

**BEFORE THE CHIEF ELECTION COMMISSIONER OF PAKISTAN/
RETURNING OFFICER FOR THE OFFICE OF THE PRESIDENT,
ISLAMABAD**

In re: **SCRUTINY OF NOMINATION PAPERS FILED ON BEHALF OF GENERAL PERVEZ MUSHARRAF FOR ELECTION TO THE OFFICE OF THE PRESIDENT OF PAKISTAN.**

OBJECTIONS RAISED ON BEHALF OF OPPOSING CANDIDATES:

Sardar Muhammad Latif Khan Khosa, Advocate for Makhdoom Muhammad Amin Faheem, candidate.
Mr. Hamid Khan, Advocate for Mr. Wajihuddin Ahmed, candidate
Mr. Farooq H. Naik, Advocate for Mrs. Faryal Talpur, candidate

REPLY ON BEHALF OF GENERAL PERVEZ MUSHARRAF/CANDIDATE.

Mr. Wasim Sajjad, Advocate/ Authorised agent.

Date of Scrutiny: 29.9.2007

ORDER

At the time of scrutiny of the Nomination Papers of General Pervez Musharraf (hereinafter referred to as the candidate) certain objections were raised in writing by the learned counsel for the opposing candidates, namely, Makhdoom Muhammad Amin Faheem, Mr. Wajihuddin Ahmed and Mrs. Faryal Talpur. The learned counsel for the candidate expressed his inability to file rejoinders due to paucity of time. Photo-copies of the nomination papers of the candidate were provided to the learned counsel for the opposing candidates an hour before the time fixed for scrutiny of nomination papers. The objections were overruled after hearing the learned counsel for the Objectors and Mr. Wasim Sajjad, learned counsel and authorized agent of the candidate, at length. Rule 5(4) of the Presidential Election Rules, 1988 provides in unequivocal terms that reasons are to be recorded only in the case of rejection of a nomination paper. Be that as it may, I deem it necessary

to highlight the main objections and record reasons for their rejection as the matter is high profile and sensitive.

2. The first objection was to the effect that the current Assemblies were not competent to re-elect the candidate for another term of five years on constitutional, legal and moral grounds as they had already endorsed his present term of five years and their own term was on the verge of expiration. The objection is devoid of force as it is not augmented by any explicit or implicit embargo contained in the Constitution that an electoral college cannot elect the same person as President twice during its one and the same term. Besides, the objection is squarely negated by the express command contained in Article 41(4) of the Constitution that election to the office of the President shall be held not earlier than sixty days and not later than thirty days before the expiration of the term of the President in office. The term of the President in office shall expire on 15th November, 2007, therefore, there can be no cavil with the proposition that election to the office of the President must be held between 15th September to 15th October, 2007. The timeframe is indubitably mandatory. Obviously, the electoral college in existence during that period will be competent to elect the President and postponement of the Presidential election till formation of a new electoral college will be a constitutional deviation too glaring to be overlooked or condoned. As regards the morality-related ground, it will suffice to say that it is by now well settled that ethical notions and moral grounds cannot be used as a springboard to strike down a provision of law or whittle down a provision of the Constitution. There is no dearth of case law on the subject. However, it will be enough to mention an oft-quoted authority on the subject which is reported as Brig. (Retd.) F.B. Ali v. The State (PLD 1975 SC 506). Last but not the least, the objection is paradoxical inasmuch as the Objectors on the one hand have assailed the competency of the current assemblies to re-elect the President and taken the

stance that the present Assemblies do not constitute a valid electoral college and on the other have filed nomination papers seeking election to the office of the President from the same electoral college.

3. The second objection related to one of the disqualifications listed under Article 63 as paragraph (d) of clause (1) and one of the conditions of President's office contained in Article 43(1) of the Constitution. The precise objection was that under the mentioned provisions of the Constitution the candidate is precluded from seeking re-election to the office of the President in uniform while holding the office of profit as Chief of the Army Staff. The objection cannot prevail for reasons that are not far to seek. Firstly, the objection is not available at all in the light of interpretation of Article 41(2) of the Constitution made in Qazi Hussain Ahmed v. General Pervaiz Musharraf (PLD 2002 SC 853) and Pakistan Lawyers Forum v. Federation of Pakistan (PLD 2005 SC 719) that a candidate for the office of the President is only required to be qualified to be elected as a member of the Parliament and is not hit by the disqualifications contained in Article 63 of the Constitution. Secondly, the disqualification contemplated under paragraph (d) of clause (1) of Article 63 is not attracted in the face of person-specific provisions of the President to Hold Another Office Act, 2004, which has been validated by the Supreme Court of Pakistan in the case of Pakistan Lawyers Forum supra, with the observations that it is not liable to be struck down as *ultra vires* of Article 43 of the Constitution. As regards the bar contained in Article 43 of the Constitution it will be pertinent to point out that it applies to the President in office and not to a candidate for the office of the President. Moreover, Article 43 of the Constitution is presently dormant on account of the overriding effect of the *non obstante* clauses contained in Article 41 (7) and (8) of the Constitution, as held in the case of Pakistan Lawyers Forum, and will get resurrected in due course of time. The said judgment, apart

from the Constitution, allows the candidate to hold two offices, namely, President and Chief of the Army Staff simultaneously for a specific period of time, which has not yet expired.

