of research. The importance of determining the appropriate time for implementing elections, with the proposition earlier is better, is illustrated in this article through three case studies wherein a victorious Western occupier (the United States) oversaw a transition to democracy. The first two case studies examine the post-World War II occupations of Japan and Germany, which contrast a short- and long-term timeline for implementation of a new national government, but also include early local and regional elections to promote self-governance and democratic roots. The third case is 2003 Iraq, which is an example of a long-term process—more than two years—leading up to the first democratic elections at the national level with no earlier votes at local or regional levels. Each of these separate approaches impacted party formation, demographic and social representation, and make-up of the respective nation’s long-term government. A model approach is then presented, advocating for early, albeit not perfect, elections for the purpose of promoting democracy (i.e., citizens learn by doing) and establishing national legitimacy on the global stage through sovereignty.


\textsuperscript{6} See, for example, the U.S.’s occupation of Iraq in 2003. The purported purpose of the invasion and subsequent occupation was, according to President George W. Bush and UK Prime Minister Tony Blair, a coalition aimed “to disarm Iraq of weapons of mass destruction, to end Saddam Hussein’s support for terrorism, and to free the Iraqi people.” President Discusses Beginning of Operation Iraqi Freedom, OPERATION IRAQI FREEDOM (March 22, 2003), https://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030322.html.; However, the initial UN Resolution recognizing Iraq’s occupation simply acknowledged the role of the U.S. and UK as occupying powers in Iraq and turned over control of the nation’s oil exports to them. S.C. Res. 1483 (May 22, 2003); Three subsequent resolutions provided only vague references to short-term political institutions that should be established by the occupiers, and these concessions were largely in exchange for allowing the continued use of force in the country. For discussion see Ellen Paine, The “Multinational Force” Mandate (Nov. 16, 2007), https://www.globalpolicy.org/component/content/article/168/36717.html.

\textsuperscript{7} See generally supra note 6.
I. Introduction  

In April 2003, the world watched as U.S. Marines toppled a statue of Saddam Hussein in Firdos Square in Baghdad while thousands of jubilant Iraqis cheered them on.\(^8\) It was a symbol of what was happening around the country: one of the harshest and most brutal dictatorships in the world was falling, opening the way to a new life of freedom. For the first time in 30 years, the citizens of Iraq would control their own destiny—or so they thought. Instead, following the cessation of formal armed conflict, Iraqis saw their country descend into anarchy as they were governed by foreign occupiers and exiled politicians from behind thick concrete walls.\(^9\) Their only interactions with governing officials came when these individuals deigned to visit local communities in armored cars, escorted by heavily armed bodyguards and wearing Kevlar vests.\(^0\) And as the violence escalated and quality of life plummeted, they were repeatedly told by these same officials that Iraqis were not yet capable of governing themselves, and that they should put their trust in the American occupation. It would take more than two years for Iraqis to get their first taste of democracy.\(^11\)

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\(^8\) ABC News, April 9, 2003.


\(^10\) Id. Larry Jay Diamond is a political sociologist and leading contemporary scholar in the field of democracy studies. He is a professor at Stanford University and a senior fellow at the Hoover Institution, a conservative policy think tank. He has published extensively in the fields of foreign policy, foreign aid, and democracy and serves as the director of the Center on Democracy, Development, and the Rule of Law. Diamond has served as an advisor to numerous governmental and international organizations at various points in his life, including the U. S. Department of State, United Nations, World Bank, and U.S.
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In February 2015, the Carter Center hosted a two-day conference on human rights and elections standards. The conference was co-chaired by former U.S. President Jimmy Carter and U.N. Assistant Secretary-General for Human Rights Ivan Šimonović. Over the next two years, key players in the field of human rights and election observation would work to develop guiding principles for cooperation between the two fields as part of the Center’s Human Rights and Elections Standards initiative. A key take-away from their eventual Plan of Action was the need for well-written and targeted recommendations for implementing a transition to democracy. The Plan stressed the importance of recommendations that are “specific, measurable, attainable, relevant, and time-bound, as appropriate, as well as sensitive to the country context”. This article is a first step towards drafting such recommendations.

Elections have been an integral part of the democratization process globally, as they are an institutionalized attempt at actualizing the essence of democracy—rule of the people, by the people, and for the people. While there are many views on what democracy is or ought to be, a common denominator among modern democracies is elections. Indeed, the role of elections in a democracy cannot be overstated. Every modern definition of representative democracy includes participatory and contested elections perceived as the legitimate procedure for the translation of rule by the people into workable executive and legislative power. Though elections by themselves are not sufficient to make a democracy, no other institution precedes elections in instrumental importance for self-gov-

Agency for International Development. In 2003, he was requested by President George W. Bush to serve as senior policy advisor to the coalition in Iraq. In this role, he repeatedly urged the rapid construction of an interim Iraqi government through a transparent and legitimate process of dialogue. On both the war and post-war activities, the Bush administration ultimately pursued policies very different from what Prof. Diamond recommended.

Peter Van Buren served in the U.S. Department of State for 24 years and spent a year in Iraq as part of a provincial reconstruction team. Following publication of his book, the Department of State began adverse proceedings against him, alleging he had not properly cleared his book for public release. Van Buren then chose to retire.

See Carter Center, supra note 2 for detailed summaries of this conference and all subsequent gatherings for the Project.

Id.

The Initiative is founded on the belief that greater and more sustained interaction between the international elections community and human rights mechanisms is needed to promote electoral reform, strengthen democratic governance, and foster the evolution of relevant international law on elections.

Plan of Action, supra note 3.

Together, these aims create the acronym SMART, a method of goal-setting attributed to Peter Drucker’s Management by Objectives Toolbox found in his 1954 book. See Peter Drucker, The Practice of Management (1954). It is a widely accepted way to ensure objectives are clear and reachable.

Plan of Action, supra note 3.


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government. Elections in newly democratizing countries do not signal the completion of the transition to democracy, but rather foster liberalization and a self-reinforcing power for increased democracy. In order to cement democratic principles in new democratic nations, therefore, it is vital for citizens to experience an election process as early as possible.

According to the National Democratic Institute (NDI), genuine elections are not merely a technical endeavor; they are a fundamental human right linked to a broad array of institutions and to the ability of citizens to exercise other civil and political rights. Elections perform three major roles: 1) they are a vehicle for the participation of citizens in the democratic process and they help to build capacities central to achieving accountable, democratic governance; 2) they aid in bringing better quality of life by linking voters’ interests to the act of selecting a candidate, party, or policy through public discourse; and 3) they are a means for managing the potential for violent conflict and advancing human security.

In 2015, then-UN Assistant Secretary General for Human Rights (and now UN Special Advisor on the Responsibility to Protect) Ivan Simonovic stated a human rights approach to elections has been proven to equitably and sustainably empower people to claim their rights, mobilize support, and build accountability because this approach uses human rights principles and obligations, including freedom from discrimination, to guide elections work.

Yet there is a gap in public international law in relation to electoral processes. Election observer groups do not generally present their findings to human rights bodies and elections-related recommendations issued by the United Nations and its various human rights organs are commonly offered to states already under review; little attention is given to those nations just beginning their transition to free and fair elections, whether they are attempting to do so on their own or under the administration of an occupier. Human rights actors are conducting capacity-building exercises on electoral issues, but they are not necessarily designed and implemented in coordination with the elections community.

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22 Id.
23 Id.
25 Id.
28 Avery Davis-Roberts, Introductory Address at the Carter Center’s Conference on Human Rights and Election Standards (Feb. 11, 2015).
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Only after grave injustices occur on a broad scale do international governing bodies start to intervene.\(^3\) While this restraint pays tribute to the sanctity of sovereignty in international law, it does little to prevent continued suffering and oppression in the nations at issue. Perhaps a better course of action would be akin to the consideration of reasonable limits on democratic rights necessary to prevent political activities aimed at abrogating the rights of other groups—international standards could establish expectations regarding elections timelines and criteria, the violation of which would be considered an act against fundamental human rights. The framework presented in this article is intended to provide guidance for just that purpose.

Section II of this article will explain the legal basis and obligations—or lack thereof—of occupying powers, including the evolution of these obligations since the Second World War, and discuss the current status of ‘occupation law’. Section III presents three occupation cases studies—Germany, Japan, and Iraq—and compares/contrasts the timing and implementation of their respective election processes and final formation of a sovereign government. Section IV then relies on the analysis of these case studies to propose a model framework for future occupations that would establish expectations and guidelines for implementing free and fair elections to meet human rights obligations under international law. Section V concludes with the recommendation that even though some nations may be on shaky ground in the beginning, it is far better to start them on the path to self-governance as soon as it is reasonably possible, rather than wait for the “perfect” set of factors to present themselves.

There is a need to find a solution to the dilemma of timing elections: while the post-conflict period is often the best time to push for reform, stakeholders are frequently fatigued.\(^3\) Also, as will be highlighted in the case studies, there are frequently pressing humanitarian concerns, security dilemmas, and logistical hurdles demanding the occupier’s attention, making it easy to delay what may be viewed as simply “procedural matters”. Elections, the drafting of new laws, and selecting new leaders and other democratic norms may seem superfluous—at least in the short term—when a Western nation is running the show, because there is little fear such a nation would pose a threat to eventual democratic self-

\(^{31}\) See, e.g., international interventions in Columbia, Guatemala, El Salvador, Sierra Leone, the Democratic Republic of Congo, Liberia, South Sudan, the Philippines, Nepal, and Rwanda. In every case, human casualties were high even before there was discussion of a coordinated, international response.

\(^{32}\) Such an approach is taken in most domestic constitutions in democratic nations, including South Africa, Canada, the United States, and members of the European Union. (Compiled language available at www.hrcr.org/safrica/limitations/limitation.doc).

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government. But regardless of the occupier's status, an occupation power is not a
government “of the people, by the people, and for the people”34. Without clearer
guidelines and expectations asserting that free and fair elections are as substantial
a human right as the concepts of equality and due process—in fact, the latter
items often stem from the former—the status quo of occupation government
could extend indefinitely, especially when the occupying officials can point to
numerous other demands some may view as more pressing priorities.35 Demo-
cratically-elected lawmakers are more likely to respect human rights of all kinds,
including those of woman and girls.36 If a nation is proclaiming itself as a new
democracy and yet is delayed in the most fundamental exercise of democratic
rights—voting—the resulting lack of capacity for the population to implement
change or an inability to imagine a different outcome from the troubled one they
have known can dampen will and limit the scope of creative solutions.37 The case
studies outlined below illustrate this fact all-too-clearly, and the model frame-
work presents a possible solution for holding occupiers accountable, a solution
that does not currently exist in international law.

II. History of Modern Occupation Law

When the United Nations was established, the word “democracy” was not
mentioned in its Charter.38 The question of democracy was only indirectly ad-
dressed by means of the then-newly accepted concept of human rights, briefly
mentioned in the UN Charter39 and later embodied in the 1948 Universal Decla-
ration of Human Rights (UDHR).40 Article 21(3) of the UDHR proclaimed the
right to free and fair elections by stating “[t]he will of the people shall be the
basis of the authority of government; this will shall be expressed in periodic and
genuine elections which shall be by universal and equal suffrage and shall be
held by secret vote or by equivalent free procedures”.41 Though ambiguous, this
article may be construed as making elections the basis of every legitimate gov-
ernment.42 The right to free and fair elections was reaffirmed by Article 25 of the

34 By its very nature, an occupying power is a foreign, external being; its authority cannot be consid-
ered as stemming from the people, regardless of the intent of the occupation. JEFFREY LEHAM &
SHIRLIE PHILIPS, WIST’S ENCYCLOPEDIA OF AMERICAN LAW (2d ed. 2008) (discussing the definition of
“military occupation”).
35 For example, in Iraq, serious violence and acts of insurgency made security a major concern within
the first two months of the occupation. As will be discussed in the case studies in Section III, however,
Germany and Japan also faced serious humanitarian concerns (though of a different type) and occupation
officials were able to overcome them within six months.
36 James Carter, Former U.S. President, Remarks on the Use of Election Standards by Observers
(Feb. 12, 2015).
37 Chad Vickery, Speech on Human Rights and Election Standards at the International Foundation
39 See id. at art. 1, 13, 55, 62, 68, and 76.
41 Id. at art. 21(3).
42 Although the UDHR, as a UN General Assembly Resolution, is not considered a legally binding
instrument, the overwhelming majority of nations who voted in its favor and its continuous affirmation

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1966 International Covenant on Civil and Political Rights (ICCPR), which is binding on states that have signed or ratified it. The first UN document to directly consider a right to democracy was the General Assembly Resolution of 21 November 1997, entitled “Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies.” Generally, this resolution sought to express the UN’s support for those nations attempting to achieve democracy and to examine options available for strengthening that support.

