

Defending Dictatorship: U.S. Foreign Policy and Pakistan's Struggle for Democracy

Table of Contents

Introduction.....	2
Convening Organizations.....	2
Executive Summary.....	3
Methodology.....	5
Preliminary Findings.....	6
Foreword.....	6
I. Constitutionality of Recent Changes in Legal Framework. 6	
A. <i>Amendments to the Constitution Imposed by Ordinance....</i>	7
B. <i>Removal of the Judiciary.....</i>	8
II. Independence of the Judiciary and Rule of Law.....	8
III. Media Freedom and Transparency.....	11
IV. Prospects for Free, Fair and Transparent Elections.....	12
V. United States Foreign Policy.....	13
A. <i>Historical Context</i>	14
B. <i>Peace and Security.....</i>	14
Conclusions.....	17
Signatories.....	18

Defending Dictatorship: U.S. Foreign Policy and Pakistan's Struggle for Democracy

Introduction

A National Lawyers Guild delegation from the United States, made up of four lawyers and four law students, visited Pakistan from January 2 – 12, 2008. Delegation members went to Lahore, Karachi, Peshawar and Islamabad where they conducted interviews with more than fifty jurists, lawyers, political party representatives, elected officials, civil servants, journalists, students, activists and members of civil society. This report discusses the delegation's investigation of how Pakistan's recent history affected four principal issues: (1) the independence of the judiciary and rule of law; (2) media freedom and transparency; (3) the freedom and fairness of upcoming parliamentary elections and (4) the impacts of U.S. foreign policy towards Pakistan.

Convening Organizations

The National Lawyers Guild (NLG) was founded in 1937 and is the oldest integrated national bar association in the United States. Throughout its existence, it has struggled to use the law "in the service of the people to the ends that human rights shall be regarded as more sacred than property interests."¹ Along with the National Conference of Black Lawyers, it is one of two U.S. constituent members of the International Association of Democratic Lawyers, a global organization of individuals and national bar associations dedicated to advancing democratic values and human rights through the law.

The Law and Policy Department at the Lahore University of Management Sciences (LUMS) formed the Rule of Law Project in December 2007 as an academic clearinghouse for investigation and research regarding the impacts of the November 2007 "Provisional Constitutional Order" (PCO) on civil society and the judiciary. The Project is preparing a comprehensive report on the effects of the suspension of the Constitution and the removal of the majority of Pakistan's appellate judiciary. The Rule of Law Project invited the NLG to send a delegation, provided logistical support for the delegates' work and co-authored this Report.

1 Constitution of the National Lawyers Guild, Preamble (1937).

Executive Summary

Lawyers have been at the forefront of a civil society movement defending judicial independence, the rule of law and democracy in Pakistan. When President Pervez Musharraf² placed Chief Justice Iftikhar Chaudhry on inactive status on March 9, 2007, Pakistan's lawyers responded with mass demonstrations supported by large segments of society. The Supreme Court reinstated the Chief Justice in July 2007. But on November 3, 2007, the President, in his capacity as Chief of Army Staff, declared an emergency and issued the PCO suspending the constitution. The lawyers joined other members of civil society in protesting the action.

An independent judiciary is fundamental to a free society. The delegation has concluded that any outcome short of restoring the judges serving on November 2, 2007 will have long-term negative impacts on the rule of law in Pakistan by subjecting the judiciary—and therefore the entire government and the country's 160 million people—to the whim of the executive.

All media, especially the Urdu language media, remain restricted and face suppression, including outright state censorship. The repressive policies imposed by the Pakistan Electronic Media Regulatory Authority (PEMRA), direct and indirect threats to media institutions and individual journalists, loss of advertising revenues, revocation of broadcasting licenses and, most insidiously, the chilling effects of these restrictions manifested by self-censorship, all limit the ability of the media to serve its essential functions. Particularly limited are the press's ability to shed light on official corruption and incompetence, substantive issues emerging in the upcoming parliamentary elections, concerns regarding their legitimacy and, notably, the ongoing government attacks on the independence of the judiciary and of the media itself. International media such as the BBC and CNN have remained comparatively free, creating a false impression of media freedom throughout Pakistan. However, the vast bulk of Pakistanis receive their news from Urdu broadcast media, which remains heavily censored. The delegation has determined that the restrictions on the media constitute a serious threat to Pakistan's developing democratic institutions.

The delegation has concluded that unless immediate, pervasive and fundamental changes are made concerning the nation's judicial system, including the enforcement of election laws and the creation of a truly independent election commission, the upcoming elections cannot be free, fair or transparent and are likely to fail to meet international standards. The electoral process appears to have been fundamentally corrupted from the outset due to the suppression of the media, the pervasive interference by local government officials in the election process and the fact that the Election Commission is beholden to the President. Furthermore, the absence of an independent juridical body to

2 The legitimacy of Musharraf's claim to Pakistan's Presidency remains in question, since his October 2007 election faced a challenge in the Supreme Court, whose forthcoming ruling was ultimately preempted by the removal of most of its judges. This report refers to Musharraf as the President notwithstanding these persisting concerns.

resolve disputes precludes the opportunity for impartial oversight. Facing such fundamental concerns about their legitimacy, elections are more likely to inflame tensions than resolve them and could potentially spark violence and further destabilize the country.