4. The third objection was that the candidate having remained President for two consecutive terms, firstly from 20th June, 2001 to 15th November, 2002 and secondly from 16th November, 2002 onwards, was not eligible for the third term under Article 44(2) of the Constitution which precludes a person from holding office of the President for more than two consecutive terms. The objection is misconceived. The first term is to be excluded from the tally having not been enjoyed as a result of election and being traceable to an extra-constitutional step which had made itself manifest through Proclamation of Emergency (Amendment) Order, 2001 (Chief Executive's Order No. 2 of 2001) and President's Succession Order, 2001 (Chief Executive's Order No. 3 of 2001).

5. The fourth objection was that the candidate was not qualified to contest the election as he was not sagacious, righteous and non-profligate and honest and ameen within the contemplation of Article 62 (f) of the Constitution as he had not fulfilled the commitment, made on the electronic media on 24th December, 2003, to give up the office of the Chief of Army Staff by 31st December, 2004. The objection is remarkable in weakness only. The matter is certainly debatable and there is nothing on the record from which the terms and conditions of the commitment or the circumstances under which it was made or not fulfilled could be gathered. It is also not known as to why the failure to fulfil the commitment was not subjected to any legal challenge. Besides, the matter has lost significance by efflux of time and falls within the ambit of a past and closed transaction. In any case, even if the quoted instance from the distant past, which does not appear to be free from political overtones and spirit of national interest, is presumed to have left any mark on the

mentioned qualification of the candidate its effect has been offset by the undertaking given by his counsel in the apex court recently that if elected he will doff his uniform before taking oath of office.

6. The fifth objection was that being Chief of the Army Staff, the candidate cannot be the President as the post of Chief of the Army Staff is not excluded from the definition of the service of Pakistan under Article 260 of the Constitution. Moreover, as a member of the Armed Forces he had made an oath under Article 244 of the Constitution not to engage in political activities. The objection is not tenable in view of the observations made in the case of Pakistan Lawyers Forum that on the strength of the *non obstante* clauses contained therein clauses (7) and (8) of Article 41 override Articles 260 and 244 as well as the oath contained in the Third Schedule. The said judgment still holds the field having not been revisited so far. It will not be out of place to mention here that Constitution Petitions titled: "Jamat-e-Islami v. Federation of Pakistan (Civil Petitions No. 58, 59, 61-63 and 68 of 2007) filed in the Supreme Court of Pakistan to challenge the validity of dual office of the candidate, which enjoys the blessings of the Parliament, have been dismissed as not maintainable.

7. The next objection related to the educational qualification of the candidate. It was contended that the candidate was not qualified to be elected as a member of the National Assembly as he was not a graduate within the meanings of Article 8A of the Conduct of General Elections Order, 2002. The objection turned out to be unfounded and frivolous when Mr. Wasim Sajjad pressed into service two original degrees, attested copies placed on the file of Nomination Paper No. 1 of the candidate, according to which the candidate had obtained degree of Bachelor of Science (Honours) in 'War Studies' from the University of Balochistan, Quetta and

degree of Master of Science in 'War Studies" from Quaid-e-Azam University, Islamabad in the years 1980 and 1982 respectively.

8. The last objection also related to the issue of qualifications and disqualifications. It was urged that the candidate was not eligible to contest election as he suffered from disqualifications enumerated under paragraphs (k), (o) and (g) of clause (1) of Article 63 of the Constitution. The objection is *sans* substance as it ignores the settled law based on the interpretation of Article 41(2) of the Constitution, mentioned earlier, that a candidate for the office of the President is only required to be qualified to be elected as a member of the National Assembly and is not hit by the disqualifications embodied in Article 63 of the Constitution. Needless to add that it is also firmly settled that qualifications and disqualifications are two separate concepts having distinct connotations and are not interchangeable.

Sd/-

(Justice ® Qazi Muhammad Farooq)
Chief Election Commissioner/
Returning Officer

Islamabad, the
29th September, 2007