State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan

Taiyyaba Ahmed Qureshi
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State of Emergency: General Pervez Musharraf’s Executive Assault on Judicial Independence in Pakistan†

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†I dedicate this paper to Pakistan, and to those who work to bring the creed to life: Faith, Unity, Discipline. For the substance of this discussion, I am indebted to Professor Osama Siddique for his guidance. The spirit of this paper comes entirely from my parents; though they physically left Pakistan many years ago, they ensured that the love of Pakistan and its culture was instilled in me. And without my husband’s constant support and encouragement, this paper would still be many rough drafts away.
I. Introduction

Whereas some members of the judiciary are working at cross purposes with the executive and legislature in the fight against terrorism and extremism thereby weakening the government and the nation’s resolve diluting the efficacy of its actions to control this menace;

Whereas there has been increasing interference by some members of the judiciary in government policy, adversely affecting economic growth, in particular;

Whereas some judges by overstepping the limits of judicial authority have taken over the executive and legislative functions;

I, General Pervez Musharraf, Chief of Army Staff, proclaim emergency throughout Pakistan.

I hereby order and proclaim that the constitution of the Islamic Republic of Pakistan shall remain in abeyance.

President General Pervez Musharraf’s “Proclamation of Emergency,” November 3, 2007

“We are determined that until there is freedom for the judges and the overturn of emergency rule, this war will continue. They can’t quiet us.”

Anwar Shaheen, Lahore lawyer, referring to Pakistani lawyers’ protests against emergency rule and dismissal of Chief Justice Iftikhar Chaudhry, November 6, 2007.

“For us the restoration of the independent judges is a matter of life and death.”

Amina Masood, wife of a terrorism suspect detained without charge by the Pakistani Government.

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On October 12, 1999, Pakistan’s Chief of Army Staff General Pervez Musharraf executed a military coup, ousting Prime Minister Nawaz Sharif and declaring himself President of Pakistan. Musharraf joined the ranks of past army leaders who inserted themselves into Pakistan’s Executive Branch, and likewise quickly moved to consolidate power for the Presidency. But for the first time, these Executive abuses led to an unexpected and forceful outcry of independence within the Pakistani Judiciary that would lead to Musharraf’s resignation.

In March 2007, after years of powerful executive rule, Musharraf attempted to suspend Chief Justice Iftikhar Chaudhry. After the Chief Justice’s recent independence and initiative in ruling against Musharraf’s shows of executive power, Musharraf’s claims that Chaudhry had misused his powers became questionable. In the following months, Musharraf also declared a state of emergency, replaced the Constitution with a Provisional Constitutional Order, shut down independent television channels, and fired all federal judges who would not take an oath to uphold his new emergency rule.

As the world looked on, armies of black-suited lawyers in Pakistan responded with an uproar of street protests and legal battles. They were met by police batons, tear gas, imprisonments based on arcane colonial-era laws, and threats of disbarment. American lawyers in Washington and all over the country marched in solidarity with their colleagues and the American Bar

6 See supra note 1.
11 See supra note 5.
12 See Terry Carter, *Lawyers March in Solidarity with Jailed Pakistani Colleagues*,
Association presented its 2008 Rule of Law Award to “those lawyers and judges in Pakistan who demonstrated courage in upholding the rule of law in their country.”

This paper will examine the context in which President General Pervez Musharraf acted against the Pakistan judiciary’s increasing independence and willingness to question and condemn Executive power. The paper will focus on Musharraf’s antagonistic relationship with Chief Justice Iftikhar Chaudhry, who became the symbol of judicial independence in Pakistan as he led the Pakistan Supreme Court in checking executive power. Section I gives a history of the current struggle, from Musharraf’s appointment as army chief, to the coup that brought him to power, and finally to his dismissal of Chief Justice Chaudhry and other federal judges. Section II examines the concept of judicial independence as understood by the Pakistani judiciary, the benefits of judicial autonomy, and why its existence in the Constitution and judicial precedent requires compliance by the Pakistani government.

To provide a background to the Chaudhry court’s independence, Section III provides a brief history of Article 58(2)(b), a constitutional amendment passed by the previous coup-maker President General Zia-ul-Haq, which allows the President to dismiss the National Assembly. This section will


briefly examine the judiciary’s varied response when Article 58(2)(b) was used to dissolve two National Assemblies, repealed by the National Assembly under Prime Minister Nawaz Sharif, and finally reinstated by General Musharraf.\footnote{See generally Osama Siddique, The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies Under the Pakistan Constitution and its Discontents, 23 \textit{Ariz. J. Int’l \\& Comp. Law} 615 (2006). Osama Siddique is an S.J.D candidate at Harvard Law School and the Founding Chair of and Associate Professor at the Department of Law \\& Policy, Lahore University of Management Sciences (LUMS). For this discussion, I am indebted to Professor Siddique and his article, which provides a complete history of Article 58 and an in-depth analysis of the Supreme Court’s reactions to its use by Pakistani Presidents, including an examination of the consistency of individual justices as they responded to multiple iterations of Presidents using Article 58 to dissolve the National Assembly. For a fuller understanding of the issue of judicial independence in Pakistan, I highly suggest that Professor Siddique’s article be read as a precursor to this one.}

Section IV begins the legal examination of the current struggle between executive and judicial power by examining the \textit{Zafar Ali Shah} case, in which the Supreme Court legitimized Musharraf’s 1999 imposition of martial law. The section then examines how Chief Justice Chaudhry began to lead the Court through increasing challenges to executive power, focusing especially on three main legal battles: (1) the \textit{Pakistan Steel Mills} Case, where the Chief Justice struck down the attempted privatization of the Pakistan steel industry; (2) petitions brought by human rights groups to challenge secret terrorism detentions; and (3) the judiciary’s reactions to Musharraf’s unconstitutional attempt to run for president while still holding an army post. In conclusion, Section V concludes by summarizing the ebb and flow of judicial independence in Pakistan and analyzing the importance of this development to Pakistan’s internal affairs and role as an actor in the War on Terror.

\section*{II. General Pervez Musharraf’s Military Rule}

Chief of Army Staff General Pervez Musharraf commandeered executive power through a bloodless military coup on October 13, 1999, deposing Prime Minister Nawaz Sharif.\footnote{See Pakistan’s Coup: The 17-Hour Victory, BBC NEWS, Nov. 11, 1999, http://news.bbc.co.uk/2/hi/south_asia/475195.stm. Sharif replaced Musharraf with General Ziauddin, but the new General found that no senior officer was prepared to accept his command. \textit{Id.} Ziauddin told Nawaz Sharif that if Musharraf was prevented from returning to the country, he was sure he could take control. Nawaz Sharif} Over the next few
years as President, Musharraf retained his position as Chief of Army Staff while consolidating executive power in his person. The coup began on October 13, 1999, when, reacting to long-standing tensions between the two, Prime Minister Sharif fired Musharraf while the General was on an official visit to Sri Lanka. When Musharraf tried to fly back into Karachi on a Pakistan International Airlines flight, Prime Minister Sharif ordered that the plane, full of civilians and running out of fuel, not be allowed to land.\textsuperscript{19}

The army high command responded by marching troops into Islamabad and placing Prime Minister Sharif and his loyalists under house arrest.\textsuperscript{20} The army also cut telephone lines and the signal to the Pakistan State Television station, on which Mr. Sharif had been expected to announce General Musharraf’s "resignation."\textsuperscript{21} Soldiers marched into the Karachi airport and forced the air traffic controllers to allow the plane to land.\textsuperscript{22} By the time Musharraf landed, the army "controlled the TV stations, administrative buildings, the power and communications infrastructure - and had the entire cabinet under guard."\textsuperscript{23} When the army restored television broadcasts, "a terse announcement ran across the bottom of the screen stating that Prime Minister Nawaz Sharif had been dismissed."\textsuperscript{24}

For the next nine years of his presidency,\textsuperscript{25} General Musharraf continued to solidify his position by increasing the power of the President while still retaining his position as Chief of Army

\textsuperscript{19} Sharif 'Diverted Aircraft.' BBC NEWS, Feb. 9, 2000, http://news.bbc.co.uk/2/hi/south_asia/636396.stm. Two hundred civilians were on the flight. \textit{Id.}

\textsuperscript{20} Pakistan's Coup: The 17-Hour Victory, \textit{supra} note 18.

\textsuperscript{21} \textit{Id.}

\textsuperscript{22} \textit{Id.} The plane reportedly had only seven minutes of fuel remaining. \textit{Id.}

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Id.}

On October 14, 1999, Musharraf issued the Proclamation of Emergency declaring himself the Chief Executive of Pakistan, and promulgated a Provisional Constitutional Order (PCO) to replace the 1973 constitution. The PCO also suspended the National Assembly and provincial assemblies, and prohibited the judiciary from acting against the Chief Executive. In January 2000, Musharraf ordered the judiciary to take a new oath of office by swearing to uphold the 1999 PCO. Six judges refused and were dismissed from their posts; they were replaced by judges who had sworn to uphold General Musharraf’s PCO and subsequent executive actions. On May 12, 2000, the Supreme Court, composed of judges who had taken this new oath of office, heard the Zafar Ali Shah case and approved Musharraf’s military coup under a doctrine of state necessity.

classic maneuvering that follows to give these coups legitimacy and strengthen the powers of the military rulers. [T]he army chiefs take six important steps. They co-opt the bureaucracy; use accountability against politicians; entrench the army in political and civil affairs; create a new breed of politicians subservient to them under the guise of local government reform; hold elections to create some sort of democratic legitimacy; and finally move to co-opt the judiciary.

See Musharraf to ‘Give up Army Post,’ BBC NEWS, Sept. 18, 2007, http://news.bbc.co.uk/2/hi/south_asia/7000120.stm. Musharraf kept his dual position throughout his presidency, promising to give it up only if he was re-elected in the November 2007 election. Id. The President to Hold Another Office Act, 2004, allowed Musharraf to be President and Chief of Army Staff at the same time, though this dual role would have been otherwise prohibited by Article 63 of the Pakistan Constitution. President to Hold Another Office Act, 2004 (Pak.), available at http://www.pakistani.org/pakistan/legislation/2004/actVIlof2004.html; see also Jayshree Bajoria, Pakistan’s Constitution, WASH. POST, Mar. 11, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/03/11/AR2008031101365.html. Moeen Cheema, Professor of Law and Policy at Lahore University of Management Sciences, explains that army chiefs who have taken over the government in Pakistan have a


See Siddique, supra note 17, at 695.

HUM. RTS. WATCH, supra note 28, at 15.

Shah v. Musharraf, [2000] 52 PLD SC 869, 1219-23 (Pak.).

HUM. RTS. WATCH, supra note 28, at 15.
To mixed reactions, Musharraf declared himself President of Pakistan on June 20, 2001, removing Sharif-appointed President Rafiq Tarar.\textsuperscript{33} After September 11, 2001, Musharraf became an American ally in the War on Terror, not in the least because Pakistan shares its northern border with Afghanistan.\textsuperscript{34} The Bush administration looked to Musharraf for military and intelligence support in fighting Al-Qaeda and the Taliban in Pakistani tribal areas.\textsuperscript{35} Pakistan received economic and military aid from the United States, and President Bush called Musharraf a "leader of great courage and vision."\textsuperscript{36}

Reassuring the country that he was "not power hungry," and that he wanted to create "real democracy," Musharraf declared on April 5, 2002 that he would allow a referendum to extend his term as president for five years, even after the new National Assembly elections in October.\textsuperscript{37} The promises of democracy fell through, however, on August 21, 2002, when Musharraf announced twenty-nine constitutional amendments that expanded the power of the president. Among the changes was the Seventeenth Amendment, which secured for the president the power to dissolve the National Assembly and granted Musharraf indemnity for all his actions since the coup.\textsuperscript{38} Whereas before, the president was simply a figurehead officer, the amendments now allowed Musharraf to dissolve an elected National Assembly and appoint military chiefs and Supreme Court justices.\textsuperscript{39} The amendments also gave the


military limited seats on the new National Security Council. In 2004, the National Assembly passed the President to Hold Another Office Act, allowing only Musharraf to simultaneously hold the President of Pakistan and Chief of Army Staff offices. Without this provision, Article 63 of the Constitution, which prevents a member of the National Assembly from holding another office for profit, would have prohibited this dual role.

Musharraf’s relationship with Iftikhar Muhammad Chaudhry began amiably enough when Musharraf appointed Chaudhry as Chief Justice of the Supreme Court of Pakistan on May 7, 2005. Chief Justice Chaudhry, however, began to grant hearings and to rule against the government on issues that the judiciary would traditionally have either dismissed on a technicality or ignored as politically non-justiciable. It began with the June 23, 2006 Pakistan Steel Mills decision, where, in an “unprecedented act of defiance,” Chief Justice Chaudhry annulled the privatization sale of Pakistan’s nationally-owned steel mills industry. In nullifying the sale, Chaudhry embarrassed the government by laying blame on Prime Minister Shaukat Aziz “for approving the under-priced sale of a major national asset.” The defiance continued in January 2007 as the Supreme Court granted and began holding hearings on charges brought by the Human Rights Commission of...
Pakistan on behalf of "disappeared" terrorism suspects.\(^{47}\)

On March 9, 2007, in an attempt to reassert his power, Musharraf tried to put Chief Justice Chaudhry on "compulsory leave" for "misuse of office," but the Chief Justice challenged the charges and refused to resign.\(^{48}\) General Musharraf’s friend and memoir author, Humayun Gauhar, said that "[Musharraf] lost his head and tried to fire the chief justice," and that "asking the chief justice to retire was a command . . . I don’t think the refusal was ever in [Musharraf’s] scheme."\(^{49}\) Chaudhry also claimed (and the government denied) that he and his family were placed under house arrest.\(^{50}\) Musharraf’s victory was short-lived, however; on July 20, 2007, the Supreme Court unanimously held that Chaudhry’s dismissal was unconstitutional.\(^{51}\) Ten out of the thirteen-member bench also called for Chaudhry’s reinstatement.\(^{52}\) Musharraf’s next challenge was to be elected as President of Pakistan. The difficulty lay not in the votes but in the Constitution.

