THE SUPREME COURT AND THE CONSTITUTION: JUDICIAL REVIEW OF POLITICAL ACTS

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Judicial power refers to the authority exercised by that department of government which is charged with the declaration of what the law is, what it means, and what it implies. Judicial power is the authority to interpret the law and to apply this in proper cases brought before the proper courts so empowered or authorized.

Under our Constitution the judicial power is vested in the Supreme Court and in such inferior courts as may be established by law. The Supreme Court is thus a constitutionally established institution beyond the power of the Congress to abolish. The Judiciary may be reorganized, provided that the security of tenure of its members is preserved.

Article VIII of our Constitution on the Judicial Department specifically defines the scope of judicial power. This includes

> [T]he duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.[1]

According to Jose N. Nolledo, professor of law and member of the 1988 Constitutional Commission, "While the foregoing is the essence of judicial power, the inclusion thereof in the Constitution is dictated by the imperative desire that courts, specially the Supreme Court, should not refuse to decide a case on the ground that the question or issue raised involves a political question."[2]

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[1]CONST. art. VIII, sec. 1, par.(2).

[2]NOLLEDO, THE NEW CONSTITUTION EXPLAINED 82 (1987).

Normally, under the principle of the separation of powers and the mutual respect due and accorded by the branches of government towards one another as co-equal instrumentalities of governance, courts may abstain from interfering with the activities and actuations of the political branches of government--namely the legislative and the executive--in their basic tasks of policy making or policy formulation, and implementation respectively.

However, in the course of the performance of these tasks, conflicts invariably or inevitably arise. Varying interpretations of the nature, extent or scope of authority belonging to each give rise to competing claims and may cause an impasse between contending parties which can paralyze the orderly operation of government or needlessly prolong an unjust situation. Hence, the need for an impartial arbiter--supposedly the courts, and specifically the Supreme Court to settle constitutional and other important questions, i.e., to define constitutional boundaries and statutory parameters, and where these are vague or confusing, to rely on reasoned construction and basic wisdom for equity and justice to all concerned.

The separation of powers, is a feature of the presidential system of government whereby specific powers are exercised respectively by co-equal and coordinate branches of government; however, this does not mean absolute exclusivity with respect to such powers as properly belong to each branch. In a democratic system these powers may be shared by two or more of the branches for the purpose of checking and balancing each other's proper powers. Thus, the power to appoint officials, while properly an executive function, may be checked and balanced by a legislative body such as the Senate in the United States or the Commission on Appointments in the Philippines, as well as by the Judiciary in cases where the question of the constitutionality of such appointment may arise.[3]

Again, the legislative power over the purse is effectively shared by the executive in the preparation of the budget, as well as through its veto power over any items or items in the general appropriations act.

The power of judicial review checks the acts and decisions of the executive and legislative branches deemed to have been committed with grave abuse of discretion amounting to lack or excess of jurisdiction, but only if actual cases are brought before the proper courts.

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[3]Bautista v. Salonga, G.R. No. 86439, April 13, 1989.

In turn, no matter how elaborate are the safeguards and guarantees of judicial independence, the judicial arm would be helpless to enforce its decisions without the law enforcement agencies under the executive and without legislative support.

Thus, we have in these three departments of government not air-tight ("water-tight" is the term that Justice Holmes uses) compartments but have more or less porous and interfacing walls that make possible coordination and cooperation, as well as occasional conflicts of jurisdiction in overlapping or not too well-defined boundaries of shared functions.

It is no easy task to sort out the tangled mesh of legal maxims and constitutional principles involved in each case. Often the justices are not in unanimous agreement on just what particular principle should prevail in a given case. But isn't this precisely why cases arise and what courts are for? Because the lines are not clear-cut and decisions can go either way? Sometimes the majority opinion seems hobbled with infirmities that dissenting opinions rather convincingly knock down. Consider Justice Gutierrez's, Justice Padilla's, and Justice Cruz's respective dissents from the majority opinion penned by Justice Melencio-Herrera in *Gonzales vs. Macaraig, Jr.*[4] upholding the constitutionality of President Aquino's veto of the legislative condition to budget augmentation from savings in their respective offices as authorized by law to the highest officials. Clearly, the power to appropriate public money belongs to Congress, yet according to the majority, we find Congress effectively disabled from imposing any condition on the allocation of funds saved in the enumerated departments.