When a nation first achieves independence, whether through internal uprising or revolt against an external power, most have democracy thrust upon them, without the benefit of developed democratic institutions and systems. In Africa, this created a political leadership vacuum, as most newly elected leaders were inexperienced in the art of governance. The leadership void permitted the rise of many military and autocratic leaders throughout the continent. Typically, however, these scenarios are left to play out, deemed to be problems the new nation must resolve on their own; only when truly heinous atrocities occur does the international community move to intervene in a sovereign nation’s independent governance. But what about in those situations where a nation has already intervened? Post-conflict, what are the responsibilities of the intervening state to ensure the fundamental human right of elections are delivered to the people?

It is important to note the difference between human rights law and transitional justice: whereas human rights law focuses on strengthening and protecting the basic rights and fundamental freedoms inherent to all human beings,


G.A. Res. 52/18 (Jan. 20, 2002).

Id.

See, e.g., Richard Joseph, Democracy and Reconfigured Power in Africa, BROOKINGS CURRENT HISTORY 324 (2011) (detailing the power vacuums that often result at the end of armed conflicts); Diamond, supra note 9 (discussing the situation in Iraq).

See Ayanleye, supra note 20, at 144.

Id.

Supra note 31.

In the 1990s, various American academics coined the term “transitional justice” to describe the different ways countries had approached the problems of new regimes coming to power and facing the massive rights violations of their predecessors. The term took hold due to the great interest in the way former Soviet Bloc countries were dealing with the legacy of totalitarianism. Over time, particular mechanisms have developed and become recognized as approaches to transitional justice, including prosecutions, fact-finding or “truth-seeking” inquiries, reparations programs, and reform initiatives. See International Center for Transitional Justice, available at https://www.ictj.org/about [hereinafter ICTJ].

transitional justice is defined as the legitimate response to massive violations of human rights;\textsuperscript{52} thus, the latter is a result of a failure in the former.

Following mass atrocities and systematic abuses of power, transitional justice aims may include establishing accountable institutions and restoring the public’s confidence in them; making access to justice a reality for the most vulnerable in society; ensuring marginalized groups play an effective role in a new, just society; building respect for the law; and facilitating the peace process and developing durable resolutions of conflicts.\textsuperscript{53} Each of these aims would appear to match easily with the goals of a democratic nation; in fact, they would overlap considerably. It would seem that offering the people a chance at self-governance might, in itself, be a strong form of transitional justice. In fact, some of the recommendations in the model framework in Section IV include best practices from transitional justice scholars. By including these practices, the model seeks to inform and solidify the fact that free and fair elections are a fundamental human right, and their past absence, or a failure to provide them in the present, should be addressed as a need for transitional justice in order to renew the public’s faith in their new government.

“Occupying Power” is the legal term for countries occupying an adversary’s territory.\textsuperscript{54} When Iraq fell to U.S. and British forces in 2003, it spurred many international legal scholars to reexamine the basic requirements of occupation law, given the extensive nature of the occupation and frequency with which extraterritorial military occupations had been occurring during the previous decade.\textsuperscript{55} The Annexed Regulations to the Hague Convention IV of 1907, the 1949 Fourth Geneva Convention, and customary international law set forth the laws of belligerent occupation,\textsuperscript{56} and both the Nuremberg Tribunal\textsuperscript{57} and a 1993 Report

\textsuperscript{52} ICTJ, supra note 50.

\textsuperscript{53} Id.

\textsuperscript{54} The definition of occupation and the obligations of the occupying power were initially codified at the end of the nineteenth century. The definition still in force and commonly used nowadays is the one contained in the Regulations Concerning the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 August 1907 (H.IV). Section III of the regulations details the rights and obligations of the military authority over enemy territory (Arts. 42–56). These are very old regulations that, according to the International Court of Justice, have acquired the status of international customary law.

\textsuperscript{55} International Committee for the Red Cross Report on Occupation and Other Forms of Administration of Foreign Territory, Nov 2010, available at https://www.icrc.org/eng/resources/documents/interview/2012/occupation-interview-2012-06-11.htm [hereinafter ICRC Report] (noting the various occupations that occurred during the 1990s following the internal conflicts that arose after the break-up of the Soviet Union).

\textsuperscript{56} Convention Respecting the Laws and Customs of War on Land art. 42, Oct. 18, 1907, 36 Stat. 2277 [hereinafter 1907 Hague Regulations] (stating that a “territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised”); Geneva Conventions of 1949 art. 2, Aug. 12, 1949 [hereinafter Geneva Conventions] (stating that, the four Geneva Conventions of 1949 apply to any territory occupied during international hostilities. They also apply in situations where the occupation of the state territory meets with no armed resistance).

\textsuperscript{57} Charles Wyzanski, \textit{Nuremberg: A Fair Trial? A Dangerous Precedent,} \textit{The Atlantic} (April 1946) (detailing the Tribunal’s references to the Allied occupiers’ responsibilities towards the German people).
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of the UN Secretary General\textsuperscript{58} characterized the Hague Regulations as reflecting customary international law binding on all States.\textsuperscript{59}

Occupation laws come into effect as soon as territory is “occupied”—that is, when the government of the occupied territory is no longer capable of exercising its authority, regardless of whether the occupation was initially deemed lawful.\textsuperscript{60} Obligations and rights of the Occupying Power only extend to those areas their forces actually control.\textsuperscript{61} Ultimately, whether territory is occupied is a question of fact,\textsuperscript{62} but occupation does not imply an assumption of sovereignty; the Occupying Power is simply administering the area it has captured. Various attributes of sovereignty are often limited during occupations, however, as the Occupying Power assumes most of the executive functions of the former government, as well as some legislative and judicial responsibilities.\textsuperscript{63} A “military government” administers the occupied territory; it may, however, permit segments of the local government to continue operating. In fact, a strong preference for allowing local authorities to perform governmental functions is evident throughout the body of occupation law.\textsuperscript{64}

Despite being labeled “military government”, the occupation government may be military, civilian, or mixed in composition.\textsuperscript{65} Regardless of their makeup, occupation law imposes significant policing/law and order responsibilities on occupation forces, as it is primarily motivated by humanitarian considerations.\textsuperscript{66} Occupation formally ends with the reestablishment of a legitimate government or other form of administration (such as by the UN) capable of adequately and efficiently administering the territory.\textsuperscript{67}

Occupation law clearly preserves, to the extent possible, the role of a defeated population in governing their own country and facilitates the eventual transfer of a nation’s authority back to its own people.\textsuperscript{68} Duties of an Occupying Power are primarily found in Articles 42-56 of the 1907 Hague Regulations and the Fourth

\begin{itemize}
\item \textsuperscript{59} The declaration these regulations are customary law is important under international law because it makes their standards and obligations binding on all nation-states, regardless of their membership or party status to various treaties or other international agreements.
\item \textsuperscript{60} See Article 42 of the Hague Regulations, supra note 54.
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id. The fact some resistance continues does not preclude the existence of occupation, provided the occupying force is capable of governing the territory to some degree. It is also not legally relevant if the occupiers claim to be “liberating” the population—justification of the conflict has no bearing on which laws apply.
\item \textsuperscript{63} Id.
\item \textsuperscript{65} Id.
\item \textsuperscript{66} Hamada Zahawi, "Redefining the Laws of Occupation in the Wake of Operation Iraqi Freedom," 95 CAU. L. REV. 6 (Dec. 2007).
\item \textsuperscript{67} Schmitt, supra note 64.
\item \textsuperscript{68} ICRC Report, supra note 55.
\end{itemize}
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Geneva Convention, Articles 27-34 and 47-78, as well as certain provisions of Additional Protocol I and customary international law.\textsuperscript{69} The main rules of occupation law stress that the occupier’s powers are not absolute and should be viewed as limited in duration, lasting only long enough for the defeated nation to re-establish its own form of government.\textsuperscript{70} Most notably missing from the list of occupier obligations are any guidelines or expectations on an Occupying Power in regards to its day-to-day administering of the occupied territory. Where are the requirements for establishing a new form of government? What criteria should be used to select new national leaders? Should a new constitution be drafted? If so, through what process? Under what circumstances is it permissible to continue governing a nation, despite vehement local protest? Though elections are recognized as a fundamental right, these questions, which get to the heart of what a new nation will become post-occupation, are left to be determined on a case-by-case basis, thus resting an inordinate amount of power on the occupier—rather than the international community—to answer them as they see fit.

Since elections, as discussed above, are often the jumping-off point for both a new government and a new way of governing, it is reasonable to examine various approaches to their implementation in order to determine whether a model approach would aid future efforts. In an attempt to control some of the many variables, the case studies examined in this piece all involve occupations by the United States and are all considered the most monumental occupations in the modern era.\textsuperscript{71} As a Western democracy, the United States is quite familiar with elections and the democratic process. The case studies were all true occupa-

\textsuperscript{69} See supra note 54.

\textsuperscript{70} See The 1907 Hague Regulations, \textit{supra} note 56; Geneva Conventions, \textit{supra} note 56; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, U.N. Doc. A/32/144, Annex I [hereinafter Additional Protocol I]; UN CHARTER (providing the following guidelines:

- The Occupying Power does not acquire sovereignty over the territory
- Occupation is only temporary
- The Occupying Power must respect the laws in force in the occupied territory, unless they constitute a threat to security or an obstacle to international law
- The Occupying Power must take measures to restore and ensure public order and safety
- The Occupying Power must ensure sufficient hygiene and public health standards, as well as provision of food and medical care
- The population cannot be forced to enlist in the occupier’s armed forces
- Forcible transfers of populations from and within the occupied territory are prohibited
- Transfers of the civilian population of the Occupying Power into the occupied territory are prohibited
- Collective punishment is prohibited
- Taking of hostages is prohibited
- Reprisals against protected persons or their property is prohibited
- The confiscation of private property is prohibited
- The destruction or seizure of public enemy property is prohibited, unless required by military necessity
- Cultural property must be respected
- People accused of criminal offenses must be afforded internationally recognized due process
- Relief agencies (such as the ICRC) must be allowed to carry out humanitarian aid duties

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tions,\textsuperscript{72} with the U.S. having almost carte-blanche to administer each of its territories,\textsuperscript{73} thus—in theory—removing delays and other obstacles caused by bureaucratic in-fighting, political posturing, group-think, and endless committee discussions. Most importantly, the timing of elections, and the decision as to whether national or local elections should come first, were altered in each case, allowing for a unique opportunity to compare each approach. These two factors are important components of the model framework set forth in Section IV.