Finally, many respondents noted the contradiction between U.S. rhetoric supporting democracy and the reality of its ongoing support for a military dictatorship, reflected in its failure to label the PCO a "coup," to demand reinstatement of the deposed judges, or to call for the elimination of media restrictions. Continued U.S. support for President Musharraf in the face of domestic and international criticism was often labeled "short-sighted." In response to President Musharraf's reported comment that he could not fight the West's "War on Terror" with a free press and independent judiciary, deposed Justice Azmat Saeed retorted, "you cannot fight terrorism with State terrorism."

The delegation discovered a consensus that U.S. foreign policy has had negative impacts on several fronts. First, White House support for the ruling regime, notwithstanding its recent attacks on the rule of law, has severely undermined prior momentum within Pakistan towards, for perhaps the first time in its 60-year history, a sustainable and genuine democracy featuring an independent judiciary and a free press. Second, U.S. support for military rule in a time of potential democratic transition has inflamed anti-American sentiment and facilitated terrorism at its root, within the hearts and minds of extremists' potential recruits. Finally, U.S. national security interests³ in regional stability are suffering from the persisting uncertainty about Pakistan's constitutional crisis, magnified by the presence of a militant insurgency—one that, according to some local experts, is finding active support within the ruling Pakistani regime supported by the White House.

The delegation suggests that U.S. policy should not focus on the perceived battle between democracy and "The War on Terror." Rather, it should dedicate itself to advancing the values of democracy, rule of law and human rights over repression and autocratic rule. This view compels shifting U.S. policy away from support for military dictatorship and towards support of independent indigenous institutions that hold the greatest promise for building genuine democracy in Pakistan – and real security for its people, the people of the region and the entire globe. At a minimum, U.S. policy should promote the restoration of all judges deposed in November 2007; an independent media free of censorship; and the necessary preconditions for the upcoming elections to be free, fair, transparent, secure and scheduled with adequate notice for full participation by all voters and candidates.

3 The delegation takes exception to promoting the purported security interests of one nation over the sovereignty of another and the human rights and personal liberty interests of its citizens or the interests of the rest of the world's people in peace, liberty and security. Setting aside these principled concerns, it remains clear that official U.S. policy serves none of these.

Methodology

The delegation prepared for its visit by reviewing articles and reports concerning recent events and present conditions in Pakistan. While in Pakistan, members visited Lahore, Karachi, Peshawar and Islamabad, where they conducted interviews with over fifty jurists, lawyers, elected officials, civil servants, journalists, representatives of political parties, students, activists and members of civil society. The delegation also reviewed documents gathered prior to, and over, the course of its stay in Pakistan. The government of Pakistan did not respond to the delegation's written requests to speak with detained Chief Justice Iftikar Mohammad Chaudhry and Supreme Court Bar Association President Aitzaz Ahsan. The delegation did have the opportunity to meet at some length with a high-ranking representative of the U.S. embassy in Islamabad, who declined to comment on the record.

Underlying the delegation's approach to its work is its commitment to the principles embodied in the Universal Declaration of Human Rights (UDHR), as adopted by the international community in various human rights conventions. Of particular significance to the investigation are the sections of the International Covenant on Civil and Political Rights⁴ (ICCPR) securing the right of all people to run for office and freely elect their representatives and the right to just resolution of disputes before an unbiased and independent judiciary.

The delegation is concerned with the role the U.S. has played in Pakistan. A consensus has emerged across nearly all sectors of Pakistani society that U.S. aid and other support for the ruling regime have negatively impacted the ability of the Pakistani people to exercise their right of self-determination and undermined prior momentum towards building a stable democracy.

The delegation has drawn several preliminary conclusions from its research in Pakistan. Having returned to the U.S., it is currently reviewing additional documentary evidence, further evaluating the information it has received and following emerging developments in preparation of its final report.

4 Although Pakistan has not ratified the ICCPR, its requirements are still widely accepted by the international community as necessary components of a genuinely free and democratic society.

Preliminary Findings

Foreword

The delegation offers its observations based on international law and human rights norms. It perceives a particular responsibility to undertake its mission because of a professional and ethical obligation to investigate attacks on the rule of law wherever they occur, as well as continuing U.S. political and material support for President Musharraf and the consequent impact of official U.S. policy on internal Pakistani affairs.

This is a critical time in Pakistan's history. Since first achieving its independence in 1947, the country has lurched back and forth from civilian governments accused of pervasive corruption and incompetence to a series of military dictatorships. While General Musharraf initially came to power in what was widely described as a popularly supported military coup, his government has more recently impeded the advance of democratic values and the rule of law.

