

IRAQ

# A Bitter Legacy: Lessons of De-Baathification in Iraq

Miranda Sissons and Abdulrazzaq Al-Saiedi

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## About the Author

This report was written by Miranda Sissons, former chief of staff at ICTJ, and Abdulrazzaq Al-Saiedi, an ICTJ consultant. The report also benefited from a significantly earlier version developed by Miranda Sissons and ICTJ consultant Dr Eric Scheye.

## About ICTJ

The International Center for Transitional Justice is an international nonprofit organization specializing in the field of transitional justice. ICTJ works to help societies in transition address legacies of massive human rights violations and to build civic trust in state institutions as protectors of human rights. In the aftermath of mass atrocity and repression, we assist institutions and civil society groups—the people who are driving and shaping change in their societies—in considering measures to provide truth, accountability, and redress for past abuses. We do this by providing technical expertise and knowledge of relevant comparative experiences in transitional justice from across the globe.

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## ACRONYMS

|       |  |
|-------|--|
| AJC   | Accountability and Justice Commission (formally named Higher National Commission for Accountability and Justice) |
| AJL   | Accountability and Justice Law   |
| CPA   | Coalition Provisional Authority  |
| HNDC  | Higher National De-Ba'athification Commission  |
| ICCPR | International Covenant on Civil and Political Rights   |
| ICTJ  | International Center for Transitional Justice  |
| IECI  | Independent Electoral Commission of Iraq   |
| ICTJ  | International Center for Transitional Justice  |
| IHEC  | Independent High Electoral Commission  |
| IHT   | Iraqi High Tribunal (formally called the Supreme Iraqi Criminal Tribunal)  |
| INA   | Iraq National Accord   |
| MENA  | Middle East and North Africa   |
| MoF   | Ministry of Finance, Republic of Iraq  |
| ORHA  | Office of Reconstruction and Humanitarian Relief   |
| SCAT  | Supreme Council for Accountability and Justice   |
| TAL   | Law of Administration for the State of Iraq for the Transitional Period  |
| UNAMI | United Nations Assistance Mission in Iraq  |
| UN    | United Nations   |
| US    | United States  |



## 1. Executive Summary

The dramatic collapse of regimes in the Middle East and North Africa (MENA) has raised many important policy and justice questions. One key question is how to deal with former regimes' security and government apparatuses. The National Democratic Party in Egypt and the Constitutional Rally party in Tunisia were disbanded by the courts. As of late 2012, people in these countries are calling for more to be done—including cleansing remaining members of the old guard from the government and the state.

Iraq's de-Baathification process is the most current example of large-scale, politically based dismissals in MENA. Yet factual information about de-Baathification is scarce and for good reason. From its inception in 2003, de-Baathification was a deeply flawed process. Ineffective and incoherent, it polarized Iraqi politics and contributed to severe instability in the Iraqi military and government—not just in the first flush of regime change, but extending as far as the parliamentary elections of 2010, some seven years later.

This report summarizes the structure and impact of de-Baathification from 2003 to 2011. It gives unique insight into de-Baathification's goals, framework, impact, and problems. It includes a focused look at de-Baathification in Iraq's Ministry of Finance from 2003 to 2006 and summarizes seven key lessons for policy makers in other countries.

The report is based on significant field research done between 2003 and 2009, plus research done outside of Iraq in 2011 and 2012. Research included unprecedented access to staff and materials at the Higher National de-Baathification Commission (HNDC). The study's authors have gone to great lengths to obtain and verify the information published in this report. Iraq's intense political and physical conflict, however, means that many frustrating gaps exist. Nonetheless, this is a uniquely detailed resource for all those who wish to understand what happened with de-Baathification and why.

What are the lessons of Iraq's unhappy experiment? Based on our research and the experiences of modern vetting programs, ICTJ believes the lessons of de-Baathification are:

- 1. Design a vetting program, not a purge.** De-Baathification dismissed people based on rank, not behavior, and this created serious problems. Establish clear criteria to use when vetting, and be certain that your vetting procedure meets basic due process standards. If it does not, you risk creating an incoherent, ineffective, and unnecessarily controversial program.
- 2. Know your target.** Without accurate data, your program risks being impractical and ineffective. It could also create severe capacity problems. If you don't have such data, pursue a more limited initiative while you gather the information you need.
- 3. Set clear, realistic objectives.** A vetting program is a tool that uses certain criteria to assess a person's suitability to be a government employee. The program cannot by itself

reform the public sector or deliver justice to victims. Be mindful of any capacity problems and where possible take steps to mitigate them.

**4. Don't create a monster.** The framework, powers, and oversight of any vetting program should be defined clearly, and it should be carried out for a limited period of time. Be sure the leadership broadly represents the makeup of your country's population and is insulated from electoral politics.

**5. Consult and educate.** Do not create a program without consulting the people who it is meant to serve. Their ideas and knowledge may differ from your preconceptions or may vary strongly among different groups.

**6. Look to the future.** Design a program with criteria that can help protect against future abuse: think about promotion, recruitment, and other procedures, not just dismissals. If practical, use your experience in the program to develop ideas for future reforms.

**7. Observe basic standards of fairness.** This is strongly related to the first lesson. Fairness is not just a legal issue—it protects a vetting program from political manipulation and increases public confidence. Vetting programs are always controversial. By adhering to administrative due process standards (which are simpler than judicial standards), you can minimize needless controversy and focus on your program goals.

As of 2012, de-Baathification's political heat had lessened, the result of both new political alliances and the death of a leading de-Baathification advocate. Reforms initiated in 2008 had yet to fully take hold. After nine years of controversy and bitterness, the de-Baathification story has not yet finished; we are likely to witness new chapters unfold. One of the only consolations of Iraq's experience is that it may enable policy makers in other MENA countries to make wiser, better choices. We hope that is the case.

## 2. Iraq's Baath Party – Basic Facts

Baathism is a secular Arab nationalist political ideology that was first developed in Syria during the 1940s, a time when Syria was still governed under the French mandate. The party's ideology, which is shared by several political groups in the Arab world, is vague and heavily nationalistic, emphasizing a goal of Arab nationalism under the motto of "Unity, Freedom, Socialism."<sup>1</sup>

Baathism is thought to have been brought to Iraq by Syrian teachers in 1949. The first Baath Party organization in Iraq was reportedly established in 1951, when a Shi'a engineer, Fu'ad al-Rukabi, took control of an organization of some 50 sympathizers in Basra.<sup>2</sup> In its early years the Iraqi Baath Party gained popularity because it opposed patterns of land ownership that reinforced the power of the Iraqi landowning elite.<sup>3</sup> The party's formal title was the Arab Socialist Renaissance Party of Iraq (Baath).<sup>4</sup>

It would be a mistake, however, to over-emphasize Baathism's ideology as its distinguishing characteristic, although Iraqis broke ties with Syrian Baathists in 1966 for ideological reasons.<sup>5</sup> There was little attempt to build a mass movement; the recruitment of party members focused on quality, not quantity. Personal relationships of trust and kinship were vital. Members were expected to be highly committed; mere sympathizers were not permitted to join. Instead, the party relied heavily on the use of force and participation in coup d'états to seize power twice in Iraq.

The first coup was in 1963, when, with its Nasserist and nationalist allies, the party overthrew the regime of 'Abd al-Karim Qassem and unleashed "a savage campaign of arrests, torture, and execution" that claimed more than 3,000 lives.<sup>6</sup> But the new regime purged itself of extreme Baathist elements within the year, and party members returned to the sidelines to plot new bids for power.

The party staged a second coup on July 17, 1968. With the cooperation of key military officers, it overthrew the regime of 'Abd al-Rahman 'Arif and consolidated Baathist power at the head of the new government within two weeks. Saddam Hussein used his relationship with Ahmad Hassan al-Bakr, newly installed as president, to control the party and key intelligence services.<sup>7</sup> The ruling elements of the party were drawn almost exclusively from Tikriti Sunnis.<sup>8</sup>

<sup>1</sup> The role that the party's ideology played became minimally important once Saddam Hussein rose to power in 1976. See Batatu, *The Old Social Classes and the Revolutionary Movements of Iraq*, 731.

<sup>2</sup> Farouk-Sluglett and Sluglett, *Iraq since 1958: From Revolution to Dictatorship*, 90-92.

<sup>3</sup> Tripp, *A History of Iraq*, 143.

<sup>4</sup> The title in Arabic was the *hizb al-b'aath al-'araby al-ishtirakiy al-'iraqi*. The Arabic term used for de-Baathification is *amaliyyat ijtithath al-Ba'ath*, which has no direct English translation but indicates the Baath are to be uprooted or turned into corpses.

<sup>5</sup> This was the result of a deep split inside the Syrian wing of the party between Baath founders Michel 'Aflaq and Salah al-Din Bitar and younger Baathist military officers who rejected aspects of their ideology—in particular, the founders' 1958 decision to dissolve the party in preparation for Syria's union with Egypt. Marr, *The Modern History of Iraq*, 136; van Dam, "The Struggle for Power in Syria and the Ba'th Party (1958-1966)."

<sup>6</sup> Tripp, *A History of Iraq*, 192.

<sup>7</sup> Aburish, *Saddam Hussein*, 80, 96-129, and 160-174; see also Applebaum, "Hussein in His Place."

<sup>8</sup> Indeed, Batatu says that by the late 1960s, "The Takritis rule[d] through the Baath party, rather than the Baath party through the Takritis." Batatu, *The Old Social Classes and the Revolutionary Movements of Iraq*, 1088.

Within a year Hussein was appointed deputy president. By 1974 he controlled the security services and the Baath Party and created a party militia to counterbalance the regular armed forces. By 1977 Iraq was ruled not so much by the Baath Party as by the small clique of Hussein loyalists who made up the Revolutionary Command Council—nominally the country’s supreme executive body—that made all important decisions.<sup>9</sup> Two years later Hussein deposed al-Bakr and was sworn in as president of Iraq. He immediately purged and executed 500 senior party officials.<sup>10</sup> The Baath Party may have been Hussein’s chosen vehicle of rule, but it existed and functioned at Hussein’s convenience.

## Party Structure and Organization

### *Early Decades, 1968–1988*

The Baath Party was intended to be—and remained—a secretive group. Its early development relied on personal and kinship relationships, becoming more systematized only after the mid-1960s. There is limited written information available on the party, but it appears it was organized in a hierarchical, cell-based structure. During most of this period, full party membership was reserved for only a tiny portion of supporters. To become an active party member required passage through four “training” ranks, an initiation process that could take at least six years. Having obtained membership and sworn the oath of loyalty, a Baath Party member often achieved no higher rank although at least five higher grades of membership existed.

In 1970, for example, it is estimated that the command stratum of the party consisted of only 47 people, while in 1976, after almost a decade of rule, the party’s active membership was only 10,000.<sup>11</sup> Though active membership tripled within 10 years to about 30,000, this still represented only 0.2 percent of the Iraqi population.<sup>12</sup> The number of organized supporters was much larger, however. If all ranks of the party and membership of auxiliary organizations controlled by the party were to be included, the number of party adherents in 1976 could have been almost 500,000.<sup>13</sup>

Although many Baath Party members were Shi'a, it is widely held that Sunnis were disproportionately represented in the party’s upper ranks, the military, and the security services.<sup>14</sup> The exercise of authority within the party was highly circumscribed to a tightly knit cadre, all personally dependent on Hussein.<sup>15</sup>

Iraq had become a one-person, not a one-party, state. Family and tribal relationships were deployed to guarantee the continued longevity of Hussein’s rule.<sup>16</sup>

Since the real power within the Baath Party was confined to a small circle, the party began progressively to hollow out state, political, and civil society institutions. Separate Baathist structures grew to parallel and eventually overshadow all other public institutions, both at the federal and governorate level.<sup>17</sup> By the mid-1980s these parallel structures had reportedly coalesced, eventually becoming indistinguishable from one another.

### *Requirements Ease, 1988–2003*

By most accounts, party recruitment measures changed in the late 1980s.<sup>18</sup> The Iran-Iraq war (1980-88), the first Gulf war (1989-1990), and international sanctions (1990-2003) strongly affected Iraq’s economy,

<sup>9</sup> Farouk-Sluglett and Sluglett, “The Historiography of Modern Iraq,” 96. See also Baram, “The Ruling Political Elite in Bathi Iraq, 1968-1986: the Changing Features of a Collective Profile.”

<sup>10</sup> Tripp, *A History of Iraq*, 222.

<sup>11</sup> Batatu, *The Old Social Classes and the Revolutionary Movements of Iraq*, 1078-80.

<sup>12</sup> Chapin Metz, *Iraq: A Country Study. Reports of membership trends afterwards are contradictory*. See Faleh, “How Saddam Keeps Power in Iraq.”

<sup>13</sup> Batatu, *The Old Social Classes and the Revolutionary Movements of Iraq*, 1078.

<sup>14</sup> See Devlin, “The Baath Party: Rise and Metamorphosis.”

<sup>15</sup> Tripp, *A History of Iraq*, 224-25.

<sup>16</sup> See Baram, “Neo-Tribalism in Iraq: Saddam Hussein’s Tribal Policies 1991-96.”

<sup>17</sup> Baran, “Iraq: The Party in Power.”

<sup>18</sup> The noted historian Phebe Marr said the Baath Party cadre had shrunk from 10 percent to 2 percent of the Iraqi population. See Marr, “Establishing a New Regime in Iraq.”

social structure, and politics. Hussein was weakened by Iraq's stalemate with Iran and his withdrawal from Kuwait. Under the strain of sanctions the party needed to retain and increase its public support. The process by which supporters became full party members grew simpler and quicker. ICTJ was told anecdotally that the time it took to obtain full party membership shrank from five or six years to fewer than 12 months.

At the same time, membership carried strong economic benefits at a time of currency collapse and great economic hardship. For example, section members ('Udu Shu'ba) received a monthly stipend of roughly \$250 in 2002, a significant sum.<sup>19</sup> Individuals who lacked purchasing power and economic opportunity were often attracted by the extra allowances and other benefits that membership conferred.

Other benefits of party membership included bonus points for children's educational results in their secondary school examination, vehicles, and greater ease of access to civil service positions and promotions.<sup>20</sup> Depending on their level, party members also possessed extrajudicial powers over other Iraqi citizens, such as detaining criminal suspects, the right to possess weapons, and (for upper levels) the right to carry firearms. From the early 1990s full party members were clearly identifiable to the general public by their olive-colored clothing.

Party members controlled preferential access to a host of important social resources, including government jobs, seed banks, professional associations, and technical training. The character reference given by Baath members in one's neighborhood was the single most important factor in obtaining employment in the security services, the military, or access to prestigious military training. It was also vital for obtaining any kind of government employment.