III. A Tale of Three Occupations: Germany, Japan, and Iraq

Germany and Japan demonstrate how elections that start at the local level allow a new balance of social and political forces to emerge and coalesce. In 1945-46, President Truman’s approach to democratization was a bottom-up effort, beginning with grassroots initiatives in small, local offices leading up to local, and then regional, elections.\textsuperscript{74} In 2003-04, the Coalition Provisional Authority (CPA) in Iraq, under the direction of Ambassador Paul Bremer, never held local elections and never allowed the Iraqis to hold them, either. Rather, President Bush decided to implement national elections first, with the hopes of establishing a governing body capable of taking over as the sovereign authority in Iraq before the 2004 U.S. elections cycle.\textsuperscript{75} In the end, however, it would take three different elections and various transitional bodies before Iraq finally had permanent leaders at ANY level—a process that took more than two years.\textsuperscript{76}

A. Germany, 1945: De-centralized, Local Control

The Potsdam Conference\textsuperscript{77} called for the establishment of local self-government “on democratic principles and, in particular, through elective councils as rapidly as possible and as is consistent with military security and the purpose of military occupation”, with later extensions of authority to regional and state administrations.\textsuperscript{78} Thus, the victorious Allied powers in Europe realized it was important to first implement democratic measures at smaller, local levels, before

\begin{itemize}
\item \textsuperscript{72} Id.; 1907 Hague Regulation, supra note 56.
\item \textsuperscript{73} See Edward N. Peterson, The American Occupation of Germany: Retreat to Victory, Wayne State University Press (1977); See Earl F. Ziemke, The U.S. Army in the Occupation of Germany, 1944-46, Center for Military History, United States Army, Washington, DC (1975). Initially, the Allied Control Council was expected to play a larger role in regards to governing Germany; however, the slow nature of collective governance became clear by mid-1945, and each victor—Britain, the U.S., France, and the Soviet Union—was left to govern its designated zone with little consultation with the other members).
\item \textsuperscript{74} Ziemke, supra note 73.
\item \textsuperscript{75} See Diamond, supra note 9.
\item \textsuperscript{76} Id.; Phoebe Marr, A Modern History of Iraq (2011).
\item \textsuperscript{77} Reports of the Potsdam Conference, available at https://www.loc.gov/law/help/us-treaties/bevans/m-ust000003-1224.pdf (The Potsdam Conference, held in the summer of 1945, was a meeting between “The Big Three” victors of World War II—Soviet leader Joseph Stalin, British Prime Minister Winston Churchill (replaced on July 26 by Prime Minister Clement Attlee), and U.S. President Harry Truman—in Potsdam, Germany, to negotiate terms for the end of World War II).
\item \textsuperscript{78} Id.
\end{itemize}
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attempting large-scale national elections.\textsuperscript{79} To accomplish this, civil affairs/military government officers were stationed in every town and village throughout the U.S. sector—oversight and control of the process would be easy due to sufficient soldiers being on the ground and living within the communities.\textsuperscript{80}

In early May 1945, the U.S. Army began to organize German provincial and district governments, including identifying citizens to serve in government positions.\textsuperscript{81} Finding men with no Nazi involvement for the higher posts proved to be arduous business. Many of the potential candidates had not worked under the Nazis due to age or political affiliation, or they had held much lower ranks. Some were women, for whom the Nazi discrimination against their sex provided an advantage during the occupation period.\textsuperscript{82}

In addition to weeding out the Nazis, military government officers recruiting Germans for appointments had to be careful to steer clear of over-involvement with other political factions. General Eisenhower repeatedly reminded army commanders the purpose of military government authorities was not to actually govern, but to oversee the German governmental authorities—a fine and delicate line.\textsuperscript{83} A network of U.S.-appointed local councils and a central advisory council were eventually established as precursors to self-government.\textsuperscript{84}

When SHAEF (Supreme Headquarters, Allied European Forces) began to look at German political activity in June 1945, it found none in the traditional sense of the term.\textsuperscript{85} The vast majority of Germans were preoccupied with other things, such as food, housing, and other problems related to survival.\textsuperscript{86} Additionally, no other party than the Nazi Party had existed legally, or even illegally, in any organized fashion since 1933.\textsuperscript{87} In August 1945, military detachments were permitted to start licensing parties at the local level, but there was little to no interest from the public.\textsuperscript{88} The detachments quickly realized German politics involved much more than parties and rivalries: the German appointees represented social, economic, and religious outlooks, in addition to political ones. Special interests, such as the Catholic Church or individual cliques, were determining policy direction.\textsuperscript{89} Nevertheless, elections for small communities (less than 20,000 people) were scheduled for January 1946, and elections for larger towns and cities would

\textsuperscript{79} DOBBINS ET AL., supra note 71, at 14.
\textsuperscript{80} ZIEMKE, supra note 73, at 272 (providing provides an extremely in-depth analysis of all aspects of the Allied occupation in Germany, with care to provide data and sources for each assertion. It is a compilation of three decades of work following the war).
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Correlli Barnett, \textit{Post-conquest Civil Affairs: Comparing War's End in Iraq and Germany}, The Foreign Policy Centre, 4 (2005).
\textsuperscript{85} ZIEMKE, supra note 73, at 361-62.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 362-63.
\textsuperscript{89} Id.
be held a few months later.90 The hope was active political life in Germany would rebound by late 1946.91

The first parties on the scene were the Communists and the Social Democrats, neither of which bore the Nazi taint, but both were opposed by the Church and lacked a working class majority.92 The two strongest pre-Nazi parties showing signs of life were the Center Party and the Bavarian People’s Party, so the U.S. was relatively generous in appointing their members to administrative posts, despite direct orders to avoid political favoritism.93 Both the CP and the BPP let it be known—to the annoyance of U.S. officials—they would welcome repentant Nazis to their ranks.94

Throughout the nation, there was a concern about lack of experience and leadership within the new political parties. Except for a few survivors of the concentration camps, there was not an abundance of men with political backgrounds.95 Outside of the senior Allied staff, most military officers and German politicians wanted the elections postponed; none of the parties who received licenses wanted to risk their existence in a premature test of strength, and several of their members already had jobs as appointees.96 But General Lucius Clay97, the U.S. officer placed in charge of military government, believed in learning by doing, so the Germans were sent to the polls whether they were ready (and willing) or not. Clay also realized that there soon would not be sufficient manpower to run the country if they did not get Germans into positions, as large numbers of U.S. officers were slated to return home in the latter half of 1945.98

90 Lest it seem this was a relatively easy feat, the challenges facing occupation officials should be clear. The last years of the conflict severely damaged Germany’s physical infrastructure. See, e.g. Tony Killick, Principals, Agents, and the Failings of Conditionality, 9 J. ON INT’L. DEV. 483-95 (1997). A huge refugee crisis loomed, the economy collapsed, and hunger haunted nearly everyone. Additionally, nearly seven million Germans died during the war. See, e.g. Eva Bellin, The Iraqi Intervention and Democracy in Comparative Historical Context, 119 POLITICAL SCI. Q. 4 (2004-05). In most industrial areas, more than half the houses were damaged, while nearly two-fifths were beyond repair. The transport system had been smashed by bombardment, with only 656 miles of rail track operable out of nearly 8,000 miles. All seven rail bridges across the Rhine were destroyed and the canal system suffered from similar damage. 1,500 road bridges were destroyed and there were desperate shortages of fuel and civilian vehicles. Essential ports were encumbered by wrecks and other obstructions; the telecommunications net was reduced to chaos. Coal was in short supply, and it served as the energy source for electric power, industry, and the remaining petrol plants. Millions of displaced persons had to be sheltered, fed, sorted out, and eventually repatriated to other parts of Europe, not to mention the several million German prisoners of war who needed to be disarmed and demobilized. See, e.g. Barnett, supra note 84, at 3.
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Despite American misgivings and local disinterest, the Germans went to the polls for local elections in January 1946 in astonishingly large numbers: 86% of those eligible voted.\textsuperscript{99} General Clay and other military government officers found this particularly gratifying, since it justified the assertion the new administration was based on popular support.\textsuperscript{100} But political principles were still obscure, since the successful parties welcomed former Nazis and either had strong ties to the Catholic Church or the Communist Party. The average German still did not recognize the personal responsibilities accompanying political freedom, but the time for discussion was over.\textsuperscript{101} In April and May 1946, the Germans voted for regional councils, again with high turnouts. On June 14, 1946, detachments in the U.S. zone rescinded all existing military government directives, officially ending military government in Germany.\textsuperscript{102}

The gradual implementation of self-governance allowed Germany’s new political parties to build momentum and enabled occupation officials to adapt their procedures before larger-scale elections took place. By establishing local and regional governments early—the first began within eight months of the German surrender—the day-to-day running of the country became much smoother. Over the next few years, the Allied governments gradually relaxed control over German political life. A new German constitution would not be drafted until 1949,\textsuperscript{103} however, giving both occupation officials and the population ample time to develop new economic, political, and social centers—in other words, allowing the Germans to decide what they wanted their new country to be. This is contrasted in Japan, as discussed below, where General MacArthur ordered national elections to be held within six months of surrender, though the close-held, grassroots approach remained the same.\textsuperscript{104}

Beginning in February 1948, the three western occupying powers of Germany (the U.S., Britain, and France) began debating the political future of their respective zones. In June of that year, negotiations were concluded, leading to the development of a democratic and federal West German state.\textsuperscript{105} The presiding ministers of Germany’s regional states were directed to arrange a constitutional assembly to draft a constitution for the new state. According to papers known as the Frankfurt Documents,\textsuperscript{106} the constitution was to specify a central government.

\textsuperscript{99} Id. at 427-428 (Before the elections, military government detachments reviewed the 4,750,000 names on the voting lists and disqualified 326,000 for Nazi affiliations).

\textsuperscript{100} Id.

\textsuperscript{101} Id.

\textsuperscript{102} Id.


\textsuperscript{104} JEFF BRIDOUX, AMERICAN FOREIGN POLICY AND POST-WAR RECONSTRUCTION: COMPARING JAPAN AND IRAQ. (Routledge Taylor and Francis Group, 2011).


\textsuperscript{106} Participants at the Potsdam Conference had agreed that the foreign ministers of the four victorious powers should meet to implement and monitor the conference’s decisions about postwar Europe. During their fifth meeting, held in London in late 1947, prospects for concluding a peace treaty with Germany were examined. Following lengthy discussions on the question of reparations, the conference ended with-
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while simultaneously respecting the various regional administrations, and would contain provisions and guarantees of individual freedoms and rights. The ministers were reluctant to begin this work, however, since they felt the creation of a West Germany state would mean a permanent separation from the eastern zone. On their own accord, they decided to implement the requirements of the Frankfurt Documents on a provisional basis. They held a parliamentary council rather than a constitutional assembly, and the resulting document was referred to as a "basic law", not a constitution. Thus, it was clear West Germany would not be the only state of German people—reunification and self-determination remained on the agenda. The Western Allied powers acquiesced to this approach.

Delegates to the parliamentary council were appointed by the leaders of West Germany’s regional states. A preliminary draft of the “Basic Law” was prepared in August 1948, and final editing started on September 1. At this time, a larger, 65-member council was formed, with members being elected by the regional parliaments of their respective states. The final draft of the Basic Law was passed by the council on May 8, 1949 and approved by the Western Allied powers a mere four days later. The ratification process was quick, and on May 23, 1949, the German Basic Law was signed and promulgated. It was followed by the first nation-wide elections in West Germany.

Prior to 1945, Germany’s experience with true democracy was close to non-existent. By the end of the war, its infrastructure was destroyed, it faced a massive humanitarian crisis, it was burdened with extensive war reparations, and its people were near exhaustion. When the Allied occupation began, the majority military government opinion favored an extended period of tutelage. If this

out any concrete decisions. The tense atmosphere during the talks and the uncooperative attitude of the Soviet participants convinced the Western Allies of the necessity of a common political order for the three Western zones. At the request of France, the Western Allies were joined by Belgium, the Netherlands, and Luxembourg at the subsequent Six Power Conference in London, which met in two sessions in the spring of 1948. The recommendations of this conference were contained in the so-called Frankfurt Documents, which the military governors of the Western zones issued to German political leaders on July 1, 1948. The documents called for convening a national convention to draft a constitution for a German state formed from the Western occupation zones. The documents also contained the announcement of an Occupation Statute, which was to define the position of the occupation powers within the new state.

107 Kommers, supra note 105, at 309.
108 Id.
109 Id.
110 Id.
112 Id.
113 COLLINGS, supra note 111.
114 Id.
116 BRIDOUX, supra note 104, at 9.
117 Id.
118 DOBBINS ET AL., supra note 71, at 14.
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view had prevailed, the result might have been the same as the protracted and increasingly expensive train of denazification programs the Allies attempted to implement but ultimately backed away from (and, it should be noted, eventually handed off to the Germans to run, with great success). General Clay made democracy as attainable an objective for U.S. forces as it was ever going to be by placing responsibility for its attainment where it would ultimately have to lay: with the German people. By not attempting to undertake an extensive democratization program, the military government actually accomplished more. 60 years later, the opposite approach was adopted in Iraq, with widespread civil education programs and “democracy talks” being attempted but no effort to actually engage citizens in the practice of democracy.