Pakistani civil society had, in recent years, built a series of independent indigenous institutions, including a free press and increasingly independent judiciary. After the removal of the country's popular Chief Justice in spring 2007, a broad-based popular movement opposed to military rule emerged. The development of Pakistan's institutions, as well as the popular mandate for democracy, included the demand for free, fair and transparent elections.

In a time of potential transition, official U.S. policy has opposed the popular movement and thereby impeded institutional momentum towards democracy, while instead supporting autocratic military rule lacking a democratic mandate. President Musharraf has effectively eviscerated Pakistani's judiciary and media, precluding an impartial process to either enforce human rights commitments or ensure the freedom, fairness and transparency of upcoming parliamentary elections.

In its fact-finding mission in January 2008, the delegation explored the content and context of this constitutional crisis, the prospects for the upcoming elections' legitimacy, and the future of U.S. foreign policy.

I) Constitutionality of Recent Changes in Legal Framework

Acting in his role as Chief of Army Staff (COAS), General Musharraf imposed a state of "emergency" on November 3, 2007. The Proclamation declares that the "Constitution of the Islamic Republic of Pakistan shall remain in abeyance."⁵ When "a grave emergency exists in which the security of Pakistan, or any part thereof, is threatened by war or external aggression, or by internal disturbance beyond the power of a Provincial Government to control," Pakistan's *President* may impose an emergency

5 Proclamation of Emergency § 2, (Nov. 3, 2007).

under Article 232 of the Constitution.⁶ However, the Constitution contains no provisions that permit it to be held “in abeyance.” In any event, the COAS has no authority to declare a state of “emergency.” Therefore, General Musharraf’s declaration clearly violated Pakistan’s Constitution.

General Musharraf also promulgated a Provisional Constitutional Order (PCO) on November 3 that suspended fundamental rights guaranteed under Articles 9, 10, 15, 16, 17, 19, and 25.⁷ Even assuming the COAS had the right to declare an emergency, the PCO, which cited as authority the unconstitutional Proclamation of Emergency, would be unconstitutional to the extent that it suspends fundamental rights beyond those that may be suspended during an Article 232 Emergency.⁸ Finally, the Order claimed to permit the President the authority to amend the Constitution of Pakistan by ordinance,⁹ yet the Constitution only permits amendments to be passed by a two-thirds majority of both houses of Parliament.¹⁰

If there were any doubts about the constitutionality of the PCO, they were dispelled by a seven-member bench of the Supreme Court, convened in an extraordinary session on the afternoon of November 3, 2007. The Court issued an order restraining the government “from administering a fresh oath” to any judges of the superior judiciary and stating that any appointment of new judges “shall be unlawful and without jurisdiction.”¹¹ The order also directed all judges not to take any new oath of office.¹²

The PCO lacks any legal authority and represents a gross usurpation of power by Pakistan’s military. General Musharraf’s action on November 3 was nothing less than a coup d’etat. The Proclamation of Emergency was, in fact, a declaration of martial law.

A) *Amendments to the Constitution Imposed by Ordinance*

Relying on the unconstitutional PCO, President Musharraf unilaterally promulgated two Constitutional Amendment Orders on November 21 and December 14, 2007, respectively. The orders seek to legitimize and insulate Musharraf’s actions by immunizing all changes from judicial review and providing other clerical changes to bring the Constitution into conformity with the newly promulgated ordinances. Both orders are unconstitutional because the PCO is unlawful in the first instance, and because Pakistan’s Constitution may not be amended by Presidential decree.¹³

6 1973 Constitution of the Islamic Republic of Pakistan, Art. 232, § 1 (“Const.”).

7 Provisional Constitutional Order No. 1 of 2007 § 2(1) (Nov. 3, 2007) (“PCO”).

8 Const., Art. 232 § 1-2 (permitting actions in conflict with Articles 15-19 and 24 of Pakistan’s Constitution). Articles 15-19 protect freedom of movement, assembly, association, trade, business or profession, and speech and Article 24 protects property rights.

9 PCO, § 2(1).

10 Const., Art. 239.

11 Supreme Court Order, § 3 (Nov. 3, 2007).

12 Supreme Court Order, § 2 (Nov. 3, 2007).

13 See Const. Art. 239.

B) *Removal of the Judiciary*

Pakistan's various constitutions have been suspended by military generals on numerous occasions over Pakistan's sixty-year history. The usual pattern has been that a general suspends the Constitution and orders all judges to take a new oath to uphold the military's orders rather than Pakistan's Constitution. In prior coups, some judges have resigned, rather than violate their oaths to uphold the Constitution. However, many respondents noted that the November 2007 declaration of *de facto* martial law differed from all prior military coups in that its plain purpose was to remove the sitting judiciary, rather than the executive or Prime Minister.¹⁴

President Musharraf promulgated the Oath of Offices (Judges) Order of 2007 on November 3. As with the constitutional amendment orders, the Order lacks legal authority because it is based on the unconstitutional PCO and removes sitting judges in a manner outside constitutional strictures.¹⁵ Unlike prior coups, where overwhelming majorities of sitting judges opted to take new oaths, a majority of the superior judiciary¹⁶ refused to do so in November.