The duties of party members varied by level (see Table 1: Baath Party Membership Levels). They reportedly included discussion of political circulars, symbolic willingness to take up arms to defend the party, tracking down deserters, recruiting new supporters, distributing ration cards, enlisting in various militias, implementing party decisions, arranging political demonstrations, establishing and controlling checkpoints, arresting and detaining criminal suspects, undertaking neighborhood guard duties, and informing on people.<sup>21</sup>

#### *Structure*

It is hard to develop a clear picture of the party's structure or membership levels prior to the US-led invasion of Iraq in 2003. According to the Higher National De-Ba'athification Commission (HNDC), the regional command consisted of 15 bureaus: two for most governorates, except Baghdad and the Kurdish region, which had three and one respectively. In addition, there were women's, military, professional, and students' bureaus.<sup>22</sup>

Each geographical bureau reportedly consisted of four branches. Each branch had four to eight sections, depending on the population and size of the area. Each section consisted of four to eight units, depending on the population and size of the area. Similarly, each unit was made up of a variable number of organizations. Circle and cell, widely used in English to describe the lowest-level unit of party organization, are synonymous. These members usually met in school buildings and did not have their own offices.

Of the three professional bureaus, the student office regulated students in post-secondary education, including universities, colleges, and training institutes. The professional office reportedly oversaw state officials and professional associates and syndicates, such as the Iraqi Women's Association and the Farmers' Union. The military office was reportedly restricted to members of the interior and defense ministries and the military.<sup>23</sup>

<sup>19</sup> Baran, "Iraq: The Party in Power."

<sup>20</sup> Ibid. Also numerous interviews conducted in Baghdad from 2005 to 2007.

<sup>21</sup> Numerous interviews conducted in Baghdad from 2005 to 2007.

<sup>22</sup> Al-Lami, "The Disbanded Baath Party – Statistics." Note: since the Baath Party supported the unity of the Arab world, the entire Arab world was "the nation" and Iraq was the "region."

<sup>23</sup> Ibid.

### *Membership Numbers*

There are no reliable figures for estimating party membership at the time of the 2003 invasion. Unlike the membership records of the Nazi Party, which were captured by Allied Forces, only the military membership lists have ever been found.<sup>24</sup>

Most figures quoted are those verbally quoted by HNDC, and they have changed at various times. According to a senior HNDC official, they are based on extrapolating membership patterns from a party handbook published in the mid-1990s.<sup>25</sup>

According to HNDC figures, when the regime fell, at least 400,000 Iraqis held the rank of full party members or above. About 150,000 of them worked in the civil service, and about 250,000 were in the defense forces or Ministry of Defense.<sup>26</sup> Of the 150,000 members who were also civil service employees, some 65,000 held one of the top four levels of membership.<sup>27</sup> Estimates of party members plus sympathizers ranged from 1.2 million to 2 million.<sup>28</sup>

### *Levels of Membership*

ICTJ developed the following chart of Baath Party membership levels based on field research from 2005 to 2007 and academic sources.<sup>29</sup> Information on the duties of different levels of party membership was developed from numerous interviews and HNDC.<sup>30</sup>

**Table 1: Baath Party Membership Levels**

| LEVEL IN PARTY HIERARCHY   | RANK - ENGLISH          | RANK - ARABIC (CPA transliteration)          | BELONGS TO                     | POWERS  |
|--|-------------------------|--|--------------------------------|---|
| <i>Highest level (symbolic only)</i>   | National command member | ‘Udu Qiyada Qawmiyya                         | National Command (Arab region) | Symbolic only   |
| <i>Highest level of Iraqi leadership</i>                                     | Regional command member | CPA: ‘Udu Qutriyya                           | Regional Command (Iraq)        | Set state and party policies. Were often office secretaries accountable only to regional command secretary (Hussein). Had official powers to order military operations. |
| <i>Bureaus could be geographical or professional (e.g. Students' Bureau)</i> | Office member           | ‘Udu Maktab (Omitted from CPA list of ranks) | Office (aka bureau)            | Supervised branch leaders. Some had powers to order military and security forces, including movement restrictions, house destructions, summonses, and interrogations.   |

<sup>24</sup> American officials found the military roster in June 2004.

<sup>25</sup> Al Faisal al-Lami, head of implementation and follow-up, Higher National de-Ba’athification Commission, Amman, Jordan, April 23, 2007.

<sup>26</sup> Al-Lami, “The Disbanded Baath Party - Statistics.”

<sup>27</sup> Anderson, “Letter From Iraq: Out On the Street.”

<sup>28</sup> The figure of 1.2 million is from al-Lami, “The Disbanded Baath Party - Statistics.” The higher estimates came from other Baghdadi interlocutors.

<sup>29</sup> Batatu, *The Old Social Classes and the Revolutionary Movements of Iraq*, 744-48. The diagram represents the classic hierarchy of Baath Party ranks, modified by information from extensive interviews. To minimize confusion, the Baath Party-related terminology of this paper is based on the terminology used in Coalition Provisional Authority, “CPA Order Number 1, de-Baathification of Iraqi Society.”

|   |                   |                       |              |   |
|---|-------------------|-----------------------|--------------|---|
|   | Branch member     | ‘Udu Far’             | Branch       | Led party sections (below). Could order security apparatus but not military to arrest. Authorized to use party firearms against suspected subversives. With other officials, could issue security decisions for area of responsibility.       |
|   | Section member    | ‘Udu Sh’uba           | Section      | Led groups, supposedly supervised and followed up work of security forces, could order checkpoints and local states of alert. Could act with local security and militias to break up suspicious gatherings. Authorized to use party firearms. |
| <i>From here CPA designates as “Senior Party Members”</i> | Unit member       | ‘Udu Ferqa            | Unit         | No decision-making role. Watched security and state administration. Followed up reports on individuals. Directly implemented orders of superiors, informed on individuals to competent authorities, gave character references, etc.           |
|   | Active member     | ‘Udu ‘Amel            | Organization |   |
| <i>Actual membership commenced</i>                        | Trainee member    | ‘Udu Mutadarrib       | Cell/circle  | A member during his or her training period.   |
|   | Candidate         | Murashah lil ‘Udwiyya | Cell/circle  | A period during which a recruit is trained and examined.  |
|   | Advanced partisan | Nasir Mutaqaddim      | Cell/circle  |   |
|   | Nasir             | Nasir                 | Cell/circle  | Formerly a hard barrier beyond which one was subjected to party discipline.   |
| <i>Lowest level of association</i>                        | Supporter         | Mua’yyid              | Cell/circle  |   |

Note: Red indicates the membership level was included in post-invasion de-Baathification measures.

Many Iraqis told ICTJ that this elaborate hierarchy had been simplified by 2003. While a distinction still existed between supporters and members, the hierarchy of intermediate steps had been significantly compressed and the time frame for membership accelerated.

De-Baathification measures after the 2003 invasion focused on the top four levels of membership—although various initiatives sometimes defined those levels differently. The small number of highest-ranked individuals, or regional leadership, were targeted as those most accountable for the suffering of Iraqis and subjected to a host of specific measures outside the mainstream de-Baathification program.

### 3. Implementing De-Baathification

De-Baathification is the term used to describe a series of legal and administrative measures introduced in Iraq shortly after the April 2003 fall of the Baathist regime. The overriding goal of de-Baathification was to prevent the Baath Party from returning to power in Iraq.

De-Baathification's framework was complicated and evolved with time. It is sometimes referred to as a vetting program, similar to the vetting of judges and police in Bosnia or of military personnel in El Salvador.<sup>31</sup> Baath members were not individually assessed on the basis of their competence, participation in human rights violations, or other measures of integrity. Instead, individuals were dismissed from government service depending on their rank in the civil service or Baath Party.

The key assumption was that any member of the top four ranks of the party must have been ideologically committed to Baathism or had committed acts that seriously violated either international human rights standards or other key social norms.

From the moment it was introduced in May 2003, de-Baathification was controversial. This section summarizes key trends in the politics, framework, and impact of de-Baathification during three phases. The first was from 2002 to 2004, when tens of thousands of party members were dismissed from employment and the armed insurgency began. The second was from 2005 to 2008, when reform pressures mounted, conflict raged, and reinstatements were paramount. The third was from 2008 to 2012, when HNDC was replaced and a struggle emerged to direct the workings of its successor, the Higher National Commission for Accountability and Justice (known most frequently in English as the Accountability and Justice Commission or AJC).

#### Phase I: 2002 to 2005

US planning for post-invasion Iraq has been widely criticized as inadequate, inefficient, and unrealistic.<sup>32</sup> Planning for de-Baathification suffered similar shortcomings. Limited knowledge of conditions in Iraq and a high degree of politicization severely compromised the planning process. Ideas for dismantling the Baath Party and its institutional legacy were first and foremost driven by Iraqi exiles, led by Ahmad Chalabi, whose primary point of reference was de-Nazification, namely, the mechanisms used to remove members and supports of the Nazi Party from public office after World War II.<sup>33</sup>

Although de-Nazification can be seen as partially successful, it is widely criticized as having failed to hold senior Nazis accountable for their actions or to prevent former Nazis from taking up senior govern-

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<sup>31</sup> For these and other cases, see Mayer-Rieckh and De Greiff, *Justice as Prevention: Vetting Public Employees in Transitional Settings*. To contrast de-Baathification with lustration policies in Eastern Europe, see Williams, Fowler, and Szcerbiak, "Explaining Lustration in Central Europe: A 'Post-Communist Politics' Approach," 39.

<sup>32</sup> See Ricks, *Fiasco: the American Military Adventure in Iraq*; Diamond, *Squandered Victory: The American Occupation and the Bungled Effort to Bring Democracy to Iraq*.

<sup>33</sup> Ziemke, *The U.S. Army in the Occupation of Germany, 1944-1946*, 381-95.

ment positions.<sup>34</sup> It is not clear whether those who supported the analogy between de-Baathification and de-Nazification were aware of these and other criticisms, although they did avoid some of de-Nazification's punitive elements. Later examples of vetting programs appear not to have been studied or discussed before instituting de-Baathification.<sup>35</sup>

Although conversations with Iraqi exiles included nuanced discussions of possible approaches to de-Baathification,<sup>36</sup> actual positions appear to have been much harder, divided between those who favored limited dismissals of senior party officials and personnel at notoriously abusive security agencies and those who favored a broader approach of "de-ideologization" and large-scale civil service dismissals. This split was mirrored in Washington, with the State Department and CIA reportedly favoring Hussein's removal but little else, and the Pentagon and Vice President Dick Cheney's office strongly supporting Chalabi's approach.

After a public struggle in the early months of 2003, the hard-line position triumphed and, through the Pentagon, became part of US policy.<sup>37</sup> As a result, US officials in Iraq adopted a broad, ambitious de-Baathification policy without a detailed understanding of the Baath Party, the Iraqi military, public institutions, or civil service, or of actual Iraqi conditions and preferences. Apparently, neither did they review alternative policy options.

#### *Establishing the De-Baathification Process*

Baghdad fell to US forces on April 9, 2003. Iraq's Baath Party was "dis-established," according to US Gen. Tommy Franks' "Freedom Message to the Iraqi People" one week later. Its property and records were to be turned over to the Multi-National Force (Coalition Forces).

The regime's fall had, however, been accompanied by widespread looting and destruction. As a result,<sup>38</sup> membership records of the Baath Party have not yet been found.

In the weeks that followed, Gen. Jay Garner in the Office of Reconstruction and Humanitarian Assistance (ORHA), followed a mild de-Baathification policy.<sup>39</sup> But his approach was criticized by some Iraqis and the US media; it also mobilized strong opposition from Chalabi.<sup>40</sup>

The result was a swift Pentagon-led policy change. As US Ambassador Paul Bremer III, the new leader of the Coalition Provisional Authority (CPA), explained about his preparations before going to Baghdad:

Undersecretary of Defense Douglas J. Feith presented me with a draft law that would purge top Baathists from the Iraqi government and told me that he planned to issue it immediately. Recognizing how important this step was, I asked Feith to hold off, among other reasons, so I could discuss it with Iraqi leaders and CPA advisers. A week later, after careful consultation, I issued this "de-Baathification" decree, as drafted by the Pentagon.<sup>41</sup>

<sup>34</sup> See Mazower, *Dark Continent: Europe's Twentieth Century*, 229-37, or Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 1-70.

<sup>35</sup> De-Baathification leader Chalabi told ICTJ that his daughter had done Internet research on de-Nazification and other World War II examples, but mentioned nothing more recent. Former CPA Administrator Paul Bremer said, "In retrospect . . . post-Cold War models may have been more relevant . . . than the earlier, post-Second World War paradigm." Bremer, Dobbins, and Gompert, "Early Days in Iraq: Decisions of the CPA."

<sup>36</sup> Conference of the Iraqi Opposition, "Final Report on The Transition to Democracy in Iraq." The report recommended a composite approach involving "dissolution of some institutions, segmentation of others, and the de-ideologization of the Baath legacy from the whole of Iraqi society," 60.

<sup>37</sup> Kirk, "PBS Frontline: 'The Lost Year in Iraq.'" See also Meierhenrich, "The Ethics of Lustration." 107.

<sup>38</sup> Ziemke, *The U.S. Army in the Occupation of Germany, 1944-1946*, 380.

<sup>39</sup> Ricks, *Fiasco: the American Military Adventure in Iraq*, 104. Once in Baghdad, Garner reportedly said in late April that Hussein's close associates and known violators of human rights would be barred from civil service jobs. Miller, "Granting Power to Baathists a Concern for Iraqi Leader."

<sup>40</sup> Tyler, "Hussein Loyalists Rise Again, Enraging Iraqis"; Miller, "Granting Power to Baathists a Concern for Iraqi Leader"; Frontline, "Truth, War and Consequences" (interview with Ahmad Chalabi). Some media reports indicated the Iraqi National Congress had prepared a list of names of some 30,000 individuals it believed should be dismissed.

<sup>41</sup> Bremer, "What We Got Right in Iraq"; Bremer and McConnell, *My Year in Iraq*, 39.

On the same day Garner was given the draft orders, Bremer submitted a memo to US Secretary of Defense Donald Rumsfeld in which he tentatively concluded that the Iraqi Army, security, and intelligence forces should be disbanded.

Bremer arrived in Baghdad on May 12, 2003; four days later the CPA issued Order 1, “De-Baathification of Iraqi Society,” followed quickly by Order 2, “Dissolution of Entities.” These two orders established the initial framework of Iraq’s de-Baathification policy and were followed by many more.<sup>42</sup>

#### *CPA Order 1: Cleansing the Civil Service*

Order 1 sought to uproot and eliminate the Baath Party by “removing its leadership from positions of authority and responsibility in Iraqi society.”<sup>43</sup> The order decreed that two categories of individuals would be excluded from public administration positions:

1. All individuals at the top four ranks of Baath Party membership, deemed “senior party members”<sup>44</sup>
2. All individuals at the three highest levels of management positions (that of director general and above) who held any level of party membership

The order also forbade displaying images of Hussein and other senior leaders, sought to initiate criminal investigations into alleged crimes, and authorized rewards for information leading to their arrest.<sup>45</sup>

Based solely on party membership and rank, the exclusions assumed that these ranks represented the party elite and that people within those ranks must have committed serious violations of human rights.