In 1945, few people believed the German nation would recover from the war. The winners of Germany’s first post-conflict elections were Communists and Catholics—two groups loathed in American politics at the time. But their victories sent a swift message to other constituencies: get it together or get out. By the time national elections arrived, many more “desirable” groups had made headway. Within five years, the German people were in control of their country through a new democratic government, and Germany gradually transitioned from a former enemy into a strong potential ally in the Cold War.

Although denazification was one of the principal objectives of the early occupation period, its proposed scale quickly proved impractical. The occupying powers did not have the manpower or resources to accomplish such a thorough purging of German society, and the U.S. forces found it impossible to administer the state without interacting with and utilizing competent bureaucrats and officials, at least some of whom were complicit in the Nazi regime. See, Peterson, supra note 115, at 4; numerous detachments quickly protested that, under the rules, they could not find enough people to begin reorganizing the German administration. See Ziemke, supra note 73, at 382. By December 1945, it was clear the status quo could not continue. Before the end of the year, Clay said it was time for the German people to take charge of denazification. See Ziemke, supra note 73, at 429; from the beginning, the Germans approached denazification differently than the Americans. While the Allies only distinguished between active and nominal Nazis, the Germans recognized several levels of gradation, settling on five: major offenders, offenders, lesser offenders, followers, and exonerated, and adopted a scale of sanctions based on the offense, thus allowing for options other than permanent exclusion. The Germans meant to remove the Nazi stigma from the individual and reinstate him to a position within society. See Ziemke, supra note 73, at 400; By June of 1946, 90% of the Germans initially purged were rehabilitated. As the standard of living then rapidly improved throughout the sector, there was accelerated progress toward political goals. See Ray Salvatori Jennings, “The Road Ahead: Lesson in Nation-Building from Japan, Germany, and Afghanistan for Postwar Iraq,” Peaceworks No 49. United States Institute for Peace, Washington, DC (April 2003).

See discussions of “democracy dialogues” in the works of Bremer, Diamond, and Van Buren, each of whom discusses thousands of civic education lessons provided in Iraq with no follow-through for actual democratic practices.

Bellin, supra note 90, at 606-07.
Ziemke, supra note 73, at 363.
Id.
Barnett, supra note 84, at 15-16.
B. Japan, 1945: Decentralized, National Control

Immediately after the Japanese announced their decision to surrender in August 1945, General Douglas MacArthur was appointed the Supreme Commander for the Allied Powers (SCAP) to oversee the occupation of Japan. Although he was technically under the authority of an Allied Powers commission, MacArthur took his orders from Washington.127 Rather than establish an American military government to rule Japan during the occupation, as was done in Germany, MacArthur decided to employ the existing Japanese government.128 This decision was based largely on two factors: 1) there was nothing similar to the “Nazi litmus test” to determine who should be purged from the new government; and 2) the U.S. military was severely lacking in Japanese language and technical experts.129 Also, MacArthur realized imposing a new order on the island nation would be a difficult task, even with Japanese cooperation. It would be impossible, he believed, for foreigners to dictate radical changes on 80 million resentful people.130 Thus, MacArthur’s regime functioned by issuing direct orders to Japanese government officials and allowing them to manage the country.131

An important element of MacArthur’s democratization strategy was to work locally among outlying communities, completely bypassing the conservative top and middle layers of the Japanese government.132 Local elections were held in which women were permitted to vote for the first time, and roving teams of civics instructors were dispatched to cities and towns to discuss the nature of democracy.133 Civil affairs officers, pulled from the military and civilian defense agencies, followed these teams and organized communities to begin reconstruction projects of local choosing. It was democracy in miniature and it helped communities address their real needs while developing an appreciation for political participation that proved useful after the return of sovereignty.134 As democratic government emerged in Japan, direct-involvement programs such as these en-

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127 In Japan, the United States took the lead in the occupation because it played the predominant role in the final phases of the Pacific war. Unlike Germany, there would be no zones and no division of responsibility. The Potsdam Conference did not limit the actions the U.S. could take in carrying out the occupation, so they hoped to avoid the most troublesome aspects of the German occupation, where policy formulation and implementation was slowed and sometimes blocked by the need to forge agreements among the four parties. See DOBBINS ET AL., supra note 71, at 28-29; 31.

128 DOBBINS ET AL., supra note 71, at 53; BRIDOUX, supra note 104; Bellin, supra note 90, at 600.

129 Id.


131 JENNINGS, supra note 119, at 9-10. Once the occupation was underway, MacArthur sent troops and civil affairs officers on rounds of motorcycle diplomacy throughout the country to establish security and explain U.S. intentions while managing local expectations of the military government; DOBBINS ET AL., supra note 71, at 32. In August 1945, MacArthur instructed the Japanese government to establish a liaison office to interact with SCAP headquarters. The Central Liaison Office was located in Tokyo and staffed by the Foreign Ministry. Liaison offices were also set up in each prefecture to serve local military government teams. The Central Liaison Office functioned as the primary channel for communication between the SCAP special staff sections and the Japanese government.

132 JENNINGS, supra note 119, at 28.

133 Id.

134 Id.
couraged a critical mass of citizens to take part in elections and to engage in political discourse while making demands and articulating interests to their new leaders. 135

The wording of the Potsdam Declaration 136 and the initial post-surrender measures 137 indicated neither MacArthur nor his superiors intended to impose a new political system on Japan unilaterally; rather, they hoped to encourage Japan’s new leaders to initiate democratic reforms on their own. 138 MacArthur announced a national election would be held in April 1946, only seven months following the surrender. 139 He also called for the Japanese Diet 140 to pass a new election law to provide for free democratic elections, including the right of women to vote. 141 But by early 1946, MacArthur’s staff and Japanese officials were at odds over the most fundamental issue: the writing of a new constitution. 142 The Japanese were extremely reluctant to replace the Meiji Constitution of 1889, 143 while the Americans desired a far more liberal document. 144 The Meiji Constitution concentrated actual political power in the hands of a small group of

135 Id.
136 See Potsdam Conference, supra note 78.
137 U.S. DEP’T OF STATE, DEPARTMENT OF STATE BULLETIN, 423-427 (Sept. 23, 1945). This document set two main objectives for the occupation: 1) To insure that Japan would not again become a menace to the United States or to the peace and security of the world. 2) To bring about the eventual establishment of a peaceful and responsible government which would respect the rights of other states and would support the objectives of the United States as reflected in the ideals and principles of the Charter of the United Nations. The document also set four main policies to be pursued: Japanese sovereignty would include only the four main Japanese islands of Honshu, Hokkaido, Kyushu, and Shikoku, while the fate of additional islands was to be determined later (this provision was taken from the Potsdam Declaration of July 26, 1945); Japan was to be disarmed, and the military was not to play any important role in Japanese society in the future; Japanese society was to be encouraged to develop personal liberties, such as freedoms of religion, assembly, speech, and the press, as well as to develop democratically elected institutions; the Japanese economy was to be developed for peaceful purposes.

138 JENNINGS, supra note 119, at 16.
140 The National Diet is Japan’s bicameral legislature. It is composed of a lower house called the House of Representatives, and an upper house, called the House of Councilors. Both houses of the Diet are directly elected under parallel voting systems. In addition to passing laws, the Diet is formally responsible for selecting the Prime Minister. The Diet was first convened as the Imperial Diet in 1889 as a result of adopting the Meiji Constitution. The Diet took its current form in 1947 upon the adoption of the post-war constitution and is considered by the Constitution to be the highest organ of state power. See “Diet Functions”, www.shugiin.go.jp

141 JENNINGS, supra note 119, at 28.
142 BRIDOUX, supra note 104, at 129, 134-36.
143 See Meiji Constitution, ENCYCLOPEDIA BRITANNICA (Aug. 3, 2011), https://www.britannica.com/topic/Meiji-Constitution. After the Meiji Restoration in 1868, Japan’s leaders sought to create a constitution that would define Japan as a capable, modern nation deserving of Western respect while preserving their own power. The resultant document called for a bicameral parliament (the Diet) with an elected lower house and a prime minister and cabinet appointed by the emperor. The emperor was granted supreme control of the army and navy. A privy council advised the emperor and wielded actual power. Voting restrictions, which limited the electorate to about 5 percent of the adult male population, were loosened over the next 25 years, resulting in universal male suffrage. Political parties made the most of their limited power in the 1920s, but in the 1930s the military was able to exert control without violating the constitution.

144 DOWER, supra note 139, at 4, 374-75, 383-84.
government leaders responsible to the emperor, not the people.145 From 1930 to the end of the war, this governing group was dominated by the military.146

MacArthur desired a constitution in which power was vested in the people, not held by an elite few and only permitted to flow down to the population.147 He communicated this view to the leaders of the Japanese government, who formed a committee to rewrite the Meiji Constitution.148 A group of Japanese constitutional scholars began meeting in late 1945, but their recommendations were too conservative for U.S. officials—after four months of work, the committee had produced a revision with only minor word changes.149 This version was rejected outright by U.S. officials.150 In the end, it fell to the Americans to draft a new national charter for Japan. On February 3, 1946, MacArthur directed the government section of SCAP (Supreme Command — Allied Powers) to draft a constitution to guide the Japanese cabinet in its efforts. This “model constitution” would then be used by the Japanese in preparing another revision.151 He urged extreme haste and secrecy because he wanted to go public with a Japanese-endorsed draft before the newly-established Far East Commission, an internal advisory board given jurisdiction over constitutional matters, convened in late February.152 Also, the scheduled national election was barely two months away, and MacArthur saw this election as a test to whether the Japanese people would accept democratic changes in their political system.153

The job of writing MacArthur’s “model constitution” fell to a team of about a dozen Army and Navy officers, all with special training in government affairs, plus a few civilian experts.154 The team met secretly, using a 1939 edition of a book on world constitutions as their main reference.155 This initial drafting convention lasted six days, and SCAP completed the entire document within two weeks.156 It was presented to Japanese officials on February 19, 1946.157 Much of the document was prepared by two senior army officers with law degrees, although other MacArthur appointees had significant influence, especially in regards to women’s rights.158 Though the document’s drafters were not Japanese,

145 See Meiji Constitution, supra note 143.
146 Id.
147 DOWER, supra note 139, at 4; DOBBINS ET AL., supra note 71, at 43.
148 Id.
149 Id. For example, the emperor became a “supreme” authority, rather than “sacred”.
150 Id.
151 Id.
152 DOWER, supra note 139, at 4; DOBBINS ET AL., supra note 71, at 43.
153 Id.
154 Id.
155 Id.
156 Id. The length of time devoted to drafting a national constitutional seems to have no correlation to its success. For example, the Constitution of the United States was written in approximately 100 hours, but, as will be discussed below, even a temporary constitution in Iraq took more than four months.
157 DOBBINS ET AL., supra note 71, at 43.
158 DOWER, supra note 139, at 411.
the Meiji Constitution, demands of Japanese lawyers, opinions of pacifist political leaders, and the earlier Japanese drafts were all taken into account within the model constitution;\footnote{DOWER, supra note 139, at 33, 39; Y. Funabashi, China's Long-term Strategy: Peaceful Ascendancy, INT'L. HERALD TRIBUNE (Dec. 30, 2003), https://www.nytimes.com/2003/12/30/opinion/asias-future-china-is-preparing-a-peaceful-ascendancy.html.} nonetheless, Japanese government leaders were shocked by the radical changes proposed in the “MacArthur Constitution”.\footnote{JENNINGS, supra note 119, at 16.} The resulting document borrowed from the British system in establishing a cabinet and prime minister who were responsible to the National Diet. The guarantees of individual rights included wording similar to that found in the American Bill of Rights. One part, pertaining to equal rights for all citizens, even went beyond the legal protections Americans enjoyed at the time.\footnote{DOWERS, supra note 139, at 4.} But the Japanese found it hard to accept the idea of “rule by the people”, which conflicted with the Japanese tradition of absolute obedience to the emperor.\footnote{DOBBINS ET AL., supra note 71, at 44; DOWERS, supra note 139, at 4.} After disagreeing among themselves, the Japanese cabinet went to the emperor, who ended the deadlock by commanding the model become the basis for the new constitution of Japan.\footnote{Id. Under the new election laws, this was the first general election in Japan in which women were permitted to vote. 39 women were elected to national office, a number that would stand as the largest in Japan's history until 2005.}