Pakistan’s Constitution does not allow an army officer to hold the civilian office of President.\(^{53}\) The issue was taken to the Supreme Court on September 28, 2007 where, under great political pressure, the Court dismissed the petitioners’ challenge to Musharraf’s dual role on technical grounds.\(^{54}\) The case was re-filed and reached the Court again on October 5, 2007. The Supreme Court decided not to stay the election but held that the

\(^{47}\) Hum. RTS. Watch, supra note 28, at 16; see also Salman Masood, supra note 44. “Since Pakistan joined the American-led effort to curb terrorism in 2001,” human rights groups noted the disappearance of at least 400 people “believed to have been picked up by [Pakistan's] powerful intelligence agencies without due process of law.” Id. at ¶14.

\(^{48}\) Hum. RTS. Watch, supra note 28, at 6; see also Masood, supra note 44.


\(^{50}\) Salman Masood, supra note 44.


\(^{52}\) Sengupta, supra note 51.


\(^{54}\) Hum. RTS. Watch, supra note 28, at 17.
Election Commission could not certify the result until the Court ruled on petitions challenging Musharraf’s rule.\textsuperscript{55}

Musharraf easily won the parliamentary election on October 6, 2007; the race was a landslide, because all other candidates dropped out and all opposing parties boycotted in protest of his candidacy.\textsuperscript{56} As ordered, however, the Election Commission did not certify the result.\textsuperscript{57} Because of the assemblies’ support for Musharraf, the Supreme Court was now under great political pressure to vote in favor of Musharraf and to approve a constitutional amendment allowing Musharraf to continue holding both the offices of Chief of Army Staff and President of Pakistan.\textsuperscript{58} The Court held hearings on November 2, 2007, and was expected to reach a decision on November 9.\textsuperscript{59} Musharraf took swift action to pre-empt any possibility of a decision against his candidacy. At 5:00 pm on November 3, 2007, General Musharraf, acting as Chief of the Army, declared a state of emergency and replaced the Constitution with another Provisional Constitutional Order, effectively precluding the Court from acting.\textsuperscript{60} Chief Justice Iftikhar Chaudhry led seven Supreme Court justices in an emergency meeting on the evening of November 3, and issued an order “barring the government from proclaiming emergency rule and urging government functionaries not to implement emergency orders.”\textsuperscript{61} When the Justices returned to their homes in the Judges’ Colony, they found their houses surrounded by police, who had “blocked journalists from entering, . . . disconnected

\textsuperscript{55} Id. at 18.

\textsuperscript{56} See Carlotta Gall, Boycotts and Legal Fight Cloud Victory for Musharraf, N.Y. TIMES, Oct. 7, 2007, at A3. As required by the Parliamentary system, Musharraf won a ninety-eight percent majority of votes from the national and provincial assemblies to defeat his only opponent, former Supreme Court judge Wajihuddin Ahmed. The Electoral College gave Musharraf more than fifty percent of its vote. Id.

\textsuperscript{57} HUM. RTS. WATCH, supra note 28, at 18.

\textsuperscript{58} Id. at 17-18.

\textsuperscript{59} Id.

\textsuperscript{60} Provisional Constitutional Order No. 1 of 2007 (Pak.), available at http://www.pakistani.org/pakistan/constitution/post_03nov07/pco_1_2007.html; see also HUM. RTS. WATCH, supra note 28 at 2.

\textsuperscript{61} HUM. RTS. WATCH, supra note 28, at 5-6; see also David Rohde, Pakistani Sets Emergency Rule, Defying U.S., N.Y. TIMES, Nov. 4, 2007, at A1.
telephone lines and jammed cellphones [sic] in the area.” Hours later, Pakistan’s state television announced that three loyalist judges had taken a new oath of office, swearing to uphold Musharraf’s emergency measure, and that pro-government judge Abdul Hameed Doger had replaced Chaudhry as Chief Justice.

Musharraf addressed the nation on the night of November 3, defending his decision to declare emergency rule and claiming he wanted to “preserve the democratic transition that [he] initiated eight years back.” He argued that the Supreme Court’s “judicial activism” was responsible for releasing sixty-one suspected terrorists, demoralizing Pakistan’s security forces, and crippling Pakistan’s actions in fighting terrorism and spreading democracy. “Obstacles are being created in the way of democratic process,” said Musharraf, “I think for vested, personal interests, against the interest of the country.” Two subsequent orders shut down all independent news stations and prohibited any report that “[brought General Musharraf or other officials] into ridicule or disrepute,” publicized statements from terrorist groups, or showed pictures of suicide bombers or victims of suicide attacks.

Musharraf resigned his post as Army Chief on November 28, 2007, and, the next day, amidst continued protest from the legal and political community, was sworn in as a civilian president. Even though he had less power as a civilian president in Pakistan’s Prime Minister-led parliamentary democracy, the powers Musharraf had secured for the position with his November 3 emergency decree boosted his presidency. Specifically,

62 Rohde, supra note 61.
63 Id.
64 Id.
65 Id.
66 Id.
67 Id.
68 See Gall & Perlez, supra note 18; Carlotta Gall, Musharraf Defends Actions After Taking Oath, N.Y. TIMES, Nov. 30, 2007, available at http://www.nytimes.com/2007/11/30/world/asia/30musharraf.html. Lawyers protested all over Pakistan on the day of Musharraf’s swearing in, clashing with police. “We are not scared,” said one lawyer, bleeding from the head after he was hit with a brick. “We don’t accept Musharraf even without his uniform. He has to go.” Id.
69 Gall & Perlez, supra note 18.
Musharraf reserved for himself "the power to lift the de facto martial law" that he imposed in November.\(^70\)

**III. Judicial Independence and Judicial Activism in Pakistan**

In order to better explain the relationship of the Pakistan judiciary to executive and parliamentary power, both before and after General Musharraf took power, this section seeks to define two concepts that will be analyzed in this paper: Judicial independence and judicial activism. Both of these terms have been used, often interchangeably, to describe the change in the Pakistan judiciary led primarily by Chief Justice Chaudhry.\(^71\)

For the purposes of this paper, an independent judiciary is understood to encompass the following ideal characteristics:

1. A judiciary free from the arbitrary and capricious use of executive or parliamentary power to influence judicial action.
2. A judiciary that makes legal rulings primarily based on precedent and objective standards rather than the justices' personal political views.
3. A judiciary whose rulings are followed by government actors and other affected parties.

These characteristics are not exclusive and take into account the role of the judiciary as explained in the Pakistani constitution and by precedent. However, these principles, especially the

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\(^{70}\) Id. Parliamentary elections were set for January 8, 2008. Both Benazir Bhutto and Nawaz Sharif, exiled former Prime Ministers, were back in Pakistan and joined the legal community in calling for Musharraf's resignation and for action to overturn the presidency's reserved power over the National Assembly. \textit{Id.} Benazir Bhutto was assassinated on December 27, 2007 while she was giving a speech at a rally. Salman Masood & Carlotta Gall, \textit{Bhutto Assassination Ignites Disarray}, N.Y. TIMES, Dec. 28, 2007, available at http://www.nytimes.com/2007/12/28/world/asia/28pakistan.html.


Chaudhry's judicial activism . . . had made him popular in the eyes of ordinary people seeking justice but [had] irked a few in [Musharraf's administration]. Some of his decisions had started to appear like an open challenge to the government, and in recent weeks cases of missing persons had been a cause of embarrassment for a few in high places." \textit{Id.}; see also Address of Iftikhar Muhammad Chaudhry to the New York Bar, \textit{supra} note 14. The New York City Bar awarded Chief Justice Chaudhry an honorary membership, recognizing his "efforts to uphold Pakistan's independent judiciary," and "a symbol of the movement for judicial and lawyer independence in Pakistan." \textit{Id.}
second and third, present the most significant ways in which the Musharraf administration has recently threatened the independence of the Pakistani judiciary.

Judicial activism has been criticized as inappropriate judicial action that goes beyond the realm of interpretation of law into policy decisions, stepping into the Legislature's duty. While judicial independence implies a sense of balance and autonomy between parts of government, judicial activism implies that the judiciary is proactively reaching out to initiate change in policy or action by the executive and legislative branches. Judicial activism may have a proper role in an independent judiciary based on a concept of separation of powers; however, if the Court continually ignores executive excesses, it "might appear to be abdicating its duty to interpret the Constitution if it [is] consistently punt[ing] on hard questions." Thus, even if policy questions emerge when the Court is analyzing a controversy, "the Supreme Court can and should declare what the law is, even in difficult or politically sensitive cases."

A. The Role of the Judiciary in Pakistan's Constitution and Precedents

The 1973 Constitution of Pakistan places the Supreme Court of Pakistan above four provincial High Courts and "such other courts as may be established by law." The Supreme Court has

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72 Keenan D. Kmiec, The Origin and Current Meanings of "Judicial Activism," 92 CAL. L. REV. 1441, 1460 (2004). Though this article interprets judicial activism in the American legal system, the framework of the judiciary and the understandings of judicial roles are so similar that it is fair to make the analysis. For example, Chief Justice Irshad Hasan Khan in the Zafar Ali Shah case extensively quotes the American judicial theories of Alexander Hamilton and Judge Learned Hand. See Shah v. Musharraf [2000], 52 PLD SC 869, 1121 (Pak.).

73 See Florida v. Wells, 495 U.S. 1, 13 (1990) (Stevens, J., dissenting) ("It is a proper part of the judicial function to make law as a necessary by-product of the processes of deciding actual cases and controversies. But to reach out so blatantly and unnecessarily to make new law in a case of this kind is unabashed judicial activism.").

74 Kmiec, supra note 72, at 1465.

75 Id.

original jurisdiction by which it may issue declaratory judgments over any dispute between the federal and provincial governments or hear a petition if the matter is of public importance and no other adequate remedy exists.\textsuperscript{77} The Court has appellate jurisdiction from another court's "judgment, decree, final order or sentence."\textsuperscript{78} The Constitution also makes the Supreme Court's legal rulings unquestionably final and binding on other courts and executive officials.\textsuperscript{79} Furthermore, the Supreme Court can rely on the cooperation of other officials, as the Constitution provides that "all executive and judicial authorities through out [sic] Pakistan shall act in aid of the Supreme Court."\textsuperscript{80}

The intent of Pakistan's founders to have a judiciary protected from executive control is clear: "The judiciary shall be separated progressively from the Executive within [fourteen] years from the commencing day [of the country's founding]."\textsuperscript{81} However, the President of Pakistan has considerable authority over the appointment of the Chief Justice and Justices. The Constitution provides that the Supreme Court is to be headed by the Chief Justice of Pakistan and otherwise consists of a number of judges that may be determined by the National Assembly or the President.\textsuperscript{82} The Chief Justice is appointed by the President, "and each of the other Judges shall be appointed by the President after to prime ministerial advice, while including safeguards against prime ministerial abuse" of power. Siddique, supra note 17, at 631. This balance was thrown off by General Zia-ul-Haq's creation of Article 58(2)(b), which gave the President the power to dissolve the National Assembly practically at will. \textit{id.}


\textsuperscript{78} \textit{id.} The President can also ask the Supreme Court for an advisory opinion "on any question of law which he considers of public importance." \textit{id.} art. 186(1).

\textsuperscript{79} \textit{id.} art. 189. "Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan." \textit{id.}

\textsuperscript{80} \textit{id.} art. 190. The Supreme Court's opinion of itself and its role in the Pakistani government is also worth reading. Supreme Court of Pakistan Website, \textit{Overview}, \textit{http://www.supremecourt.gov.pk/web/page.asp?id=116} (last visited Feb. 2, 2010).

\textsuperscript{81} The Constitution of the Islamic Republic of Pakistan art.175(3) (Pak.), \textit{available at} http://www.pakistani.org/pakistan/constitution/part7.ch1.html.