Another judicial maze is exemplified by three recent cases involving the appointing power of the President in relation to the Commission on Appointments. These are *Sarmiento III vs. Mison,*[5] decided 17 December 1987; *Bautista vs. Salonga,*[6] decided in 13 April 1989; and *Calderon vs. Carale,*[7] decided 23 April 1992.

It may be worth noting that in all these cases the majority decision exempting the executive officials in question from legislative confirmation through the Commission on Appointments was penned by Justice Padilla.

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[4]G.R. No. 87636, November 19, 1990.
[5]G.R. No. L-79974, December 17, 1987.
[6]*See* note 3, *supra.*
[7]G.R. No. 91636, April 23, 1992.

Based on a reading of Section 16 Article VII of the 1987 Constitution, he categorizes presidential appointments into 4 classes, namely:

> First, the heads of the executive departments, ambassadors, other public ministers and consuls, officers of the armed forces from the rank of colonel or naval captain, and other officers whose appointments are vested in him in this Constitution;
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> Second, all other officers of the Government whose appointments are not otherwise provided for by law;
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> Third, those whom the President may be authorized by law to appoint;
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> Fourth, officers lower in rank whose appointments the Congress may by law vest in the President alone.

Indubitably, according to Justice Padilla, the first group is appointed with the consent of the Commission on Appointments, but the next three groups are appointed by the President without the requirement of confirmation. It is a question to ask, why make four categories, why not just two--those that require confirmation by the Commission on Appointments and those that do not. As the three cases were decided, Mr. Mison, Ms. Concepcion-Bautista, and Mr. Carale and others fall under the last three groups, presidential appointments without need of confirmation.

From the Constitutional Commission records, the case for Mr. Mison seems tailor made, since the Customs Commission is considered a bureau, and bureau directors have decidedly been cast off the enumeration in the first category.

Still, the dissenting opinions of Justice Gutierrez and Justice Cruz seem valid and cogent. From an analysis of the three sentences that make up Sec. 16 of Article VII, they make a good case for confirmation--not in the particular case of Mr. Mison but in anticipation of future cases. The word *alone* in the third sentence is the fly in the ointment that casts doubt on the real intent of the framers, granting that they knew their true intent and assuming that this intent is accurately reflected in the wording of this provision, however contrary this might be to the democratic spirit of EDSA and people power prevailing in our country at that time.

Incidentally, and this may be material to the interpretation and understanding of this provision, Section 16 of our present Constitution is a resuscitation of Article VII, Section 10, paragraph 3 of the 1935 Constitution

with seemingly minor changes but of far reaching consequences. The article in the 1935 Constitution was clear and unequivocal, to wit:

> The President shall nominate and with the consent of the Commission on Appointments, shall appoint the heads of the executive departments and bureaus, officers of the Army from the rank of colonel, of the Navy and Air Forces from the rank of captain or commander, and all other officers of the Government whose appointments are not herein otherwise provided for, and those whom he may be authorized by law to appoint; but the Congress may by law vest the appointment of inferior officers in the President alone, in the courts, or in the heads of departments.

No question here about the requirement for confirmation of *all* presidential nominees prior to their appointment, excepting only inferior officers whose appointment Congress may by law vest in the President *alone,* or in the heads of departments.

The confusion arose in splitting up this long but clear directive into three sentences but using the same operative words. Now the word "also" in the second sentence of Section 16, Article VII of the 1987 Constitution can be construed to mean "likewise" or "in like manner" as indeed Senator Neptali Gonzales as *amicus curiae* offered this view to check the appointing power. But the word "alone" being retained in the third sentence for appointment of lesser officials argues for confirmation, *i.e.,* participation of the Commission on Appointments in presidential appointments of the preceding categories beyond those expressly enumerated in the first sentence.

As a matter of fact, the President herself, acting through her Executive Secretary, Mr. Joker Arroyo, seemed uncertain regarding the legal and constitutional requirements of her appointment of Atty. Mary Concepcion-Bautista, at first refusing to submit this for confirmation and later submitting this anyway, only to be rejected by the Commission, such that the President had to appoint and did so appoint another Chairman in Concepcion-Bautista's stead, but which appointment had to be set aside anyway when the Supreme Court decision upheld Mary Concepcion Bautista's resolute contention that since her office was not included in the enumeration of offices subject to confirmation in the first sentence of Section 16, her appointment as Chairman of the Human Rights Commission by the President was sufficient by itself and constitutional.