There was a similar rationale behind the dismissal of high-ranking managers: that no one at the level of director-general or above could have obtained or held their positions without individual involvement in party misdeeds.

By making these assumptions, the orders created a de-Baathification program with several serious flaws. First, it was built on the presumption of guilt—not the presumption of innocence, with guilt collectivized. This presumption poisoned both the process and politics of de-Baathification for years to come, as is discussed below in Section 5, “Lessons for Policy Makers.”

The result was a swift Pentagon-led policy change. As US Ambassador Paul Bremer III, the new Second, the order did not take into account the need to maintain a functioning civil service, unleashing significant disruption in ministries, such as education and finance, as skilled workers were removed from their jobs.<sup>46</sup>

#### *CPA Order 2: Disbanding the Military, Security, and Other Organizations*

Order 2 dissolved the Iraqi armed forces, security services, party militias, and other organizations notorious for their roles in party affairs or which might otherwise afford Baathists opportunities to return to power.<sup>47</sup> These organizations included the secret intelligence service (*mukhabarat*), the Ministry of Defense, the army, navy, air force, Olympic committee, and others. All military ranks and titles were abolished, conscripts were released, and employees dismissed, as of April 16, 2003. Everyone received termination payments. Pensions would continue, except for senior party members,

<sup>42</sup> Four of the first five CPA orders involved de-Baathification; the fifth introduced gun controls. Other CPA laws also contained de-Baathification-related criteria, such as Order 27.

<sup>43</sup> Section 1 (1).

<sup>44</sup> Defined in the order as ‘Udu Qutriyya (Regional Command Member); ‘Udu Far’ (Branch Member); ‘Udu Sh’uba (Section Member); and ‘Udu Ferqa (Group Member). CPA officials appear to have omitted the rank of ‘Udu Maktab (bureau member), which existed between ‘Udu Far’ and ‘Udu Qiyada Qutriyya.

<sup>45</sup> Sections 1 (1) and 1 (4).

<sup>46</sup> See Feith, “U.S. Policy Toward Iraq.”

<sup>47</sup> CPA Order 2. The majority of these entities were indeed notoriously abusive, the primary exception being the armed forces.

which included members at the same membership levels targeted under Order No. 1, plus officers at the rank of colonel and above.<sup>48</sup>

A detailed discussion of de-Baathification's impact on the military lies outside the scope of this paper, which, for practical reasons, concentrates solely on the vetting of Iraq's public administration and civil service.<sup>49</sup>

It is worth noting, however, that the decision to dissolve the Iraqi armed forces has inspired bitter controversy. Critics have argued that putting hundreds of thousands of potentially armed unemployed Iraqis on the streets—and removing the traditionally significant social prestige accorded to the Iraqi armed forces—contributed immeasurably to the creation of the insurgency that followed. Supporters have countered that the armed forces had already dissolved themselves.<sup>50</sup> It is important to note that although the decision is often presented as a binary one (keep/disband), other options probably existed, such as vetting or disbanding certain units and maintaining others. The lack of a coherent vision for swiftly reconstituting the military was also a significant failure.

#### *Iraqis Take Charge*

In the weeks following Orders 1 and 2, the CPA issued several other instruments to try and flesh out de-Baathification procedures;<sup>51</sup> yet, it appears that many of these procedures were never implemented or became irrelevant within a few months.

After the CPA created the Iraqi Governing Council (IGC) in July 2003, power over the de-Baathification process quickly flowed into Iraqi hands. During Chalabi's period as IGC head, on August 18, 2003, the IGC created HNDC, the entity that would lead de-Baathification initiatives for the next eight years.<sup>52</sup> By September 1, Iraqi ministers were appointed to lead all ministries. That same month Chalabi became commission chairman and appointed Mithal al-Alusi, a Sunni political party colleague, as director.<sup>53</sup> Using funds originally earmarked for the Iraqi secret intelligence service, the two quickly hired technical staff, most of whom belonged to Shi'a political factions. Authority and resources were centralized in Chalabi's hands; it was now possible for the commission to create change on the ground, regardless of the CPA.

#### *Creation of the Enduring Framework*

In September 2003, the de-Baathification commission significantly changed de-Baathification's framework. Although it targeted the same party and managerial ranks as the CPA, the commission vastly expanded the scope of de-Baathification. It prohibited certain categories of people from holding high-level positions in the new state bureaucracy, politics, civil institutions, or the media.

The people affected were party members from the level of 'Udu Ferqa and above, those who held civil service or equivalent positions from the level of director general or above, members of "oppressive institutions," or were known to have participated in stealing national wealth, aggression, or other crimes. The last three categories were not previously part of de-Baathification. The commission thus gave itself enormous new, undefined powers to influence political participation, civil service recruitment, social status, and the economic welfare of many thousands of Iraqis.

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<sup>48</sup> Ibid., Section 3 (6). The order held out the prospect that officers at the level of colonel or above would be able to prove to the CPA administrator that they were not senior party members.

<sup>49</sup> Ibid., Section 3 (6).

<sup>50</sup> See Terrill, *Lessons of the Iraqi de-Baathification program for Iraq's future and the Arab revolutions*. Former CPA officials reflect on their decisions in Bremer, Dobbins, and Gompert, "Early Days in Iraq: Decisions of the CPA".

<sup>51</sup> CPA Order 5, "Establishment of the Iraqi de-Baathification Council"; CPA, Memorandum1, "Implementation of de-Baathification Order No. 1." Section 4 of the latter defined broad appeals criteria that could have influenced appeals processes.

<sup>52</sup> IGC, "Decision 21." It also established a subcommittee to reinstate former civil service employees who had been sacked by the regime for political reasons. The links of dismissals and returns were later important factors in enhancing political party controls over the allocation of state employment.

<sup>53</sup> Al-Alusi's position was described, variously, as HNDC's director or as the commission's general director of culture and media.

The commission also created de-Baathification committees in each ministry.<sup>54</sup> It cancelled all previous reinstatements and seized control of appeals processes, thereby ending the pragmatic appeals and reinstatement policies of the CPA.<sup>55</sup> No appeals criteria were defined: dismissed individuals had the “right to submit requests of appeal to the HNDC,” which would “study them and take suitable decisions respectively.”<sup>56</sup> Reinstatement procedures were also drawn up for individuals dismissed by the previous regime. The commission retained the power to make final decision in all cases.<sup>57</sup>

The increasingly heated Iraqi approach immediately triggered a power struggle between the CPA and the de-Baathification commission. By November 2003 Bremer belatedly legalized the commission by delegating it authority to operate—but also sought to curtail its authority.<sup>58</sup> He also attempted to insert new and far better due process standards into de-Baathification procedures.<sup>59</sup>

At this point the CPA was largely irrelevant, and the changes Bremer sought to introduce were of little avail.<sup>60</sup> By the beginning of 2004, de-Baathification procedures were controlled by an undated de-Baathification commission “regulation,” which was handed out in poster form and displayed in many ministries. The regulation reinforced the commission’s role in a number of ways by:

- Confirming the commission as the main repository of all Baath-related information.
- Limiting the power of the ministries, with the commission notifying ministries of individuals to be de-Baathified and ministers ordering relevant dismissals, reporting back to the commission, and establishing local appeals committees.
- Setting up exemption procedures, although it was silent as to criteria (exemptions could be granted permanently or for one year, in which case the relevant ministry was obliged to monitor the exempted person’s behavior and report back on his or her activities).
- Defining the appeals processes.<sup>61</sup> Only Ferqa-level party members and certain high-ranking civil servants had the right to appeal, but they would lose their pensions if the appeal was rejected. Appeals criteria were nebulous, with no independent appeals mechanism.<sup>62</sup>

The regulation also lacked two other important items. It omitted the due process protections the CPA had attempted to mandate two months earlier. And the source and limits of the de-Baathification commission’s authority remained unclear. There was no mention in any instrument of the commission’s powers to enforce implementation of its decisions. These gaps would generate confusion and resentment, feeding sectarian animosities for years to come.

#### *First Opposition, 2004-2005*

As the CPA prepared to hand over power to the Iraqi Interim Government in June 2004, relations with the de-Baathification commission deteriorated still further. As Bremer left, he rescinded the legal au-

<sup>54</sup> IGC, “Decision 52.” It also stated that all civil servants vetted could apply for pensions, a little-known commitment that was never formally implemented.

<sup>55</sup> HNDC, “Decision No. 1.”

<sup>56</sup> Ibid., para. 2.

<sup>57</sup> Ibid., para. 6.

<sup>58</sup> CPA Memorandum 7, “Delegation of Authority Under De-Baathification Order No. 1,” November 4, 2003. The CPA sought to legalize only the de-Baathification commission decisions that conformed to CPA Orders 1 and 2.

<sup>59</sup> Ibid. Section 2. The new standards included “advance written notification explaining the grounds for dismissal and the procedures for appealing that dismissal; a reasonable opportunity to respond to the notification in writing or in person and present evidence; and a reasonable opportunity to appeal immediately any adverse decision, in writing or in person, to a fair and impartial entity independent of the individual or organization that rendered the adverse decision, which shall promptly render a written decision in the case.”

<sup>60</sup> Bremer and McConnell, *My Year in Iraq*, 260.

<sup>61</sup> HNDC, Regulation, Fourth (C) 1-5.

<sup>62</sup> Ibid., Fourth (B) 1-7. The final commission decision supposedly had to be signed by two judges who were seconded to the commission. When ICTJ interviewed one of the judges in Baghdad in October 2005 about appeals procedures and other aspects of his role, he told them that procedures were not always followed and he was uncomfortable in his role.

thority and powers of HNDC, enabling it to be dissolved once the interim government created a new entity.<sup>63</sup> But being protected by the provisions of the Law of Administration for the State of Iraq for the Transitional Period (TAL), the commission's legal status was sufficiently murky to allow it to survive.<sup>64</sup>

The interim government, led by Dr. Ayad Allawi, a former Baathist and Shi'ite secularist, was hostile to the commission's work. As Iraq's armed insurgency gained strength, Allawi reportedly favored limiting de-Baathification to a small number of key Baathist leaders, thereby strengthening Sunni commitment to the political process and perhaps enticing insurgents back to the negotiating table.<sup>65</sup>

Instead, Chalabi and other supporters of de-Baathification fought virulently against any change in policy. At one level, the power struggle centered on de-Baathification policy: how actively and deeply de-Baathification should be pursued and how many former Baathists would be allowed to return to government service. At another level, it was personal and political: Allawi's political base reportedly had a number of former party officials who were prepared to renounce their affiliation but did not support de-Baathification's breadth or speed. After an antagonistic few months, the commission sought and received a decision from the Shura Council, Iraq's government legal counsel, affirming its legality and legitimacy.<sup>66</sup>

Although the commission could not be abolished, its power could be curtailed. Two days later the cabinet secretariat immediately informed all ministries and state institutions that all contacts with HNDC had to be routed through the secretariat.<sup>67</sup> Shortly after, Commission Director Mithal al-Alusi was referred for criminal investigation and removed from his position. The government cancelled the credentials of three-quarters of HNDC's staff, cut its funding, and attempted to force the commission to move offices.<sup>68</sup> The government prepared a draft law to create a new, smaller judicial body, answering to the Ministry of Justice.<sup>69</sup>

## Phase II: Struggles, 2005-2008

### New Government, New Constitution

Allawi's government lasted just six months. The Iraqi elections of January 2005 ushered in a Kurdish-Shi'ite alliance headed by Prime Minister Ibrahim al-Ja'afari. Sunnis had boycotted the transitional elections, and, as a result, they were only marginally represented. Chalabi also regained power, being appointed deputy prime minister and interim oil minister.

Government support for de-Baathification rebounded, and the commission's powers and preeminence were immediately reinforced. Less than three weeks after the new government took power, Iraq's Commission on Public Integrity informed the cabinet secretariat that no state entity had the competence to cancel or alter de-Baathification decisions and that cooperation with the commission should immediately resume.<sup>70</sup>

<sup>63</sup> CPA Order 100, "Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority." The order rescinded CPA Order 5 and Memoranda 1 and 7 in their entirety. It withdrew all authority that had been delegated to HNDC and stated it "shall be abolished at such time as the Iraqi Interim Government issues an order establishing the Independent Iraqi de-Baathification Council."

<sup>64</sup> Article 31 (B) (2), (3), and (4); Article 36 (B) (3); and Article 49.

<sup>65</sup> Allawi, *The Occupation of Iraq: Winning the War, Losing the Peace*, 337. Allawi's position as head of the interim government was consistent with his attitude on this issue before the fall of the regime.

<sup>66</sup> First, the Shura Council said HNDC could continue its activities because the interim government had not established an independent de-Baathification council. Second, the council accepted that the commission's creation had been confirmed by Section 49 of the TAL.

<sup>67</sup> Cabinet General Secretariat, Iraq, "Letter from the Cabinet General Secretariat to all Ministries and State Institutions not linked to Ministries, Subject: Correspondence. Number 4882/9198."

<sup>68</sup> Anderson, J "Letter From Iraq: Out On the Street," 6.

<sup>69</sup> Republic of Iraq Council of Ministers, "Foundation of an Organization to remove traces of the Baath Party from Iraqi Society, Law Number (5) of May 25, 2003."

<sup>70</sup> Republic of Iraq Commission for Public Integrity, "Letter Q/12, 23 May 2005. To the Council of Ministers/General Secretariat. Subject: Cancellation." Within weeks the cabinet secretariat was writing to ministries to exhort them to implement de-Baathification orders. See Republic of Iraq, Council of Ministers, General Secretariat, "Letter Number q/6/85 [annotation: /4325]. To the Ministry of Housing and Population/Office of the Minister. Subject: Procedures."

