



**Testimony by Mark L. Schneider, Senior Vice President, International Crisis Group
to the House Committee on Oversight and Government Reform on “Pakistani
elections: Will they be fair and free or fundamentally Flawed?”**

20 December 2007
Washington, DC

I want to express once again the appreciation of the International Crisis Group for the continuing attention of the Committee and particularly Chairman John Tierney and the other members of the House Subcommittee on National Security and Foreign Affairs to U.S. relations with Pakistan and the performance of that government concerning democracy, Islamic extremism and terrorism.

This hearing asks whether the parliamentary elections scheduled for January 8th will be fair and free or fundamentally flawed. That question has to be asked now. After the elections it will be too late.

The sad answer today is that the January 8th parliamentary elections will be fatally flawed unless current political, electoral and legal environments are rapidly improved. Today conditions to permit a fair and free election do not exist. The required conditions are not limited to those that reign on Election Day. It is December 20; martial law was lifted five days ago and the election will be held in only 18 days.

Election Day is the final act of a democratic drama. Act one requires objective and non-partisan rules and standards adopted and monitored by neutral authorities. Act two demands that parties are permitted to select their own candidates, candidates allowed to campaign without hindrance or intimidation, and a free press given unfettered opportunity to challenge, question, and report on candidates, parties and public issues — including the illegality of emergency rule and the actions of President Musharraf and Pakistan security forces.

The final act of a free and fair election requires that eligible voters can vote, that their votes are counted honestly and reported accurately, and that complaints are judged by independent entities---in Pakistan, ultimately the high courts.

The emergency government of Army Chief of Staff *General* Pervez Musharraf, and the government of *President* Pervez Musharraf as of 15 December, have violated the country’s constitution and, thus far, undermined all efforts to establish basic and necessary conditions for a free and fair election.

Musharraf's Martial Law Regime

I was in Pakistan the week prior to the declaration of martial law by *General* Musharraf on 3 November. There was little expectation that emergency rule would be imposed because the Supreme Court was not expected to rule against Musharraf on two critical constitutional challenges to his re-election by the out-going lame-duck parliament; (a) that he held the dual offices of army chief and president and (b) that his re-election was illegal because of the two-year year bar on military or civil officials contesting for public office.

The court also was hearing a case in which the government was being charged with contempt by the court for disregarding its order permitting former Prime Minister Nawaz Sharif to return to Pakistan and for having forcibly deported him at the airport back to Saudi Arabia.

On 3 November, General Musharraf, concerned about the Supreme Court's pending decisions, pre-empted the Court, proclaimed an emergency and imposed a Provisional Constitutional Order (PCO) -- effectively martial law -- in his words, to "save Pakistan from destabilization" and "to halt a wave of terrorism and militancy."

Yet there was a key disconnect in Musharraf's justification for martial law and his actions. Although he based the imposition of martial law on the terror threat, he targeted political opponents, not radicals. Even the text of his "Proclamation of Emergency" cites terrorism alone in only two of twelve substantive clauses. In the other ten, Musharraf complains about Pakistan's then-independent judiciary. Also the first people arrested were party leaders and the first people released from prison were accused or convicted terrorists, including those involved with suicide bombing, who then were exchanged for soldiers being held hostages.

Musharraf's actions and timing revealed his true motives: At the end of my week-long visit on 2 November, nearly every observer in Islamabad had become convinced the court would disqualify Musharraf's re-election on constitutional grounds. Retaining political power was his motive for acting, not fighting terrorism; martial law was the means.

Pakistan was taken by surprise. No one anticipated a repeat of 1999: the Constitution suspended again. This time, thousands of lawyers, human rights activists, political party officials and reporters were rounded up and detained. The Supreme Court was sacked, the provincial high courts were intervened, and judges were placed under house arrest.

To understand the full implication of Musharraf's actions and their implications for the parliamentary elections - it is vital to understand the difference between the state of emergency provision contained in article 232 (section 1) of Pakistan's constitution and the Provisional Constitutional Order (PCO) enacted by Musharraf, not as President but as Army Chief.

That emergency provision in Pakistan's constitution would have kept Pakistan's institutions intact and accepted Supreme Court review of the provisions of the emergency order and implementation. Musharraf's PCO gutted the independence of the judiciary, requiring all high court judges to swear an oath of allegiance to the PCO and barring any court or judgment against the Proclamation, PCO, or the President or any of his designated authorities.¹

Even Musharraf now acknowledges that he acted neither constitutionally nor legally. "Have I done anything constitutionally illegal? Yes, I did on November 3," he said last Saturday. *General Musharraf's Provisional Constitutional Order* deprived the courts of the authority to challenge any executive order for unconstitutionality and gave him the power to amend the constitution.² Effectively, General Musharraf replaced constitutionalism and rule of law with open military rule.