\textsuperscript{82} \textit{id.} at art. 176 (Pak.), \textit{available at} http://www.pakistani.org/pakistan/constitution/part7.ch2.html (last visited Feb. 2, 2010). (The number of judges will be "so many other Judges as may be determined by Act of [the National Assembly], or, until so determined, as may be fixed by the President.") \textit{id.}
consultation with the Chief Justice.” \(^{83}\) Before entering office, the Chief Justice “shall make an oath before the President, and any other Judge of the Supreme Court shall make [an oath] before the Chief Justice.” \(^{84}\) If the office of the Chief Justice is vacant or if the Chief Justice “is absent or is unable to perform the functions of his office due to any other cause,” the President can appoint the most senior of the remaining justices “to act as the Chief Justice of Pakistan.” \(^{85}\) The justices of the Pakistan Supreme Court do not have lifetime tenure; they only hold office until they reach sixty five years of age, resign, or are “removed from office in accordance with the Constitution.” \(^{86}\)

The judiciary also envisions itself as more than just a counterbalance to executive and judicial power. Chief Justice Irshad Hasan Khan, writing for the majority in *Syed Zafar Ali Shah v. General Pervez Musharraf*, \(^{87}\) stated that the province of the judiciary is to protect fundamental rights and individual freedoms and to ensure checks and balances to sustain the separation of powers. \(^{88}\) These duties “[call] for an independent and vigilant system of judicial administration so that all acts and actions leading to infringement of Fundamental Rights are nullified and the rule of law upheld in the society.” \(^{89}\) Furthermore, the judiciary’s role is not only to abstractly protect the Constitution and laws of the land, but to actively promote the welfare of the country and its people.

*[The Judiciary]* is called upon to enforce the Constitution and safeguard the Fundamental Rights and freedom of individuals. To do so, the Judiciary has to be properly organized and effective and efficient enough to quickly address and resolve public claims and grievances; and also has to be strong and independent enough to dispense justice fairly and impartially. It is such an efficient and independent Judiciary which can foster an appropriate

\(^{83}\) *Id.* art. 177(1).
\(^{84}\) *Id.* art. 178.
\(^{85}\) *Id.* art. 180.
\(^{86}\) *Id.* art. 179.
\(^{87}\) Shah v. Musharraf, [2000] 52 PLD SC 869 (Pak.).
\(^{88}\) *Id.* at 1121, ¶ 211-12. Chief Justice Khan actually includes an entire passage on judicial independence from THE FEDERALIST NO. 78 (Alexander Hamilton).
\(^{89}\) *Id.* at 1121, ¶ 211.
legal and judicial environment where there is peace and security in the society, safety of life, protection of property and guarantee of essential human rights and fundamental freedoms for all individuals and groups, irrespective of any distinction or discrimination on the basis of cast [sic], creed, colour, culture, gender or place of origin, etc. It is indeed such a legal and judicial environment, which is conducive to economic growth and social development.\textsuperscript{90}

Because the Pakistani Constitution and the Courts themselves recognize their role as counter-balance to executive and judicial power and as an active protector of fundamental rights, it is fair to analyze judicial actions by these standards. Historically, however, the Pakistan Judiciary "was not known for its independence."\textsuperscript{91} Since the country was founded, the Courts have refrained from questioning executive and legislative actions in any meaningful way, deferentially arguing that "the power of judicial review should be exercised with caution"\textsuperscript{92} and "[j]udges must take care not to intrude upon the domain of the other branches of Government."\textsuperscript{93} However, when Iftikhar Chaudhry began his role as Chief Justice, a notable change occurred in the judiciary's response to executive and legislative action. Not only did Chief Justice Chaudhry lead the Supreme Court in granting hearings and ruling against the executive on previously untouched issues, his actions mobilized the entire Pakistani legal community to take action against Musharraf's abuse of Executive power. The Chaudhry Court's actions, which prompted the community-wide movement, created a judiciary that broke from tradition in its willingness to analyze and overturn the administration's excesses.

\textsuperscript{90} Id. at 1121, ¶ 212.


\textsuperscript{92} See Shah, PLD 2000 SC at 1123, ¶ 215.

\textsuperscript{93} Id. (quoting Brig. (Retd.) Imtiaz Ahmed v. Government of Pakistan through Secretary, Interior Division, 1994 SCMR 2142, ¶ 12).
IV. A Weak Foundation: The Supreme Court's Acquiescence to the Article 58(2)(b) Presidential Power

Article 58(2)(b) is a Constitutional provision that provides the President "with untrammeled discretionary powers to dissolve [The National Assembly] on a largely subjective judgment of [its] performance." The Supreme Court's judicial review of Article 58(2)(b) dissolutions provides insight into the willingness, or lack thereof, of the Court to check Executive power in the decades leading up to the Musharraf presidency. The image that emerges is of a judiciary that was neither decidedly independent nor thoroughly controlled by the Executive. Rather, the Court's willingness to question the Executive ebbed and flowed as judges strayed between both statutory and precedent-based decisions and also judicial extensions of their own political preferences. With the first use of Article 58(2)(b), the Pakistan judiciary used the Constitution to narrowly define the Article 58(2)(b) power but not actually reversed the Executive action. Ultimately, judges vacillated between stringent and relaxed tests, and though each use of Article 58(2)(b) was legally challenged, it was "invariably judicially legitimized[...]. . . . undermin[ing] judicial integrity, capacity, and consistency."95

A. Article 58(2)(b): The Presidential Power of Dissolution

Article 58(2)(b) was added to the Constitution in 1985 by General Zia-ul-Haq, the army chief who became President after a military coup in 1977.96 The operative clause allows the President to "dissolve the National Assembly in his discretion, where, in his opinion:" (a) the Prime Minister has lost the confidence of the National Assembly and no other member can fulfill the role, or (b) when "a situation has arisen in which the Government of the Federation cannot be carried on in accordance with the provisions of the Constitution and an appeal to the electorate is necessary."97

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94 Siddique, supra note 17, at 622.
95 Id. at 623.
96 Id. at 622.
97 The Constitution of the Islamic Republic of Pakistan art. 58(2)(b) (Pak.), supra note 15. Proponents of the Article thought of this clause as a "safety valve" that would avoid martial law by providing a constitutional method of resolving a government stalemate. See Siddique, supra note 17, at 623. Opponents argue that "Article 58(2)(b) has been a reason for, rather than a solution to, acute political instability" and that it "has
Since General Zia first used the Article to dissolve the National Assembly, “four elected governments were dissolved through it in the short span of eight years.” In 1997, the National Assembly led by Prime Minister Nawaz Sharif eliminated Article 58(2)(b) with the Thirteenth Amendment, but President Musharraf reinstated Article 58(2)(b) with the Legal Framework Order, 2002, and the Seventeenth Amendment.

B. The Irregular Judicial Review of Article 58(2)(b)

General Zia-ul-Haq first used Article 58(2)(b) on May 29, 1988 when he announced that he was dissolving Prime Minister Muhammad Khan Junejo’s National Assembly. Zia charged “that the National Assembly was not up to the task of adequately performing its role and had failed to safeguard the property, honor, and security of the people.” In its first opportunity to interpret Article 58(2)(b), the Supreme Court in Pakistan v. Muhammad Saifullah Khan (Haji Saifullah) based its judgment on detailed constitutional interpretation and severely limited the power, “exud[ing] enthusiasm for the restoration of democracy, openly had hugely negative ramifications for a nascent democratic culture.”

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101 Siddique, supra note 17, at 649 (citing Haji Saifullah, 41 PLD 166 (1989) (Pak.)). Zia’s charges were “that the National Assembly was not up to the task of adequately performing its role and had failed to safeguard the property, honor, and security of the people.” Id.

102 Siddique, supra note 17, at 649.
professing faith in a parliamentary system.”

Justice Nasim Hasan Shah, writing for the ten justice majority, held that the Article 58(2)(b) power could only be used when “[t]he machinery of the Government has broken down completely, its authority [has] eroded and the government cannot be carried on in accordance with the provisions of the Constitution.”

Justice Shah created a two-step process that the President had to follow: “First, the President had to form an objective opinion . . . based on some material and factual grounds, which in turn were judicially reviewable.”

“Secondly, if [the President’s] objective opinion was that the government qualified to be dissolved because it met the test, it was within the President’s discretion to dissolve it.” Nevertheless, despite finding that Zia’s justification for dissolving the National Assembly did not meet the stringent test and thus that the dissolution was illegal, the Court was not willing to restore the Assembly. Without any legal basis and “rather ambiguously, Justice Shah stated that . . . national interest lay in the holding of elections, rather than in reviving the assemblies.”

Though the Court was willing to make legal arguments against President Zia’s dissolution, the interpretation was never truly enforced and the executive action stood.

The second use of Article 58(2)(b) dissolution was performed by President Ghulam Ishaq Khan on August 6, 1990 to dissolve the National Assembly led by Prime Minister Benazir Bhutto. Unlike General Zia’s weakly supported allegations, President Khan’s “order of dissolution [was] precise . . . and supported by

103 Id. at 655 (quoting Haji Saifullah at 190, 194-5).
104 Id. at 654-55, (quoting Haji Saifullah at 190, 194-5).
105 Id. at 655 (quoting Haji Saifullah at 190, 194-5).
106 Id.
107 Siddique, supra note 17, at 657 (citing Muhammad Nawaz Sharif v. President of Pak., [1993] 45 PLD 473, 565 (Pak.)). Justice Shah later regretted this decision when he examined the dissolution of PM Nawaz Sharif’s National Assembly in 1993. “On [sic] hindsight, I now think that after having found the action of dissolution of the National Assembly was not sustainable in law, the Court should not have denied the consequential relief and ought to have restored the National Assembly.” Id.
108 Siddique, supra note 17, at 659 (“Thus, barely two years after having to sit in judgment over the fate of a dissolved Assembly, the Pakistani courts found themselves adjudicating the legality and legitimacy of another dissolution – this time involving a government that had come to power through the first party-based elections in many years.”). Id.
documentary evidence."\textsuperscript{109} In \textit{Ahmed Tariq Rahim v. Pakistan},\textsuperscript{110} a twelve judge majority of the Supreme Court upheld the dissolution order. "Without any preliminary justifications or analysis," the Court opted for a broader test than the \textit{Haji Saifullah} precedent.\textsuperscript{111} Justice Shafiur Rahman, writing for the majority, "did not explain why he had departed from the previous [more stringent \textit{Haji Saifullah}] test, which was based on precedent and consensus, and with which he was in full agreement."\textsuperscript{112} He created a standard that allowed the use of Article 58(2)(b) "not just [as] a curative action, but also a preventative one."\textsuperscript{113} Defining Article 52(2)(b) dissolution as "an extreme power, to be exercised where there is an actual or imminent breakdown of the constitutional machinery,"\textsuperscript{114} without elaborating upon what those situations would entail, the Justice left more discretion to "the President's judgment call . . . [based on] a more subjective evaluation of the state of affairs in the country."\textsuperscript{115}

The Court in \textit{Tariq Rahim} proved still weaker and less willing to assert any real power than it was in \textit{Haji Saifullah}. Any justification for creating a weaker test that seriously expanded presidential power was "at worst nonexistent and at best highly unconvincing,"\textsuperscript{116} and the opinion "barely . . . evaluated the substantive content and merit of the actual grounds for dissolution."\textsuperscript{117} The result was that "it was already becoming clear that when the judiciary was entrusted with the task of mediating between confrontational political forces" like the President, Prime Minister, and the National Assembly, "it was unavoidable for the judiciary to come out looking tarnished."\textsuperscript{118}

The third dissolution occurred when President Khan again used Article 58(2)(b) to dismiss the National Assembly led by

\textsuperscript{109} Id. at 659-60.
\textsuperscript{110} Ahmad Tariq Rahim v. Pakistan, [1992] 44 PLD 646, 684 (Pak.).
\textsuperscript{111} Siddique, supra note 17, at 665.
\textsuperscript{112} Id. at 666.
\textsuperscript{113} Id. at 665, 668.
\textsuperscript{114} Rahim, 44 PLD at 684 (Pak.).
\textsuperscript{115} Siddique, supra note 17, at 665.
\textsuperscript{116} Id. at 671.
\textsuperscript{117} Id. at 669.
\textsuperscript{118} Id. at 671.
Prime Minister Nawaz Sharif.\textsuperscript{119} Sharif, previously President Khan's protégé, started moving away from his mentor's political ideology. President Khan responded by dissolving the National Assembly on April 18, 1993.\textsuperscript{120} The Supreme Court's subsequent actions showed the justices' own interest in speaking on the highly politicized issue. Invoking its original jurisdiction, the Court took the case before any lower courts. Chief Justice Nasim Hasan Shah also suggested that the Court had already planned its ruling by making public statements "to the effect that the Court would reach a result that would be appreciated by the public."\textsuperscript{121}

In arguably "the single most irreconcilable judicial opinion in all the dissolution cases," \textit{Muhammad Nawaz Sharif v. President of Pakistan},\textsuperscript{122} Justice Rahman reverted back to the narrower \textit{Haji Saifullah} test without even mentioning his own opinion in \textit{Tariq Rahim}.\textsuperscript{123} Justice Rahman then "conducted [an] . . . exhaustive analysis" of President Khan's reasoning behind the dissolution and found it unpersuasive.\textsuperscript{124} Not only did the Court find the dissolution unconstitutional, it went a step further and restored the dismissed Assembly.\textsuperscript{125} Though the result was arguably good in a democratic sense, concurring opinions showed evidence that the inexplicable flip to a narrow test was due to members of the judiciary's "deep political polarizations . . . [and] subtle, though noticeable indications of [the Justices'] personal political preferences" for Nawaz Sharif.\textsuperscript{126}

\textsuperscript{119} \textit{Id.} at 672.
\textsuperscript{120} \textit{Id.} at 673.
\textsuperscript{121} Siddique, \textit{supra} note 17, at 674.
\textsuperscript{122} \textit{Id.} at 675 (citing \textit{Muhammad Nawaz Sharif v. President of Pak.}, [1993] 45 PLD 473 (Pak.)).
\textsuperscript{123} \textit{Id.} "Article 58(2)(b) of the Constitution empowers the executive head to destroy the legislature and to remove the chosen representatives. It is an exceptional power provided for an exceptional situation and must receive as it has in \textit{Haji Saifullah} the narrowest interpretation." \textit{Id.} (quoting \textit{Nawaz Sharif}, 45 PLD at 579).
\textsuperscript{124} \textit{Id.} at 676 (citing \textit{Nawaz Sharif}, 45 PLD at 630).
\textsuperscript{125} \textit{Id.} at 680 (citing \textit{Nawaz Sharif}, 45 PLD at 570).
\textsuperscript{126} \textit{Id.} at 681. Serious allegations against Prime Minister Nawaz Sharif received substantially less attention from the court, "while [Benazir] Bhutto got more than her fair share of reprimands for lesser crimes" when the Court upheld the dissolution of her National Assembly. \textit{Id.} at 676. In reverting to the narrower \textit{Haji Saifullah} test, Justice Rahman decided that the President could not claim a deadlock and dismiss the Prime Minister without first obtaining a vote of no-confidence from the National Assembly.
The fourth and final dissolution case was a repeat performance. Benazir Bhutto was reelected to another term as Prime Minister in 1993 and developed a tense personal and political relationship with President Farooq Leghari. Serious tensions also arose between Bhutto and Chief Justice Sajjad Ali Shah, which “started with a disagreement over a judicial appointment and became progressively worse as the Chief Justice pronounced unfavorably against several Benazir [judicial] appointments.” Prime Minister Bhutto was ousted and arrested by military troops on November 4, 1996; President Leghari used Article 58(2)(b) to dissolve the National Assembly the next day.

