

Run-off presidential election in Afghanistan is ill-advised

A credible government requires a Loya Jirga

By Chibli Mallat

Thursday, October 22, 2009



It is decision time in Afghanistan. No longer on the deployment of additional US troops, but on what a "credible government" means.

The White House and the leading Democrats including Senator John Kerry, chairman of the Senate Foreign Relations Committee, have all but adopted the suggestion made in last week's column: no additional troops for Afghanistan before the cloud over the presidential elections is

removed. The main question now is how to get what the White House's chief of staff Rahm Emmanuel described as "a credible Afghan partner."

Through the Independent Electoral Commission (IEC), which he controlled, Karzai tried to force an acknowledgment that he had crossed the 50 percent threshold to become president. The IEC labeled its 54 percent tally for Karzai as "final." But following the firm, principled position taken by former number two UN envoy in Afghanistan, Peter Galbraith, himself a powerful member of Democratic Party decision-making circles, Karzai's IEC endorsement was preempted by a decision of the Electoral Complaints Commission (ECC), which concluded on October 18 that 210 sample polling stations were rigged, some with over 91 percent fraud. Karzai is unable to go through with the IEC anointment of his presidency and gave up yesterday on his winning claim, and adopting the US Secretary of State pressure for a run-off on November 7.

A run off would be a mistake. The second proposal last week – to call in a Loya Jirga, a wide assembly under the Constitution to deal with the governmental crisis – is a better way forward than a run-off.

The most impressive precedent for inconclusive presidential elections remains that of Florida in 2000. A large literature has resulted, with a general consensus amongst constitutional law specialists in the United States that the decision Bush v. Gore of December 12, 2000, comes down in US Supreme Court history as one of the most infamous. Despite the immense prestige of the US Supreme Court judges, and the confidence they command in the country, the brethren split straight down the party middle: five Republican-appointed justices for Bush, four Democrat-appointed justices for Gore. Bush was declared the winner despite the fact that Gore had an overall lead of half a million votes across the country, and that the Florida Supreme Court (which had a majority of Democrat-appointed judges) had ruled in his favor against the Florida secretary of state, a Republican appointee.

Having just completed a book on "Democracy in America" for a Middle Eastern public, I articulated then my own take on the Florida problem, against the position that Laurence Tribe, the distinguished constitutional law professor at Harvard, took a couple of days later. As senior counsel to Gore, he charted the course for resolving the dispute in an op-ed in the New York Times entitled "Let the courts decide."

Judges are not always well equipped to adjudicate electoral matters. Suppose that a large hurricane had hit Florida that day, preventing people from voting and resulting in an election too close to call. In that case, citizens would be called to vote again when the hurricane subsided. Better to re-run the elections, my conclusion went, on the state or even the national level, than let the courts adjudicate a matter where it was clearly impossible to account for the missing or troubled votes. I am comforted in this conclusion by the overwhelming unease, in constitutional doctrine, with the Bush v. Gore decision.

Now how does this apply to Afghanistan? First, a major difference with the Florida mess needs to be underlined. The problem on August 20 did not arise from a natural disaster, it was man-made. Had there been an inkling of human misdoing in Florida, the police should have been called in to arrest the wrongdoer. This was not the case in the US: the decision was too close to call because of the issue of "chads" and other electoral shenanigans preventing a recount from being conclusive. In Afghanistan, the disaster is man-made: in part, the Taliban openly undermined the process, preventing people from voting. More gravely, it seems that Karzai, as chief executive, was behind much of the rigging. If the president or his men are responsible for blatant manipulations, as it appears, it is inconceivable to allow him to reap the fruit of a poisonous tree he planted over eight years of governance as chief executive in the country. Indeed, he should be arrested and tried under Article 58 of the Afghan electoral law, which requires the prosecution of anyone who "commits fraud or cheating in voting or vote counting." It is unlikely to happen, however, because Karzai appointed the seven members of the IEC, and sacked Attorney General Abdel-Jabar Sabit last year when he realized he would be running against him for the presidency.

This brings me to the run-up elections now proposed in decision-making circles the world over, and apparently comforted by the runner-up in this case, former Foreign Minister Abdullah, whose campaign has been floating a number of suggestions, including a re-run and a joint government. I never met Karzai or Abdullah, but neither strikes the planet as a George Washington. Nor would it be fair on other candidates to allow Karzai on the ballot if the elections have been rigged by him.

Another major problem in the proposed second turn is logistical. Peter Galbraith wrote that some 1500 out of the 7000 precincts were unable to vote due to the Taliban, let alone the 30 percent cheating ascribed by Galbraith to Karzai's supporters. There will never be enough international observers, civilians and military, to deploy in good time to reverse this fact and to secure the freedom and fairness of the process. "By itself," Galbraith wrote, "a runoff is no antidote for Afghanistan's electoral challenges."

A re-run appears therefore to be doubly flawed. Since Hamid Karzai is responsible, possibly criminally, for the systemic failure on August 20, it is hard to see how he can be allowed to remain on the slate as a candidate.

Equally importantly, difficult logistics suggest that a large number of citizens will be unable to freely cast their votes, and that this cannot be remedied in time for a re-run. In a presidential election, each vote counts.

The conclusion therefore is that the re-run is ill-advised, even if it were to lead to Karzai's defeat. With whom should the world deal as a "credible" government in Afghanistan? The response is in the Constitution: in such a dramatic case, Afghanistan needs the largest possible consensus-building which only the Loya Jirga provides under Article 111 of the Constitution. When it convenes, the Loya Jirga elects a chairman who will be the natural government caretaker. Maybe the Loya Jirga needs to address the constitutional failures of Afghanistan's 2004 Constitution, and change it from a presidential regime into a parliamentary one, and from centralized to federal. Regardless of those more structural changes, a Loya Jirga is the most democratic means to a "credible government" in Afghanistan.

Chibli Mallat is presidential professor of law at the University of Utah. He helped organize and monitor the Kurdish elections of May 1992. His "Al-Dimuqratiyya fi Amirka" was published in Beirut in Fall 2000, and his column on the Florida contest on November 10, 2000, can be found here [<http://www.mallat.com/articles/CyberiaNews201100.pdf>]