Before they were placed under confinement and fired by the military, Pakistan's Chief Justice and six of his Supreme Court colleagues declared the PCO and Musharraf's actions illegal and unconstitutional.

Thus, Pakistanis and others found it incomprehensible that President Bush would assert, as he did, that Musharraf had not crossed any red lines that would mark him as undemocratic. In fact, this was Musharraf's second time across the red line; the first in 1999, the second on 3 November.

International Response

The United States, the United Kingdom and the European Union privately expressed disappointment and dismay and to a surprising and welcome degree publicly declared emergency rule to be unwise and martial law abuses unacceptable. The U.S., desiring to maintain its counter-terror relationship with Musharraf, called upon him to end emergency rule, give up his post of army chief, and hold free and fair and timely elections. The Administration talked of aid reviews being undertaken. Congressional leaders called for tougher measures, including adopting some conditionality in the foreign military aid provisions of the FY2008 State/Foreign Operations section of the Omnibus appropriations bill.

¹ PCO Paragraph 2 (3) states "that the Supreme Court or a High Court and any other court shall not have the power to make any order against the President or the Prime Minister or any person exercising powers or jurisdiction under their authority."

² PCO Paragraph 3 (1) and (2).further declares that n that: "No court including the supreme Court, the Federal Shariat Court and the High Courts, any tribunal or other authority shall call or permit to be called in question this Order, the Proclamation of Emergency of the 3rd day of November 2007, the Oath of office....No judgment, decree, writ, order or process whatsoever shall be made...against the President or Prime Minister or any authority designated by the President

To the casual observer, it may appear that Musharraf has met those preconditions. He indeed gave up the post of army chief on 28 November. On November 19, he announced that parliamentary elections would be held on 8 January. And on 15 December, he issued a new order ending the emergency, repealing the PCO, and reviving the Constitution.

However, Musharraf imposed a new series of caveats, restrictions, and limitations that violate fundamental freedoms, thus making free and fair elections highly doubtful without an end to those impediments.

The day before he lifted the emergency, he acted once more to violate the Pakistan Constitution by adopting six Constitutional amendments by fiat. In Pakistan, constitutional amendments require a two-thirds parliamentary majority. The 1973 Constitution specifically gives the Supreme Court the authority to interpret the Constitution. Musharraf's amendments denied the courts and the parliament their constitutional prerogatives to challenge those amendments. The damage to the independence of the judiciary and freedom of the press directly affect the parliamentary election campaign.

The end result: the judiciary remains gutted and high courts have been stripped of any authority to challenge any of the actions taken during the PCO period, or the emergency proclamation or any of the amendments he promulgated by executive order.

Independence of the judiciary and the rule of law

On 15 December, in a televised address just hours after signing a proclamation formally lifting emergency rule, Musharraf declared that the 8 January elections would be "absolutely fair and transparent". He also said: "The constitution is being fully restored". However, he rejected restoring the judges who refused to sign an oath to the PCO.

The Revocation of the Proclamation of Emergency maintains in force the mandates of the PCO and the provisional ordinances and decrees pronounced from 3 November until 15 December, including the following:

- The prohibition barring civil servants from running for office within two years of retirement no longer would apply to the office of the president.
- The dismissal of the Supreme Court judges and High Court judges by Musharraf cannot be challenged "by or before any court".
- An amendment to the 1952 Army Act, retroactive to 2003, permits military courts to try civilians for a wide range of offenses, including causing "public mischief."
- Another decree threatens freedom of association by giving the new hand-picked high court authority to disbar lawyers and violated the independence of bar associations.

His decrees stipulate that all constitutional amendments made since 3 November shall “not be called in question by or before any Court”, including the Supreme and High Courts.

By taking on the powers to unilaterally amend the constitution, Musharraf has undermined constitutionalism and rule of law, including constitutionally guaranteed fundamental rights and protections. And by removing dissenting judges and packing the supreme court and the high courts with his hand-picked choices, Musharraf has undermined judicial independence, essential for any free and fair election.

By depriving the judiciary of their constitutionally guaranteed right to review the constitution, he has also laid the seeds for the disintegration of his post-8 January political order.