On March 6, 1946, the Japanese cabinet accepted the constitution and an outline of the document was presented to the Japanese public, followed by statements of approval by Emperor Hirohito and General MacArthur.\footnote{Id.} The population eventually accepted this hastily written and poorly translated document,\footnote{DOWERS, supra note 139, at 407.} as did the Far East Commission after suggesting minor revisions.\footnote{DIETRICH NOHLEN ET AL., ELECTIONS IN ASIA: A DATA HANDBOOK 381, (OUP Oxford 2001).} Elections for national representatives occurred on April 10, 1946,\footnote{Id.} with the resulting body responsible for approving the constitution. The MacArthur draft, which proposed a unicameral legislature, was changed to allow a bicameral one, with both houses being elected.\footnote{Id.} In most other respects, the new government adopted the U.S. version in its entirety, including the symbolic nature of the emperor, guarantees of civil and human rights, and the renunciation of war.\footnote{DOBBINS ET AL., supra note 71, at 44; DOWERS, supra note 139, at 4.}

The Liberal Party was the biggest victor in the national elections, winning 148 of 464 seats in the Diet, with the Progressive and Socialist parties also having strong showings at 110 and 96 seats, respectively.\footnote{Id.} Voter turnout was 72.1%.\footnote{Id.}
allowing U.S. officials to assert the validity of the elections, the same way they had in Germany. The three major parties that emerged from the election were loosely based around the major parties from the 1937 election, prior to the war.\textsuperscript{172} Liberals and Progressives initially agreed to form a government under Liberal leader Ichiro Hatoyama, who would assume the position of Prime Minister; however, Hatoyama was promptly purged by U.S. officials for being a militarist,\textsuperscript{173} so the new government was formed under Shigeru Yoshida, who became Prime Minister on May 22, 1946.\textsuperscript{174} When the Diet met during the summer of 1946, the newly elected legislators voted a final approval of Japan’s new democratic constitution, which became effective on May 3, 1947.\textsuperscript{175}

The Japanese constitution would not have been written the way it was had MacArthur and his staff allowed Japanese politicians and constitutional experts to resolve the issues as they wished.\textsuperscript{176} In late 1945 and early 1946, there was much public discussion on constitutional reform, and the MacArthur draft was apparently greatly influenced by the ideas of certain Japanese liberals.\textsuperscript{177} The constitution’s U.S. origins were deliberately kept quiet, but the awkward phrasing of the document made the secret hard to maintain.\textsuperscript{178} Revision became a topic of fierce debate almost immediately, but many embraced the new constitution despite its foreign roots.\textsuperscript{179}

Like Germany, Japan in 1945 was a country on the brink: it had suffered the destruction of two atomic bombs and the fire-bombing of its major cities,\textsuperscript{180} its people were on the brink of starvation,\textsuperscript{181} and its military had resorted to kamikaze tactics.\textsuperscript{182} At the time of Japan’s occupation, U.S. forces faced a regimented people and strong, conservative elites, but they were able to rally the population behind a common national cause—building a new democratic government.\textsuperscript{183} In 1949, MacArthur made a sweeping change in the SCAP power structure\textsuperscript{184} that

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\textsuperscript{172} Id.
\textsuperscript{173} Following the elections, successful Diet members were vetted by U.S. officials, as there had not been time to conduct investigations on every candidate prior to the election. It was discovered Hatoyama had committed numerous “militant acts” during the war.
\textsuperscript{174} Idser et al., supra note 170, at 390.
\textsuperscript{175} Id.
\textsuperscript{176} Dobbin et al., supra note 71, at 44; Dower, supra note 139, at 4.
\textsuperscript{178} Dobbin et al., supra note 71, at 44; Dower, supra note 139, at 4.
\textsuperscript{179} Id.
\textsuperscript{181} Bellin, supra note 90, at 601-02.
\textsuperscript{182} Pacific Survey, supra note 180, at 16, 24, 28.
\textsuperscript{183} Bridoux, supra note 104, at 133, 175.
\end{flushleft}
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greatly increased the power of the Japanese government, and the occupation began to draw to a close. The Treaty of San Francisco, \(^{185}\) which was to end the occupation, was signed on September 8, 1951; it came into effect on April 28, 1952, formally ending all occupation powers of the Allied forces and restoring full sovereignty to Japan. \(^{186}\) Less than seven years after being an aggressor in the most destructive war the world had ever seen, the Japanese were again an independent people free to run their country as they wished. Since then, the Japanese have changed or done away with a number of the reforms instituted by MacArthur, but one reform remains firmly in place: the MacArthur Constitution. \(^{187}\) In 70 years, the document has never been amended. \(^{188}\)

C. Iraq, 2003: Centralized National Control

The 2003 occupation of Iraq began with the assumption an interim government made up largely of exiled opposition leaders \(^{189}\) would quickly begin running the country. This assumption proved incorrect. When Ambassador Paul Bremer was named as head of the Coalition Provisional Authority (CPA) in May 2003, \(^{190}\) he announced the U.S. would seek a UN resolution confirming America’s status as an occupying power \(^{191}\) and informed the exile opposition

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\(^{185}\) The Treaty of San Francisco, or more commonly known as the Treaty of Peace with Japan, was officially signed by 48 nations on September 8, 1951, in San Francisco, CA. It came into force on April 28, 1952 and officially ended the occupation of Japan. According to Article 11 of the Treaty, Japan accepted the judgments of the International Military Tribunal for the Far East and of other Allied War Crimes Courts imposed on Japan both within and outside the country. The treaty served to officially end Japan’s position as an imperial power, to allocate compensation to Allied civilians and former prisoners of war who had suffered Japanese war crimes during World War II, and to return sovereignty to the Japanese government. See Treaty of Peace with Japan art. 11, signed Sep 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45, https://treaties.un.org/doc/Publication/UNTS/Volume%20136/volume-136-1-1832-English.pdf.

\(^{186}\) This was true for the main islands of Japan; the United States continued to hold the chains of Iwo Jima and Okinawa until 1968 and 1972, respectively.

\(^{187}\) DOBBINS ET AL., supra note 71, at 44; DOWER, supra note 139, at 4.

\(^{188}\) Id.

\(^{189}\) The U.S. assumption was underlying bureaucratic and military structures in Iraq would be left intact to govern the country while the top political leadership would be replaced by the exiled opposition to Saddam. The hard core of this exile group had operated outside Baghdad’s control in the 1990s and was designated to receive support under the U.S.’s Iraq Liberation Act of 1998—a Congressional statement that “It should be the policy of the United States to support efforts to remove the regime headed by Saddam Hussein from power in Iraq.” The group consisted of a mix of Sunnis, Shias, and Kurds, but a gathering of this opposition in London in mid-December 2002 gave an indication of future problems. The Kurds wanted federalism with a high degree of separatism opposed by most others. Most objected to the leadership of Ahmad Chalabi, the apparent U.S. front-runner for Iraq’s leadership who had strong ties to the CIA. Secularists had reservations about others’ Islamist agendas, and the United States had concerns about one group’s ties to Iran. Marr, supra note 76, at 260.

\(^{190}\) THOMAS E. RICKS, FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ (2006) (this book also reviews the precursor to the CPA, the Office of Reconstruction and Humanitarian Assistance (ORHA), established under retired General Jay Garner. The intent of the ORHA was to oversee response to an expected humanitarian crisis in Iraq. When the crisis never arose and governance became an issue within a few weeks, it was replaced with the CPA).

\(^{191}\) This was accomplished with UN Resolution 1453, which authorized the United States to exercise legal power in Iraq, as well as to spend any Iraqi funds. The resolution made no mention of creating democratic institutions based on free and fair elections, nor was this codified in the early CPA regula-
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parties and other local leaders the idea of an interim government with real sovereign authority had been indefinitely postponed.192

A key element in establishing a counter-insurgency (COIN) effort is establishing a local government that can stand on its own so the people believe in their leaders. U.S. Army Field Manual 3-24, General David Petraeus193 best-selling doctrine194 for COIN operations argues, “The primary objective of any counter-insurgency is to foster the development of effective governance by a legitimate government.”195 In contrast, the main critique in regards to the electoral process in Iraq concerned its timetable and the lack of involvement of local actors. While most experts agree a stable security environment is a highly desirable factor before holding elections, the various interim or transitional institutions put in place in Iraq caused great distrust among the population.196

Inside the CPA, there was widespread agreement Iraq would not be ready for national elections anytime soon. Analysts felt time was needed to allow more moderate, secular, and democratic parties in Iraq to develop their identities and support.197 It was believed many months were needed before an Iraqi electoral commission could be appointed and organized to register voters and certify the eligibility of parties and candidates.198 This was not merely a political judgment; the concern was that for elections to be fair, a level playing field must be established for the competing parties.199 External experts advised against starting elections on a large scale, as holding national elections too early can strengthen extremist and rejectionist forces,200 but Bremer and his top governance staff deliberately resisted calls, and even vetoed plans, for direct elections for some local and provincial councils.201 Had a major effort been launched in early summer 2003, elections for a constitutional assembly could have been held by the spring

192 Ricks, supra note 190, at 165 (this decision inarguably contributed to the confusion and frustration the Iraqis were already experiencing, as they had been told by Gen Garner, head of the earlier ORHA, that the U.S. would hand over control within a few weeks).

193 Despite later falling from grace during his tenure as Director of the FBI, General Petraeus is still considered the most successful battalion commander of the Iraq war. While in charge of the 101st Airborne Division, his strategies and tactics of working with local leaders and living among the citizens would later become the foundation of the Army’s new counter-insurgency manual, which was largely authored by Petraeus. He later returned to Iraq, in 2007, as commander of the entire multi-national force.

194 At one time, FM 3-24 was one of the Top 20 books on both Amazon and Google Books. U.S. Dep’t of Army, Field Manual 3-24, Counter-Insurgency (2000) [hereinafter FM 3-24], https://www.hsdl.org/?view&did=468442.

195 FM 3-24, supra note 194.


197 Diamond, supra note 9, at 72.

198 Id at 79.

199 DOBBINS ET AL., supra note 71, at 191, 205.

200 Id.

201 Diamond, supra note 9, at 79-80.
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of 2004 using the existing provinces as multi-member districts, or foregoing districts altogether.\(^{202}\) However, the CPA feared early elections would give advantage to radical Islamic forces, which were better organized, initially, than their more moderate or liberal opponents.\(^{203}\) While this fear had some basis—87% of Iraqis wanted religious groups to share power in government and 56% wanted religious leaders to play a role in politics\(^{204}\)—it also ignored the wishes of the people. Most Iraqis overwhelmingly endorsed basic democratic principles such as free and fair elections, free speech, even equal rights for women, and most possessed a keen desire to elect the members of any constitutional-drafting body.\(^{205}\)

The CPA’s refusal to consider early elections raised concerns among many observers, including the United Nations.\(^{206}\) In July 2003, UN envoys proposed beginning a voter registration drive, but the issue was a non-starter for Bremer. He reiterated there were no voter rolls, no election law, no law on political parties, and no electoral districts.\(^{207}\) He also argued electing a government without a permanent constitution “invites confusion and eventual abuse”.\(^{208}\)

During the summer of 2003, coalition military commanders were ordered to halt elections in towns and cities across Iraq, as the CPA preferred to use a system of consultation, indirect elections, and appointments to choose local mayors and councils.\(^{209}\) At the national level, a seven member Leadership Council had been appointed prior to Bremer’s arrival in Iraq.\(^{210}\) This council was comprised of the heads of key exile parties who had not lived in the country for decades,\(^{211}\) and Bremer desired a broader base with more diversity (the exiles on the Council were all Shia Muslims).\(^{212}\) He spent more than two months attempting to locate suitable candidates, but most Iraqis were resistant to participating in an appointed government that delayed direct elections.\(^{213}\) Eventually, Bremer and his staff announced a 25-member Interim Governing Council still dominated by exiled politicians.\(^{214}\) Bremer insisted the Council be perfectly representative of the

\(^{202}\) Id. at 48.

\(^{203}\) Id.

\(^{204}\) Id.