This period marked the height of the commission’s power. It continued to process dismissals and reinstatement decisions (see sub-section, “Dismissals, 2003–2006”), inserted de-Baathification provisions into the new Constitution, and influenced two of the most important processes of the period: the 2005 national elections and the trial of Hussein and others at the Iraqi High Tribunal (IHT).<sup>71</sup>

#### *The Constitution*

The year 2005 was marked by struggles to write Iraq’s new Constitution and maximize political power in the elections that followed. Sectarian attitudes were hardening: Sunnis lacked representation in government and felt victimized by de-Baathification, while an armed insurgency raged in many Sunni areas of the country. Shi’ite politicians were flexing their muscles but genuinely feared a return of Baath Party rule, fanned by Allawi’s softer position on de-Baathification. There were also massive sectarian-inflected, and patronage-driven hirings into government departments that had little or nothing to do with public sector needs.<sup>72</sup>

Advocates of de-Baathification triumphed in securing strong de-Baathification provisions in the new Constitution. The Baath Party was prohibited (Article 7). In highly protective language, the de-Baathification commission was to continue until it had “completed its function,” but became nominally subject to parliamentary oversight (Article 135, First, Second, and Sixth). People subject to de-Baathification were banned from the Presidency Council, Prime Ministership, Parliament, and, in broadly drafted language, from other equivalent judicial, provincial, and state positions (Article 135, Third and Fourth).

The Constitution was approved with grudging Sunni support, secured only by a promise that sensitive areas could be renegotiated and amended. While it brought the commission under parliamentary control in a nominal way, the commission was also exposed more closely to majoritarian and sectarian dynamics via the parliamentary de-Baathification committee, which gave the commission broad but undefined powers to strike down potential public leaders and a shield against future reform efforts. Proponents of de-Baathification would later argue that attempts to change the program or the commission were unconstitutional.

#### *The 2005 Elections*

Another major milestone during this period was HNDC’s first foray into electoral issues. In anticipation of the general election of December 15, 2005, HNDC attempted to bar roughly 170 candidates from participating—even while Chalabi and prominent commission member Ali Faisal al-Lamii were themselves candidates.<sup>73</sup> This drew the commission squarely into conflict with the Independent Electoral Commission of Iraq (IECI), one of the few Iraqi bodies with a reputation for integrity and efficiency.

The de-Baathification commission sent multiple lists to IECI in late November and early December, just weeks before Election Day. Those affected were drawn from a variety of party lists, although electoral experts later indicated that secular and Sunni parties were disproportionately affected.<sup>74</sup> IECI objected to the fact that it had been given multiple conflicting lists at the last minute and was expected to cancel candidacies with minimal reasoning or evidence. HNDC had also interpreted its powers broadly and sought not just to bar alleged senior party members, but also candidates who it believed were ineligible as a result of fraud, age, or alleged corruption.

Needing to preserve its independent authority, IECI did not accept the lists outright, but asked all candidates alleged to have been senior party members to respond to an IECI questionnaire within

<sup>71</sup> Known variously as the Iraqi Special Tribunal, the Iraqi High Tribunal, and the Supreme Iraqi Criminal Tribunal.

<sup>72</sup> Allawi, *The Occupation of Iraq*, 420. International Fiscal Reform Adviser 1, “Confidential ICTJ Interview.”

<sup>73</sup> Chalabi led his own electoral list; al-Lami was a candidate for a Shi’ite religious party. When asked about the conflict of interest, al-Lami explained HNDC had set up a separate internal committee to oversee the electoral vetting.

<sup>74</sup> Interview with international electoral expert. ICTJ also interviewed IECI officials multiple times in Baghdad in 2006.

three days. It then disqualified 40 candidates and notified the commission of 45 cases of mistaken identification.<sup>75</sup> It also decided it could not scrutinize further lists: if any successful candidates were subsequently found to have lied on their candidacy declaration, IECI would invalidate their election. HNDC was furious, but to little avail. Media and political turmoil surrounded the entire process. All political factions were again left with the perception that procedures were politicized, arbitrary, and, from a Shi'a perspective, ineffective.

#### *The Iraqi High Tribunal, 2005–2006*

A second development in 2005 was the first HNDC challenge to the IHT. The tribunal was set up to investigate and try people alleged to have committed crimes against humanity, war crimes, or genocide during Hussein's rule. The relationship of IHT and the de-Baathification commission shows the politicized, selective use of de-Baathification measures. It also underscores the lack of clarity with regard to the de-Baathification commission's executive and enforcement powers.

Judicial vetting is a complex area. Because of the need for judicial independence, an external executive body should not be able to force the reassignment or dismissal of judicial staff. In the case of IHT, the tribunal's own rules allowed for dismissal in cases of criminal behavior or misrepresentation of facts, giving it sufficient tools to dismiss individuals as part of de-Baathification measures, if it believed it appropriate. Any grounds for dismissal of judges presented by external actors that fell short of these standards could constitute political interference with the independence of the judiciary.

All tribunal judges and prosecutors had been subjected to a separate vetting process in 2003, plus a careful selection process.<sup>76</sup> But the tribunal's statute, unlike other de-Baathification instruments, banned any former Baath Party member—not just senior party members—from participating.<sup>77</sup> This standard was almost unimplementable because party membership was strongly enforced among judges and prosecutors during the Hussein era. It appears not to have been fully enforced when the tribunal was set up, but served as a sword over judges' heads from 2005 onward.

The commission intervened successfully three times in judicial assignments directly related to the Hussein trial, commonly known as the Dujail trial.<sup>78</sup>

The first attempt was in July 2005—shortly before the Dujail trial opened—when the commission sought to remove 19 tribunal employees. Administrative staff, including the tribunal's administrative director, were dismissed; judicial staff were not. Some court staff told ICTJ that the judges had escaped dismissal only because of US pressure. Fearing for judicial independence and the tribunal's reputation, the United States threatened to relocate the trial to a third country if the judicial dismissals were carried out.

The second attempt came in January 2006. Presiding Judge Rizgar al-Amin had resigned in the wake of public criticism, and Judge Sa'id al-Hammashi had been announced as his replacement. Al-Hammashi was a former lawyer who showed signs of independence and a strong interest in international justice norms. The commission swiftly pressured the tribunal into transferring him from the Dujail trial chamber to another case—although not in removing him from tribunal staff. The removal of a sitting judge from a case as a result of executive order is a flagrant breach of principles respecting the independence of the judiciary. Knowing this, the cabinet secretariat made an effort to help the tribunal sidestep pressures from the de-Baathification commission but was unsuccessful.<sup>79</sup>

<sup>75</sup> "Notes of HNDC Press Conference, December 12, 2005." Arabic names are complex, and misidentification problems are common. Yet 25 percent was a startlingly high misidentification rate.

<sup>76</sup> See CPA Order 15, "Establishment of the Judicial Review Committee," June 26, 2003.

<sup>77</sup> CPA Order 48, "Delegation of Authority Regarding an Iraqi Special Tribunal," December 9, 2003, Appendix A, Article 33. A second tribunal statute, Law 10 of 2005, entered into force the day the Dujail trial opened. ICTJ has copies of the law after it passed and before it was signed by the Presidency Council. The wording of the key article was altered before it was signed.

<sup>78</sup> Sissons and Bassin, "Was the Dujail Trial Fair?"; Sissons, and Wierda, "Dujail: Trial and Error?"

<sup>79</sup> Republic of Iraq, Council of Ministers, Cabinet General Secretariat, "Ref: MG/5/607. Letter to the Supreme Iraqi Criminal Tribunal, Secret, Subject: Linger." The letter states that tribunal appointments were made according to the requirements of the tribunal statute and are not open to actions of the de-Baathification commission. No procedures should be taken against staff unless directed by the cabinet.

Al-Hammashi's removal damaged the tribunal's appearance of independence and its credibility worldwide. It placed the tribunal in a weak position to resist the de-Baathification commission's third intervention, which came in the weeks immediately before the release of the Dujail trial judgment and verdicts.

An internal Tribunal de-Baathification Committee was created in 2006, consolidating a new power elite inside the tribunal.<sup>80</sup> It concluded a deal with HNDC to dismiss several staff; other more prominent staff remained but resigned from their leadership positions. But the main blow fell in October, just as the Dujail trial judgment was being finalized and fears were running high that Hussein might not receive the death penalty. The de-Baathification commission told four judges that they would be given the opportunity to apply for transfers rather than face the public humiliation of de-Baathification. Crucially, this changed one judge in the Dujail trial and at least one member of the cassation chamber, thereby assuring Hussein the death penalty.<sup>81</sup>

#### *The Maliki Government, 2006–2008*

The Maliki government assumed power on April 22, 2006. Maliki, a former deputy chairman of the de-Baathification commission, was seen as a strong de-Baathification supporter. But the commission's foray into electoral politics had aggravated the already deep divisions over de-Baathification, and the worsening insurgency exacerbated them still further.

Sunnis repeatedly portrayed de-Baathification as "de-Sunnification," complaining that de-Baathification had become a sectarian instrument wielded to prevent Sunnis from participating in public life. The presumption of guilt inherent in de-Baathification processes—and the collective nature of that guilt—made the claim hard to rebut. Resentment was stoked further, caused by the commission's strong Shi'a political ties and lack of transparency as well as its lack of accountability. Many senior military and security officials also advocated reform. The future development of Iraq's military and army was of vital importance to all politicians; many also recognized that improving the armed forces required experienced leaders, many of whom had served in high-level positions in the former regime.

Sunni views contrasted strongly with deep-seated fears amongst the Shi'a that de-Baathification had not gone far enough. These had at least three elements. First, in the absence of a coherent transitional justice strategy, many Shi'a expected de-Baathification to fulfill multiple transitional justice goals, like prosecutions. These expectations were fed, not managed, by de-Baathification advocates. Second, there was the legitimate criticism that de-Baathification had not gone far enough: by focusing only on high-ranking cadres, many lower-level party members who might have committed severe violations of human rights were still in place. Third, there was genuine fear (ably exploited by commission leaders) that the Baath Party was gathering strength for a return to power.

Thus the main Shi'a political parties strongly supported de-Baathification, particularly the Sadr bloc, to whom Maliki owed his prime ministership.<sup>82</sup> The Sadr movement had a powerful armed street presence, and one of its members assumed leadership of the parliamentary de-Baathification committee.

There were also important actors outside electoral politics who had significant influence, such as Grand Ayatollah Ali al-Sistani. Kurdish political leaders generally were content to implement the will of their coalition partners.

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<sup>80</sup> Interview with tribunal judge.

<sup>81</sup> ICTJ interviews with de-Baathification and tribunal officials as well as international observers from August 2006 to March 2007 indicate a very high probability that these changes to judicial assignments were made in an effort to be certain that Hussein received the death penalty. The evidence against him in the Dujail trial was not as strong as most Iraqis had presumed.

<sup>82</sup> Prime Minister Maliki assumed his leadership position by one vote and was widely held to be indebted to the Sadrist for their support. Although Shi'a formal party positions were strong, key officials indicated to ICTJ that many politicians privately held more nuanced positions and supported reform but still needed to reassure the rank and file that they would not permit the return of the Baath Party.

It was political pressure from Sunnis and the US government that forced the new government to consider changing the de-Baathification process. With rising violence and midterm elections looming, US officials decided that reforming de-Baathification was essential to lessening sectarian tensions. They immediately pressured Maliki's government to commit do so. It is important to note, however, that the United States and the United Kingdom prioritized these changes because of de-Baathification's inflammatory political symbolism and perceived security impacts. They had little interest in the coherence or success of the program, *per se*.

Partially in response to these pressures, Maliki's government publicly committed itself in June 2006 to reform de-Baathification as part of its "reconciliation" strategy. Despite US prodding, little progress was made until late 2007. Various parties produced reform proposals, most of which were based on the existing system, and at least one high-level agreement fell apart after a deal had been announced.<sup>83</sup>

In addition to political divisions, reform negotiations were hampered by one major flaw. Almost no politicians understood de-Baathification's complex procedures and framework, nor could they access information about alternative models.<sup>84</sup> Commission leaders capitalized on their position of superior knowledge and presented a new draft law to Parliament. In essence, the Law of the Supreme National Commission for Accountability and Justice (commonly known as the Accountability and Justice Law or AJL)<sup>85</sup> entrenched the prevailing system, but few people knew enough to recognize it.

After months of wrangling, the Iraqi prime minister and president sent the draft law to Parliament, where debate was heated. The Iraqiya bloc and a number of Sunnis rejected the law and refused to vote. Some hard-liner Shi'a members, including Sadrists, objected to the law because they believed it rewarded perpetrators by expanding pension and due process rights.

In the end, under pressure from a visit by US Secretary of State Condoleezza Rice, a sparsely attended Iraqi Parliament passed the AJL on January 12, 2008.<sup>86</sup> But its reception was lackluster. Although required by law, the presidential council never ratified or vetoed the bill. Vice President Tareq al-Hashemi refused to approve it on the grounds that it would not assist reconciliation.<sup>87</sup> In the end, the law passed by surviving the time period required for any veto. Another 18 months lapsed before it was implemented.

### Phase III: The Old Becomes New, 2008–2012

#### *About the Accountability and Justice Commission*

The AJC created a new body, the Higher National Commission for Accountability and Justice. While the law did contain some improvements, it also preserved much of the old system.<sup>88</sup>

Some of the most significant changes—at least on paper—were:

- A simpler, clearer basis for de-Baathification efforts, including clearer enforcement requirements.
- Most Ferqa-level members were permitted to return to government service. Those who could not hold senior government positions or had been employed at key organizations including the presidency council, the prime minister's council, the supreme judicial council, and the Ministries of Foreign Affairs and Defense.

<sup>83</sup> The only proposal that was significantly different from the system in force was that of the Iraqiya Party, which continued to advocate for a judicial committee. The agreement was concluded at the leadership council level and was brokered just before US Ambassador Zalmay Khalilzad left in March 2007.

<sup>84</sup> This observation is based on extensive ICTJ research, including a United Nations Assistance Mission in Iraq (UNAMI)-ICT conference on comparative vetting experiences in April 2007.

<sup>85</sup> Republic of Iraq, Law 10 of 2008.

<sup>86</sup> The 132 MPs who objected to the bill refused to attend the session, hoping that Parliament would fail to meet its quorum of 138.

<sup>87</sup> Al-Hashimi Refused to Approve the Accountability and Justice Law", Asharq Al-Awsat, 2 Feb. 2008,

<sup>88</sup> For a more complete discussion, see Sissons, "Iraq's New Accountability and Justice Law."

- Most people (that is, Shu’ba- and Ferqa-level members) dismissed became eligible for pensions.
- A more aggressive stance against employees of Baath-era intelligence agencies, who were to be dismissed from government service, regardless of whether they were party members.<sup>89</sup>
- A stronger link to criminal investigation efforts.
- The creation of seven new commissioners to function as a new leadership.
- The introduction of an independent judicial appeals chamber, linked to Iraq’s Court of Cassation. Procedures for reinstatement and exemptions were also clarified, although criteria remained vague. Importantly, however, no time limits were placed on the de-Baathification process. It was unclear whether the de-Baathification commission would simply be renamed or dissolved; and the process still lacked basic administrative fairness guarantees.