II) **Independence of the Judiciary and Rule of Law**

The judiciary in Pakistan has historically been aligned with the military-political establishment. However, the past year witnessed a judiciary assertively checking executive aggrandizement in a range of contexts. In addition, the movement among lawyers to restore deposed judges, first in the wake of the Chief Justice's removal on March 9 and then in the wake of the PCO, created political space for *bona fide* opposition to military rule for the first time in a generation.¹⁷

Lawyers cite four issues that came before the Supreme Court which gave rise to their movement and ultimately led to the declaration of martial law: (i) a decision staying the privatization of a state-owned Steel Mill; (ii) a series of cases requiring hearings for persons detained by authorities without charge (the missing persons cases); (iii) the dismissal and subsequent reinstatement of Chief Justice Chaudhry; and (iv) the petitions challenging General Musharraf's eligibility to sit as a candidate in the October, 2007 presidential election. Several respondents, as well as analysts from around the world, indicated that the Supreme Court's anticipated ruling against Musharraf in the election case is what prompted him to declare martial law.

14 See Proclamation of Emergency (stating that "there has been increasing interference by some members of the judiciary in government policy" and that "some judges by overstepping the limits of judicial authority have taken over the executive function and legislative functions").

15 Const., Art. 209, § 6 (permitting a sitting judge to be removed only upon the recommendation of the Supreme Judicial Council).

16 The "superior judiciary" consists of the Provincial High Courts, the Federal Shariat Court, and the Supreme Court of Pakistan.

17 See Human Rights Watch, *Destroying Legality* 5-6 (Dec. 2007), available at <http://hrw.org/reports/2007/pakistan1207/>.

In the Steel Mill case, the Court reviewed a government privatization project that would have resulted in the sale of state owned assets at grossly undervalued rates to an international consortium that included army generals. The Court stayed the sale, concluding that the process was opaque and failed to meet numerous statutory requirements. The military establishment viewed the decision as an affront to its authority and its ability to extract economic patronage from the state.¹⁸

The missing persons cases, some filed by the Human Rights Commission of Pakistan (HRCP), and others by the Chief Justice *sua moto* (on his own motion), exposed the intelligence agencies' practice of detaining and disappearing both legitimate and questionable terrorist suspects. These cases imposed a check on the executive branch's actions, purportedly taken in the "War on Terror," vindicated the right of due process and revitalized the writ of *habeas corpus*.

Our investigation indicates that the intelligence agencies detained hundreds of alleged "terrorists" without providing them any procedural protections. Families of detainees allege that they were disappeared and/or handed to U.S. agencies for interrogation. Many were non-violent political activists, members of the Balochistan independence movement and student organizers with no connection to terrorism.¹⁹ While these detainees likely had no relation to violent extremist elements, their detention allowed the government to satisfy the U.S. demand for assistance in the "War on Terror" while conveniently eliminating elements politically opposed to the military government.

The Supreme Court demanded that the intelligence agencies physically produce detainees in court, explain their alleged links to terrorist activities and cite the legal basis for their detention. According to a senior advocate and prominent member of the lawyer's movement, very few documents were ever produced. Eventually, the Supreme Court released detainees but reportedly only those whom the agencies agreed posed no threat. Nonetheless, in President Musharraf's declaration of martial law, he suggested that the courts had released "terrorists," thus blaming the Pakistani courts for compromising national security.²⁰

In the third case, the Supreme Court reinstated the Chief Justice following his suspension by the President on March 9, 2007 on charges of alleged corruption. The summary removal of the Chief Justice outraged and emboldened lawyers dismayed by

18 See Ayesha Siddiqi, *MILITARY, INC.: INSIDE PAKISTAN'S MILITARY ECONOMY* 105 (2007) ("The military regime favored its cronies as much as the civilian governments, and so exacerbated the problem of crony capitalism . . ."); Shahid ur-Rehman, *WHO OWNS PAKISTAN?* (1998). General Musharraf obliquely referred to the Steel Mills case in the Proclamation of Emergency, referencing judicial interference in "economic policy, . . . downsizing of corporations and urban planning . . ." Proclamation of Emergency at 1.

19 See Human Rights Watch, *Destroying Legality* 5-6 (Dec. 2007), available at <http://hrw.org/reports/2007/pakistan1207/>; International Crisis Group, *Pakistan: The Forgotten Conflict in Balochistan* 3-5 (Oct. 2007), available at <http://www.crisisgroup.org/home/index.cfm?id=5131&l=1>

20 It is worth noting that the Musharraf government released 26 *convicted* terrorists in late 2007 in order to secure the release of over 200 military officers taken hostage in Balochistan.

the President's refusal to follow applicable constitutional procedures²¹ and is widely credited with inspiring the birth of the lawyers' movement.