Through her political statements and policies directed at judges, Bhutto “had antagonistically pushed the judiciary into a comer” and Chief Justice Shah “proved to be not above showing [his resentment] in his judgment.” One day before hearing the case of the second Bhutto dissolution, however, the Court decided Mahmood Khan Achakzai v. Pakistan, a challenge to the Eighth Amendment and Article 58(2)(b) itself. The Court unanimously upheld the Eighth Amendment, arguing that since previous legislatures had allowed the amendment to stand, there was clear “ratification by implication.” In Benazir Bhutto v. President of Pakistan, the Supreme Court upheld the dissolution using a

See id. (citing Nawaz Sharif, 45 PLD at 616-17). Bhutto overcame a vote of no-confidence before President Khan dissolved her government, but this “badge of legitimacy was apparently found to be insufficient for Benazir Bhutto in [Tariq Rahim].” Id.

127 See Siddique, supra note 17, at 682. “At the height of their strained relationship, in a veiled attack, Benazir accused [Leghari] and the military intelligence of involvement in the murder of her brother... who was gunned down in front of his house in mysterious circumstances on September 20, 1996.” Id. (citing Benazir Bhutto v. President of Pak., [1998] 50 PLD 388, 482 (Pak.)).

128 Id.

129 See id. at 683.

130 Id. at 684. Bhutto had also “allegedly victimized the Chief Justice’s family, and there was widespread news coverage of a government-sponsored police raid on the house of the Chief Justice’s daughter, with the motive to involve his son-in-law in a corruption case.” Id.

131 Siddique, supra note 17, at 685 (citing Mahmood Khan Achakzai v. Pakistan, [1997] 49 PLD 426 (Pak.)).

132 Id.

133 Siddique, supra note 17, at 685-86 (quoting Achakzai, 49 PLD at 446 (Pak.)).
relaxed test somewhere between Haji Saifullah and Tariq Rahim that showed "benign acceptance of the presidential grounds for dissolution."\textsuperscript{136}

\textbf{C. Lessons from Article 58(2)(b)}

The Article 58(2)(b) cases hardly proved the Pakistan judiciary to be an independent body that was willing to serve and to ensure a balance of powers through judgments based on law and logic. Instead, the decisions were characterized largely by the Justices’ personal political preferences and weak judicial review, hypothetically used but rarely enforced to overturn executive action. Though the Court initially placed strict limitations on the President’s use of Article 58(2)(b) in the Haji Saifullah case, this was largely an academic and theoretical exercise in judicial review and its logical result was never realized. Then, without any legal explanation, the Court in Tariq Rahim created a new, deferential interpretation of Article 58(2)(b) that greatly expanded presidential power. Furthermore, with no legal explanation, but with actions that reeked of political preference, the Court reverted to the strict Haji Saifullah standard to keep its favored Prime Minister, Nawaz Sharif, in office.

The Court’s approach to the Nawaz Sharif and second Benazir Bhutto dissolutions showed that the Court was willing to use thorough judicial review and even enforce its result to the benefit or detriment of its preferred candidate. However, the largely halfhearted judicial review would become characteristic of the Pakistan judiciary when analyzing executive action, and the Executive could naturally come to rely on this deference.\textsuperscript{137} When

\textsuperscript{134} Siddique, \textit{supra} note 17, at 685 (citing Benazir Bhutto v. President of Pakistan, [1998] 50 PLD 388 (Pak.)).

\textsuperscript{135} Siddique, \textit{supra} note 17, at 686. The court first made life difficult for Bhutto. Her petition was dismissed twice “on flimsy procedural grounds,” and “her request for an early hearing was declined as the Supreme Court first took up less urgent petitions... and did not cut short its winter break in spite of the prevailing political crisis.” \textit{Id.} at 686-87. “The press and public opinion largely saw these as unnecessary procedural hurdles to frustrate Benazir.” \textit{Id.} at 687.

\textsuperscript{136} \textit{Id.} at 691.

\textsuperscript{137} \textit{See, e.g.}, Shah v. Musharraf, [2000] 52 PLD SC 869 (Pak.). “Historically, Pakistan’s judiciary was not known for its independence. Over the previous half century the courts had frequently been intimidated or induced to support military coups and other acts contrary to the rule of law, most notably the hanging of the deposed Prime Minister
first tested by the new regime, the Supreme Court's approach to Musharraf's coup would provide an example both of this political deference and Musharraf's successful actions to further tilt the Court in the Executive's favor.

V. The Supreme Court's Early Deferential Holdings on Musharraf's Rule

Iftikhar Chaudhry was appointed to the Supreme Court in February 2000 after serving ten years as a judge in the Balochistan High Court. As a junior justice, "Chaudhry did not betray any signs of breaking with the past traditions in order to chart an independent course for himself." He voted with the majority in the Zafar Ali Shah case to validate Musharraf's emergency rule and immunize him from actions taken in connection with the emergency, and in the Seventeenth Amendment case to uphold the amendment that increased Executive power. These actions left him "despised" by some of the legal community for making pro-Executive decisions, and "he was widely criticized for legitimizing martial law." In these two cases, the Supreme Court held to the Judiciary's tradition of validating army takeovers by affirming the destruction of civilian rule and securing for Musharraf both immense executive power and confidence in judicial support.

139 Id.
140 See id.
142 See Siddique, supra note 17, at 622 ("Since its emergence on August 14, 1947, Pakistan's political and constitutional evolution has been repeatedly interrupted by praetorian rule through several impositions of martial law - the most recent one imposed after General Pervez Musharraf's military coup in 1999. Musharraf's coup was legitimized by the judiciary, which has been habitually relegated to the task of validating army takeovers through questionable jurisprudence.") Id. "[T]here have been seven military displacements of civilian governance with military rule since independence." Id. at 624, n. 25.
A. Syed Zafar Ali Shah v. General Pervez Musharraf, Chief Executive of Pakistan

In the Zafar Ali Shah case, the petitioner challenged "the validity and legal effect of the army take-over" and the issuance of General Musharraf's Proclamation of Emergency (Proclamation), the Provisional Constitutional Order No. 1 of 1999 (PCO), and the Oath of Office (Judges) Order, 2000 (Oath). The Proclamation and PCO, as a result of the Senate, National, and Provisional Assemblies led by Prime Minister Nawaz Sharif were dissolved and the Constitution was held in abeyance. The PCO ordered that the Court could not "call or permit to be called in question the Proclamation of Emergency... or any Order made in pursuance thereof," and that "no judgment... whatsoever shall be made... against the Chief Executive [Musharraf] or any authority designated by him." The Oath stated that a Supreme Court judge "shall not continue to hold that office if he... does not make [the] Oath." Judges were thus required to continue to "function and exercise their respective powers and jurisdiction [only] subject to the Proclamation and PCO as amended." Only those justices, including Chaudhry, who had taken the oath and sworn to uphold Musharraf's orders heard the Zafar Ali Shah case.

Petitioners argued that the Proclamation and the PCO were unconstitutional because they violated the constitutional principle

143 Shah v. Musharraf, [2000] 52 PLD SC 869 (Pak.).
146 Shah, 52 PLD SC 869 at 909 (Pak.).
147 Id. at 918, ¶ 9.
148 Id. at 913 (quoting Provisional Constitutional Order No. 1 of 1999, §§ 4(1) and 4(2)).
149 Id. at 915 (citing Oath of Office (Judges) Order, 2000 Order No. 1 of 2000).
150 Id. at 915-16.
151 See id.
that State power be exercised only "through the chosen representatives of the people . . . based on Federalism, [a] Parliamentary form of Government, [and the] Independence of [the] Judiciary." They further argued that the army takeover had "impaired the judicial trichotomy of powers by eliminating the Executive, suspending the Legislature, and making an attempt to curtail the independence of the Judiciary." The 2000 Oath was also challenged on the ground that it restricted the Supreme Court's power of judicial review.

First, the Court went through a long and detailed discussion of the Pakistani judiciary's independence, claiming that the power of judicial review was inherent and could never be removed by any legislation. The Court held that even if the Martial Law Orders did attempt to take away jurisdiction, the Court still had "the power of judicial review to judge the validity of any act or action of the Armed Forces." The Court also held that "the Superior Courts continue to function under the Constitution" and that "[t]he mere fact that the Judges . . . have taken a new oath under the Oath of Office (Judges) Order No.1 of 2000, does not in any manner derogate from this position." But, while recognizing the President's power, the Court held that judicial power still existed, "notwithstanding anything to the contrary contained in any legislative instrument enacted by the Chief Executive." Finally, the Court could not review the cases of judges who either had not taken the oath or were not given the oath because they were "past and closed transaction[s]."

Despite its claims of supreme and inherent judicial review, the Court mostly accepted Musharraf's claims without substantial analysis. With resounding unanimity, the Supreme Court held that the army takeover and all three contested orders were legitimate;

153 Id. at 922, ¶ 17.
154 Id. at 1117, ¶ 203.
155 Id. at 869.
156 Id. at 1221, ¶ 6, § vi.
157 Id. at 1220, ¶ 5.
158 Shah, 52 PLD SC 869, at 1221, ¶6, §vi (Pak.). The Court stated that attempts to remove jurisdiction "[are] an exercise in futility and the power of judicial review remains intact." Id. at 872.
159 Id. at 1222, ¶ 8.
the army takeover was "extra-constitutional" but still valid under a doctrine of "State necessity." The Court agreed with General Musharraf that the government had completely broken down and that there was no constitutional solution to the problem since Article 58(2) had been repealed. The Court held that Musharraf's actions "as were required for the orderly running of the State and all acts, which tended to . . . promote the good of the people, [were] also validated." The Court also confirmed immense power for Musharraf, holding that "as Chief Executive, having validly assumed power by means of an extra-Constitutional step, in the interest of the State," he was now entitled to "perform all such acts and promulgate all legislative measures" that would achieve his declared objectives, which "tend[ed] to advance or promote the good of the people," or that were required for "the ordinary orderly running of the state."

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160 Id. at 1219. The Court found that:

[all the elements viz. inevitable necessity; exceptional circumstances; no other remedy to apply, measures taken being proportionate to the necessity and of temporary character limited to the necessity and of temporary character limited to the duration of exceptional circumstances, were present, inasmuch as, the Constitution provided no solution to meet the extraordinary situation prevailing on 12th October, 1999 when the Armed Forces took over the affairs of Pakistan.]

Id. at 878-79, ¶ 0. The court also stated that "the Armed Forces had to intervene to save the State from further chaos, for maintenance of peace and order, economic stability, justice and good governance and to safeguard integrity and sovereignty of the country dictated by highest considerations of State necessity and welfare of the people." Id. at 878, ¶ 1. Factors contributing to the complete government shutdown included corruption and mis-declaration of assets by politicians, id. at 875, ¶¶ d-e; that the government was merely an oligarchy, where only a few individuals and families held the reigns of economic and government power, id. at 876, ¶ g; "general apathy and indifference" among Pakistani citizens as shown by low voter turnout, id. at 876, ¶ h; and attempts to politicize, destabilize and create dissent in the army that could have resulted in chaos, anarchy, and an army faction civil war "had the former Prime Minister been successful in his designs," id. at 883, ¶ x.

161 Id. at 1168, ¶ 249. ("After careful analysis . . . we are of the view that it is never safe to confer unfettered powers on a person who is holding the reins of the affairs of the country as is embedded in the saying, 'power corrupts and absolute power corrupts absolutely.' Accordingly . . . we would like to observe that probably the situation could have been avoided if checks and balances governing the powers of the President and the Prime Minister had been in the field by means of Article 58(2)(b).") Id.