#### *New Law, Old Struggle*

As soon as the new law entered into force, power struggles over its implementation began. HNDC leaders Chalabi and Faisal argued that the new law permitted the de-Baathification commission to become the new Supreme Council for Accountability and Justice (SCAJ). Opponents, including al-Hashemi, argued that the commission had lost jurisdiction and that an entirely new process, commission, and leadership had to be established.

True to form, the commission acted preemptively. Ali Faisal al-Lami, now executive director, called for all former Baathists still in the government to apply to HNDC for reinstatement or retirement (with pension) under the new law. Some 41,000 applications were received, and a bureaucratic struggle over the approvals process emerged among the cabinet, Parliament, and HNDC that ended only when al-Lami was detained by US forces in September 2008.<sup>90</sup>

Al-Lami was released 10 months later, in July 2009. During his detention, HNDC activities stalled and the cabinet prevented it from assuming the new body’s functions.<sup>91</sup> But al-Lami resumed his position shortly after his release. He petitioned the parliamentary legal committee, the Supreme Court, and the Shura Council for the de-Baathification commission’s right to become the new commission.<sup>92</sup> In October 2009 the Supreme Court agreed, and the commission changed its name, but retained the same staff and procedures in preparation for its new role. Al-Lami and others exploited differences between Sadrists and the Da’wa Party to ensure the December 2009 parliamentary vote to approve appointments to AJC’s new board of directors failed.<sup>93</sup>

#### *Election Maneuvering, 2010*

Benefiting from a badly divided government, Chalabi and Faisal faced few restraints. From late 2009 the AJC leadership focused on a single key issue: the election on March 7, 2010. Once again, AJC Chairman Chalabi and Deputy Chair al-Lami were electoral candidates, this time both running as candidates of the Iraqi National Alliance, a rival to Maliki’s own Da’wa Party. It was clear that public opinion was divided and a future government would be a grand coalition of some kind. Iraq’s sectarian divide had seemingly narrowed in the 2009 provincial elections, but deepened quickly as AJC stepped into the fray. Working from January 2010, it sought to disqualify former party members,

<sup>89</sup> This aroused opposition. Some 7,000 employees of security-related ministries were said to be affected.

<sup>90</sup> Al-Lami was detained on suspicion of association with Iranian intelligence and participation in an armed Shi’a insurgent group. He was handed over to Iraqi forces when US forces withdrew from Iraqi cities in June 2010 and released shortly afterward. The figure of 41,000 is from an interview with a member of the parliamentary justice and accountability committee.

<sup>91</sup> Much of the material in this section is based on an interview with al-Lami.

<sup>92</sup> The parliamentary legal committee agreed, basing its decision on Articles 1 (2) and 28 of the AJC.

<sup>93</sup> Maliki selected Waleed Al-Hili, a prominent Da’wa Party member, as chairman. But votes to approve Al-Hili and other new commissioners failed. See “Parliament Disapproves Al-Hili’s Chairmanship of Committee Countering Baath Party.”

former employees of Hussein’s secret intelligence and security institutions, and, in a controversially broad interpretation of its powers, individuals whom it considered as having promoted the Baath Party.<sup>94</sup> In a stunning blow, prominent Sunni political leader Saleh al-Mutlaq was one of those named in this category.

Over the course of the elections AJC sought to disqualify 511 candidates—including sitting parliamentarians—and focus on the leadership of the non-Shi'a blocs.<sup>95</sup> In a move that would have altered the political landscape dramatically, it also sought to ban 15 political parties, the majority of which were Sunni.<sup>96</sup> The heavy impact prompted complaints of sectarianism, conflicts of interest, and the threat of a boycott by the Sunni political elite.

In a move widely interpreted as one designed to embarrass Prime Minister Maliki, in the last weeks of February AJC publicly asked the government to remove 376 military and security officers from their positions. It made sure that the names were published, including the director of military intelligence, the general commander of the federal police, and 18 other prominent figures.<sup>97</sup> Maliki, furious at being publicly broadsided, was stuck between looking soft on the Baath Party or infuriating the vital security apparatus. In the end he only partially complied, protecting a number of high-ranking Shi'ite officers.

Because electoral disqualifications regulate access to power, they are always controversial, but Iraq's disqualifications were unusually so, given the political interests, sectarian makeup, and troubled track record of AJC's leadership. Leaders around the world grew concerned about the situation, prompting US Vice President Joseph Biden to try to intervene unsuccessfully.<sup>98</sup>

As weeks of brinksmanship continued, multiple bans, appeals, and deals took place. More than 170 candidates appealed the AJC order to the judicial appeals committee, which had been hurriedly brought into being for this purpose. In total, 26 appeals were upheld, after which the committee swiftly lost quorum.<sup>99</sup> The Independent High Electoral Commission (IHEC), preserving its independence, refused to disqualify some 52 candidates.

The election resulted in a cliffhanger: the Iraqiya bloc won 91 seats and Maliki's State of Law (dawlat al-qanun) bloc 89 seats. AJC again attempted to disqualify candidates, including eight from the Iraqiya bloc, a move that would have dramatically reshaped election outcomes. Incensed, Sunni politicians called for new elections.<sup>100</sup> But during coalition negotiations, the State of Law bloc entered into negotiations with Chalabi's Iraqi National Accord (INA), and de-Baathification efforts diminished considerably. Wrangling to form a government continued until November 2010, with de-Baathification one of the items at stake. In the end, after an agreement that cancelled de-Baathification measures against three Sunni leaders, Maliki retained his position and Saleh al-Mutlaq, formerly banned from the elections, became deputy prime minister.<sup>101</sup>

### *Leadership Finally Changes*

As the government was formed, al-Lami became the acting chair of the AJC, as Chalabi assumed duties in Parliament. In May 2011, however, al-Lami was assassinated, and AJC's political power quickly diminished.<sup>102</sup> Maliki dismissed Chalabi as chairman in June, replac-

<sup>94</sup> For the latter category, AJC relied on Article 7 of the Constitution, which contained a broad prohibition on inciting racism or terrorism, “especially the Saddamist Baath.”

<sup>95</sup> Of the 511 attempted disqualifications, the most deeply affected were 72 candidates from the Iraqiya bloc, 67 from the National Unity Coalition, and 20 from Ahrar.

<sup>96</sup> UN intervention reportedly helped prevent the disqualification. See “Iraq's Uncertain Future: Elections and Beyond.”

<sup>97</sup> ‘Abd al-Wahidd Toma, “Al-Hayat Publishes the Names of DeBaathified Officers.”

<sup>98</sup> Biden proposed postponing the cancellation of candidacies until after the elections, a tactic unacceptable to Shi'a parties.

<sup>99</sup> One judge was killed and two retired. A new committee was formed only after July 2011. In the absence of the judicial committee, the AJC itself had handled 774 appeals; 421 were upheld and 103 were denied as of September 2011. From an interview with an Iraqi judge.

<sup>100</sup> Mahdi, “Al-Hashimi Calls the Presidency Council for Emergency Meeting.”

<sup>101</sup> Reportedly, another element of the so-called Arbil Agreement was the disbanding of AJC.

<sup>102</sup> Al-Lami was shot while driving on May 26 2011. His brother was killed the following month. Iraqi police later said a group affiliated with al-Qaeda was responsible for al-Lami's death.

ing him with Da’wa Party stalwart and Human Rights Minister Muhammad Al-Sudani.<sup>103</sup> In September 2011, Maliki dismissed two Chalabi allies from the commission’s leadership and replaced them with allies of his own.<sup>104</sup> But the seven-person leadership board, composed of political party members across the ethnic and religious spectrum, was formed only in July 2012.

As of August 2012, political negotiations were in play to select the AJC chairman, but the board had not taken up its duties. AJC officials continued to process retirements and reinstatements, while the commission continued to lack clear oversight and transparency mechanisms.

## Numbers and Trends

### *Dismissals, 2003–2006*

As mentioned earlier, a detailed look at de-Baathification’s impact on Iraq’s military and security institutions is outside the scope of this paper. It is clear, however, that its impact was immediate and profound. At the stroke of a pen in May 2003, some 400,000 conscripts, officials, officers, and others were left unemployed by CPA Order 2.

There appears to be almost universal criticism of the decision to dissolve the army, particularly in light of the bloody insurgency that evolved in 2004 and intensified from 2006 to 2008. It appears, however, that many people were reabsorbed into new military and security institutions. De-Baathification measures were largely backward looking and for the most part did not prohibit future reemployment.<sup>105</sup>

The impact on Iraq’s public administration is somewhat harder to assess. Implementation varied according to the ministry or institution involved, with some agencies enthusiastically dismissing eligible employees and others proceeding more slowly or selectively. In the Ministry of Foreign Affairs and other specialized entities, for example, the need for certain technical skills meant that exemptions were frequent and implementation severely compromised. The exception was the judiciary, which was subjected to a separate judicial vetting process.<sup>106</sup>

Despite a halting start, however, de-Baathification of the government accelerated strongly at the end of 2003 and in the first months of 2004. Although Iraqi officials conveniently laid responsibility on the CPA for the mass wave of dismissals, ICTJ’s on-the-ground research strongly indicates that the de-Baathification commission was largely responsible. Policy-making power appears to have flowed to the commission from September 2003 and operational power from November 2003.

During these months the CPA began to realize that de-Baathification’s scope was larger than it had envisioned.<sup>107</sup> The education sector was particularly hard hit, at a time when it appeared that schools and universities were having difficulty functioning.<sup>108</sup> In the following months, it became increasingly clear that many thousands of people had been dismissed, but few had received pension payments or had their appeals heard.

The lack of transparent regular reporting makes it difficult to track trends in dismissals, appeals, or reinstatements. ICTJ obtained internal statistical data from the commission, summarized below.

<sup>103</sup> “Maliki Dismisses Chalabi from Chairing the Accountability and Justice Committee.”

<sup>104</sup> “Al-Maliki Dismisses Two Chalabi allies from ‘Accountability and Justice Organization.’”

<sup>105</sup> HNDC estimated in 2007 that almost 80,000 military and security personnel had been reinstated to government service, slightly more than half the number of military and security personnel who had also been Baath Party members. Al-Lami, “The Disbanded Baath Party – Statistics.”

<sup>106</sup> CPA Order 15, “Establishment of the Judicial Review Committee,” Section 4 (1), June 26, 2003. The criteria consisted simply of “suitability of Judges and Prosecutors to hold office.”

<sup>107</sup> Bremer and McConnell, *My Year in Iraq*, 260–61.

<sup>108</sup> Bremer attempted to reverse the dismissal and speed the appeals of thousands of teachers to alleviate this problem in April 2004. Bremer, “Turning the Page.”

ICTJ cannot verify its accuracy, but given the complete lack of other data, believes it should be publicly accessible.<sup>109</sup>

There is no reliable information about the size of the Iraqi civil service prior to the fall of Hussein's regime. Informed estimates range from 900,000 to more than a million, not counting the military.<sup>110</sup>

Based on HNDC data, which at times are contradictory, we made the following determinations:<sup>111</sup>

- Some 45,111 civil service employees had been senior party members and therefore were eligible for de-Baathification, fewer than half of the 111,144 civil servants who had been party members of any kind.<sup>112</sup>
- The pace of dismissals was very fast from 2003 to mid-2004, and then slowed. Almost 70 percent were dismissed before June 2003 (41,324 or 69 percent). Another 14 percent were dismissed between June 2004 and October 2005. Another 17 percent had still not been dismissed as part of de-Baathification by October 2005.
- The Ministry of Education was by far the most affected. It had 18,064 senior party members—four times more than that any other ministry. This is not surprising given the ministry's large size and the regime's emphasis on propaganda via the education system. Almost all senior party members (16,149) were dismissed before June 2004, with another 1,355 dismissed in the next 16 months. Slightly more than 400 senior party members had not been dismissed as part of de-Baathification by October 2005. The vast majority of these were Ferqa-level members, the lowest level of party membership at which de-Baathification applied. The impact on schools and administration was so severe that the CPA ordered many thousands reinstated in April 2004—although there is no easy way of knowing how many actually were reinstated.<sup>113</sup>
- The ministry with the next highest number of dismissals was higher education (4,361).<sup>114</sup> The Ministry of Health came in next, with 2,367 dismissals. Interestingly, the Ministry of Science and Technology and the Ministry of Agriculture employed a significant number of party members, but had de-Baathified a far smaller proportion of staff than other ministries. Science and Technology had de-Baathified only 120 senior party members, with 2,351 senior party members still employed.<sup>115</sup> Agriculture had de-Baathified only 999 senior party members, fewer than half the number of employees who were senior party members (2,340).
- Information on the dismissal of senior bureaucrats is harder to obtain. Many ministries reportedly retired or transferred senior figures, rather than go through a formal de-Baath-

<sup>109</sup> Categories, definitions, and dates are often defined poorly and change from period to period. It is also important to note that HNDC defined dismissals undertaken during the period of CPA operations as having been executed by the CPA. Based on our research, ICTJ believes this definition is likely to be misleading.

<sup>110</sup> Taranco, "Iraq - World Bank/ United Nations Joint Iraq Needs Assessment, Government institutions, civil society, the rule of law and media," 16.

<sup>111</sup> HNDC, "Untitled Arabic document with statistics updated through October 2005."

<sup>112</sup> HNDC, "Total Statistics for the Year 2005/Department of Ministries." In 2007 al-Lami said up to 150,000 civil servants were eligible for de-Baathification; 140,000 were removed by the CPA (including 102,000 who were trainees and acting members, well below the de-Baathification threshold). The HNDC document states that 11,6000 immediately returned to their positions. ICTJ has not found supporting evidence for these larger numbers. Al-Lami, "An Explanation of the Duties of Baath Party Members."

<sup>113</sup> Bremer, "Turning the Page." On the impact in 2003, see Nelson, "United States Institute of Peace Association for Diplomatic Studies and Training, Iraq Experience Project."

<sup>114</sup> The World Bank reported in 2003 that higher education faculty numbered roughly 14,500 in 2001 (see Taranco, "Iraq - World Bank/ United Nations Joint Iraq Needs Assessment, Government institutions, civil society, the rule of law and media," Section 3 (A) (3.6). A former ministry employee told ICTJ in February 2006 that party membership was a required condition of employment in the Ministry when she joined in 1980.

<sup>115</sup> The Ministry of Atomic Energy was dissolved, and 1,300 employees transferred to Science and Technology in August 2003. This may well have affected party membership rates and the implementation of de-Baathification. It is unlikely anyone thought dismissing Iraq's nuclear scientists was a good idea. UN Educational Scientific and Cultural Organization, *Iraq: Education in Transition: Needs and Challenges* 2004.

ification process. The number of senior bureaucrats dismissed was trivial compared with the number of senior party members dismissed, but the impact in some ministries (like education) was reported anecdotally to be severe. HNDC records show that 574 civil service senior bureaucrats (that is, at the level of director-general or above) had been dismissed by October 2005.

