

Fact Sheet

Middle East Program

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Palestinian Presidential Elections

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When does Mahmud Abbas's term as president of the Palestinian Authority expire? Recently Hamas and Fatah have begun debating this issue, leading to confusion both among Palestinians and outside observers.

This question-and-answer guide is designed to clarify some matters and to explain why some matters simply cannot be clarified.

1. When will Palestinian presidential elections be held?

Whenever Fatah and Hamas agree to hold them—and Israel decides to permit them.

2. Is it purely a political matter? Isn't there any constitutional provision that determines when they will be held?

There is a provision, and it seems very clear (even though it was inserted as an afterthought).

The “constitution” of the Palestinian Authority is a document called the “Basic Law” that was drafted over several years, beginning in 1993. It was finally promulgated in 2002 and amended twice since then, once in 2003 and once in 2005.

Since the Basic Law was only for the interim period specified in the Oslo Accords—a period that was supposed to end in 1999—there was no provision for re-election. The Basic Law simply said (Article 53) that the president's term would last for the entire interim period. [See www.palestinianbasiclaw.org for English translations of the relevant documents; Arabic documents can be found in the on-line version of the Palestinian Gazette at <http://muqtafi.birzeit.edu/pg/>]

In 2005, a set of amendments was introduced to make it possible for new parliamentary elections. These amendments fixed the term of the parliament at four years. In the process, a provision was inserted (Article 36) stating that “the term of the presidency of the National Authority shall be four years.”

3. *So since Mahmud Abbas was elected in January 2005, that means his term ends in January 2009?*

Yes, that is a logical reading of the Basic Law.

But there is another law governing elections that indicates the president's term ends one year later at the same time as the end of the parliament's term in January 2010. The wording of this election law is a little complicated, but the bottom line is clear. As with the Basic Law, the president and parliament are to serve for four years. But the election law also says that the president and the parliament are supposed to be elected concurrently. And the simple fact is that they were elected a year apart—presidential elections were in January 2005 and parliamentary elections were in January 2006.

So the law—which was passed in the summer of 2005 between the two elections—tried to sort this out. It says that for the first cycle of elections, the four-year clock for both the president and the parliament should start with the later parliamentary elections. And this is in keeping with the decree on the earlier presidential and parliamentary elections—those elections were, in theory, a single election held on two different dates a full year apart. The election law therefore suggests that the four years begins with the later date.

Actually, there are two different versions of the election law, though for present purposes that may not matter. The first law is the one passed in 2005 by the parliament. The second was issued by decree by the President Abbas in 2007. The president does have the authority to issue decrees with the force of law in emergency situations when the parliament is not in session. And the Palestinian Central Elections Commission seems to accept the validity of the decree law, though the 2007 law has not yet been tested.

But Hamas does not accept that the necessary conditions obtained in 2007 when Abbas issued the decree-law, so it insists that the 2005 law is still in force. Moreover, presidential decree-laws that are not approved in the next parliamentary session become invalid. Hamas claims that the parliament has held such a session. But it did so only by using a very dubious legal device (counting deputies arrested by Israel toward a quorum).

The provisions of the two laws vary on some critical matters (the 2007 law is partly designed to exclude Hamas), but not the provisions on presidential and parliamentary terms.

4. *OK, the election law—or rather both election laws—say the president's term runs out in 2010. But so what? Shouldn't the Basic Law trump the election law?*

That is a very plausible argument.

But there are two other arguments that suggest that the provisions of the election law for the 2010 elections do not contradict the Basic Law.

The first argument is that from January 2005 to January 2006, President Abbas was not serving as president pursuant to his election in January 2005; instead, he was merely filling out the remainder of Arafat's term. He began filling his four-year term, it is claimed, only after the parliamentary elections were completed in January 2006. Since the four-year term was not even specified until after the 2005 elections, it is not baseless to claim that his earlier service might not count toward the four-year term. But this interpretation seems very much after the fact. It certainly does not explain why President Abbas took the presidential oath mandated in the constitution in January 2005 but not in January 2006 if that was when he was beginning his first full term.

A second argument is that it was the same parliament that drafted both laws and it did so at the same time (it passed the amendments to the Basic Law and the election law about a month apart and the second was clearly supposed to be based on the first). Further, the president signed both on the same day. So that would seem to indicate a clear intent to have the election law interpret how the new clauses in the Basic Law would be applied.

Both arguments have drawn complaints from some Palestinians who say that they are designed to avoid a very clear constitutional text. But they have been endorsed by the head of the *Diwan al-Fatwa wa-l-Tahsri*, a body that assists the government in drafting legislation. The Diwan's interpretation is not legally binding, but it is the one that the presidency can cite as giving legal weight to its view. But to complicate things still further, the Diwan itself is split. The head who issued the ruling earlier served as justice minister and head of the parliament's legal committee. But he has been challenged by a leading official of the Diwan who answers not to the Ramallah-based Palestinian Authority but to the Hamas-controlled Palestinian Authority in Gaza.

5. *Can the drafting of the law really have been so careless and sloppy?*

Yes.