162 Id. at 1220, ¶ 3.

163 Id. at 1220, ¶ 6. Musharraf could also take any act or legislative measure that could have been made under the 1973 Constitution, including the power to amend the Constitution. Id. Constitutional amendments could only be made if the Constitution as it
The Court did provide some limits—Musharraf was required to hold elections for the National and Provisional Assemblies within ninety days and achieve his declared objectives within three years of the October 12, 1999 takeover. The Court also reserved for itself the power to "re-examine the continuation of the Proclamation of Emergency . . . at any stage if the circumstances so warrant." The Court concluded, "[T]his is not a case where old legal order has been completely suppressed or destroyed, but merely a case of constitutional deviation for a transitional period so as to enable the Chief Executive to achieve his declared objectives."

It is not surprising that the Zafar Ali Shah Court validated the army takeover—after all, the only judges who were allowed to hear this case were those who had sworn to uphold Musharraf's rule. The paradox is the passion with which the Court both proclaims its own authority and supports Musharraf's reasons for subordinating the entire country to himself and the army. This deference continues even in the face of a Provisional Constitution that makes a clear attempt to block the Judiciary's power to act against the government. What emerges from the Zafar Ali Shah case is not a system that respects federalism, but rather a judiciary that touts its own independence while acknowledging that it is subordinate to the Executive's claims of acting in the national interest. As Chief Justice Khan wrote, "the power of judicial review should be exercised with caution," and "[j]udges must stand could not achieve his declared objectives. Id. at 1221, ¶ 6. No amendment could be made to change the "salient features of the Constitution i.e. independence of Judiciary, federalism, [or the] parliamentary form of Government blended with Islamic provisions." Id. The "declared objectives" are as stated in Musharraf's speeches on October 13 and 17, 1999. Id.


165 Shah, 52 PLD SC 869 at 1223, ¶ 18.

166 Id. at 1222, ¶ 13.

167 General Zia-ul-Haq's military rule was also validated by the Supreme Court in Begum Nusrat Bhutto v. Chief of the Army Staff under the same doctrine of state necessity as was used to validate Musharraf's rule in Zafar Ali Shah. See [1977] PLD SC 657 (Pak.).

168 Shah, 52 PLD SC 869 at 1123, ¶ 215.
take care not to intrude upon the domain of the other branches of Government.”

Moreover, even though the Court argued that the attempt to limit judicial review is futile and invalid, the fact that the attempt was made showed that General Musharraf expected such unquestioning deference from the Judiciary. For all its words, the Supreme Court demonstrated in this case that it would provide such deference, even lamenting the repeal of the president-centric Article 58(2)b, which could have avoided the situation entirely. The claims of inherent judicial power were a facade; justices who had pledged to support the army rule graciously validated it, and “[w]hatever independence and commitment to constitutional ethos had been displayed by the Court in some of the early [Article 58(2)b] dissolution judgments seems like ancient, forgotten history.”

B. The Seventeenth Amendment Case

The Seventeenth Amendment was passed on December 31, 2003, further consolidating and legitimizing Executive power in General Musharraf. By validating the President to Hold

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169 Id. (quoting Brig. (Retd.) Imtiaz Ahmed v. Government of Pakistan through Secretary, Interior Division, [1994] SCMR 2142, ¶ 12 (Pak.)).
170 See id. at 1168, ¶ 249.
171 Siddique, supra note 17, at 699.

Clause (2): Amended Article 41 and stated that Article 63(1)(d) would become operative on December 31, 2004. See The Constitution of the Islamic Republic of Pakistan amend. XVII, cl. 2 (2003) (Pak.). Article 63(1)(d) says that “[a] person shall be disqualified from being elected or chosen as, and from being, a member of [the National Assembly if] he holds an office of profit in the service of Pakistan other than an office declared by law not to disqualify its holder.” Art. 63(1)(d). Ordinarily, the position of Chief of Army Staff would have disqualified Musharraf from acting as President under this Article. However, the date of operation, coupled with the “an office declared by law
Another Office Act, 2004 (Office Act), the Seventeenth Amendment allowed General Musharraf to hold both the Chief of Army Staff and President of Pakistan offices, exempting him from the Constitution’s express prohibition of the dual role. It also validated the Proclamation of Emergency and all orders following it and immunized Musharraf from any litigation resulting from those orders. Additionally, the Seventeenth Amendment validated the 2002 Legal Framework Order, which added the infamous Article 58(2)(b) dissolution powers back into the Constitution, and set a sixty-five year retirement age for Supreme Court justices.

not to disqualify its holder created a loophole which was filled by the President to Hold Another Office Act, 2004 (Office Act). Id; see also President to Hold Another Office Act, No. VII (2004) (Pak.), available at http://www.pakistani.org/pakistan/legislation/2004/actVIIof2004.html. Enacted on December 31, 2004, the Office Act allowed the President of Pakistan to also hold the position of Chief of Army Staff, and declared that such a dual office would not violate Article 63(1)(d). Id. The Act also explained that this provision was to be valid only for the current President, General Pervez Musharraf. Id.

Clause (3): Amended Article 58, which had been re-added into the Constitution by Musharraf’s Legal Framework Order, 2002, and added a clause that requires the President, within fifteen days of dissolving the National Assembly, to refer the dissolution to the Supreme Court for approval. See The Constitution of the Islamic Republic of Pakistan amend. XVII, cl. 3.

Clauses (6) and (7): Amended articles 179 and 195, the retirement age of Supreme Court Justices and High Court Judges was set at sixty five and sixty two, respectively. See id. cls. 6-7.

Clause (10): Validated and affirmed the Oct. 14, 1999 Proclamation of Emergency and all orders, appointments, and proceedings made between October 12, 1999 and the date the Seventeenth Amendment would take effect. This included the Provisional Constitution, Oath of Office (Judges) Order, 1000, the Legal Framework Order, 2002 (which added Article 58(2)(b) back into the constitution). See id., cl. 10. "Notwithstanding anything contained in the Constitution[, the orders] shall not be called in question in any court or forum on any ground whatsoever." Id.


The Constitution of the Islamic Republic of Pakistan art. 63(1)(d) (Pak.).

Id.
Petitioners challenged the validity of the Seventeenth Amendment, the 2002 LFO, the Office Act (2004) and other supplemental legislations that would give effect to the Amendment’s provisions. In analyzing the claims, the Supreme Court limited the scope of its judicial review, arguing that a constitutional amendment “can be challenged only on one ground, viz., it has been enacted in a manner not stipulated by the Constitution itself.”

The Court held that because Parliament was properly constituted and General Musharraf’s presidency had been approved at the time the Amendment was made, no procedural objection could be sustained. A substantive objection was improper for the Court to hear, because “[a] constitutional amendment posed a political question, which could be resolved only through the normal mechanisms of parliamentary democracy and free elections.” Even if the amendment violates “certain salient features of the Constitution, no constitutional amendment could be struck down by the superior judiciary” on those grounds.

The Court concluded with a sentiment that its hands were tied, stating that it “must make every attempt to reconcile the statute to the Constitution and only when it is impossible to do so, must it strike down the law.” Thus, the Court refused to overturn the Seventeenth Amendment and its supporting orders, stating that if they were struck down, “this entire constitutional edifice will collapse,” because all major officers of the country “will cease to hold office at once.” “In short,” said the Court, it was “not the function of the judiciary” to strike down a law where such an action “would invite chaos and create a constitutional crisis. This Court must allow the government to function and the institutions to gain strength and mature with time.”

178 See Judgment, supra note 172.
179 Id. at 27, ¶ 32.
180 Id.
181 Id. at 43, ¶ 57.
182 Id. at 42, ¶ 57.
183 Id. at 57, ¶ 87.
184 Judgment, supra note 172, at 34-35, ¶ 40. The Court further supported its reasoning: “The very fact that Parliament chose to [insert the provision that Article 63(1)(d) would only come into effect on Dec. 31, 2004, at the same time as the President to Hold Another Office Act] shows that Parliament did not intend the ban on holding of
C. The Court Before Chief Justice Chaudhry

The Zafar Ali Shah case and the Seventeenth Amendment present a paradoxical picture of the Pakistani judiciary. The Court asserted its inherent power of judicial review in Zafar Ali Shah but then carved out a very narrow scope in which to operate in the Seventeenth Amendment. It claimed that it was prevented from acting by the principles of federalism, but continued to justify extra-constitutional orders that allowed the President to take power and act without hindrance from the legislature or judiciary. Furthermore, though the Court limited its judicial review, claiming that it was not the Court’s place to speak on a political question, it certainly had no qualms about using strong language to empower the President. In both instances, the Court uses such strong language to legitimize and support Musharraf’s rule so as to call into question its purported narrow role, even going so far in the Zafar Ali Shah case as to lament the repeal of Article 58(2)(b) that would have consolidated even more power in Musharraf’s person.

Thus, the state of the judiciary before Chaudhry became Chief Justice was one where it at least acquiesced to and at most staunchly supported expansive executive power, explaining away difficulties with claims of separation of powers and state necessity. Extreme deference was given to executive power, leaving the stage open for the subjugation of the Pakistani government to General Musharraf’s military rule. Neither case is particularly telling of then Justice Chaudhry’s judicial viewpoints, though he voted with the majority and was criticized for his pro-government stance. He did take the Oath and presided as a justice in both the Zafar Ali Shah and the Seventeenth Amendment cases (Justice Irshad Hasan Khan and Justice Nazim Hussain Siddiqui presided as Chief Justice, respectively). Regardless of what prompted Chaudhry to take the Oath and vote with the Zafar Ali Shah majority to validate the takeover, he would soon make it clear that he was not willing to give Musharraf free reign over the country.

two offices to be absolute . . . but instead to be dependent upon the will of Parliament itself.” Id. at 53, ¶ 76. The Court described legislation as a political question, saying that “[t]his Court has consistently held that the wisdom or policy of the legislature is not open to question in the exercise of the power of judicial review.” Id. at 56, ¶ 85.

See Profile, supra note 138; Baker, supra note 141.
VI. The Chaudhry Court: The Rise of Judicial Independence

As a junior justice, Chaudhry was criticized for legitimizing Musharraf’s martial law rule in the Zafar Ali Shah case and other cases.\textsuperscript{186} General Musharraf, perhaps encouraged by Chaudhry’s voting record, appointed Chaudhry as Chief Justice of the Supreme Court of Pakistan on May 7, 2005, personally swearing him in.\textsuperscript{187} However, as Chief Justice, Chaudhry “took forceful action in cases relating to human rights, women and the environment, often coming down hard on senior police and civil officials to enforce the relevant laws.”\textsuperscript{188} In just one year, Chaudhry had used the Court’s original jurisdiction to hear petitions of over 6,000 human rights cases in Pakistan.\textsuperscript{189}

Musharraf recognized that Chaudhry’s new activism might threaten his chances of running for President, since Musharraf was still holding the office of Chief of Army Staff and his re-election would require a constitutional amendment ratified by the Supreme Court.\textsuperscript{190} On March 9, 2007, Musharraf attempted to dismiss Chief Justice Chaudhry for “misuse of office.”\textsuperscript{191} The charges

\textsuperscript{186} See Baker, supra note 141.


\textsuperscript{188} M. Ilyas Khan, Judge Row Prompts Pakistan Democracy Questions, BBC NEWS, Mar. 12, 2007, http://news.bbc.co.uk/2/hi/south_asia/6442829.stm. After the attempted dismissal in March 2007, Chaudhry gave an interview to a Pakistani newspaper, Dawn. He discussed the petitions he had accepted and heard as Chief Justice, including those against rising oil and pharmaceutical prices[, ] . . . preventing public parks being converted into exclusive (mini) golf clubs or commercial complexes [ , ] . . . prohibiting the cutting of forests in the construction of an elitist township[ , ] . . . instituting inquiries into disappearances, providing relief to rape victims, [and] banning forced marriages and the exchange of girls and women to settle disputes according to local customs.


\textsuperscript{189} I am Innocent, supra note 188. There had been a severe backlog of cases at the Supreme Court, and Chaudhry worked overtime to clear the docket. Profile, supra note 138; Khan, Judge Row Prompts Pakistan Democracy Questions, supra note 188.

\textsuperscript{190} See Baker, supra note 141.

against Chaudhry included nepotism, demanding the use of official transportation, and writing orders that conflicted with what he previously stated in open court. Chaudhry was summoned to the Army House, General Musharraf's official residence, and questioned about his actions in the presence of Prime Minister Shaukat Aziz and other uniformed officials. However, Chief Justice Chaudhry challenged the charges against him and refused to resign. Thereafter, on March 13, 2007, the Supreme Court held a hearing to determine the validity of the charges against Chaudhry. On July 20, 2007, the Supreme Court threw out the charges against Chaudhry and reinstated him, declaring that Musharraf's order restraining Chaudhry from holding the office of Chief Justice was "illegal."


192 See Text of Reference against CJ, supra note 191, § II, ¶¶ 1, 31, 34.

193 See Khan, Judge Row Prompts Pakistan Democracy Questions, supra note 188; Suspension and Reinstatement, supra note 191. "Observers believe that [this factor] played a decisive role in elevating him from the realm of the ordinary to the status of a hero." Profile: Iftikahr Chaudhry, supra note 138.