- The Ministry of Manufacturing and Mineral Resources saw more than double the number of dismissals than the two other ministries most heavily affected—health (36) and education (33). Anecdotally, the high-level dismissals at education caused significant capacity problems.

Given the very high proportion of Iraqi women working in the education sector, it is likely that de-Baathification may have had a significantly higher impact on female government employees. ICTJ notes also that at the Ministry of Finance, half of the research subjects whom ICTJ located were women. But the absence of statistical breakdowns by gender complicates any further analysis. The gendered impacts of civil service de-Baathification deserve future study if and when additional information becomes available.

#### *The Change from Dismissals to Reinstatements, 2006–2012*

To speak of any coherent vetting, hiring, or reinstatement procedures in Iraq in 2006 and for several years afterward would be a mischaracterization. From early 2006, HNDC’s focus switched to the mechanics and politics of reinstatement; that much is clear. External scrutiny of the commission’s activities was extremely weak. Most interlocutors were still focused on the specter of the return of high-level Baathists to political life. This meant that opportunities were rife for political manipulation and patronage.

As discussed in previous sections, formal reinstatement criteria were vague. Collegial and political support appears to have been extremely important elements in favor of a successful application. Reinstatement processes were cumbersome and open to manipulation. They varied significantly according to the politics of each ministry and governorate; reinstatements could be accelerated for important cases.<sup>116</sup>

Given the surrounding national and government chaos, however, none of this is surprising.

Iraq’s public sector doubled from 2003 to 2005. In 2006 it grew more due to a law reinstating former civil servants who were dismissed by Hussein’s regime for political reasons.<sup>117</sup> The law, along with weak governmental controls, rampant patronage, and the effects of corruption and conflict, meant that civil service personnel procedures slipped almost entirely out of government control and into the hands of those with the most extensive patronage networks.

Based on the fragmentary information that exists, HNDC reinstated at least 9,088 people in at least 46 different orders from 2004 to early 2006.<sup>118</sup>

With its staff focused on reinstatements, from 2006 to 2007 the HNDC leadership increasingly focused on the politics of de-Baathification reform, described above in the section “The Maliki Government, 2006–2008.” From 2008, when the AJL was passed, it seized the initiative to call for applications for retirement and reinstatement under the new law. Since that time, those applications—plus the 2010 electoral vetting—have formed the bulk of de-Baathification activities.

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<sup>116</sup> Interviews with al-Lami and Chalabi.

<sup>117</sup> “Law Number 24 of 2005, Law of Reinstatement of Individuals Dismissed for Political Reasons.” An HNDC member was on the three-person panel that oversaw reinstatements. The entire civil service payroll, which had reportedly doubled to two million between 2003 and 2005, was reported to have jumped by another 265,000 positions between January and March 2006 alone, according to ICTJ’s interview with international fiscal reform adviser 1. The growth in numbers was also reflected in the Iraqi federal budget.

<sup>118</sup> HNDC, “Unnamed List of Reinstatement Orders.”

The 2008 call for applications had resulted in some 41,000 new claims for processing by September 2011.<sup>119</sup> As of the same date, roughly 4,110 Ferqa-level members had been reinstated as well as 2,717 Shu’ba members. In addition, some 1,257 former security employees had been referred to retirement with pension.

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<sup>119</sup> Phone interview with AJC employees, Baghdad, September 2, 2011.

## 4. Case Study: The Ministry of Finance, 2003–2006

The practical impact of de-Baathification is difficult to verify. It is just as difficult to understand how de-Baathification was carried out, day to day.

To overcome these challenges, ICTJ researched de-Baathification's impact on the Iraqi Ministry of Finance (MoF) from 2003 to 2006. ICTJ located and interviewed 15 former MoF employees<sup>120</sup> and conducted interviews with the ministry's internal de-Baathification committee, a former minister of finance, long-term international advisers, and additional ministry employees. At the same time, ICTJ actively monitored HNDC activities and sought, but did not receive, meetings with former key CPA staff members.

In 2004 Iraq's MoF had roughly 6,600 employees.<sup>121</sup> Under the former regime, the ministry had reportedly acted primarily as a payments agency.<sup>122</sup> It encompassed Iraq's two commercial banks, performed governmental bookkeeping and accounting, and served as a dumping ground for civil servants who were out of favor but could not be dismissed.<sup>123</sup> The result was a bloated ministry with few vital functions. ICTJ selected the MoF as the focus of its study because of its relatively small size, the apolitical nature of its work, and its reputation for having had cooperated with de-Baathification measures.

According to HNDC, by mid-2006 1,192 employees of the MoF had been de-Baathified—roughly 19 percent of its 2004 establishment.<sup>124</sup> At least 104 had been reinstated, but there were likely many more. Interestingly, these numbers differ greatly from those kept by the ministry's own de-Baathification committee. One explanation may be that HNDC's statistics also included security force employees stationed at the ministry, not just actual ministry employees.<sup>125</sup> The great majority of dismissals had taken place from April 2003 to September 2005, and the vast majority of people dismissed were senior party members. By September 2005, only 18 senior bureaucrats had officially been de-Baathified—but more may have been forced to retire, which was generally seen as a gentler tactic.

### Institutional Context

The ministry faced immense challenges from 2003 to 2004. In the months after the fall of the regime, Iraq's command economy was collapsing, and its offices and records were damaged.

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<sup>120</sup> The number reflects the difficulty of the search and the sensitivity of the topic.

<sup>121</sup> Ministry of Finance, Budget Department, "2006 Iraqi Federal Budget." One international adviser said the normal staff complement of a comparable ministry in developed countries would be roughly 1,000 employees (interview with international fiscal reform adviser 1).

<sup>122</sup> Interview with international fiscal reform adviser 1. See also Bremer and McConnell, *My Year in Iraq*, 66.

<sup>123</sup> Interview with Allawi.

<sup>124</sup> HNDC, "Untitled Arabic document with statistics updated through October 2005."

<sup>125</sup> ICTJ was informed that 479 employees had been dismissed, 105 had been reinstated, and 44 had retired. The remainder awaited decisions as to reinstatement or retirement. Interviews with MoF de-Baathification committee members 1 and 2.

The overwhelming concern was one of capacity. CPA officials were anxious to get the ministry functioning as soon as possible.

The CPA tried to retain key officials in the MoF (and other ministries) irrespective of Baath Party connections. In the words of a former MoF minister:

There was very little de-Baathification as such, but people were kept in their jobs through unacknowledged acceptance of their status by the CPA. Then when the first minister [of Finance] came in, he was not that concerned with de-Baathification because the ministry was run by the Americans.<sup>126</sup>

Based on ICTJ research, there were three different phases of dismissal:

- The first was initiated by the CPA and ran from May to September 2003, when individuals were dismissed on the basis of CPA orders and perhaps without any formal de-Baathification-related documentation.
- The second showed the speed with which Iraqis seized control of the process. From September 2003 to the first quarter of 2004, a ministry-based de-Baathification committee used criteria specified in HNDC Decisions 1 and 2 to identify and dismiss employees.
- The third was from early 2004 onward, when HNDC began operating. The ministry's own de-Baathification committee appeared to play less of a role from then on, merely implementing instructions from the commission.<sup>127</sup> Likewise, the initial reluctance to dismiss senior bureaucrats appeared to have ended by 2005.

#### *Patterns of Membership and Dismissals*

MoF employees interviewed by ICTJ shared several characteristics. All except one were in their late 40s or older and had joined the party decades earlier. The majority had been at the Ferqa level for many years, with one promoted to that level just a few years previously. Interestingly, seven of the fourteen were women, a surprisingly high ratio given that women's participation in the Iraqi workforce averaged just 17 percent in 2004.<sup>128</sup> Four were dismissed in the early CPA period and the rest after the creation of HNDC. Two of those interviewed had occupied senior management positions at the level of director general.

Almost all of the people who were de-Baathified had applied for exemptions; most had done so several times. Six had successfully been reinstated by March 2006. Few had heard of the possibility of retirement, and none had successfully obtained retirement benefits by March 2006, even though technically they were allowed to do so.

Individuals reported joining the party at a time of heady Arab nationalism and because other forms of political activity did not exist.<sup>129</sup> Several mentioned professional necessity: "I was told that I could not be hired unless I was a party member."<sup>130</sup> One told ICTJ she joined to prove her political allegiance after being found reading a communist newspaper.<sup>131</sup>

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<sup>126</sup> Interview with Allawi.

<sup>127</sup> Interview with MoF de-Baathification committee member 1. Indeed, apart from providing reinstatement forms to prospective applicants, its main function appears to have been to check peoples' salary records to verify their party membership and to occasionally recheck names at the commission's request.

<sup>128</sup> World Bank, Economic and Social Development Unit, *Rebuilding Iraq: Economic Reform and Transition*, 35. The report notes that female workers filled 60 percent of education jobs and 32 to 28 percent of the total in agriculture, health, and social and financial intermediation. It is possible that the de-Baathification of the health and education ministries, which had the highest number of dismissals and an above average proportion of female workers, had a strongly gendered impact.

<sup>129</sup> Interview with e-Baathified MoF official 2.

<sup>130</sup> Interview with de-Baathified MoF official 3.

<sup>131</sup> Interview with de-Baathified MoF official 4.

Those dismissed during the first phase of de-Baathification found out in different ways. A typist went to collect her July 2003 salary—and found it to be labeled “last payment.”<sup>132</sup> A general director at the Rasheed Bank was informed personally that he had been de-Baathified by an American CPA adviser and left his duties the same day. Others received dismissal orders from the MoF’s personnel section “at the order of the American command.”<sup>133</sup> ICTJ has a copy of one dismissal letter from this period, which makes no mention of de-Baathification. Rather, it simply states that the four people listed were terminated from their positions “because their services are not necessary” and that termination was considered applicable immediately.<sup>134</sup>

Most people dismissed in the second phase heard rumors beforehand, as relevant letters awaited ministerial approval. Many were informed by colleagues, but two were simply barred by ministry guards from entering their offices. Only a few had actually seen or obtained copies of their dismissal orders. Contrary to later HNDC regulations, none were given any information about appeals (*isti’naf*).

#### *Looking Through an Individual Lens: Due Process Issues*

De-Baathification was designed and carried out with numerous due process flaws, as is discussed in “Lesson Seven: Observe Basic Standards of Fairness.” Perhaps the most significant is that at least until 2010, people who were de-Baathified were dismissed immediately, without the chance to know or question the evidence against them and without the possibility of appeal prior to dismissal.

As was the case in most ministries, individuals dismissed from the MoF based on their level of party membership were identified by their salary records, which clearly showed the extra bonuses and allowances that were added to their salaries as a result of their party membership.

The MoF’s identification of eligible persons appeared mostly accurate, with the exception of “H,” who complained he had been targeted for dismissal in September 2004 because of a professional dispute. He was merely a “member” (‘Udu), below the de-Baathification threshold. H is an example of the pitfalls of dismissals without due process protections. H was unusual because he complained prior to dismissal—but to no avail. Eighteen months and multiple bureaucratic steps later, H continued to wait for a possible reinstatement decision.<sup>135</sup>

All other former employees simply accepted their dismissal and then sought ways to return to work. None had heard of the possibility of appeal; all simply focused on obtaining exemptions (*istithna’*, which is understood in English as reinstatement). Appeals appeared simply not to be a practical reality for these people, despite the language of HNDC policy documents.

The only other case in which a former employee tried to contest their dismissal was that of a woman, “I,” who was dismissed on June 30, 2003. She decided to fight, and the arbitration court upheld her decision. But the decision was not implementable because only HNDC can reinstate a person who has been de-Baathified. The process took about six months between attorneys and the courts.<sup>136</sup>

Given Iraq’s complicated and often-conflicting legal framework, such a case is not surprising. If true, however, it appears to contradict statements made by Chalabi and other senior de-Baathification officials that people who contested de-Baathification decisions could seek redress through the justice system.<sup>137</sup>

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<sup>132</sup> Interview with de-Baathified MoF official 5.

<sup>133</sup> Interview with de-Baathified MoF official 1.

<sup>134</sup> Rafidain Bank, “General Administration, Personnel Division. Administrative Order Number 8, June 30, 2003.”

<sup>135</sup> Interview with de-Baathified MoF official 6. ICTJ sighted the relevant HNDC dismissal letter, as well as the MoF dismissal order of September 2004. No rank or reasoning was given. The example illustrates the difficult of getting action in case of suspected error.

<sup>136</sup> Interview with de-Baathified MoF official 4.

<sup>137</sup> Interview with Chalabi.

### *Reinstatement*

Everyone ICTJ interviewed had applied for reinstatement several times. Six of the fourteen had succeeded and returned to work by February 2006. Only a handful had learned of the possibility of reinstatement by official sources. Most learned by chance, through word of mouth, or from the media.

Based on ICTJ interviews, the reinstatement process could best be described as haphazard. It appears that official reinstatement request forms were first issued around March 2004. An extended process of submitting multiple reinstatement requests, being instructed to resubmit documentation, and then waiting to learn of the decision appeared to be the norm. Bureaucratic problems between the MoF and the de-Baathification commission complicated matters. Most applicants experienced time lags of several months at each stage of the process, a far cry from the 12-week time frame stipulated in HNDC regulations.

Criteria for reinstatement were unclear in principle and in practice. The emphasis of the application process was clearly on collegial support; there was no discussion of workplace skills other than the requirement to submit a resume. Several successful applications ICTJ saw lacked the required information. When ICTJ raised the issue with HNDC, the commission said it sought to make decisions according to “humanitarian criteria,” not just paperwork requirements.<sup>138</sup> Even people who had been reinstated did not know why.

Of those successfully reinstated, most were notified seven to 15 months after submitting their application. People who were not reinstated at the time of their ICTJ interview had waited between 6 to 31 months without reply. Even after reinstatement orders were issued, there were often significant lag times before people were allowed to return to work. When they returned, some but not all received their entitlement to back pay for the months that they had not worked. All except one, however, also attended a “rehabilitation course” run by the de-Baathification commission’s Cultural Directorate, a compulsory education measure focused on explaining the crimes of the Baath Party.

### *Exemptions*

The difference between reinstatement and exemption was negligible, and many of the same procedures were followed. To seek exemption required a plethora of forms and support from the ministry and the community. Among other things, applicants were required to submit a declaration of regret for their former party membership, pledge not to return to its ranks or thoughts, not to praise it, and to supply a certificate signed by the head of their former department and five additional coworkers confirming that they had been an “obedient and disciplined employee” and enjoyed “a good social reputation and did not commit any action or crime against the sons of the people.”<sup>139</sup>

Personal information required included a resume, information for all bank accounts, a full listing of party ranks obtained and party supervisors for each rank, and numerous identification requirements. Interestingly, each applicant was also required to supply the names of five other members of their Baath Party cell prior to April 9, 2003.