The reaction to the Chief Justice's suspension included the familiar images of vast numbers of lawyers, supported by other members of society, marching in opposition to his summary removal from office. Emboldened by popular support for the Chief Justice, the Supreme Court reinstated him by a 10-3 majority on July 20, demonstrating the court's potential to uphold constitutional processes in the face of political pressure.

Finally, a series of petitions challenging General Musharraf's eligibility to stand for reelection as President were filed. The Constitution does not permit a military officer, or indeed any person holding an "office of profit in the service of Pakistan,"²² to seek the presidency. On October 5, the Supreme Court permitted the presidential elections to go forward on the next day, but ordered the Chief Election Commissioner to withhold notification of the results until the Supreme Court resolved the pending cases. Arguments in the election cases were heard through the last week of October and some respondents stated that the Court was preparing to rule against the President.

It was this action that set the stage for the November 3 PCO and the removal of more than sixty sitting judges, including over two-thirds of the Supreme Court. The vast majority of respondents, representing a wide range of political and institutional affiliations, praised the deposed judges as experienced and highly qualified whose only "sin" was genuine judicial independence. Their replacements, by contrast, were widely condemned as inexperienced, unqualified and completely beholden to President Musharraf.

The muzzling of the media, discussed below, and the widespread arrests of lawyers and political activists under *de facto* martial law, prevented wide-scale public protests. One journalist argued that the media's absence after the PCO "created a sense of fatalism among democracy activists, even though the scale of Musharraf's crime against the judiciary was greater" than the removal of the Chief Justice in March.

The lawyers warn that the failure to reinstate the deposed judges will permanently and irreparably damage the institution of the judiciary, stripping it of any hope of independence and credibility in the foreseeable future. One lawyer told us, "Judges used to be elevated, now they are recruited." The lawyers have maintained a boycott of the courts for two months, but their ethical obligations to their clients and personal financial imperatives make it difficult for them to continue. Consequently, some members of their movement have called for an end of the boycott and, for the first time, some prominent lawyers are appearing before the PCO judges. Some have considered holding a symbolic boycott one day a week. The future of the movement, and the judicial branch it is supporting, is threatened and its hopes for success are in grave doubt.

21 See Const. Art. 209.

22 The President must meet all the eligibility requirements for a member of parliament. Const. Art. 41, § 2. The provisions relating to the qualifications of members of parliament exclude those who hold an office of profit. Const. Art. 63, § 1(d).

III) Media Freedom and Transparency

The existence of an independent media is essential to a democratic society, generally, and a free and fair election process, in particular. Preliminary evidence indicates that the Pakistani press faces severe restrictions and is unable to report completely and accurately on events of national importance.

Urdu language media, both print and broadcast, have been especially restricted, while the English language media and international press have remained *comparatively* free, though still threatened and subject to repressive legislation.²³ One journalist explained that, “English papers can get away with many things because few people read them.”²⁴ Even Urdu print media reaches a relatively narrow audience, because a large portion of the population cannot read Urdu. The concentration of restrictions on Urdu media, while both the English language Pakistani media and the international press enjoy greater freedom, conveys the *appearance* of an independent press to the outside world, while severely constraining press freedom in Pakistan.

Difficulties faced by the media (and the Urdu-language media especially) include government restrictions on (or threats to restrict) licensing, banning certain media personalities from appearing altogether, punitive withdrawal of advertising revenue and direct and indirect threats of personal harm.

GEO, Pakistan’s most popular television network was forced off the air entirely following the PCO. It continued to broadcast via satellite from the United Arab Emirates (UAE) until Pakistan’s government pressured the UAE to prohibit its broadcast. Eventually, it was able to resume satellite broadcasting, which prompted the Pakistani government to ban the import and sale of satellite receivers. A second popular station, Aaj TV, was removed temporarily from the air before being restored, subject to ongoing restrictions and monitoring.²⁵

The media are also subject to economic pressure. Half of all advertising revenue comes from government and military-owned businesses, which have canceled advertising in several leading media outlets accused of anti-government bias. Further, independent media outlets are financially stretched by having to confront legal challenges in courts they perceive as stacked against them following the removal of independent judges in November.

23 See, e.g., NEW YORK TIMES, *From Pakistan, With Jihad*, Jan. 23, 2007, available at <http://www.nytimes.com/2007/01/23/opinion/23tue2.html> (reporting on a physical attack by Pakistani intelligence agents on New York Times journalist Carlotta Gall); see also Arun Venugopal, *ABUSES: NYT’s Carlotta Gall recounts beating in Pakistan, threats*, SAJA Forum, Jan. 21, 2007 (reporting subsequent threats by intelligence agents against Gall’s photographer, sources, and other journalists).