194 HUM. RTS. WATCH, supra note 28, at 12. See also Masood, supra note 44.

195 Pakistan Panel Quizzes Top Judge, BBC NEWS, Mar. 13, 2007, http://news.bbc.co.uk/2/hi/south_asia/6444355.stm. "[The] Supreme Judicial Council (SJC) [is] a five-member body of senior judges empowered to probe the conduct of their peers." Khan, Judge Row Prompts Pakistan Democracy Questions, supra note 188. Originally, the Supreme Judicial Council began to hear the case. However, three of the five judges on the SJC were "hand-picked" pro-government judges who "would have ruled against [Chaudhry]." Chaudhry petitioned and won the right to have his case heard by the whole Supreme Court. See Somini Sengupta, Chief Justice Is Reinstated in Pakistan, N.Y. TIMES, July 20, 2007, available at http://www.nytimes.com/2007/07/20/world/asia/20cnd-pakistan.html. The final short order was 10-3 in favor of reinstating Chaudhry. Short Order of the Supreme Court of Pakistan regarding Constitutional Petition No. 21 of 2007 filed by the Chief Justice of Pakistan (July 20, 2007) (Pak.), available at http://www.pakistani.org/pakistan/constitution/events/cjpr_ref_2007/sc_ref_order.html [hereinafter Short Order].

196 Short Order, supra note 195. There were calls for the government to apologize to Chaudhry. M. Ilyas Khan, Musharraf Faces Legal Nightmare, BBC NEWS, July 20, 2007, http://news.bbc.co.uk/2/hi/south_asia/6909279.stm. Wasim Shah, a Dawn newspaper legal correspondent, explained the sentiment among the Pakistan legal community: "The court has completely demolished the government's case and has put an uncomfortable question mark on its moral standing . . . . In coming days, the government will find it increasingly difficult to deny that it tried to get rid of a constitutional office holder with malafide intentions." Id.
In addition to the resounding verdict reinstating Chaudhry, another victory occurred—a powerful boost to the confidence of the Pakistani legal community as a whole. The March 9, 2007 dialogue between Chaudhry, Musharraf, and Prime Minister Shaukat Aziz was broadcast on national television, "meant to show the nation that even the Chief Justice was not above the law." Musharraf's ploy backfired and the attempt to fire Chief Justice Chaudhry "unleashed outrage against the military." Thousands of lawyers in black suits and ordinary Pakistani citizens took to the streets in protest; commentators called Chaudhry the "judge who said no."

Musharraf's attempt to discredit Chaudhry had exactly the opposite effect, and the increase in support for Chaudhry corresponded with the unprecedented "rate of evaporation of support for Musharraf." Before the suspension, Chaudhry was most known for his initiative in questioning the government's privatization of the Pakistan Steel Mills and its secretive terrorism detentions. With renewed vigor after his reinstatement, he continued to hear petitions on disappeared persons and led the Judiciary's challenge to Musharraf's election to the Presidency while the General still held the position of Chief of Army Staff.

A. Pakistan Steel Mills Case

The state-owned Pakistan Steel Mills Corporation (PSMC)

197 Khan, Musharraf Faces Legal Nightmare, supra note 196.
198 Baker, supra note 141.
199 Id. Supreme Court advocate Athar Minallah said, "It’s not about the Chief Justice anymore. It’s about the future of this country. It’s about having systems, having institutions that are not dependent on individuals. It’s all now about democracy." Id.
200 Profile, supra note 138.
201 Baker, supra note 141 (quoting Asan Iqbal, Secretary of Information for the Pakistan Muslim League).
202 Profile, supra note 138; I am Innocent, supra note 188. "I was also going to look into the privatization of the Habib Bank," said Chaudhry. Id.
203 Carlotta Gall & Salman Masood, Pakistan Released Qaeda Suspect as Case Was To Be Heard, N.Y. TIMES, Aug. 22, 2007, at A9; Profile, supra note 138.
205 See Pakistan Steel Mills Corporation Website, http://www.paksteel.com.pk (last
was the biggest producer of steel in Pakistan. Though the company was initially financially weak, a restructuring of its operations greatly increased its financial standing. The undervalued sale was a "pet project" of Prime Minister Shaukat Aziz, who headed the Cabinet Committee on Privatization. The eventual purchaser, Arif Habib, was allegedly an associate or friend of the Prime Minister. From the beginning, Chief Justice Chaudhry's decision in Pakistan Steel Mills showed his willingness to broaden the statutory interpretation and the scope of judicial review to encompass as much of the contested government action as possible. Chief Justice Chaudhry accepted the petition using suo motu jurisdiction, a part of the Court's original jurisdiction which allows the Court to accept a case "on the application of any aggrieved party" if the matter is of public importance and no other adequate remedy exists. Chaudhry used case precedent to broaden the scope of both of these elements.

visited Feb. 2, 2010).

206 Steel Mills, supra note 204 at 4-5, ¶ 3.
207 Baker, supra note 141.
208 This contention has been made multiple times in the Pakistani media. See, e.g., Syed A. Mateen, Non-Political Prime Minister, PAK TRIBUNE, Apr. 10, 2007, http://paktribune.com/news/index.shtml?174716. Though the author could not find any substantiated statement by the Prime Minister himself, the fact that this general sentiment exists shows that Pakistanis were skeptical about the sale. Protests marked the widespread discontentment with the sale. See, e.g., Pakistan Steel's Sale Criticized: Protest Drive Planned, DAWN, Apr. 3, 2006, http://www.dawn.com/2006/04/03/local8.htm.

209 See Constitution arts. 184, 199 (Pak.). The Supreme Court may invoke original jurisdiction under Article 184(3) if it considers the matter to be of public importance with respect to the enforcement of Fundamental Rights (Part II, Ch 1). Under Article 199(1), "if it is satisfied that no other adequate remedy is provided by law," the Supreme Court may "on the application of any aggrieved party" issue upon any party, including the Government, an injunction or an order to act, or even void an action already taken. A writ of habeas corpus provision also appears in Article 199(1)(b). See also Maryam Khan & Osama Siddique, The 2005 South Asian Earthquake: Natural Calamity or Failure of State? State Liability and Remedies for Victims of Defective Construction in Pakistan, 9 AUSTL. J. ASIAN. L. 187, 216 (2007) ("Article 184(3) of the Constitution enshrines the original jurisdiction of the Supreme Court and also grants it suo motu powers to intervene in areas of 'public importance' for the enforcement of the Fundamental Rights. The Supreme Court may utilize the same powers as the High Courts to issue various writs, as well as their power to issue any order to any person for the enforcement of any Fundamental Rights . . . . Over the past almost three decades, these provisions of the Constitution have been extensively invoked for rights protection."). Id.
and argued that "petitioner cannot be refused relief and penalized for not throwing himself again (by way of revision or review [as other petitions had been unsuccessful or denied]) on [the] mercy of authorities who are responsible for such excesses."\textsuperscript{210}

The government, through Aziz's Cabinet Committee on Privatization, had decided to privatize PSMC and had begun to value the shares, publicize information, and solicit bids for PSMC.\textsuperscript{211} A consortium of three companies, Magnitogorsk Iron & Steel Works, Al-Tuwairqi Group, and Arif Habib Group, bought 75% of the stock for Rs 21.68 billion (approximately $362 million) at Rs 16.80 per share.\textsuperscript{212} The consortium also achieved management control of PSMC.\textsuperscript{213} Petitioner, the Pakistan Steel Peoples Workers Union, brought suit against the Government of Pakistan. The main contentions were against the transparency and propriety of the sale process, namely (a) that the privatization package was improperly amended once a final sale had been approved by the Council of Common Interest; (b) that only the three individual buyers and not the consortium had been approved as buyers; and (c) that PSMC had been grossly undervalued as an incentive to the consortium.\textsuperscript{214}

Chaudhry continued his expansive interpretation of issues throughout the case. He conceded that "in exercise of the power of judicial review, the courts normally will not interfere in pure policy matters (unless the policy itself is shown to be against

\textsuperscript{210} \textit{Steel Mills, supra} note 204 at 18, ¶ 26. "[I]f an adequate remedy provided by law is less convenient, beneficial and effective in [the] case of a legal right to performance of a legal duty, the jurisdiction of the High Court can be invoked." \textit{Id.} (citing Anjuman-e-Ahmadiya, Sarghoda v. Dy Commissioner Sarghoda, PLD 1966 SC 639 (1966) (Pak.)). "[I]f a statutory functionary acts mala fide or in a partial, unjust and oppressive manner the High Court in exercise of its writ jurisdiction has power to grant relief to the aggrieved party." \textit{Steel Mills, supra} note 204 at 18-19, ¶ 26 (citing Murree Brewery Co. v. Pakistan, PLD 1972 SC 279 (1972) (Pak.)).

\textsuperscript{211} See \textit{Steel Mills, supra} note 204 at 5-8.


\textsuperscript{213} See Iqbal, \textit{supra} note 212; see also \textit{Steel Mills, supra} note 204 at 53, ¶ 63.

\textsuperscript{214} See \textit{Steel Mills, supra} note 204 at 7-11. Respondents agreed that the approval of the CCI was required for any privatization of industrial units owned by the Federal Government. \textit{Id.} at 12, ¶ 16. There were several discrepancies between the Privatization Commission's original public offers and the final package of incentives and concessions offered to the successful bidder. \textit{Id.} at 8, ¶ 8.
Constitution and the law) nor impose its own opinion in the matter” and that “while exercising power of judicial review [the Court] may not express opinions on . . . issues requiring technical expertise and specialized knowledge.” But Chaudhry reframed the issue so that it was no longer a political question, arguing “[i]n the instant case, however, we are seized not with a [technical] issue as such but with the legality, reasonableness and transparency of the process of privatization. . . . These are well established basis for [the] exercise of judicial review.”

The Court addressed both the process of valuing the PSMC and the purchase and sale itself in order to determine the validity and transparency of the sale. At the onset, Chaudhry recognized that, according to the Privatization Ordinance of 2000, which allowed the sale, “it should have been the endeavor of on the part of the Privatization Commission to . . . fetch [the] highest price” possible for the company. Instead, the valuation did not include the land upon which PSMC rested and its assets were grossly understated. Though the Privatization Commission

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215 Id. at 42, ¶ 58.
216 Id. (emphasis added). Chaudhry also wrote that “[w]e are conscious of the fact that the courts are not supposed to settle the controversy as to which method should have been followed by the valuer for the purpose of determining the value of shares . . . . However, we can look into the models of valuation internationally recognized to ascertain [proper models].” Id. at 53, ¶ 64.
217 Id. at 47-48, ¶ 61. The Privatization Ordinance of 2000 provides the basic rules allowing for and regulating the privatization of an industry. Valuation is to be conducted in accordance with the Privatization Commission Valuation Rules, 2001. Pre-qualification of potential bidders is to be conducted in accordance with the rules of the Privatization Commission Regulations. Id.
218 Id. at 48, ¶ 62. See also id. At 78-79, ¶ 94 (“The decision of CCI . . . explicitly provides that the object of privatization would be to retire the debts and this policy has been incorporated in the [Privatization] Ordinance of 2000, as well. Therefore, if the P.C. wanted to sell the shares of PSMC for any other purpose i.e. to build its capacity for the purpose of catering the requirements of steel in the country then in that case they should have again approached the CCI for the purpose of modification if its policy. . . . However, the only object should be the debt retirement and for this purpose the government may apply any such formula internationally recognized which may ensure to bring more money in the country.”)
219 Id. at 50, ¶ 63.
220 Steel Mills, supra note 204 at 54-55, ¶ 67. The reports prepared by the valuer, City Group, “had calculated the discounted cash flow from 2006 onward without having regard to the fact that after restructuring in the year 2002-3 the PSMC did increase its profitability and the [Privatization Committee] while publishing the notices for
recommended a price of Rs. 17.43 per share, the CCOP decided on a price of Rs. 16.18 per share. Furthermore, the CCOP approved "huge" incentives for the final buyer that were not included in the initial public offering, including payment of loans and acceptance of legal liability for workers' claims by the Government of Pakistan.

The Court also held that the approval of the Consortium was improper; procedural irregularities hinted at a result-driven approval process skewed in favor of Arif Habib. The CCOP and Privatization Commission knew that Arif Habib was involved in nine civil and criminal cases; this questioned his corporate credentials and should have disqualified him, but the issue was not discussed by the groups. Last, in the final contract, the eventual purchasers were different from the initial bidder—while the consortium consisted of Magnitogorsk Iron & Steel Works, Al-

Expression of Interest in the newspapers had shown the statement of positive financial condition." Id. at 55, ¶ 67. In fiscal year 2004-5, PSMC had a net profit of 6 billion Rupees. After it was restructured, the company also paid off the principal amount of its 11.35 billion Rupees debt. "Therefore under these circumstances it was incumbent upon the Privatization Commission [to ensure that it was] mentioned categorically in the Terms of Reference framed [for the valuer that the PSMC] is [an] ongoing profitable concern and it has marketable assets and the liabilities are much less than the assets." Id.

Id. at 59, ¶ 72. Rs. 17.43 = $.29 per share, calculated at an exchange rate of Rs. 60 per 1 US$.