In the past too, military rulers, including Musharraf himself, had unilaterally amended the constitution but had subsequently sought indemnity for their acts through parliamentary sanction. His opposition, including the centre-right Pakistan Muslim League-Nawaz (PML-N) and centre-left Pakistan Peoples Party (PPP) have said that they will, once in parliament, challenge the legality of the manner in which he has sought to seek legal sanction for his unconstitutional acts.

JUDICIARY’S ROLE IN ELECTIONS:

It is crucial to understand that the judiciary in Pakistan is intimately involved in the conduct of elections. The Election Commission of Pakistan (ECP) is comprised of a retired Supreme Court justice and a serving High Court Judge from each province—two of these seats are unfilled.

Musharraf, by permanently barring the previous Supreme Court and the Provincial High Court judges who refused to bow to his edict, has assured that the commission will be comprised of his hand-picked choices. District Returning Offices, Returning officers and Assistant Returning Officers, who supervise the actual polling process in each province—are either district court judges themselves or are appointed by district court judges, all under the guidance of the provincial high courts, whose new members are suspect.

Remember that Musharraf has sacked 13 of the 17 Supreme Court judges and more than 40 High Court judges. And any electoral complaint of fraud, rigging or electoral law violation ultimately will be heard on appeal to those courts. Stacking the full range of high courts, nationally and provincially—including naming a totally new high court in Islamabad—amounts to hijacking the electoral process itself.

ENSURING A CREDIBLE ELECTION

Musharraf’s actions prior to lifting the emergency and the nature of the ‘restoration’ of the constitution, show that the government does not intend to hold a free and fair election.

CARETAKER GOVERNMENTS

The partisan nature of the caretaker governments, national and provincial, has been strongly criticized by the opposition. Caretaker prime minister, Senate chairman Soomro is a member of Musharraf's Pakistan Muslim League-Quaid-i-Azam (PML-Q). Cabinet ministers in the centre and the provinces are either party members or Musharraf loyalists; some ministers even have close relatives contesting elections. The opposition parties say that the caretaker governments are already using the official machinery, including the administration, intelligence agencies and police, to influence the election outcome

Musharraf also dismissed an opposition demand to establish caretaker local governments during the election process. The opposition protested because local governments are stacked with Musharraf loyalists, the results of massively rigged local polls in 2005.

ELECTION COMMISSION

The opposition understandably has asked for the reconstitution of the ECP, a demand Musharraf has dismissed. The ECP's decision to reject the nomination papers of the Nawaz Sharif and his brother makes its subservience obvious. The Election Commission of Pakistan is an autonomous, constitutionally sanctioned entity entrusted with holding the national elections. It comprises a retired Supreme Court and one serving High Court Judge from each of the four provinces. Two of those seats are now vacant.

The Chief Election Commissioner (CEC) is also charged with appointing Election Tribunals, which deal with petitions in the event of an election dispute. These tribunals consist of High Court judges. Challenges against decisions of these tribunals end up before the provincial High Courts and finally the Supreme Court. Hence every stage of the election process is conducted and supervised by the judiciary.

The present ECP has failed to control abuse and fraud and provide free and transparent elections on any occasion during Musharraf's watch, including the 2002 national polls.

Other ECP related issues:

- i. Voters Roll: There were millions of missing voters on the computerized list of some 52 million produced this summer by the ECP. The opposition protested since there were some 20 million names fewer than in 2002. The Supreme Court ordered a revision. However, 25 million voters' names were then added to the rolls from the 2002 list without verification, even whether they might no longer be living. In seeking to verify those names, the parties requested and the ECP initially agreed—including in conversations with the Crisis Group—to permit electronic review of the rolls by the parties and civil society. That review has not been permitted. Ironically the electoral registration process has been funded by the U.S. In short, not all eligible voters have been registered and the list of supposed eligible voters remains deeply flawed.

- ii. Dispute resolution: The political parties have raised serious concerns about the lack of transparency in the complaints process and the ECP's lack of response to election complaints filed so far. The ECP has yet to take action to redress complaints about the inappropriate use of state resources, and intimidation by local government and intelligence agencies.
- iii. Code of Conduct of 20 November for political parties and contending candidates: The new Code of Conduct places serious curbs on constitutionally guaranteed freedoms of speech and assembly. The political parties, for instance, cannot "propagate any opinion or act in any manner which defames or brings into ridicule the judiciary or the armed forces". Parties also are required to obtain the permission of local authorities to hold public meetings, and accept any "restrictive or prohibitory orders in force in the place proposed for the meeting". They cannot hold public meetings or rallies "on main streets and roads" without giving the police at least two days advance notice.