6. *So Hamas will insist on the earlier date and Fatah on the later date?*

Hamas is now insisting on the earlier date in very strong terms. But Fatah leaders themselves have been less consistent. They have mentioned both dates in the past. They sometimes mentioned the earlier date as a way of emphasizing to the outside world how necessary it is to work speedily toward a negotiated settlement—by pointing out that the president's term is nearly expired, they hoped to add urgency to diplomacy. Now that the date is actually approaching, they seem to prefer the later date.

7. *So with such a dicey legal and political situation, will elections be held? What will the elections commission do?*

Pass the buck.

This is not cowardice; the commission is not really able to do anything else. As a legal matter, the commissioners' attitude is that they are tasked with implementing the law, not adjudicating fundamental constitutional disputes. So they will do what the authoritative constitutional institutions tell them. Absent a clear constitutional consensus, they would prefer an unambiguous court judgment.

And as a practical matter, they cannot hold elections unless other government agencies cooperate—such as the security services and the ministry of education (which provides many of the polling places). Control of these in the West Bank falls under one government and in the Gaza Strip under another government. In other words, both Hamas and Fatah would have to agree.

8. *So the courts will have to decide?*

No, the courts are just as divided.

There is supposed to be a constitutional court—a body that would be ideally suited to interpreting the extent to which the election law violates or merely interprets the Basic Law—but the law creating the court is itself in legal limbo because of some dubious measures taken adopting it. In the absence of a constitutional court, the High Court can act in a similar capacity, but the Court itself has not generally been bold and is unlikely to be accepted as legitimate by Hamas (because of a dispute over the Supreme Judicial Council, the body that oversees the judiciary as a whole).

9. *Can't the parliament clarify this by passing legislation that is more clearly in line with the Basic Law?*

Yes, but it cannot meet. Hamas has a clear majority but cannot muster a quorum because so many of its deputies are held by Israel.

If there is an agreement between Israel and Hamas over a release of prisoners, Hamas would be able to reconvene the parliament with a quorum. It would then be able to cancel all of Abbas's decree laws quite easily. But it still would not have the votes to pass new laws over a presidential veto.

10. *So what happens if the dispute is not resolved?*

From the perspective of the Ramallah-based government, it is likely that Abbas will be regarded as president after January 2009 passes, and perhaps even after January 2010 if elections prove impractical. There is, as explained above, a complicated but not implausible basis for allowing him to stay in office for the intervening year. There

is no legal or constitutional basis for his continuing after January 2010 except that there may be nobody to take his place.

From the perspective of the Gaza-based government, the text of the Basic Law governs the situation. Under its provisions, the presidency will become vacant in January 2009. Hamas argues that the presidency will then pass on an interim basis to the parliamentary speaker, Abd al-Aziz Dweik, who is currently held by the Israelis. Dweik would serve (presumably from prison) for sixty days while elections were organized. The Basic Law is silent on what happens if elections do not occur.

But even this interpretation runs into problems because of faulty drafting and legal ambiguities. First, the Basic Law provides for succession by the speaker only if the president dies, resigns, or is declared legally incompetent by the parliament and the courts. The succession provision was not updated when the four-year term limit was introduced. Second, Dweik's position as speaker has been contested by some Fatah deputies who claim that since the parliament re-elects the speaker every year, Dweik's term itself expired long ago. (If this is the case, the speakership reverts to the parliament's oldest member, Abd al-Fatih Dukhan who is not only from Hamas but one of the movement's founders.)

11. Isn't this all just legal mumbo-jumbo?

Not completely. While both sides have played fast and loose with the law, neither side has repudiated it. And if there is ever reconciliation between Fatah and Hamas, it will probably take the form of reviving the Basic Law's provisions.

12. So it's really a political matter?

Now, we're back to the beginning. There will be a presidential election when Hamas and Fatah agree on one—and Israel permits it.

13. But why does Israel have to permit it?

As a practical matter, it would be difficult to have elections without Israel allowing some freedom of movement among Palestinian-ruled areas. And Israel controls not only movement among Palestinian territories; it also directly controls east Jerusalem as well as some areas in the West Bank. The previous three Palestinian elections were held only with considerable coordination with Israel.

Israeli attitudes toward Hamas participation in elections have probably hardened over the past two years. In 2006, President Abbas managed to convince the United States that Hamas participation was desirable, and the United States managed to convince Israel (under Ariel Sharon, a highly fractured Palestinian leadership was a goal, not an anathema; many Israeli leaders did not feel there was a strong difference between Hamas and Fatah in any case). There was a brief effort on the part of some in Israel and the United States to insist that Hamas be excluded from elections, but such a step

would have been politically difficult and legally both baseless and unenforceable (one major reason Hamas could not be excluded was because it did not formally run; instead its candidates participated under the banner of a new “Change and Reform” list). The 2007 decree-law issued by Abbas gives a slightly stronger legal basis for barring Hamas, but the decree itself is on shaky legal grounds, could be repealed by a reconvened parliament, would be circumvented without much difficulty, and is politically impractical.

So a three-way Hamas–Fatah–Israeli agreement may be necessary. And if that ever comes, Palestinians may have to wait beyond either 2009 or 2010 to vote.

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