Id. at 60, ¶ 73, (quoting the CCOP decision of March 31, 2006). The CCOP authorized the sale of 75% of equity stock in PSMC, i.e. 1,290,487,275 shares at a price of Rs. 16.18 per share, totaling US $348 million. Id.

Id. at 63, ¶ 76.

Id. at 69-70, ¶ 86. The buyers had been approved individually, but not as a Consortium as the Privatization Commission rules required. Id. Furthermore, the CCOP authorized the Privatization Commission to accept any offer "if [the bidder's] per share price is equal or higher than the Reference Price," even though the CCOP is not supposed to delegate its responsibility of accepting offers to the Privatization Commission. Id. at 59, ¶ 72.

Id. at 70-72, ¶ 87. Paragraph 2.2(j) of the Request for Statement of Qualification could have disqualified him.

"[H]is involvement in litigation was in the knowledge of the Privatization Commission. Thus, it had a duty to have [considered the matter] before declaring him qualified . . . [because] a person who is involved in litigation in respect of the matter which pertains to a corporate body . . . and against whom a report publicly has also been issued . . . could not be considered a person who could, prima facie, handle the affairs of the Pakistan Steel Mills transparently." Id. at 72, ¶ 87.
Tuwairqi Group, and Arif Habib Group, the final contract was between the Government of Pakistan, Arif Habib Securities Limited, and Arif Habib himself.226

Summarizing the valuation and approval procedures, Chaudhry stated that the process “reflected indecent haste” by the Privatization Commission and the CCOP.227 and that “this unexplained haste casts reasonable doubt on the transparency of the whole exercise.”228 The entire process of privatization, from the initial proposal by the Pakistani Government to the final valuation report to the eventual sale, occurred within two days.229 Chaudhry also stated that CCOP’s decision “betrays total disregard of the rules and the relevant material” and thus “fails the test of reasonableness laid down . . . for the exercise of the power of judicial review.”230 He also reflected a sense of duty, stating that when “[f]aced with such a situation a Constitutional Court would be failing in its Constitutional duty if it does not interfere to rectify the wrong more so when valuable assets of the nation are at stake.”231 The Court’s final holding invalidated the sale and purchase of the Pakistan Steel Mills Corporation.232

This was an embarrassing result for General Musharraf and Prime Minister Aziz.233 Musharraf’s reaction to this ruling can be

226 Steel Mills, supra note 204 at 74, ¶ 90. Magnitogorsk and Al-Tuwairgi Group (ATG) were merely guarantors of Arif Habib. Id.
227 Id. at 66, ¶ 82.
228 Id.
229 See id. The Financial Advisor presented the final valuation report to the Privatization only one day before the bidding date instead of the required six weeks, an action which “deprived the PC to assess the report independently and the CCOP of a well considered and independent comment on the said report” from the PC. Id. at 57, ¶ 69. Within two days, the final report of the valuer was received, the PC met to summarize the report for the CCOP, and the CCOP fixed a per share price and authorized the PC to approve any bids higher than that price. See id. at 66, ¶ 82. “This transaction is [an] outcome of a process reflecting [a] serious violation of law and gross irregularities with regard to sale of the first and the biggest steel mill that this country has. From the facts admitted before us, even the procedural irregularities are not disputed.” Id. at 65, ¶ 78.
230 Id. at 62, ¶ 75. The CCOP decision “reflect[ed] disregard of the mandatory rules [and] all material which was essential for arriving at a fair reference price.” Id. at 61, ¶ 74.
231 Id. at 62, ¶ 74.
232 Steel Mills, supra note 204, at 3.
233 Khan, Judge Row Prompts Pakistan Democracy Questions, supra note 188.
seen in the Proclamation of Emergency promulgated on November 3, 2007. The Proclamation claims that emergency rule is justified because of the “increasing interference by some members of the judiciary in government policy, adversely affecting economic growth” and the “weaken[ing of] the writ of the government [by] . . . constant interference in executive functions, including . . . economic policy, price controls, [and] downsizing of corporations.” Chief Justice Chaudhry later related that the Pakistan Steel Mills decision brought the ire of General Musharraf and Prime Minister Shaukat Aziz upon him; Aziz told Chaudhry that “Musharraf was ‘very angry’ with him.” But Chaudhry would not budge: “I told the prime minister in very categorical terms that I had no business to appease anybody and had decided the case in accordance with the Constitution and the law.”

B. Terrorism Cases

In 2001, as an ally in the US-led War on Terror, Pakistan began to arrest and detain citizens and foreign nationals who were suspected to be linked to terrorist activities. Political opponents of the Pakistani government, such as activists or minority ethnic groups demanding more rights from the federal government, “were [especially targeted as] victims of enforced disappearance.” They were “arbitrarily detained . . . , denied access to lawyers, . . . and held in undeclared places of detention run by Pakistan’s intelligence agencies, with the government concealing their fate or whereabouts.” When asked about enforced disappearances, General Musharraf responded, “I don’t want even to reply to that, it is nonsense, I don’t believe it, I don’t


237 AMNESTY INT’L, supra note 3, at 9; Baker, supra note 141.

238 AMNESTY INT’L, supra note 3, at 9.
trust it.”

In the face of Musharraf's denials, Chaudhry's willingness to stretch the traditional Pakistani judicial role continued when he led the charge to take General Musharraf and the military to task on the secret terrorism detentions. In December 2005, the Supreme Court took judicial notice of a newspaper article about the "enforced disappearance" of an activist and began to challenge the Pakistani government about his and other enforced disappearances. Even after Chaudhry was temporarily suspended in March 2007, the other Supreme Court justices continued to hear missing persons cases. Chaudhry rejoined his colleagues in the cause when reinstated on July 20, 2007. The Supreme Court continued to take suo motu notice of disappearances and held regular hearings to determine the whereabouts of the detainees, between October 2006 and November 2007, the Supreme Court traced at least 186 disappeared people.

Supreme Court justices claimed that no government official would escape scrutiny. Chief Justice Chaudhry, in his characteristic style of direct, demanding questioning, told the director-general of the Federal Investigation Agency, "[the prisoner] must be produced today or you will be sent to the lock-up." The Court also began issuing orders to government officials to account for the whereabouts of detainees. The numbers are incredible. I get cases when I'm driving. I have three diaries full of names.”

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239 Id. Human rights groups claim that under previous administrations, "there were one or two cases [of disappearances], but not the systematic disappearances by the intelligence agencies under Musharraf." Carlotta Gall, Picture of Secret Detentions Emerges in Pakistan, N.Y. TIMES, Dec. 19, 2007, at A1.

240 Khan, Judge Row Prompts Pakistan Democracy Questions, supra note 188. A commendation must be given to Ms. Amina Masood Janjua, the wife of a detainee who founded the Defense of Human Rights, which, along with the Human Rights Commission of Pakistan, is working on locating and obtaining justice for the missing people. According to Ms. Janjua, "[i]t used to be two cases every week .... Today, there were three. The numbers are incredible. I get cases when I’m driving. I have three diaries full of names.” Jane Perlez, Pakistani Wife Embodies Cause of 'Disappeared,' N.Y. TIMES, July 19, 2007, at A1.

241 AMNESTY INT’L, supra note 3, at 5.

242 Perlez, supra note 240.

243 Gall & Masood, supra note 203.


245 AMNESTY INT’L, supra note 3, at 5.

246 Syed Shoaib Hasan, Security Chief Gets Jail Warning, BBC NEWS, Aug. 20,
N.C. J. INT’L L. & COM. REG.

officials to appear before the Court and to locate the disappeared people. Each missing person’s case brought before the court was individually researched to determine the person’s whereabouts. Chaudhry made it clear, however, that his goal was not to release guilty people, but to ensure that each detainee was ensured his rights and that the families of the missing persons could know the missing person’s location. "We are not asking for immediate release of the disappeared, but want legal proceedings according to the law by regularizing the arrest of people who had later gone missing,” said Chaudhry.

The last case on enforced disappearances was heard on November 1, 2007, two days before Musharraf declared a state of emergency on November 3, 2007. Analysts comment that “the timing of the proclamation of emergency and of the dismissal of judges of the higher judiciary coincided with the increasingly insistent demands of the Supreme Court to call high officials of the intelligence agencies to testify.” Similar to the results of Pakistan Steel Mills Case, the animosity between Musharraf and Chaudhry resulting from the prosecutions was again apparent from the Proclamation of Emergency: “Some members of the judiciary [are] working at cross purposes with the executive and legislature in the fight against terrorism and extremism thereby weakening the government.”


248 Hasan, supra note 246.

249 Gall, supra note 239.


251 AMNESTY INT’L, supra note 3, at 5.

252 Id.

253 Id. at 11; see also Provisional Constitutional Order No. 1 of 2007, supra note 7; Ihtasham ul Haque, Emergency to End Judicial Activism, DAWN, Nov. 4, 2007, http://www.dawn.com/2007/11/04/top12.htm (arguing that the judiciary’s activism was hampering government efforts to combat terrorism, Musharraf said, “[o]ver 100 suo motu cases are being heard by the Supreme Court, besides thousands of applications against the executive were being entertained due to which the government’s system has collapsed totally.”). Id.
C. Musharraf's Re-election to the Presidency

The Supreme Court's reaction to Musharraf's candidacy for and re-election to the Presidency in 2007 was the culmination of the continuous battles with the Judiciary. By now, Chaudhry had made his impact; the Supreme Court had already shown that it was willing to continue challenging the Executive in his absence, and the legal community had poured into the streets to support judicial independence. In a very short period of time, Musharraf would repeat a sequence of events similar to his 1999 coup in order to ensure his position as President.

Musharraf's term as President was to expire on November 15, 2007, and he planned to run for re-election while still holding the position of Chief of Army Staff. His main obstacle to this arrangement lay in Chief Justice Chaudhry and the Supreme Court's final decision on whether Musharraf's position as Army Chief made his candidacy for President unconstitutional. Musharraf planned to resign the army post only after he was elected President by the National and Provincial Assemblies. His advisors predicted the tension and recommended this plan of action, so that in case "the chief justice attack[ed] him, he [could] stay as army chief." Opposition parties filed petitions opposing

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254 Carlotta Gall, Political Ally Says Musharraf to Quit Top Army Post, N.Y. TIMES, Sept. 1, 2007, available at http://www.nytimes.com/2007/09/01/world/asia/01pakistan.html. The provision in the Seventeenth Amendment that approved the President to Hold Another Office Act, which allowed him to hold the dual role, was to expire on December 31. Id.

255 Id. Chaudhry Shujaat Hussain, Musharraf's advisor and president of the ruling political party, openly stated his feelings about "vengeful" Chief Justice Chaudhry: "Whenever we try to think of some allowance, at once the chief justice comes in front." Hussain added that efforts were under way to reach out to Mr. Chaudhry, who "should behave like a judge." Hussain also lamented that Musharraf's reputation had been damaged by the attempt to suspend Chaudhry, but he was hopeful that Musharraf would be re-elected, saying, "[e]xcept for this judicial crisis, we were going in a very good way." Id.; see also Carlotta Gall, Even Musharraf's Allies Question His Re-Election Goal, N.Y. TIMES, Aug. 17, 2007, available at http://www.nytimes.com/2007/08/17/world/asia/17pakistan.html [hereinafter Re-Election Goal]. Ishaq Khan Khakwani, the minister of state for information technology and telecommunication, said, "I think it is very difficult for [Musharraf] to get through the question of eligibility . . . . I wish that he would get through, but there are too many ifs and buts." Id.


257 Gall, supra note 254.
Musharraf's candidacy, but the Supreme Court, in a nine-member bench headed by Justice Rana Bhagwandas, allowed Musharraf to take part in the election. However, the Court also ruled that the Election Commission could not certify the results until a final decision was reached on Musharraf's candidacy. This prevented Musharraf from taking the oath of office even if the election went in his favor.

On October 6, 2007, the assemblies elected Musharraf President after a boycott by opposition parties; as ordered, the Election Commission did not certify the result. After hearing lengthy opposition challenges to Musharraf's election, an eleven-member panel headed by Justice Javed Iqbal decided to delay a planned hearing and ruling on the issue until November 12, three days before Musharraf's term was to expire.

Delivering the resolution on November 1, 2007, Justice Iqbal warned the government against any extreme action, saying "no group should think that it can take the Supreme Court hostage," and "[n]o threat will have any effect on this bench, whether it is martial law or [a state of] emergency . . . Whatever will happen, it

259 Ghulam Hasnain, Judges Ruling on General Faced Sex Blackmail, TIMES ONLINE, Nov. 11, 2007, http://www.timesonline.co.uk/tol/news/world/asia/article2848490.ece. Some analysts claim that the Court acted under political pressure and personal blackmail, including secretly taped sexual trysts. 'The message was clear,' said a British barrister who was told about the tapes by a Pakistani counterpart. 'If you rule the wrong way, these [tapes] will become public and your family destroyed.'” Id.
261 HUM. RTS. WATCH, supra note 28, at 18.
will be according to the constitution and rules.”  However, on November 2, Justice Iqbal announced that the Court would continue hearings “because of the climate of political uncertainty.”  Justice Iqbal’s words proved an inadequate warning; even international voices sensed the tensions between the Executive and the legal community, whose armies of black-suited lawyers had been protesting in the streets since Musharraf’s candidacy was allowed. Amid circulating drafts of a provisional constitutional order allowing emergency rule, US Secretary of State Condoleezza Rice spoke out against any “extra-constitutional means” of government.