At times additional documents were required, including copies of dismissal orders and letters of support from the local ministerial de-Baathification committee. Some applicants were also asked for statements of support from political parties or local community dignitaries. Several said they had difficulty obtaining the required documents because MoF records had been damaged or destroyed.

### *Retirement*

When the IGC established the initial Iraqi framework for de-Baathification in 2003, it resolved that employees subject to de-Baathification could apply for retirement.<sup>140</sup> This was no small matter because

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<sup>138</sup> Interview with head of HNDC’s legal committee.

<sup>139</sup> HNDC, “Reinstatement Request Form.”

<sup>140</sup> IGC, “Decision 54.”

the Iraqi pension system was generous. Shortly afterward, later decisions by the de-Baathification commission limited that right to Ferqa-level members and senior bureaucrats at that level or below if they gave up their notional right to appeal.<sup>141</sup> The message was clear: it was best to go quietly.

It appears, however, that retirement was not a practical option for most people. Only four of the 15 individuals dismissed from the MoF had heard of the possibility of obtaining retirement, although all of them were of a level to be eligible.<sup>142</sup> Three had applied for it, but none had received a clear decision by March 2006, years after applying. Statistics provided by MoF de-Baathification officials indicated that there was probably a substantial backlog of unmet retirement requests.

Some of this may have been the result of conflicting requirements and procedures among the MoF, HNDC, and the government bureaucracy responsible for administering pensions. Some of it may have been sheer confusion over who in fact was entitled to retire or simple political unwillingness. The last reason sounds more likely, given that retirement procedures were expedited for senior-level bureaucrats, a convenient route that minimized problems for the minister's office but not for lower-level employees.<sup>143</sup>

#### *Looking Through a Larger Lens: The Relationship Between HNDC and MoF*

While the de-Baathification commission was a widely feared entity, its enforcement powers were often unclear. The links between HNDC and ministry or provincial de-Baathification committees were equally unclear, although willingness to implement the commission's orders clearly varied from entity to entity.<sup>144</sup>

Relations between the MoF and HNDC appear to have been amicable. Indeed, two members of the MoF's de-Baathification committee made it clear that they perceived their own role as merely administrative: they operated according to HNDC's orders, forwarded information to HNDC for decision, and implemented the orders they received in return.<sup>145</sup>

Their descriptions emphasize the important distinction between formal/legal authority and informal/real power, suggesting that HNDC had extensive informal power, even if it did not possess de jure enforcement powers. The commission's extensive files, its lack of transparency and accountability, and its ability to inflict public humiliation (often via the media) inspired fear in its targets, many of whom decided not to resist. Ministerial attitudes could and did make a difference to de-Baathification dismissal rates, but less so to reinstatement and other issues.

Several senior informants told ICTJ that de-Baathification efforts at the MoF became more personalized, arbitrary, and sectarian in 2005. This may have been a reflection of worsening political and sectarian relations inside Iraq as a whole as well as the struggle to win power in that year's national elections.<sup>146</sup> Allawi, who as minister of finance in the transitional government of 2005-06 had dismissed remaining senior bureaucrats, told ICTJ:

<sup>141</sup> HNDC, "Regulation," Fourth (B) 2. b. It is possible that applicants would have had to meet any retirement requirements regarding age and length of service, although that is not clear. Many people interviewed would have met such requirements. Iraqi retirement arrangements were extremely generous until the passage of amendments to the Unified Pension Law 27/2006 in late 2007, and they remain generous.

<sup>142</sup> It is possible that applicants would have had to meet any retirement requirements regarding age and length of service, although that is not clear. Many of the individuals interviewed would have met such requirements.

<sup>143</sup> Allawi told ICTJ that when he assumed office, "We had perhaps about eight to 10 individuals who were above the level at which they had to be removed from office and, as a matter of principle I tend[ed] to apply HNDC decisions, so we removed about eight people who were very senior Baathists, whom the CPA had kept on at the level of director generals. One of them was the head of the bank, the largest bank, the Rafidain . . . The rest I removed in July or August . . . Basically I retired them rather than fired them, so they were not formally de-Baathified as such."

<sup>144</sup> HNDC officials routinely emphasized that the commission's powers were advisory, not executive. It could only notify entities of its recommendations and ask the MoF to stop the relevant salaries. Perceptions of HNDC's power were considerably greater. HNDC officials were adroit at using media smear campaigns, for example, to compel entities to action.

<sup>145</sup> Interviews with MoF de-Baathification committee members 1 and 2.

<sup>146</sup> For example, international fiscal reform adviser 1 to the MoF told ICTJ that "2005 became a situation of vendettas and possibly some degree of sectarianism. It became less about de-Baathification as originally intended and more personalized."

I worked on the question of de-Baathification before the war and was very much in favor of it. But unfortunately the idea is never as good as the reality in a place like Iraq, and the context was wrong. It was a good policy contextually misplaced and was pretty soon taken over by the normal currents in Iraqi politics and became personalized and abused . . . It was horribly mismanaged, but I don't think it could have been managed any differently. It's now a distorted, half-applied process, misused without much benefit for anybody.

*Impact on Capacity and the Focus on Senior Bureaucrats*

It is unclear whether the de-Baathification process had a significant impact on the MoF's capacity, because that capacity by 2003 was already so low. All Iraqi employees interviewed by ICTJ said there was no discernible impact, as did a former minister.

Foreign advisers, however, perceived some impact, particularly when clusters of high-level bureaucrats were dismissed simultaneously, as had happened in 2005.

One foreign expert told ICTJ in 2006 that after three years of work:

There's no real management at the ministry, and the people who have been introduced within the last two years have not come to grips with the management problem. It's difficult to get reliable information . . . I assume that some of this has to do with the fact that an entire generation of managers was taken out by de-Baathification and understand that some of those dismissed were in the wrong place at the wrong time, and may have been excellent resources for the rebuilding. A number of people hold that view, and it is very prevalent amongst those who didn't leave Iraq. Returnees tend to take a much harder line: "They deserved anything they got and are lucky not to be punished."

As with all interlocutors, this informant's understanding of de-Baathification focused entirely on high-level bureaucrats (director-general and above). No one raised any issues related to lower-level workers who were dismissed, other than lower-level workers themselves. It appears that in practice most people's understanding of de-Baathification was centered on individuals in prominent positions in the government or in the Baath Party. The tens of thousands of Ferqa-level members who did not hold high-ranking bureaucratic positions appeared irrelevant to people's perceptions of the issue.

## 5. Lessons for Policy Makers

Serious reform is almost always controversial. Reforms that seek to “cleanse” government of people affiliated with other political parties or regimes are particularly so. They cut off access to livelihoods and prestige, they affect the efficiency and honesty of state institutions, and they are often seen by at least some of the population as politically partisan.

In the past 60 years, the world has learned a great deal about how to reform state institutions and build new political systems. For example, the political purges of the 1950s were replaced by more carefully designed, but still broad lustration programs in many Eastern European countries in the 1990s. More importantly, several countries have experimented with vetting programs in which individuals are assessed individually for their integrity and capacity to work in government service. Examples of such programs include judicial vetting in Bosnia, police reform in Liberia, and vetting programs in El Salvador and post-authoritarian Greece.<sup>147</sup>

It is sad and ironic that de-Baathification was designed and pursued without reference to modern experience, but instead reached back over 50 years to a flawed and ultimately unsuccessful model, de-Nazification. Thus it was that de-Baathification was to a large extent needlessly partisan, controversial, flawed, and ineffective.

There are no clear-cut standards for vetting programs, although there are a number of useful guidelines published by the Organisation for Economic Co-operation and Development and the UN.<sup>148</sup> Policy makers who are thinking of introducing a vetting program or similar institutional reforms should refer to these guidelines, recent case studies, and the list of key program design questions summarized in the Appendix of this report.<sup>149</sup> They will learn little from de-Baathification other than the need to avoid its most obvious lessons, seven of the most important of which are summarized below.

### **Lesson One: Design a Vetting Program, Not a Purge**

A robust vetting program screens a person’s suitability for future government employment according to specific criteria. Examples of such criteria include integrity (lack of corruption, lack of human rights violations) and capacity (having the skills needed to do the job). At its best, vetting is a forward-looking process that defines and screens for the qualities required in a new civil service rather than a backward-looking sanction for past behavior. A good vetting process can be an entry point for a wider civil service reform program.

De-Baathification was not a vetting program. There was no assessment made of an individual’s capacity, deeds, or integrity. Instead, evaluation was based on the individual’s level of party membership

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<sup>147</sup> The questions and recent case studies are available in ICTJ archives.

<sup>148</sup> Organisation for Economic Co-operation and Development, *The OECD DAC Handbook on Security System Reform Supporting Security and Justice*; UN Development Program, *Vetting Public Employees in Post-conflict Settings: Operational Guidelines*; Office of the UN High Commissioner for Human Rights, *Rule-of-Law Tools for Post-conflict States: Vetting: an operational framework*.

<sup>149</sup> For a discussion of the shortcomings of vetting literature, see McFate, “The Art and Aggravation of Vetting in Post-Conflict Environments.”

or seniority in the civil service, with the assumption that anyone at or above the Ferqa level in the Baath Party or director-general in the civil service must be unfit to be a government employee.

This assumption is partly linked to the problem of insufficient data (see “Lesson Two”). But it generated at least two significant problems for Iraq.

First, de-Baathification did not meet the most basic due process standard—judging an individual based on his/her conduct. (For a detailed discussion of all standards, see “Lesson Seven.”) Many people who were dismissed may not have been guilty of serious rights violations, even while other violators remained in place. This failure created widespread dynamics of sectarian grievance and fear, poisoning the program’s credibility and reception.

Second, de-Baathification triggered widespread concerns of an impunity gap. Because people were dismissed on the basis of rank, not behavior, lower-level Baathists who had violated human rights or engaged in corruption retained their enviable civil service positions, as did other employees who may have been unfit for service, but were not party members. This fed unanswerable concerns that many violators were still at large, fanning deep-seated fears of the party’s return.

De-Baathification’s design flaws generated a system that was controversial and ineffective. Ultimately, the program has lacked coherence. It did not have a compelling logic in either intellectual or policy terms.

### **Lesson Two: Know Your Target**

A good vetting program is based on reliable, accurate, and up-to-date information. Without such information, programs face two major risks: being ineffective and damaging state capacity.

As discussed earlier, de-Baathification was designed by long-term exiles and foreigners, and was formulated with only fragmentary data about the Baath Party and the contemporary workings of the Iraqi state.<sup>150</sup>

Driven by the strong desire for speed, de-Baathification was launched and implemented prior to formulators gaining any practical understanding of Iraqi realities. This may in part explain the otherwise-puzzling decision to entirely disband the Iraqi Army. It also explains why Iraqi schools had difficulty continuing to operate: teachers were clustered at the Ferqa level of membership.

Rather than start a broad-based program without data, policy makers should either a) gather data before developing a program, enabling them to make crucial decisions, such as program scope, focus, or goals based on real information; or b) initiate a highly focused, selective series of measures while data gathering takes place. In any event, a mapping process that involves collecting and analyzing data should be a prerequisite to any broader-based vetting process.

A final issue is that of state capacity. A vetting program may be effective in terms of targeting individuals who lack capacity for government service, but at the same time damage state capacity. The damage occurs when people with specialized or scarce skills are simultaneously removed from government service, immediately creating delivery problems for government—and a political crisis for the vetting program.

There is no easy remedy for this dilemma. Perhaps the most important concern is to honestly acknowledge such limits and swiftly implement actions to overcome them.

For the sake of reality, it is important to note that many vetting programs eventually incorporate skill-based exemptions for absolutely critical personnel, and as a result, some highly specialized violators

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<sup>150</sup> It is possible that detailed classified information was available to planners. However, in all of ICTJ’s research, we saw no sign of such information.

may evade vetting altogether. Temporary exemptions, probationary periods, and skills-training programs can be useful here, as can administrative actions that do not dismiss an individual but remove him or her from decision-making authority while retaining their skills or experience for the organization as a whole.

ICTJ notes that AJC holds a rich body of information on the Baath Party, but appears not to have engaged in any coherent analysis of party functions, structure, or membership profile. It appears that even in 2012, Iraq lacks reliable information on how the Baath Party functioned, despite the fact that there is a wealth of information at hand. Without such detailed empirical data, it is impossible for Iraq to design or conduct an efficient, well-targeted, and coherent vetting program.

### **Lesson Three: Set Clear, Realistic Objectives**

To be effective, a vetting program should have clear, realistic goals. Vetting is a highly controversial, resource-intensive activity. It disturbs government functions and political power relations. For these reasons, policy makers should be practical about what kind of program they can sustain and for how long. Most vetting programs are conducted for relatively short time periods, such as one to three years.

From its inception, expectations of de-Baathification were unrealistic. Its supporters hoped it would extinguish the party, weed out violators, rebuild the state, deliver justice to victims, and ensure remembrance of past violations. Their expectations were strengthened by the lack of a visible Iraqi transitional justice strategy.<sup>151</sup>

These high expectations were disastrous. The conflation of different objectives conferred enormous potential powers onto the de-Baathification commission, which was not only permitted to, but also obliged to, engage in activities in which it had no experience or expertise. De-Baathification's open-ended mandate, broad goals, and undefined powers created significant conflict for a long period.

Ultimately, vetting programs are simply administrative programs designed to identify, organize, and dismiss personnel from government service. They can make important contributions to state efficiency and institutional reform; if handled well, they can also make important symbolic contributions to public perceptions of change. But they do not deliver justice to victims, and rarely if ever do they result in criminal punishments for violators.<sup>152</sup>

### **Lesson Four: Don't Create a Monster**

Vetting programs ideally help rebuild trust in government. To do so, they need to be seen as credible, representative, professional, and insulated from day-to-day politics.

In contrast, de-Baathification's framework and legal powers were opaque. Its leadership was seen as sectarian and political, and, to date, the program has lacked meaningful oversight/accountability mechanisms. These serious errors damaged de-Baathification's reception and credibility.

#### *Framework*

De-Baathification's policy framework was almost impenetrable. It was scattered across dozens of orders, decisions, and regulations by at least three different bodies, using two different mandates. It was almost impossible to establish how it was supposed to work.<sup>153</sup>

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<sup>151</sup> Several transitional justice initiatives have been launched, but with little connection and poor public education. See Stover et al., "Justice on Hold: Accountability and Social Reconstruction in Iraq."

<sup>152</sup> For criminal punishments to take place, there must be a link between the investigation and information of the vetting program and a country's judicial system. Although HNDC and AJC theoretically had powers to refer cases to a prosecutorial office, in practice this appears not to have happened.