\(^{205}\) Id.

\(^{206}\) Id at 46-47.

\(^{207}\) This issue, however, raises a question: if Bremer was the ultimate authority in the country, why did he not initiate steps to create these things?

\(^{208}\) Diamond, supra note 9, at 46-47.

\(^{209}\) Id.

\(^{210}\) This issue, however, raises a question: if Bremer was the ultimate authority in the country, why did he not initiate steps to create these things?

\(^{211}\) Id.

\(^{212}\) Id.

\(^{213}\) Id.

\(^{214}\) Id.
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population, with the result being 18 members who were so obscure 2/3 of Iraqis could not offer an opinion on them.215

The Governing Council quickly became a source of frustration, as it was a completely ineffectual body.216 Bremer repeatedly appealed to the Council to develop a timetable for drafting a constitution and electing a permanent government, while the Council insisted power be handed over to them immediately.217 With no timeline for direct elections, the Council was never held accountable, and it was easy for them to blame Iraq’s problems on the CPA. Polls continued to show most of Iraqis believed their country was controlled by Bremer (which, to a great extent, it was), and Council members spent most of their time lobbying each other and the Americans for positions in the new government.218 Failure to agree on a Council leader resulted in a “rotating presidency” that changed each month.219 Eventually, in September 2003, an impatient Secretary of State Colin Powell set a six-month deadline for the Iraqis to draft a new constitution, but by then the Council had been denounced by the population as a puppet of the American occupation.220

Following Secretary Powell’s edict, Bremer published an op ed in the Washington Post, laying out a lengthy, seven-step roadmap to end the occupation.221 First, a constitution would be written and ratified, followed by a national election.222 This was opposite the approach taken by the U.S. in Germany and Japan, where elections were held to determine who had the authority to approve the new constitutions on behalf of the people. Neither U.S. officials, CPA staffers, nor Iraqis supported Bremer’s plan.223 The Bush administration wanted to transfer authority before the 2004 elections,224 and most coalition aids—namely, the British—worried Bremer’s plan was too slow and cumbersome.225 Important religious and political leaders in Iraq declared it unacceptable to have the constitution prepared by unelected actors.226 In November 2003, President Bush abruptly announced the occupation would end in June 2004, overruling Bremer’s original plan.227 Bremer then revealed a new series of steps later that month in which he

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215 Diamond, supra note 9, at 48.
216 Id. at 26, 43; Marr, supra note 76, at 272-73.
217 Diamond, supra note 9, at 49-50.
218 Id. at 26, 43; Marr, supra note 76, at 272-73.
219 Diamond, supra note 9, at 49-50.
220 Id. at 26; Marr, supra note 76, at 272-73.
221 UN Resolution 1511 mandated the United States to present a plan by December 2003 for transitioning to an Iraqi government.
222 Ricks, supra note 190, at 254; Marr, supra note 76, at 279.
223 Id.
224 Id.
225 Id.; Diamond, supra note 9, at 25.
226 Ricks, supra note 190, at 254; see also Diamond, supra note 9 (discussion of Shia Sheik al-Sistani, one of the most influential actors in Iraq, and not a member of the Governing Council. At one point, Sistani even issued a fatwa—a religious decree binding on the faithful—forbidding any followers from participating in a non-elected government).
227 Id.
abandoned the goal of drafting a constitution or holding a national election before the turnover; instead, the U.S. would transfer power to a temporary body. The new plan proposed a national assembly to be chosen through a series of complex local caucuses, which would then select the interim government. This interim body would be responsible for conducting a national election for a constituent assembly by March 2005. The constituent assembly’s sole responsibility would be to draft a constitution and hold a referendum on it. If successful, a second election would be held in December 2005 for a new national assembly, which would become Iraq’s new constitutional government. To govern the country in the meantime, the CPA and Governing Council were to work together to draw up a transitional administrative law (TAL).

This plan also would not survive. The Governing Council resented having it imposed on them and most Iraqis opposed the complicated system of caucuses and the idea of an unelected, interim government. Barely two weeks after it was announced, Bremer’s second attempt to build a government was in serious trouble, and the CPA had less than two months to draft the TAL and get it adopted so they could begin work on the caucuses that would elect the transitional assembly. Many within the CPA did not understand how the caucus system was supposed to work, and most Iraqis felt the local and provincial councils would simply bow to American will because they were appointed by the CPA. The United States was repeatedly finding itself on the less democratic side of arguments: Iraqi leaders called for an elected constitution-making body, Bremer said an appointed body would do; Iraqis wanted direct elections for local government, Bremer and other top officials vetoed them; Iraqis desired direct, transparent elections, the CPA proposed an opaque and convoluted process. Ultimately, the UN intervened with a compromise: the caucuses would be scrapped and the interim government chosen by June 30, 2004. A transitional assembly would then be directly elected by December. But the question remained as to how the interim government would be selected, and it would not be answered until the TAL was approved.

A preliminary draft of the TAL emphasized civil rights, a central government with an independent judiciary, and separation of powers. Shia groups quickly demanded (and ultimately received) a provision forbidding the passage during the interim period of “any law that contradicts the universally agreed tenets of

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228 Marr, supra note 76, at 258; Diamond, supra note 9, at 51.
229 Id.
230 Id.
231 Id. This plan postponed the drafting of the constitution for another 15 months and delayed the direct election of a new government for nearly two more years.
232 Marr, supra note 76, at 279; Diamond, supra note 9, at 51.
233 Diamond, supra note 9, at 76-81.
234 Id.
235 Id. at 128, 198, 201-02.
236 Id. at 83, 137-38; Marr, supra note 76, at 282.
237 Marr, supra note 76, at 281.
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Islam”.238 Another provision of the TAL mandated the law “aim to achieve” at least one-quarter of the national assembly seats be awarded to women.239 Staffers believed it possible to craft electoral rules to ensure this goal.240 During one contentious meeting between the CPA and the Governing Council involving a debate on family law issues, the majority voted to repeal a reference to shari’a law241 that had been previously approved.242 A delegate from the one of the largest Shia parties walked out, claiming the majority was attempting to force things on the Council members and accused the CPA of not operating by consensus. Eight other Council members followed.243 The deadline came and went without approval of the TAL.244 During another marathon meeting, the Sunni delegation threatened to walk out, as well, when it became clear the CPA was negotiating with the Kurds for the possibility of a Kurdistan Regional Government.245 Last-minute negotiations resulted in a document no party was satisfied with, and the Shia delegation refused to attend the much-publicized signing ceremony. The CPA, suffering one of its most embarrassing moments, cancelled the ceremony and renewed negotiations. The document was signed five days later.246

Immediately following the TAL signing ceremony, 12 members of the Governing Council issued a statement proclaiming their intention to “amend” certain provisions of the TAL they felt were undemocratic. There was no legal mechanism for them to do so, but the speaker stated they would seek to make changes before the June 30 transfer of power.247 These same Council members warned the TAL would lack legitimacy until it was approved by a democratically-elected national assembly (which was not part of the CPA’s planned agenda).248

The TAL received mixed reviews. Some argued the Governing Council did not have the authority to adopt even an interim constitution.249 People repeatedly asked why the document had not been submitted for consideration by civil society organizations, political parties, religious leaders, and the general public.250 CPA staffers suggested Iraqis focus on the future constitution, since the TAL was

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238 Language was also added forbidding laws contradicting democracy or fundamental human rights, but the TAL did not address the question of what would happen if there was a disagreement between the two provisions. According to one sheik, “In Shiite Islam, leadership comes from Allah, but Allah will not choose directly. When the people elect a leader, he will be the man selected by Allah, so there is no contradiction between Islam and democracy.”

239 Id. at 147, 156.

240 Diamond, supra note 9, at 172 (the provision was initially approved during an unusually poorly attended meeting of the council).

250 Id. at 164-65, 167, 171.

241 Id. at 173-76.

242 Id. at 177 (these Council members were all Shia Muslims).

243 Id.

244 Diamond, supra note 9, at 172.

245 Id. at 179-85, 197-98.

246 Diamond, supra note 9, at 177.
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purely a temporary document, but this came across as dismissive of Iraqi concerns.251 Most Iraqis noted the contradiction between the CPA’s declared democratic intent and the lack of opportunity for democratic participation.252 If civic education must be reinforced by what people see in real life, what the Iraqis observed was an interim constitution drafted and adopted without national debate; a postponement of direct elections, even at local levels; another round of appointed government officials; and perpetuation of control by the Governing Council, most of whom did not enjoy popular support.

In April 2004, the UN sent a new envoy,253 Lakhdar Brahimi, to Baghdad to begin the delicate task of constructing the interim government. Most of the exile politicians resisted this move, believing the UN would ease de-Baathification,254 and insisted on assurances the TAL would not be recognized in any Security Council resolutions before they would cooperate.255 Brahimi wanted to cut the exiles from power and force them to run in the later elections, believing the leading officials in the interim government should agree not to be candidates for permanent positions.256 Brahimi’s first choice for president, Adnan Pachachi, rejected the position because he was a strong Arab who did not want to appear “American”.257 The top pick for Prime Minister, Adel Abdul Mehdi,258 was vetoed by the Governing Council out of fear he would oppose Islamic law. In the end, Bremer selected Ghazi Al-Yawar259 for president, an exile who had repeatedly thanked President Bush for overthrowing Saddam, and Ayad Allawi260 was left as the only remaining suitable candidate for prime minister. The other mem-

251 Id.
252 Id.
253 The first UN Special Envoy to Iraq, Sergio de Mello, was killed when the UN building in Baghdad was bombed in August 2003.
254 Diamond, supra note 9, at 246-53.
255 These concerns were genuine, as the U.S. intended to seek formal recognition of the TAL by the Security Council, including it in the same resolution endorsing the new government and formally recognizing Iraqi sovereignty. This would make it far more difficult for the permanent Iraqi government to drift away from any TAL provisions, thus dispelling the CPA’s push it was “merely a temporary document”.
256 Diamond, supra note 9, at 246-53, 257.
257 Pachachi chose to decline the post publicly, stating that he turned down the position “because I was accused of being the choice of the Americans. I had to refuse this offer, in order to preserve my reputation and my honor. Trying to portray me as a little soft on the Americans when I have been struggling for Arab rights all my life is not only false, it is unfair. I find it really insulting.” (“Pachachi Slams ‘Dirty Politics’ in Iraq”, Arab News, June 5, 2004).
258 Mehdi was a trained economist who left Iraq in 1969 for exile in France. He worked for French think tanks and edited magazines in French and Arabic. He was educated in France, and is the son of a respected Shiite cleric who was a minister in Iraq’s monarchy.
259 Al-Yawar was scheduled to be the last holder of the rotating council presidency, with a term lasting until 30 June 2004, the date of the expected transition to official Iraqi sovereignty.
260 A prominent Iraqi political activist who lived in exile for almost 30 years, Allawi, a Shia Muslim, became Iraq’s first head of government since Saddam Hussein when the council dissolved on June 1, 2004 and named him Prime Minister of the Iraqi Interim Government. A former Ba’athist, prior to the war Allawi helped found the Iraqi National Accord, which today is an active political party. In the lead up to the 2003 invasion of Iraq, the INA provided intelligence about alleged weapons of mass destruction to MI6. Allawi has lived about half of his life in the UK, and his wife and children still live in Britain for security reasons.
bers of the Governing Council reluctantly approved these choices.\textsuperscript{261} Brahimi was permitted to select 31 ministers, and he used criteria such as integrity, professional experience, and technical competence—factors he had hoped to use for the entire process.\textsuperscript{262} Only six ministers had ties to major parties and six were women.\textsuperscript{263}

The new Iraqi Interim Government was appointed on June 2, 2004, and the UN recognized Iraq’s full sovereignty, effective June 30. Bremer went directly to the airport after the June 28th ceremony and immediately left the country.\textsuperscript{264}

During 2004-05, several events would define Iraq’s political system: three elections (two for a national assembly and one a referendum on the constitution), the drafting of the constitution itself, and the process of forming indigenous national and provincial governments based on election results.\textsuperscript{265} These were the first genuinely free elections in Iraq’s modern history, but they also solidified trends already under way: fragmentation of the state along ethnic and sectarian lines, a weak central government, and a deeply divided political elite.\textsuperscript{266}

In November 2004, on-going disagreements among the various factions in the interim government ultimately resulted in the Sunnis withdrawing from the interim government and boycotting the January 2005 elections.\textsuperscript{267} Twenty-three Shia groups then united to form an alliance in hopes of sweeping the results.\textsuperscript{268} On January 30, 2005, the elections for the National Assembly were held. The overall conduct of the election was in accordance with international standards, although the turnout was low, especially among Sunni Arabs.\textsuperscript{269} Only eight million people voted in Iraq’s first democratic elections—less than one-third of the population and barely half of the registered voters—a much lower turnout than was seen in the 1945 occupation elections. The vast majority of seats in the Assembly went to the Shia alliance, with a small minority going to the Kurds, but no Sunni representation; of note, the Sunni population generally boycotted even voting in the elections, thus affecting their legitimacy.\textsuperscript{270} Ultimately, the new

\textsuperscript{261} Diamond, supra note 9, at 258-59, 262.