On November 3, 2007, Musharraf declared a state of emergency and held the Constitution in abeyance. Apart from two clauses citing a general increase in terrorism, the Proclamation of Emergency placed the blame upon the judiciary for “working at cross purposes with the executive and legislature in the fight against terrorism,” “interfer[ing] . . . in government policy, adversely affecting economic growth,” and “constant interference in executive functions” that demoralized the police force. The proclamation also stated that while “the Government is committed to the independence of the judiciary and the rule of law and holds the superior judiciary in high esteem, it is nonetheless of paramount importance that the Honourable Judges confine the scope of their activity to the judicial function and not assume charge of administration.”

Mimicking the setup to the Zafar Ali Shah case, a new Oath of

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264 Id.


266 See Re-Election Goal, supra note 255. Pakistan’s bar associations started a nationwide campaign in support of Chaudhry during the suspension controversy. They began a new campaign on September 1, 2007 against Musharraf’s election. Id.


268 See Proclamation of Emergency (Pak.), supra note 234.

269 Id.

270 Id.
Office (Judges) Order was promulgated and all federal judges were automatically suspended until they swore to uphold the Proclamation of Emergency and the PCO No. 1 of 2007.271 Chief Justice Chaudhry responded quickly on the evening of November 3, heading a seven-justice panel to pass an emergency order annulling the Provisional Constitutional Order, directing all judges not to take the new Oath of Office to uphold it, and restraining military officers from following the decree.272 Shortly thereafter, Chief Justice Chaudhry and other judges who refused to take an oath to uphold the new PCO were placed under house arrest.273

By proclaiming emergency rule, General Musharraf had “fired the entire Supreme Court” and many of the High Court Judges; specifically, he had restrained them under house arrest and replaced them with judges who had taken a new oath to uphold his emergency rule.274 Now protected from Chaudhry and the Judiciary who had been ruling against him, Musharraf resigned his


A person holding office immediately before this Order as Judge of the Supreme Court, the Federal Shariat Court, or a High Court shall cease to hold that office with immediate effect [unless the Oath is made] . . . [A Judge] who has made Oath as required by these clauses shall be bound by the provisions of this Order, the Proclamation of Emergency of the 3rd day of November, 2007, the Provisional Constitutional Order No. 1 of 2007, and notwithstanding any judgment of any court, shall not call in question or permit to be called in question the validity of any of the provisions thereof. Id.


273 Saleem, supra note 272.

274 Jane Perlez & David Rohde, Pakistan Attempts to Crush Protests by Lawyers, N.Y. TIMES, Nov. 6, 2007, available at http://www.nytimes.com/2007/11/06/world/asia/06pakistan.html; see also Oath of Office (Judges) Order, 2007 (Pak.), supra note 271 (requiring that a judge, “who has made Oath . . . shall be bound by the provisions of this Order, the Proclamation of Emergency of the 3rd day of November, 2007, the Provisional Constitutional Order No. 1 of 2007, and notwithstanding any judgment of any court, shall not call in question or permit to be called in question the validity of any of the provisions thereof.”) Id.
commission and took the oath of President as a civilian. Before resigning however, he transferred the power of lifting emergency rule to the President, therefore ensuring that he still held the reins of power. Justice Abdul Hameed Dogar, who had taken the oath to uphold Musharraf’s second emergency rule, was sworn in as Chief Justice. On November 4, Chief Justice Dogar overruled Chaudhry’s annulment, validating the emergency declaration. The reconstituted Supreme Court then dismissed the challenge to Musharraf’s election on November 22, 2007.

VII. Conclusion

Though he was re-elected in November 2007 to a five-year presidential term and confirmed by a Supreme Court again filled with his sworn supporters, General Musharraf’s victory was short lived. In the February 2008 parliamentary elections, Pakistani citizens voted to remove almost all of Musharraf’s party “in what government and opposition politicians said was a firm rejection of his policies since 2001.” Political parties who had formerly worked in opposition banded together in a coalition to get Musharraf out of office. Facing impeachment, Musharraf resigned from the presidency on August 18, 2008.

This paper examined the Pakistani judiciary’s reaction to General Musharraf’s rise to power, from the initial enthusiastic acceptance of the army regime to later outright opposition by the

275 See. e.g.. Gall & Perlez, supra note 18.
276 Id.
entire legal profession, led by the dynamic presence of Chief Justice Iftikhar Chaudhry. The Judiciary’s role was not only to check executive and legislative power, but also to control the military power that was concentrated in the President’s person. In Musharraf’s presidency and his conflict with Chief Justice Chaudhry’s court, the Pakistani judiciary began to assert its power as Executive will came to bear on the use of military power in terrorism investigations and detentions.

Domestically, Chief Justice Chaudhry and the Supreme Court’s willingness to check executive power inspired nationwide confidence in the Judiciary. Taking cases based on original jurisdiction, the Chaudhry Court initiated rulings to curtail Musharraf’s attempts to consolidate power on every front--economic, social, legal, and political. Musharraf claimed in his Proclamation of Emergency that this activism eroded the separation of powers and led the Judiciary to improperly interfere with executive and legislative power. But perhaps any activism was a small price to pay for preventing a fledgling democracy from falling, again, into the hands of a military dictator.

The operation of an independent judiciary in Pakistan at this critical moment in history was also important internationally because of the potential concentration of executive and military power in one Head of State and Pakistan’s role in the global War on Terror. Musharraf and his army regime secretly detained nearly 500 citizens with no process, possibly torturing the men as well. Chaudhry’s initiative in demanding that the government trace and provide process to these men “was very embarrassing to the government because the [detainees who were released] told all their stories.” By adding its rulings to international calls for fair terrorism prosecutions and an end to torture, the Chaudhry Supreme Court not only effectuated the release of those who were detained without cause, but began the movement towards a just and effective fight against terrorism.

Musharraf was not the first President to try to control the decisions that went in and came out of the Pakistan judiciary, and probably will not be the last. His actions to ensure judiciary

282 Proclamation of Emergency, 2007 (Pak.), supra note 234.
283 Gall, Picture of Secret Detentions Emerges in Pakistan, supra note 239.
284 Id.
confirmation were similar to General Zia-ul-Haq’s procedures after he took power. Under Zia, judges “were required to take a loyalty oath under the Provisional Constitutional Order, which amounted to a pledge of allegiance to the new military order. . . . At the same time, the oath was used to purge independent-minded judges, who refused the oath or were not invited to take it.”285 After his 1999 coup and 2007 re-election, Musharraf followed the same pattern, removing any judges who would question him and then packing the court with oath-taking supporters.

However, the difference between the 2007 attempt and past attempts, and the factor which may hinder future usurpations of judicial power, was the willingness of thousands of Pakistani lawyers nationwide to protest and boycott courts in the name of judicial independence. This movement was inspired by Chief Justice Chaudhry’s defiance and confidence in standing up to military excesses, despite acquiescence in his earlier Supreme Court career. Former Law Minister Iftikhar Gilani explained the legal community’s reaction to Musharraf’s summons of the Chief Justice to the Army House in March, 2007: “That frame, of the Chief Justice sitting in front of the general, did for Pakistan what the Tiananmen Square photo of the boy standing before the tank did for China . . . . Almost every Pakistani has seen that image, and it has become a symbol of defiance against military rule.”286 The long-term and continuous political pressure from Pakistani citizens themselves was a major factor of Musharraf’s increasingly frustrated desperation as his hopes of re-election were threatened.

Though Chaudhry was unable to prevent Musharraf from again taking drastic action in 2007, the rulings that he made as Chief Justice and the confidence that he inspired in the legal community may have paved the way for resistance by independent-minded judges in the future. The message sent by the judiciary was clear to Musharraf and to any future military President: Though he could attempt to subjugate the courts to his decrees and silence those who would question him, no longer would the common man stand behind such executive arrogance.

285 Siddique, supra note 17, at 627.
286 Baker, supra note 141.
VIII. Author’s Note

Since this article was completed, Iftikhar Chaudhry was reinstated to his post as Chief Justice of Pakistan. After continued pressure from the public and former Prime Minister Nawaz Sharif, Prime Minister Gilani announced that Chief Justice Abdul Hameed Dogar would retire on March 21, 2009, and “Iftikhar Chaudhry and all other deposed judges [would] be reinstated.” The Chaudhry court seems to be continuing in its actions against executive power. Beyond picking up from where he left off, Chaudhry is even leading the court to issue retroactive rulings nullifying Justice Abdul Hameed Dogar’s actions.

The Court has not yet gone so far as to charge Musharraf with treason, as called for by former Prime Minister Nawaz Sharif, but it demanded in July 2009 that Musharraf justify his November 2007 emergency actions. Legal experts said that although Musharraf was not obligated to appear before the Court because no formal criminal charges had been filed, it would be better for Musharraf to appear voluntarily to maintain his right to appeal later legal action. Neither Musharraf nor his lawyers appeared


288 Hasan, supra note 287. Gilani also revoked section 144, a law that outlawed public demonstrations, and ordered provincial governments to “release political workers, lawyers and all those arrested during the long march.” Id. Gilani said, “I want to congratulate the nation. Let us celebrate this with dignity . . . . This was the promise made by our late leader Benazir Bhutto . . . . I think the time has come to fulfill this promise.” Id.


291 Id.
in court on the appointed date.\textsuperscript{292} Instead, Musharraf gave a
televised interview in which he defended his emergency actions as
"absolutely constitutional and legal." "I don't blame myself," he
said, adding that the "[h]andling of the Chief Justice [by some
officials] was shabby."\textsuperscript{293}

The Supreme Court heard the constitutional petition despite
Musharraf's absence, first affirming that the Court attempted to
deliver the notice of summons to Musharraf's residence but that
the man who answered the door refused to take it.\textsuperscript{294} The Court
held that Musharraf's November 2007 declaration of emergency,
the PCO, and the replacement of Chaudhry and other federal
judges were unconstitutional and invalid.\textsuperscript{295} The opinion speaks
extensively about the need for an independent judiciary. "An
independent and strong judiciary is a back bone of viable
democratic system[s] all over the world."\textsuperscript{296} The Court held that
any judge who took the 2007 Oath of Office violated the
constitution and also that the Supreme Court's emergency order on
November 3 that marked Musharraf's actions was illegal.\textsuperscript{297} The
Court was explicit about the sweeping effect of this ruling: All
judges who took the oath were to be removed from their posts, all
appointments made in consultation with Dogar were nullified, and
all orders and judgments made by any court with any

\textsuperscript{292} Musharraf Court Notice Unheeded, BBC NEWS, July 29, 2009,

\textsuperscript{293} Javaid Naqvi, CJ's Dismissal Was Right Thing to Do: Musharraf,
world/12-cj+dismissal+was+right+thing+to+do+musharraf--bi-08.

\textsuperscript{294} Sindh High Court Bar Association et. al. v. Federation of Pakistan,
http://www.supremecourt.gov.pk/web/user_files/File/CONST.P.9OF2009.pdf; see also
Syed Shoaib Hasan, Musharraf Emergency "Unlawful", BBC NEWS, July 31, 2009,
claimed that they had not received notice of the trial. \textit{Id.}

\textsuperscript{295} See Sindh High Court Bar, supra note 294, at 12.

\textsuperscript{296} \textit{Id.} at 8-10. The opinion states that Musharraf's actions were "undeniably
taken to prevent" the Court from hearing the petition against his presidential candidacy. But
the opinion is not without bitterness. "[T]his country witnessed that . . . [the] tenure of a
Chief Justice of Pakistan was curtailed with ulterior motives . . . and pliant members of
[the] superior judiciary were out rightly given undeserved benefits while the others were
shown doors . . . . Many judges of superior judiciary who declined to toe [Musharraf's] line of action were unceremoniously sacked." \textit{Id.} at 8-9.

\textsuperscript{297} HUM. RTS. WATCH, \textit{supra} note 28, at 5-6.
unconstitutionally appointed judge were voided.\textsuperscript{298} The opinion also states that Chaudhry is, and always was, the constitutional Chief Justice of Pakistan.\textsuperscript{299}

For now, the Court has passed any discussion of a treason charge to the National Assembly.\textsuperscript{300} In August 2009, a lower court ordered the Islamabad police to file a case against Musharraf for illegally confining judges and their families in their homes during the November emergency.\textsuperscript{301} A sentence for the criminal charge could mean a three-year imprisonment.\textsuperscript{302}

The Court is continuing to tread new and uneasy grounds in its relationship with the executive branch. Any legal action against a former military dictator is unprecedented in Pakistan; former Chief Justice Saeeduzzaman Siddiqui noted that “in the past, courts have tended to condone military takeovers.”\textsuperscript{303} It remains to be determined whether the Pakistani judiciary, under Chaudhry’s leadership, has blurred the line between judicial independence and judicial activism.\textsuperscript{304} What is clear is that Pakistanis were ecstatic at the victory of the lawyer’s movement that stood up for the rule of law and brought back their “savior.”\textsuperscript{305}

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\textsuperscript{298} Sindh High Court Bar, supra note 294, at 16-20.
\textsuperscript{299} Id. at 17.
\textsuperscript{302} Pakistan Police in Musharraf Move, supra note 300.