<sup>153</sup> For example, ICTJ held a policy workshop on de-Baathification for senior Iraqi officials in April 2007. Participants included prime ministerial and presidential legal advisers, leading parliamentarians, senior representatives from the shura council (majlis al-Shura) and the Supreme Judicial Council, and the acting minister of justice. No one apart from the HNDC representative had ever cited the relevant legal instruments before, and when compiled, they took up hundreds of pages.

This state of affairs was highly convenient for HNDC, which benefited from the fact that the majority of its interlocutors were unfamiliar with its mandate and regulations. The complex network of arrangements among the commission, ministries, and governorate offices exacerbated these problems, as did the lack of any meaningful public reporting. The overall result was confusion, ineffective reform discussions, and—for such an important undertaking—a surprising lack of scrutiny.

The creation of AJC clarified the legal basis for de-Baathification, but as of August 2012, it had not improved people's understanding of implementation procedures.

#### *Enforcement Powers*

HNDC's enforcement powers were unclear, and this exacerbated the problem. Commission leaders publicly insisted that they had very few powers: Chalabi told ICTJ, "We just advise the authorities, and then the ministries take the steps."<sup>154</sup> In dealing with public employees, HNDC could at least bring noncompliance to the attention of the Iraqi Commission on Integrity. The problem was particularly acute when de-Baathification decisions clashed with those of other independent organs of state, like IECl.<sup>155</sup>

In practice, however, the commission secured enforcement by exerting political and moral pressure, as well as through its considerable ability to inspire fear. Indeed, in conversation with Chalabi during his service as commission chairman, it was clear that he regarded popular support for de-Baathification as the ultimate guarantee of the commission's power; if the government stepped across a particularly sensitive line, then street violence would result.

If either HNDC or AJC had clearer enforcement powers and mechanisms, they may not have had to rely on informal mechanisms, such as political pressure and media campaigns. But absent clearly defined enforcement and sanctioning procedures, it is no wonder that de-Baathification was widely seen as personalized, capricious, and, by virtue of its connection with the political elite, all-powerful.

The situation under AJC appears not to have improved greatly. Implementation of de-Baathification procedures continues to depend heavily on the background and attitude of the people in charge.<sup>156</sup> For example, a 2011 attempt by the education minister to implement reinstatements backfired when a Shi'a provincial leader refused the order. In contrast, the minister of higher education, a Da'wa Party member, implemented dismissals of senior officials without hesitation.

#### *Leadership and Accountability*

Negative perceptions of de-Baathification were reinforced by two more issues: the lack of a neutral leadership group and the absence of any clearly defined accountability mechanism.

Leadership of a vetting initiative is always highly sensitive. When politics are strongly influenced by identity issues, it is wise to create a leadership body that has well-regarded representatives from all identity groups and is insulated from electoral politics.

Yet, de-Baathification failed on both counts. First, it was always strongly identified with Shi'ism. This was partly the result of Chalabi's leadership of HNDC and AJC and the fact that he and his key executive, al-Lami, were electoral candidates in 2005 and 2010. That most high-ranking commission staff were Shi'a undermined perceptions still further.

Second, HNDC had no meaningful oversight. A governing board existed on paper but in reality rarely met. The 2005 Constitution linked the commission to a parliamentary committee, but details

<sup>154</sup> Interviews with Chalabi and al-Lami.

<sup>155</sup> In those cases, HNDC would call for a court or shura council decision eventually. These took many months, but reminding other state bodies to cooperate.

<sup>156</sup> Interview with Qais al-Shathr, head of the parliamentary accountability and justice committee. See al-Ta'i, "Baathists sue the director of the education directorate in Thi Qar."; Nu'man,, "Iraqiya Bloc Confirms Removal of 13 Professors."

were vague. And given the absence of an independent appeals body until 2010/2011, there was no check of any kind on the day-to-day decision making of de-Baathification commission employees: an internal monitoring and audit directorate existed, but had no independence and reported in the same hierarchy as every HNDC unit.

It is possible that with the approval of a new group of AJC commissioners, perceptions of de-Baathification leadership and governance have improved since 2011. The creation of a functioning appeals mechanism also helped. Yet the majority of structural problems—particularly the appointment of active politicians as AJC chairmen—remain, and history cannot be undone. After eight years of highly partisan de-Baathification leadership, it is unlikely that Iraqis will ever perceive AJC as a neutral, professional, or independent body.

### **Lesson Five: Consult and Educate**

The speed with which de-Baathification was implemented led to two defects: lack of accurate information, as discussed in Lesson Two, and lack of consultation. Simply put, the CPA implemented de-Baathification without knowing much about the Baath Party—and without knowing what Iraqis wanted in terms of de-Baathification. These were significant mistakes.

Justice policies tend to have the greatest public legitimacy when they incorporate the opinions of the local population or when they involve a period of public consultation and debate. Obtaining empirically sound opinion data has been organized in many challenging post-conflict situations, and many justice consultation processes have likewise been implemented.<sup>157</sup>

Bremer arrived in Baghdad with the draft orders already written. He consulted with the seven-member leadership council of Iraqi opposition groups, composed primarily of exiles, and they received strong support.<sup>158</sup> But there was no wider attempt to find out what Iraqis thought about the issue.

In reality, it appears that Iraqi attitudes may have been significantly more nuanced than those of Iraqi exiles or the CPA. A national survey held in mid-2003 found that, although there was clear support for the dismissal of Baath Party members who had participated in criminal or corrupt activity,<sup>159</sup>

Many Iraqis differentiated between the Party leadership and those who actually ordered or committed human rights violations, and party members in general. With few exceptions, respondents were reluctant to place the entire Baath Party membership on trial, and there was widespread recognition that Baath Party membership was a technique for survival under the old regime that did not necessarily mean direct participation in human rights crimes.<sup>160</sup>

In fact, “Most respondents . . . felt that it was unfair to penalize individuals solely on the basis of their party membership, and believed that those who joined the party out of fear or in order to work should not be made to suffer for it.”<sup>161</sup> Some of those interviewed also recognized the need to balance widespread de-Baathification with the continued provision of public services, fearing that a very broadly based process “would deprive Iraq of crucial human resources needed to rebuild its state and society.”<sup>162</sup>

Had there been greater consultation or some effort to gain empirically valid opinion data, it is possible that a more targeted, effective program could have been developed—and that it might have been

<sup>157</sup> See Vinck and Pham, “Ownership and Participation in Transitional Justice Mechanisms; A Sustainable Human Development from Eastern DRC”; Stover and Weinstein, *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, 323-421. Methodologically sound opinion data on transitional justice preferences have been gathered in Afghanistan, Uganda, the Democratic Republic of Congo, Iraq, and elsewhere.

<sup>158</sup> This is not surprising since the policy originated from a number of those leaders. Those less in favor of the sweeping reforms were reportedly comforted by the power of the administrator to grant discretionary exemptions.

<sup>159</sup> “Iraqi Voices: Attitudes toward Transitional Justice and Social Reconstruction.”

<sup>160</sup> *Ibid.*, 28.

<sup>161</sup> *Ibid.*, 35.

<sup>162</sup> *Ibid.*, 37.

implemented with greater public confidence. It was a poor way to start a process intended to cleanse, renew, and revivify Iraq's key institutions of state.

### Lesson Six: Look to the Future

De-Baathification looked backward, not forward. It sought to remove violators, but did not think about other significant personnel challenges. For example, it did not seek to assess the fitness of individuals who might have been corrupt, who lacked the capacity to do their job, or who had violated human rights—but who had not been members of the Baath Party. A large number of people who were unsuitable for public service, therefore, remained in Iraqi government employ.<sup>163</sup>

Second, de-Baathification did not create a set of criteria for future recruitment to government service. Many of those who were dismissed simply found their way back into government service, even without an official reinstatement. There were no defined selection standards or mechanisms to prevent them from being reinstated. There was also nothing to stop a wave of fresh violators entering government—which is what promptly happened during the insurgency of 2003 to 2008—a challenge in many transitional situations. Such standards may not have been a practical possibility in the chaotic growth of the Iraqi public sector from 2003 to 2008, but may well be of use for the future.

Finally, in some countries a tightly focused vetting effort has also paved the way for broader institutional reforms in government and the armed services in which better personnel management and a clear code of ethics gradually can improve the skills, integrity, and functioning of the public sector. Rebuilding better government takes decades, not years.<sup>164</sup> By expending so much of its efforts in de-Baathification efforts, there is no doubt that the Iraqi government has forfeited some of the time, energy, and goodwill needed for other public sector reform efforts.

### Lesson Seven: Observe Basic Standards of Fairness

As previously discussed, de-Baathification's structure and implementation violated basic due process and human rights standards. This is not just a legal issue. Such standards protect vetting programs from the appearance (and realities) of political manipulation. Without them, a vetting program becomes a purge, with all the instability and anger that purges create. Vetting programs should respect the rule of law, or else they can undermine post-conflict reconstruction and transitional justice goals.

Although technical details may differ among instruments, the basis for due process standards is the *International Covenant on Civil and Political Rights (ICCPR)*, which is reinforced by standards outlined in the *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*.<sup>165</sup>

People who have a civil service position or appointed office who are subjected to a vetting process have rights to:<sup>166</sup>

- Be evaluated according to known and reasonable criteria.

<sup>163</sup> We are not arguing that the program should have been expanded to assess these criteria; it was already very large. Rather, if personnel reforms had been designed or targeted differently, it might have been possible to incorporate these criteria.

<sup>164</sup> International Bank for Reconstruction and Development, *Conflict, security, and development*, 109. This is available in Arabic, and it is an excellent resource for policy makers who want to reform institutions.

<sup>165</sup> For more detail, see Andreu-Guzmán, "Due Process and Vetting" in Mayer-Rieckh and De Greiff, *Justice as Prevention: Vetting Public Employees in Transitional Societies*. See also Office of the UN High Commissioner for Human Rights, Rule-of-Law Tools for Post-conflict States: Vetting: an operational framework.

<sup>166</sup> Due process standards for judges and for those seeking election are different. For the former, see Office of the UN High Commissioner, "Basic Principles on the Independence of the Judiciary." For the latter, see the discussion in Andreu-Guzman, note 172.

- Be presumed innocent.
- Receive prior detailed notice of allegations/actions against them, in order to have adequate time to prepare a defense.
- Examine the evidence used to draw up the allegation.
- Receive unbiased consideration by a legally constituted, impartial body, preferably in a public hearing.
- Contest the allegations at the same body and present exculpatory evidence.
- Have the procedure conducted in a reasonably expeditious manner.
- Appeal an adverse decision to an impartial body that is independent of the body that conducted the vetting hearing.<sup>167</sup>

De-Baathification procedures never adhered to these standards, although some improvements occurred after 2010. All individuals eligible for de-Baathification were presumed guilty of wrongdoing. Originally no provisions existed for a person subject to vetting to be notified of his or her dismissal prior to being dismissed. People had no right to examine the evidence against them, let alone to defend themselves at a hearing. Until 2010, there was no means of appealing de-Baathification decisions to an independent body.

Additionally, it is a widely accepted international legal principle that individuals be punished only for acts that they themselves have committed. Under the ICCPR, individuals have the right not to be subjected to collective punishment. While administrative sanctions, like losing one's job, do not reach the level of seriousness of a criminal penalty, de-Baathification's focus on rank rather than individual acts failed good practice standards and contributed strongly to Sunni complaints of being subjected to collective punishment.<sup>168</sup>

Equally importantly, HNDC and AJC never enunciated a clear, consistent methodology for deciding appeals, reinstatements, and exemptions. This meant that relevant criteria were not "known and reasonable," as basic due process standards require. Decisions appeared to be made according to informal matrices of expediency, humanitarian reasons, and the individual's degree of political or professional support.

On paper, the 2008 AJC law contained a significant number of changes intended to improve due process protections. As of mid-2011, the majority had not been implemented, with the exception of the brief functioning of the independent appeals committee during the elections of 2010. Processes remained confusing and implementation arbitrary.

According to Qais al-Shathr, head of the parliamentary accountability and justice committee:

In the government sector, de-Baathification relies on the personality and beliefs of the minister. Some try to make it easy on those who are subject to de-Baathification—and others make it hard. Exemptions are also based on selective processes . . . The process of exemption is very complicated and long and potentially impossible.

<sup>167</sup> See De Greiff and Mayer-Rieckh, *Justice as prevention: Vetting Public Employees in Transitional Societies*, 508. In common law legal systems, the right to receive consideration and contest evidence would include the right to physical participation in a hearing in front of the unbiased body. That right is less fully established in countries using the civil law systems.

<sup>168</sup> Ibid., 458, for collective punishment versus individual responsibility. Relevant standards are contained in *The rule of law and transitional justice in conflict and post-conflict societies: Report of the UN Secretary General*, para. 53; Council of Europe Parliamentary Assembly, "Resolution 1096. Measures to dismantle the heritage of former communist totalitarian systems."

As of August 2012, AJC was still focused on deciding on the 41,000 appeals and reinstatement requests gathered in 2008; therefore, AJC continues to suffer from the legacy of bad processes, unfair procedures, and arbitrary implementation that it inherited from HNDC. With another 15,000 applications for reinstatement apparently yet to be filed,<sup>169</sup> it looks as if the epic process of de-Baathification will continue. Policy makers of other nations would do well to avoid its mistakes.

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<sup>169</sup> Interview with member of justice and accountability committee.

## Appendix: Key Questions to Ask When Designing a Vetting Program

If you are seeking to design a vetting process, there is no generic model to follow. You must, however, decide what you want to achieve and how you want to achieve it. Below is a list of nine key decisions you should address when thinking about creating a vetting program.<sup>170</sup>

| NUMBER | DECISION            | DETAIL   |
|--------|---------------------|--|
| 1      | Rationale           | What are your reasons for vetting? Is it clear that a vetting program is the best means for achieving your goals?  |
| 2      | Targets             | What are the institutions and positions to be vetted?  |
| 3      | Criteria            | What misconduct or other items are you screening for? (For example: corruption, capacity.)   |
| 4      | Sanctions           | What happens to the individuals who are positively vetted? (There may be more than one kind of outcome: dismissal, demotion, bar to promotion, transfer, retirement, and so on.) |
| 5      | Design              | What are the type, structure, and procedures of the vetting process?   |
| 6      | Scope               | How many people are screened? How many will be sanctioned?   |
| 7      | Timing and Duration | When does vetting occur? How long will the vetting program last?   |
| 8      | Coherence           | How will the vetting program link to other institutional reform initiatives? How does it link to other transitional justice measures?  |
| 9      | Resources           | Do you have adequate funds, legal powers, information, and skills to carry out the program successfully? If not, what gaps must you try to fill?                                 |

<sup>170</sup> Adapted from Duthie, "Introduction", in *Justice as Prevention*.

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