\textsuperscript{262} Lasseter, supra note 263.

\textsuperscript{263} Marr, supra note 76, at 287-89, 301-02.

\textsuperscript{264} Id. at 286.

\textsuperscript{265} Id. at 287-89, 301-02.


\textsuperscript{267} Id.

\textsuperscript{268} Id. at 287-89, 301-02.

\textsuperscript{269} Id. at 287-89, 301-02.

\textsuperscript{270} The World Bank shows the 2005 population of Iraq to have been 27.01 million, with 14.2 million registered to vote.

\textsuperscript{271} Id.

\textsuperscript{272} Sunnis are roughly 1/3 of Iraq’s population, a sizeable amount to have denounce the election process.
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government continued to be led by the exile opposition parties and their leaders, with a significant shift to the more religiously-oriented parties.\textsuperscript{273}

The Transitional Assembly took over for the interim government in May 2005, and a new constitution was negotiated by Shia and Kurdish members.\textsuperscript{274} When a draft was presented to the public in August 2005, thousands of Sunnis staged protests.\textsuperscript{275} In the referendum for the constitution, two key Sunni provinces rejected the document, almost leading to its failure due to Iraq's federal structure.\textsuperscript{276}

Following the adoption of the Constitution in October 2005, which vested legislative authority in a council of representatives, national parliamentary elections were held on December 15, 2005.\textsuperscript{277}

In the end, both elections reinforced Iraq's growing divides, as long delays in forming a cabinet and indecisions regarding the distribution of power contributed to the tension.\textsuperscript{278} The new permanent government was not in place until May 20, 2006\textsuperscript{279}—nearly two years after the U.S. returned sovereignty. Overall, 2005 saw powerful factions with armed militias become heads of ministries, positioning themselves as the new Iraqi oligarchy.\textsuperscript{280} These same parties also swept the local elections, leading to complex power struggles in many areas, including Baghdad, where the power vacuum soon allowed sectarian and ethnic conflict to spiral out of control.\textsuperscript{281} Provincial elections were not held, nor were local or national elections repeated, until January 31, 2009.\textsuperscript{282}

Many have argued Iraq had only a brief experience with competitive elections in the 1920s and 30s, and even this was largely a charade.\textsuperscript{283} From 1958 to 2003, Iraqis knew only rule by force.\textsuperscript{284} However, these same attitudes and beliefs were expressed in regards to Germany and Japan in the 1940s—both were seen as militaristic and autocratic; both had experienced years of terror and oppression; and neither had a true democratic government in place.\textsuperscript{285} In fact, each had lived with democratic elections for only about 15 years before powerful regimes began

\begin{footnotes}
\footnotetext[273]{Marr, supra note 76, at 287-89, 301-02.}
\footnotetext[274]{Id. at 296-300.}
\footnotetext[275]{Id.}
\footnotetext[276]{Id. at 299.}
\footnotetext[277]{Id. at 287-89, 301-02.}
\footnotetext[278]{Id.}
\footnotetext[279]{BRIDOUX, supra note 104, at 108.}
\footnotetext[280]{Id.}
\footnotetext[281]{See, e.g., Bellin, supra note 90.}
\footnotetext[282]{Id.}
\footnotetext[283]{BRIDOUX, supra note 104, at 9.}
\end{footnotes}
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to consolidate their power. Yet each nation eagerly embraced a return to democracy and accepted newly implemented democratic ideals.

There is no clear reason why local elections, at the least, could not have occurred in Iraq in the fall of 2003 or early spring 2004. The arguments put forth by Bremer and the CPA do not hold up when compared with the 1945 cases and their results. First, Bremer asserted he was concerned about the lack of secular political parties, but these groups still did not fare well in the national elections two years later. As General Clay learned in Germany, politics in most countries involves much more than parties and rivalries; there are also social, economic, and religious outlooks. In Germany, special interests, such as the Catholic Church and other cliques, were deciding which of their members should be in office. The same situation occurred in Iraq, but it was not limited or moderated by a democratic process. By the time the CPA began to initiate steps towards such a process, most Iraqis were fearful of the notion, believing special interests groups would simply mandate the outcomes of any elections. Bremer's hesitation only reinforced their fears, since he shared them. What was never explained to the people of Iraq is the fact that special interest groups play a large role in all democratic nations—individuals frequently turn to group affiliations, including religious ones, for guidance on how to vote.

Others have asserted there were no political parties to resurrect in Iraq in the spring of 2003, but this is clearly not true; quite the opposite, in fact. Several exiled parties eagerly returned to Iraq following the fall of Saddam's regime, and more internal ones quickly emerged at much faster rates than they did in either Germany or Japan.

National elections in Iraq were also delayed because the CPA found the ideologies of certain groups distasteful, and they hoped to wait until more desirable groups could gain power and popularity. This runs counter to Clay's experience in Germany, where "less desirable groups"—Communists and Catholics—were the most successful parties in the first election, but other groups quickly got on the bandwagon or risked being ostracized altogether. Similar to Iraq, MacArthur decided to have national elections first in Japan, as opposed to local

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287 See Ziemke, supra note 73; see also Dower, supra note 139; Bridoux, supra note 105.

288 Ziemke, supra note 73, at 361-62.

289 See, e.g., Diamond, supra note 9 (discussing Sheik Sistani's influence in Iraq, which the CPA largely ignored).

290 Id.

291 See, e.g., Bellin, supra note 90; Marr, supra note 76; Diamond, supra note 9; Bremer, supra note 9 (all overviewing the numerous political factions in Iraq in 2003, many of which included armed militias).

292 Id.

293 Diamond, supra note 9, at 79.

294 Ziemke, supra note 73, at 362-63.

295 Id.
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ones, but used straight-forward procedures, unlike Bremer’s extremely protracted approach. Ambassador Bremer thought it would take many months to find and appoint Iraqis capable of running elections; in 1945, occupation officials simply ran the elections themselves. In Iraq, it was deemed better to appoint leaders than allow elections, and more advisable to wait months for the “right” people (who ultimately never materialized or rejected the notion) rather than directly oversee the process.

IV. Proposed Model: Local and Earlier is Better

In December 2017, the Democratic Elections Standards Project at the Carter Center issued a plan of action for moving towards more defined human rights and elections standards. The plan noted that while there are several mandates focused on the rights and freedoms critical to genuine elections, more detailed, targeted language is needed. As noted above, part of the Project’s recommendations following a two-year analysis of human rights and elections law is the development of specific recommendations for a human rights approach to elections. This section attempts to take a first step in that direction by providing a framework for implementing elections as early as possible following a post-conflict occupation. To inform these recommendations, the following sources were referenced and analyzed: the Organization for Security and Cooperation in Europe’s Office of Democratic Institutions and Human Rights (OSCE/ODIHR) Reference Guide to Democratic Elections Best Practice, the vast collection of data accumulated by the Carter Center during its lead-up to the December 2017 plan, and the constitutional framework for provisional self-government in Kosovo (as an example of a Western-led, post-conflict occupation, though on a much smaller scale than those discussed above.) Additionally, the occupations of

296 See Dower, supra note 139, at 4.
297 Marr, supra note 76, at 280.
298 See Pachachi, supra note 257.
300 Id.
301 Id.
302 Id.
304 Carter Center, supra note 299.
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Germany, Japan, and Iraq were studied in-depth in order to obtain proper “lessons learned” in regards to the timing of election implementation.\textsuperscript{306}

As the case studies above have illustrated, earlier is better when starting a post-conflict transition to democracy; however, in addition to knowing \textit{when} to start, an occupier must also know \textit{where}. The model framework presented below will stress the importance of starting at the local level, so as to build citizens’ experiences with democracy before attempting large-scale, national elections with potentially as-yet-unknown candidates. Think tanks like the RAND Corporation\textsuperscript{307} have previously recommended local elections be permitted early on, post-conflict, followed by national elections at a later date.\textsuperscript{308} While it is important to also establish new national leadership sooner rather than later, since some new nations (such as Iraq) have neighbors capable of interfering in the elections process,\textsuperscript{309} the decision to hold national elections first can actually delay the installation of a new, permanent government, thus allowing external forces to exert even more influence on the final outcome.

A. First Steps: Immediately Following Cessation of Conflict

If at all possible, a Security Council resolution should be pursued that both recognizes the occupation and sets forth the expectation that the occupation’s purpose is to establish and develop meaningful self-government. Such a resolution—or, if not feasible, a proclamation by the occupier—should note the desire to respect the will of the people and acknowledge their historical, constitutional, and legal development. It should make clear the aim of any occupation is to enable the people to gradually take responsibility for the administration of their own nation, and that their provisions for self-government will be established through free and fair elections.

B. Setting Expectations: 1-Month Post-Conflict

When a nation finds itself in the position of Occupying Power following a conflict, it would benefit from a firmly established set of guidelines, which aim to root democratic practices within the population as soon as possible. In setting expectations for the occupied population, however, two major factors must be recognized: 1) the purpose of the \textit{occupation} must be to promote stability and democracy, regardless of the reason behind the conflict (i.e., stop humanitarian

\textsuperscript{306} Id. (much of the research conducted on each of these nations was done in a multi-factor analysis of post-conflict occupations conducted by the author for completion of her doctoral dissertation).

\textsuperscript{307} RAND CORPORATION, https://www.rand.org/ (last visited Mar. 25, 2018) (the RAND Corporation is a nonprofit institution that helps improve policy and decision-making through research and analysis. RAND focuses on issues such as health, education, national security, international affairs, law and business, the environment, and more. It is funded through government grants and private endowments).

\textsuperscript{308} Thomas Maulucci, Jr., \textit{Comparing the American Occupations of Germany and Iraq}, 3 YALE J. INT’L AFFAIRS 120, 122 (2008).

\textsuperscript{309} DOBBINS, ET AL., supra note 71, at 153.
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suffering, remove a dictator, interstate conflict,\textsuperscript{310} etc.); and 2) the occupier must have no aims to permanently occupy the territory. If both of these factors are not present, it is doubtful the occupation would be granted approval, or even acquiescence,\textsuperscript{311} by the international community, causing a different set of variables, outside the scope of this article, to come into play. If these two factors are present, however, it is difficult to imagine a situation where this model could not be implemented.\textsuperscript{312}

As an Occupying Power begins implementing the framework for a new provisional government, it must make clear that all persons—whether appointed to fill vacant positions, permitted to stay in previously-held posts, or later elected—must observe internationally-recognized human rights standards.\textsuperscript{313}

In order to promote proper elections, an Occupying Power must immediately facilitate the safe return of refugees and displaced persons to their homes and assist with the recovery of their property and possessions.\textsuperscript{314}

Local, regional, and national seats of government should remain the same, if for no other reason than to provide a sense of stability and continuity for the population; however, Occupation officials should be sensitive to where they establish their offices and headquarters within these locations. In Iraq, for example, CPA staff moved into Saddam’s former palaces and jails in an attempt to send the message that the old regime was gone, but what the public saw was simply a new regime moving in.\textsuperscript{315} Current municipalities and basic territories of self-


\textsuperscript{311} Id. (in 2003, the U.S. was not granted approval by the Security Council to invade Iraq; however, it was later recognized as an occupying force in the country, along with Great Britain).