24 Interview with Rahimullah Yusufzai, Editor, THE NEWS and Correspondent, ABC NEWS, TIME Magazine, BBC, in Peshawar, NWFP (Jan. 8, 2008).

25 Several other stations, including English-language Dawn, and international stations including Al-Jazeera, BBC, CNN and Sky, were forced off the air for some time. With the exception of Al-Jazeera, these stations are now allowed to broadcast, subject to restrictions.

The contrast between the popular response to the March 9 removal of Chief Justice Chaudhry and the November 3 removal of more than sixty judges indicates the impact of severe media restrictions. The former elicited massive demonstrations in support of the Chief Justice and the lawyers' movement, fueled by continuous live reporting on the crisis as it evolved. The latter, an act described by a leading international journalist as far more "tyrannical," elicited a more limited response except from lawyers, due largely to an effective media blackout.

Finally, despite the disparity between the treatment of the English and Urdu language media, all media are subject to restrictive Pakistan Electronic Media Regulatory Authority (PEMRA) regulations. This constitutes a direct assault on a free press. Thus far, PEMRA restrictions have been applied disproportionately to the Urdu language media. PEMRA's ability and willingness to seize printing presses and broadcast equipment operates as an effective hammer ready to strike any time the government chooses.

Perhaps the most insidious result of the attacks on the integrity of the free press is the chilling effect and self-censorship resulting from fear of repercussion. As long as journalists are subject to attack for critical coverage of the government, reporters are bound to think twice about the content of their reporting. The delegation thus concludes that no media outlet in Pakistan is free and independent.

IV) Prospects for Free, Fair and Transparent Elections

It is well recognized that an election is not an event, but a process. Consequently, a free and fair election depends on the integrity of the entire process—not just balloting at polling stations. Of particular importance to the process are a free press, a non-partisan body to set electoral rules and an independent judiciary or other adjudicative body to resolve electoral disputes quickly and fairly.

Pakistan lacks a recent history of free and fair elections. Our respondents discussed numerous pre-poll abuses in the lead-up to the elections, now scheduled for February 18, 2008, as well as preexisting structural problems that render the holding of free, fair or transparent elections unlikely, if not impossible. The reported pre-poll abuses include the partisan deployment of state resources; the partiality of local government officials legally required to be neutral; harassment, arrest and even assassination of candidates and party workers; and voter intimidation.

There are also several preexisting structural problems that preclude confidence in the results, including the government attack on the judiciary described above. Because the Election Commission charged with overseeing the elections is drawn from the judiciary and appointed by the President,²⁶ its ability to conduct the elections fairly is highly suspect. Moreover, there is no impartial tribunal available for the resolution of election-related grievances. Nevertheless, some respondents suggested that the

26 Const. Art. 213, § 1; Const. Art. 218, § 2(b).

President's overwhelming unpopularity could increase voter turnout, which could, in turn, make it more difficult for the polls to be so rigged as to completely skew the results.

The decision to delay elections from their originally scheduled date of January 8, 2008, following the assassination of Benazir Bhutto, violated the Constitution and was therefore unlawful.²⁷ Official accounts suggest that the delay was caused by unrest resulting from the assassination. However, respondents posited that the delay was occasioned by the fear of the Pakistan Muslim League-Q (PML-Q), President Musharraf's party, that it would lose the election to another party or coalition able to form a government that could reinstate the deposed judges. Furthermore, many fear that the elections may be postponed again as Musharraf's popularity continues to wane.

Ironically, many people believe that Bhutto's assassination has increased the likelihood that the election results will reflect the people's will. This is not to say that the elections will be so free, fair and transparent as to meet international standards. Rather, some feel that PML-Q and President Musharraf are so unpopular that the vote cannot be rigged sufficiently to change the results. Also, they expect that people's anger could result in a large turnout and greater scrutiny of the process.

The Free and Fair Election Network ("FAFEN"), a non-partisan, non-governmental organization founded in 2006, is committed to building a culture of free, fair, and transparent elections through careful monitoring of the process. For the upcoming elections, FAFEN has deployed election monitors in 264 out of 270 constituencies throughout Pakistan. However, the delegation has little hope that FAFEN's efforts will be sufficient to resolve the systemic problems to allow the upcoming elections to be free, fair and transparent. Without widespread and immediate changes to numerous pervasive problems, the 2008 elections for the Pakistani National and Provincial Assemblies have little hope of meeting internationally recognized norms.

Finally, numerous respondents shared fears that, should the public perceive that official electoral results are inaccurate or unrepresentative, the country may face increasing violence and continued instability.

V) United States Foreign Policy

In view of the impact U.S. foreign policy has on Pakistan, evaluation of that policy is a key responsibility of the delegation. Unfortunately, American policymakers appear to view their options as largely constrained by a perceived need to maintain stability in a volatile region and to have an ally in the "War on Terror," accompanied by a presumption that President Musharraf is the only leader who can fulfill those needs. Our investigation indicates that this perception is wrong on several counts.