Strong and cogent dissents were registered by four Justices, namely Justices Gutierrez, Cruz and Griño-Aquino, with Justice Medialdea conforming with Justice Griño-Aquino. Still, this ponencia is only consistent

with the same *ponente's* view in *Mison* and will be even more consistently applied in *Calderon vs. Carale*[8], where a statute[9], requiring the confirmation of the Chairman and other commissioners of the National Labor Relations Commission by the Commission on Appointments, had to yield to the Court's interpretation of Section 16 of Art. XVII in the *Mison* and *Bautista* cases, declaring such a requirement for confirmation unconstitutional and void, and once more upholding such presidential appointments as sufficient unto themselves.

Again, Justice Cruz dissented. He in fact dissented in all three cases.

Surprisingly, Justice Gutierrez in this case, wrote a concurring opinion this time. Even as he continued to believe that the majority was wrong in the *Mison* and *Bautista* cases, he said that:

> I think it is time to finally accept the majority opinion as the Court's ruling on the matter and one which everybody should respect. There will be no end to litigation if every time a high government official is appointed without conformation by the Commission on Appointments, another petition is filed with this Court.[10]

I fear that this is not the last word on this controversial Section. Until the Constitution itself is rendered in clear and unmistakable language, there will be reams of decisions and opinions, pro and con. Personally, if I may be allowed this observation, I find Justice Gutierrez's dissenting opinions more impressive and convincing than his *ponencia* for instance in *PLDT vs. Eastern Communications Phils.*[11] or his concurring opinion in *Calderon vs. Carale,* which is something of a let-down. Almost like "all right since you insist."

In his concurring opinion in the *Mison* case Justice Sarmiento had occasion to say:

> But like Justice Cruz in his dissent, I too am aware that authors of the fundamental law have written a "rather confused Constitution" with respect, to a large extent, to its other parts, and with respect, to a certain extent, to the appointing clause itself, in the sense that it leaves us for instance, with the incongruous confirmation whereas that of Undersecretary of Foreign Affairs, his superior, does not."

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[8]*See* note 7, *supra.*
[9]REP. ACT NO. 6715 (1989)
[10]Dissenting Opinion, Calderon v. Carale, G.R. No. 91636, April 23, 1992.
[11]G.R. No. 94374, August 27, 1992.

So much for the executive power of appointment, the legislative participation therein, and the judicial delineation of their constitutional boundaries.

Now we come to the judicial review of legislative actions. In the case of *Bengzon, Jr.*, the *Senate Blue Ribbon Committee*[12], the Supreme Court enjoined this legislative body from compelling the petitioners and intervenor to testify before it, holding that the inquiry in question is not specifically in aid of legislation and if pursued, would violate the principle of separation of powers between the legislative and judicial departments of government, since the petitioners were impleaded as defendants in a case before the Sandiganbayan.

Justice Gutierrez expressed a strong dissent to the Court's opinion in the case penned by Justice Padilla. Justice Gutierrez's words deserve quoting:

> The Court is asserting a power which I believe we do not possess. We are encroaching on the turf of Congress. We are prohibiting the Senate from proceeding with a constitutionally vested function. We are stopping the Senate Blue Ribbon Committee from exercising a legislative prerogative–investigations in aid of legislation. We do so because we somehow feel that the purported aim is not the real purpose.
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> The Court has no power to second-guess the motives behind an act of Congress. Neither can we substitute our judgment for its judgment on a matter specifically given to it by the Constitution. It encompasses practically every aspect of human and corporate behavior capable of regulation. How can this Court say that unraveling the tangled skeins behind the acquisition by Benjamin "Kokoy" Romualdez of 39 corporations under the past regime and their sudden sale to the Lopa Group at the onset of the new dispensation will not result in useful legislation.

This, in my opinion, is a judicious exercise of the power of judicial review. This is dissent at its finest.

Justice Cruz enhanced this broad view of the legislative prerogative to investigate with his own dissent, saying that the express avowal of the object of the inquiry *in aid of legislation* was not indispensable. Justice Cruz would curb the Court's appetite for judicial review in these words:

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[12]G.R. No. 89914, November 20, 1991.

> While it is true that the Court is now allowed more leeway in reviewing the traditionally political acts of the legislative and executive departments, the power must be exercised with the utmost circumspection lest we unduly trench on their prerogatives and disarrange the constitutional separation of powers. That power is available to us only if there is a clear showing of a grave abuse of discretion, which I do not see in the case at bar.

In a more recent case, decided on October 20, 1992, namely, *Teofisto T. Guingona and Lakas NUCD vs. Neptali A. Gonzales, Alberto Romulo, and Wigberto Tañada*[13] with the Nationalist People's Coalition as petitioner-in-intervention, the Supreme Court unanimously (excepting only Justice Medialdea who was on leave) granted the petitioned writ of prohibition to unseat Senators Romulo and Tañada from the Commission on Appointments.