\textsuperscript{312} See Ziemcke, supra note 73 (though many argue the security situation in Iraq made it far too difficult to begin a grassroots democratic movement, as the case study on Iraq illustrates, such an effort was never on the agenda, and the Iraqi people knew it. Also, while the CPA faced many obstacles in Iraq in regards to security issues (many of which it could—and has—been argued were of their own making—see Diamond’s and Van Buren’s work, specifically, for more discussion of this issue), the Allied powers in Germany and Japan faced as least as challenging a situation due to massive humanitarian crises).

\textsuperscript{313} Id. (at a minimum, provisional institutions and their officers should be informed of the requirements within the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The occupier should ascertain those instruments commonly accepted regionally (such as the European Convention for the Protection of Human Rights and Freedoms), as well as other international protocols that may be applicable, generally. While this may include treaties or other forms of international agreements to which the occupied nation is not a party, it is important to note the provisional government will not be bound by the entirety of these protocols; rather, they will merely be expected to uphold the notions of individual liberties and protections found in these documents. Doing so will present a firm commitment to democracy and human rights on behalf of the new government.).

\textsuperscript{314} Id. (in Germany, for example, after V-E Day, SHAEF (Supreme Headquarters – Allied Expeditionary Force) officials estimated the total number of displaced persons (DPs) in SHAEF-held territory—including those already repatriated—to be 5.2 million. The western Europeans were leaving as fast as transportation could be provided, at a rate of 200,000 a week in May. In June, the rate of Soviet DP repatriation reached 250,000 per week; however, towards the end of the year, this number would actually swell, as native Germans were expelled from other nations and Soviet citizens fled for Western territory. Nonetheless, all DPs were given priority transportation and found housing within a year.) See also Ziemcke, supra note 73.

\textsuperscript{315} See Diamond, supra note 9 (the U.S. and CPA officials simply reconstituted much of Saddam’s property for their own use—Saddam’s Presidential Palace became CPA Headquarters, and later the U.S.

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government should be maintained, and it must be clearly communicated to local agencies and institutions that they should keep functioning,316 though purges and new appointed leaders may come later. Low-to-mid level bureaucracies must continue to operate, even with less-than-ideal staffing, facilities and experience, because these services have the most direct impact on every-day lives of citizens. It is especially important that this message be sent to local law and order officials, provided they were not complicit in human rights violations under the previous regime.317

C. Establishing Interim Processes: 1-3 Months Post-Conflict

Ideally, even prior to the end of hostilities, an Occupying Power will have considered whether they will purge the bulk of the defeated government or allow certain levels or positions to remain in place to help administer the nation. Part of this decision will rely on practical matters: in Germany, there was a clear “Nazi litmus test” that could be used to identify “undesirables”, at least in the beginning;318 in Japan, no such test existed, and other factors—such as language and technical barriers—made it more appealing to leave most Japanese officials in place and only purge the top levels. In Iraq, such a litmus test was available through membership in the Baath Party, and an approach similar to that in Germany was used—complete purging from government posts of all members.319 Unfortunately, despite lessons learned in Germany in regards to the numerous setbacks the de-Nazification program faced,320 the CPA pushed ahead with full de-Baathification in Iraq.321 The result was an utterly non-functioning state and a complete power vacuum. Thus, it is vital an Occupying Power understand not just the “face” of a possible political enemy, but the depths of its nature, as well—most Nazis and Baath Party members were members in name only, and did not actually support the groups’ aims.322

Regardless of which approach is selected (total purge vs. top level, or a combination of the two), some positions will need to be filled. The starting point should always be at the local level, which requires occupation personnel to operate

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316 Id. (in Iraq, practically every soldier, law enforcement official, and government employee simply went home and never returned to work following the invasion. The result was a complete halting of all government services and lack of infrastructure maintenance, including water and sewage).
317 Id. (if so, a more immediate purge may be required, with rank-and-file officers remaining on staff to serve under occupation leadership).
318 See ZIEMCKE, supra note 119 (regarding the various approaches to de-Nazification in Germany).
319 See Diamond, supra note 9; Bremer, supra note 9, at 57 (for detailed discussions of the de-Baathification program implemented by the CPA in Iraq, see Diamond’s work).
320 See ZIEMCKE, supra note 119.
321 See Bremer, supra note 9 (Bremer accomplished this with CPA Order #1, De-Baathification, which he issued on May 16, 2003).
322 See ZIEMCKE, supra note 119, at 380-82 (during the author’s deployment to Iraq in 2008, dozens of Iraqis discussed the near-mandatory nature of Baath Party membership. One gentleman who worked at the Central Criminal Court in Baghdad stated “your kids could not play soccer [at] school if you were not a member.”).
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within communities, not behind walls. Potential local leaders should be identified and approached to ascertain their willingness to serve. Ironically, political prisoners could be a great source of manpower in this endeavor, as enemies of a previous despotic regime could be powerful allies in democratic thought. 323 Most importantly, however, occupation officials should not attempt to skew appointments in favor of any one party or group, and should rely heavily on the wishes of the public, even if the result is "less desirable" candidates. Forcing selections on an unsupportive public would only serve to breed resentment towards the Occupation's stated goals, as Iraq clearly illustrates.

Exiled politicians should only be used in the new government if it is clear the public desires their return and supports their candidacy; otherwise, these individuals could be viewed as "elitists" who fled a bad situation while others remained to suffer. 324 At a minimum, a new nation should never be ruled entirely by exiles, especially those who have been away from the country for several years, if not decades.

Any individuals appointed or otherwise selected by occupation officials to serve in an interim capacity should be prohibited from candidacy in the first round of elections. This prohibition helps to eliminate favoritism (as well as the perception of it) and promotes an even playing field among the candidates.

D. Implementing Elections: 3-6 Months Post-Conflict

A date for local and regional elections, within this same time frame, should be set. Voting districts should be drawn with a view to providing regional equality and on the basis of objective criteria, such as population or geography, but tradition can also be a factor. If possible, current districts, or those in use before the previous regime came to power, should be maintained. If voter rolls are not readily available, other means of accounting for citizens can be used, based on available data. In Iraq, for example, information regarding payouts under the UN's Oil for Food program were used to establish the initial census following the war. 325

A process for registering and approving political parties should be implemented, as well as a method for candidates to file for participation in a certain race. This process may or may not include a vetting process before a candidate can be placed on the ballot.

Potential candidates, political parties, and voters should be informed of the rules for the elections. These rules must be easily understood, published, and

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323 Id. (in Germany, for example, many future leaders were discovered amongst the concentration camp survivors).

324 See Diamond, supra note 9 (this fact was frequently used in Iraq by those who distrusted the Governing Council, especially since most members were quite wealthy).

325 OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, APPLYING IRAQ'S HARD LESSONS TO THE REFORM AND RECONSTRUCTION OF STABILIZATION OPERATIONS (2010), http://www.dtic.mil/dtic/tr/fulltext/u2/a515368.pdf (during the wide-spread looting that occurred following the coalition forces' arrival in Baghdad, the director of computer services at the Ministry of Trade secured the list of every Iraqi household eligible for food rations. After the official list vanished amid the looting, this copy was later used as a basis for registering voters in Iraq's first democratic elections).
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made public, and should include the manner and location of voting, as well as any information necessary for a voter to cast a valid ballot.

It must be determined if Occupation officials will oversee the elections, or if there is a sufficient number of local appointees available to do so.

E. Selecting the Provisional Government: 6-9 Months Post-Conflict

Direct elections for local leaders should be held, followed soon after by regional elections. Judicial functions should be transferred to newly elected judges. Regional leaders should be heavily involved in discussions with Occupation officials regarding whether the first national election should rely on regional voting or a single, multi-member district. This decision, obviously, relies heavily on the ethnic, social, and political make-up of the country, as well as geography, population, and size.

F. Transfer of Sovereignty: 9-12 Months Post-Conflict

Direct elections should be held for at least one chamber of the national parliament or legislature. Following this first election of national leaders, it can be determined if a bicameral approach is preferred. Terms for these positions should be short—no more than two years—with reelection permitted. The main purpose of this provisional national parliament is to draft a new constitution, but its institutions would also have responsibility for greater governmental functions, including economic, financial, and fiscal policy; trade; health, welfare, and education programs; and labor, development, and environmental protection.

In regards to the drafting process, the occupier and the new parliament should work together to ensure certain provisions are enshrined in the constitution; for example, language should be included regarding basic electoral rights, due process, and equal protection under the law. Following approval of the constitution and passage of a public referendum, the Occupying Power should take all necessary measures to transfer powers and responsibilities to the provisional government.

If there is more than one nationally recognized or predominant language in a nation, each translated version of the constitution should be considered authentic, but one language should be selected to prevail in case conflict.

G. On-Going Responsibilities of the Occupying Power

For the duration of this transitional period, maintenance of law and order within the nation remains the prime responsibility of the Occupying Power. Though it may utilize native law enforcement agencies, law and order is of fundamental importance and cannot be passed off to a not-yet-steady government. This is why, often, even after the transfer of sovereignty, Occupation troops and other officials remain in-country.\(^{326}\) This law and order responsibility includes

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maintaining border security (a task largely ignored in Iraq, due to insufficient troop numbers), regulating possession of firearms, enforcing public safety regulations and laws, and conducting functions that aid in civil emergencies.

While elections are a critical way to promote a stable political environment in which human rights can flourish, it should be made clear that elections—even at the national level—are not, by themselves, an exit strategy; rather, they must be part of a long-term, institution-building process. While it may be necessary to post-pone elections due to security concerns, the nature of the security problems must be strongly considered, and elections should never be postponed solely from fear of their results. Such security concerns are yet another reason to start elections at the local level, where greater oversight and control can be implemented and adapted, as needed, rather than starting on a grand scale with near-insurmountable obstacles. Iraq faced clear security concerns in 2003; however, most of the violence was not widespread until July 2003—in other words, the CPA had more than two months to make an impact, during which their main statements related to delaying the return of sovereignty and postponement of elections. Germany and Japan were the losers in the most destructive war in history; their cities were destroyed, millions were homeless, countless others were starving or ill. Yet both were well on the road to democracy within less than a year. While there are other factors to consider, the timeliness of their democratic experience is, without a doubt, a significant point.

V. Conclusion

Lessons learned in 1945 should have been obvious in 2003, and Iraq now illustrates these points even more strongly. First, local, direct elections are an important stepping-stone and occupation authorities should not wait for more “desirable” parties to emerge. If the people are unhappy with their options, they will work to make more. Second, occupation officials should use the power they have to move the process along. If there are no election laws, draft them; no voter rolls, create them. All this can be accomplished while still making it clear the new government will have the power to implement new laws, as appropriate. Finally, potential (and aspiring) national leaders must be held accountable. Interim appointees and other officials must not be allowed to hamstring the democratic process. Large committees and councils should be used with caution, as various obstacles to consensus will only stall the proceedings.

327 Id.
328 See Diamond, supra note 9; Bremer, supra note 9.
329 See ZIMCZEK, supra note 73.
330 Id. (for example, security concerns, population cohesion, occupation legitimacy, consistency of governance, etc.).
331 See Diamond, supra note 9 (there is significant debate over whether voter rolls existed in Iraq; in fact, they did. Elections were routinely held under the Baath regime, though they were not competitive and largely for show. Nonetheless, voting districts comprised of approximately 250,000 people were well-established, able to serve at least as a starting point for future elections).
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Between 1949 and 1960, the economy in West Germany grew at an unparalleled rate: low rates of inflation, modest wage increases and a quickly rising export quota made it possible to restore the economy and brought a modest prosperity. According to official statistics the German gross national product grew in average by about 7% annually between 1950 and 1960. Three national democratic elections were held, each resulting in a peaceful transfer of power. During the same time frame, Japan saw its economy and education system reorganized and rebuilt. A former enemy, it also became a Western ally, and began to find its economic footing as a manufacturer of consumer devices and electronics. In contrast, the 15 years since Iraq’s occupation began have seen continued violence, widespread ethnic cleansing, and an on-going insurgency that culminated in a civil war. Its first democratically-elected Prime Minister, Nouri al-Maliki, was forced to resign on August 14, 2014.

333 Id.
334 Id.