²⁷ The constitution requires that parliamentary elections be held within sixty days of the expiry of the term of parliament on 15 November 2007. Const., Art. 224, § 1.

A) *Historical Context*

Since the 1970s, U.S. foreign policy has worked at cross-purposes. Working to stem the Soviet invasion of Afghanistan from 1979 – 1989, the Reagan Administration actively trained and equipped the Afghan *mujahedeen*, and propagated a vision of Islam predicated on armed resistance to foreign imperialism. After the Soviet withdrawal, young refugees from the conflict, who became known as the *Taliban* (students) on account of their education in religious schools, were initially supported by the U.S.

Throughout this period, weapons such as small-arms, rocket launchers and shoulder-fired surface-to-air missiles flooded both Afghanistan and areas of Pakistan along the Afghan border, including the Northwest Frontier Province (NWFP) and Balochistan. In addition, the cultural transformation wrought by promoting a *ji*had-focused version of Islam also affected Pakistan's border areas. Since 1947, the dominant political party in the NWFP, the Awami National Party (ANP) has remained avowedly secular – so much so that it opposed the initial creation of Pakistan on the ground that its constituents preferred the Indian secular state to an alternative defined in terms of religion.

In the 1990s, when the U.S. essentially abandoned Afghanistan without providing economic opportunities to the former *mujahedeen*, many cadres formed the precursors to al-Qaeda.²⁸ During the same period, the Pakistani military establishment endangered U.S. national, regional, and global security, first by developing nuclear weapons in violation of the Non-Proliferation Treaty (NPT), then by threatening their use in the Kargil conflict initiated by then-General Musharraf, and finally by spreading nuclear weapons technology to other states including Iran, North Korea and Libya.

B) *Peace and Security*

Pakistan's role in nuclear proliferation is especially threatening to U.S. national and global security interests. In 1999, Pakistan instigated an armed conflict with India in the Kargil region in northern Kashmir, with the Pakistani military fighting alongside armed insurgents. A National Intelligence Estimate (NIE) released that year noted the country's weapons capabilities and predicted a substantial likelihood of nuclear escalation, which led President Clinton to declare the subcontinent "the most dangerous place in the world." General Musharraf initiated the conflict, prior to his 1999 coup.²⁹

In 2004, nuclear scientist Abdul Qadeer Khan, whose work establishing Pakistan as a nuclear state won him acclaim as a national hero, admitted to running an international technology smuggling operation. Despite his initial arrest, he was eventually pardoned by Musharraf and has yet to be produced for debriefing by

28 See generally, Time Weiner, *LEGACY OF ASHES* (2007) (arguing that U.S. international covert operations have often undermined long-term U.S. national security interests).

29 Then-Prime Minister Nawaz Sharif claims to have first learned about the incursion by Pakistani forces from his Indian counterpart Atal Bihari Vajpayee. See *I learnt about Kargil from Vajpayee*, says Nawaz, *DAWN*, May 29, 2006.

international investigators despite demands by the U.S. House of Representatives and the Swedish Weapons of Mass Destruction Commission.³⁰

In 2006, Musharraf reached an agreement with tribal leaders along the Afghan border in Balochistan entailing the withdrawal of Pakistan's military from the tribal areas in exchange for self-policing by tribal leaders. The agreement encountered skepticism by U.S. national security advisors, and in 2007, another NIE revealed that, after having been displaced from Afghanistan by the NATO invasion following 9-11, al-Qaeda had reconstituted its network and possibly even expanded its original capabilities in Pakistan.

After American indignation forced Musharraf to redeploy the Pakistani Army to the region,³¹ several reports emerged of military units being captured en masse by insurgents. Our investigation revealed that tribal codes require such surrender, since inter-tribal solidarity essentially trumps professional responsibilities or national allegiance. The Musharraf regime claimed that the pre-PCO Supreme Court was responsible for undermining the "War on Terror" by releasing terrorists. However, a deposed chief judge of one provincial High Court noted that the government itself released twenty-six terrorists convicted of offenses such as attempted suicide bombing in exchange for the release of military hostages, while other observers noted that the only "terrorists" released by the courts were those cleared by the intelligence services of any involvement in terrorism.

Finally, several experts in the Peshawar area, including a correspondent who frequently reports for such outlets as ABC News, Time Magazine and the BBC, alleged that Musharraf's government is today engaged in active, ongoing, direct support of militants by providing arms, ammunition and supplies. In one reported incident, a local police constable detained a truckload of ammunition allegedly bound for militant camps, which was then released to the ISI through the intervention of a local police chief contacted by senior military commanders. This analysis finds support in a January 15, 2008 NEW YORK TIMES article reporting that "Pakistan's . . . military intelligence agency has lost control of some of the networks of Pakistani militants it has nurtured since the 1980s"³²

30 See *The A.Q. Khan Network: Case Closed?: Hearing before House Subcommittee on International Terrorism and Nonproliferation* (May 2006) (recommending that U.S. authorities gain access to Khan in order to interrogate him as to the scope, scale and potentially ongoing activities of his technology smuggling network); December 2006 statement by Hans Blix, former chief of the International Atomic Energy Agency (IAEA) (that Khan's acts were not possible "without the awareness of the Pakistani Government.").