The Court relied on a strict construction of Section 18 of Article VI of our Constitution regarding the composition of the Commission on Appointments, thus:

> There shall be a Commission on Appointments consisting of the President of the Senate, as ex-officio Chairman, twelve Senators, and twelve Members of the House of Representatives, elected by each House on the basis of proportional representation from the political parties and parties or organizations registered under the party-list system represented therein.

In effect the Supreme Court intervened, it would seem with alacrity, in this basically political question, defining proportional representation in strict mathematical terms, namely, 2 Senators to a party seat in the Commission, aside from the Senate President. The numerical mandate in the Constitution for 12 Senators as counterpoise to 12 Representatives was shunted as inferior to, or not as important as, the mandate for "proportional representation" in exact mathematical terms, namely 2 Senators to a party seat in the Commission, aside from the Senate President. The numerical mandate in the Constitution for 12 Senators as counterpoise to 12 Representatives was shunted as inferior to, or not as important as, the mandate for "proportional representation" in exact mathematical quantities.

This [majority] is what the Constitution requires for decisions of the Commission. Under Article VI, Section 18, the last sentence provides that "the Commission shall rule by a majority vote of all the members." The

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[13]G.R. No. 106971, October 20, 1992.

composition is something else--a clear directive *at least as equally authoritative.*[14]

Thus the Court gave no reasonable allowance for the impossibility of mathematical exactitude in dealing with warm bodies, live human beings. The LDP had at the time of this decision 15 members in the Senate, the NPC 5, the Lakas-NUCD 3, and the LP-PDPL 1--all odd numbers, not exactly divisible by 2. So if the Senate allocated and elected 8 to LDP (or 1/2 more than the exact 7 1/2), 2 to NPCV (or 1/2 less than the exact 2 1/2) 1 to Lakas-NUCD (or 1/2 less than the exact 1 1/2), and 1 to the LP-LDP (or 1/2 more than the exact LP-PDPL (or 1/2 more than the exact 1/2) as members of the Commission on Appointments, does this rounding off of numerical quantities really "*amount to abuse of authority granted by law" and grave abuse of discretion*" as the Court opined? Hardly. Not exactly a Solomonic decision, I would think. Use of authority and discretion, yes; but "grave abuse" of either or both, no-definitely not.

You, dear people, be the judge. But this is what can happen when an obviously political question, instead of being resolved in the political branch concerned, is submitted for adjudication to the judicial branch, which can seize the opportunity to tell a co-equal branch what to do, such as to re-align party membership in order to conform with the Court's rigid mathematical formulation of one Commission member for every two Senators in a party--not more, possibly less, since fractions are to be truncated, never rounded off. Would this not encourage turncoatism or party switching for convenience rather than conviction? Is this the expedient solution being recommended by the Court?

This is not to say that this kind of political maneuvering for selfish advantage is unknown to the political branches. That the Senate did not promptly re-arrange its party affiliations in pursuance of the Court's formula is something to say for it--for the time being at least. The point, however, is that in submitting a starkly political question to the judicial branch, this political branch has gained nothing, but instead lost precious ground morally and constitutionally--indeed lost not just 2 Senators in the Commission on Appointments but free and turf. Actually, no one really

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[14]The first sentence of Article VI, Section 18, provides: "There shall be a Commission on Appointments consisting of the President of the Senate, as ex-officio Chairman, twelve Senators, and twelve Members of the House of Representatives, elected by each House on the basis of proportional representation from the political parties and parties or organizations registered under the party-list system represented therein.

gained anything in the process--not even the petitioner. To be thus admonished by a supposedly co-equal branch is a kind of humiliation that might have been avoided. The Senators could have done much better if it had settled this question quietly among themselves with everyone abiding by an amicable agreement among the different political parties. In my humble opinion, here is one case for judicial restraint if not outright abstention by the Court. There is a lesson here somewhere that should not be lost to our legal scholars as well as to politicians regarding judicial review.

To be fair, I must say that I found in the cases studied many gems of judicial statesmanship. May I make special mention here, in addition to those previously cited, of Justice Feliciano's brilliant 22-page dissent in the *PLDT vs. Eastern Telecommunications, Inc. and National Telecommunications Commission*[15] case, decided only last 27 August 1992.

[15]*See* note 11, *supra.*