Political parties traditionally use public rallies to mobilize political support; and insist that these restrictions deny them this opportunity.

Freedom of Expression and Media

Although the lifting of the emergency and the repeal of the PCO formally restores fundamental rights of speech, ordinances issued since 3 November to curb media independence remain in force. To curb radio and television, Musharraf had issued an ordinance that prohibits any coverage which "defames or brings into ridicule the Head of State, or members of the armed forces, or executive, legislative or judicial organs of the state" and establishes a series of vague other restrictions and carries a maximum prison sentence of three years. A similar ordinance was issued for the print media. The Pakistan Federal Union of Journalists (PFUJ) and the All Pakistan Newspapers Society (APNS) all have condemned the fresh prohibitions against live coverage of political debates and other restrictions issued to private TV channels by the Pakistan Media Regulatory Authority, whose violations could result in three years in jail and cancellation of licenses.

In an interview with the Washington Post, Musharraf said: "The problem with the West and your media is your obsession with democracy, civil liberties and human rights". The West, including the US, has gained some lost credibility by insisting on free and fair elections. It must not lose the gains made by legitimizing a deeply flawed election.

U.S. ROLE

U.S. Ambassador Anne Patterson's well-publicized visits to detained human rights activists, to journalists, and to the suspended television stations after the declaration of emergency were extremely valuable. So too were her statements and the statements from others, including Secretary Rice, encouraging all moderate forces to come together to oppose extremism, to participate in fair and free elections, with full press freedom and to

see an end to emergency rule. They were correct that free and fair elections would lead to the victory of the moderate forces. A rigged election will only empower extremists.

One gaping omission in the Bush Administration stance has been its silence with respect to the handcuffing of the judiciary, the firing of high court judges, and the inadequacy of the provisions relating to the lifting of the emergency. The Administration has ignored the direct linkage between the independence of the judiciary and free and fair elections.

Given legitimate U.S. concern for a stable partner in the war against terrorism, it is even more important for the U.S. to err on the side of supporting the democratic process. Musharraf's popularity, as the IRI poll of 19-28 November shows, is at an all time low. Between 66-75 per cent of those polled were anti-Musharraf and wanted change. 70 per cent opposed the imposition of emergency; 66 per cent believed it was imposed, not to better fight terrorists, but to prevent the Supreme Court from overturning Musharraf's re-election to another term as president; 71 per cent opposed the suspension of the constitution; 70 per cent opposed the ban on political rallies and the crack down on lawyers and civil society and arrest of opposition politicians; and 77 per cent opposed the detention of the sacked Supreme Court judges.

The United States and the international community should press for:

- **Full restoration of the constitution—not just those portions of the constitution that sit well with President Musharraf;**
- **Restoring an independent judiciary and restoring the judges;**
- **Voiding the emergency period press ordinances which establish onerous controls over electronic media and which threaten all media with severe penalties—including the threat of three years in jail, loss of license, and \$170,000 fine for those who violate the code of conduct imposed by the electoral commission which prohibits criticism of Musharraf, the military, emergency rule or foreign affairs;**
- **Establishing a truly neutral electoral commission and a truly neutral caretaker government during the campaign period;**
- **Allowing the political parties active consultation on the electoral process, including electronic review of the voting rolls, consultation on where polling places are located, agreement that results will be posted and announced at each polling station and unobstructed access of party monitors and independent observers to polling stations.**
- **Eliminating the provisions of the electoral code of conduct which restrict political parties and candidates from holding rallies and other assemblies without local government and police permission.**
- **Removing the power of military courts to try civilians and assuring that intelligence services and security forces take no further actions to interfere with the electoral process.**
- **Releasing from house arrest, judges and their lawyers and others detained for engaging in democratic protest.**

The US, and its Western allies, must recognize that fair and free elections are the best option for a secular and moderate parliamentary majority, a unified country against extremist jihadi organizations, the Taliban and Al Qaeda. However, a rigged election will produce the worst of all possible worlds. Unless there are major shifts in policy by the Musharraf government, likely only if strong international pressure echoes the demands of civil society and the moderate political parties, on January 9th, we will see a parliament without credibility, a government dominated by Musharraf linked religious parties with strong ties to extremists, a divided Pakistan.