31 See, e.g., David Ignatius, *Sept. 10 in Waziristan: What Will Be Done About al-Qaeda's Camps?*, WASH. POST, July 31, 2007, at A19.

32 See Carlotta Gall and David Rohde, *Militants Escape Control of Pakistan, Officials Say*, N.Y. TIMES, January 15, 2008, at A1.

Our findings suggest that U.S. policy towards Pakistan continues to undermine long-term U.S. national security interests and prospects for peace and security in the region. These interests are shared among the people of all countries in the international community, rendering the current U.S. support of Musharraf increasingly isolated, as well as deeply problematic for several reasons.

First, support for Musharraf's repressive government exacerbates instability and has severely intensified anti-American sentiment throughout all layers of Pakistani society. Second, support for the democratic process and an independent press and judiciary—rather than unconditional support for an individual head of state—would at once advance the interests of the Pakistani people in building a sustainable and competent democracy while also helping to ensure stability and accountability. Finally, the U.S. administration has several effective policy options at its disposal including, but not limited to, curtailing aid and applying forceful diplomatic pressure.

Respondents revealed a variety of potentially effective means through which the U.S. can strengthen democratic institutions in Pakistan, the surest means to ensure peace and security in the region. Many respondents believe that curtailing diplomatic and political support for the current government would be the most effective start. There was widespread belief that Musharraf was able to forestall elections and sack the judiciary only because of assurances from the U.S. that it would continue to support his regime notwithstanding domestic political pressures. His increasing political isolation within Pakistan increases the salience of U.S. support or condemnation at this time.

In addition, foreign aid to Pakistan could be cut back, subjected to an audit, or restricted to economic and social development projects. On the policy incentive side, further aid can be conditioned on the restoration of the judiciary and holding a prompt, free, fair and transparent election. Finally, a former senior government official noted that trade concessions in the form of reduced barriers to textile imports would spur economic development and diminish opportunities for terrorist recruitment. As such, trade concessions are a powerful tool both to affect democratic progress and to curb violent extremism by encouraging economic development in militancy-prone areas like the Federally Administrated Tribal Areas, the Northwest Frontier Province and Balochistan. In sum, the U.S. has at its disposal numerous options to advance democracy and rule of law in Pakistan, while still furthering its own security imperatives.

The delegation heard constant criticism of the contradiction between the Bush administration's rhetoric promoting democracy and the reality of its support for a military dictator. While our respondents were careful to separate the American people from the government of the U.S., many warned that current policy is breeding hatred for both. We were repeatedly warned that the U.S.'s failure to strongly condemn the November coup was, and continues to be, contrary to long-term U.S. interests in Pakistan.

Conclusions

1. Anything short of restoration of the pre-PCO judiciary will have long-term negative impacts on judicial independence and the rule of law, subjecting the judiciary—and therefore the entire government and the people—to the whim of the executive.

2. Pakistan presently lacks a free and independent media, which is necessary to expose potential abuses of military rule, as well as corruption and incompetence in civilian administration.

3. Major problems continue to affect the election process and are unlikely to be rectified between now and February 18, 2008. The delegation does not believe that the elections, if held, are capable of being free, fair or transparent so as to comport with internationally recognized standards. Nevertheless, it is possible that the results may reasonably reflect the will of the voters in light of President Musharraf's extreme isolation. However, increased tension, violence and instability driven by perceived unfairness is an equally – if not more – likely possibility.

4. The true battle being waged today is not between democracy and “terrorism.” Rather, it is the battle between advancing the values of democracy, rule of law and human rights, on the one hand, and repression and autocratic rule on the other. The way to combat extremism and the repressive rule to which it aspires is by supporting the expansion, rather than the contraction, of human rights. This requires a major change in U.S. policy, away from support for military dictatorship and towards support of genuine democracy and rule of law in Pakistan. In short, U.S. policy should encourage and promote the restoration of all deposed judges, an independent media and free, fair and transparent elections to be held as scheduled.

Signatories

Saba Ahmed, J.D. Candidate, 2009, Lewis and Clark Law School

Shahid Buttar, Esquire

David Gespass, National Vice President, National Lawyers Guild

Ryan Hancock, Vice President, Mid-Atlantic Region, National Lawyers Guild

Enoka Herat, J.D. Candidate, 2010, University of Washington

Kathleen Johnson, Esquire

Kerem Levitas, J.D. Candidate, 2009, University of Washington

Radhika Sainath, J.D. Candidate, 2008, University of California, Berkeley

National Lawyers Guild Delegation

Devin T. Theriot-Orr, Director

LUMS Rule of Law Project