CHECKING THE BALANCE OF THE SEPARATED POWERS: A CRITICAL VIEW OF *DE CASTRO V. JBC*[*]

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Prologue

The year was 1800, the United States. "In December a vacancy occurred in the chief justiceship by reason of the resignation of the incumbent. By then, it was already clear that the election of 1800 had gone against the Federalists and President John Adams, in the fading months of his term, felt a strong need to put a dedicated Federalist on the bench before the government should come into the hands of Thomas Jefferson and the Republicans. And "like a bolt out of the blue", President Adams nominated his secretary of state, John Marshall, to be Chief Justice."

February, 1801. "Less than three weeks before Jefferson would succeed Adams as President, the Federalist Congress enacted the "Circuit Court Act" – more infamously known as the "Midnight Judges Act". With this, the lame duck President, John Adams, appointed sixteen new justices of the peace. Among them was William Marbury, appointed by Adams on the eve of his relinquishment of the Presidency to Jefferson, whose executed commission was not delivered to him by the secretary of state. Thus, he sought a writ of mandamus from the Supreme Court of the United States for the delivery of his commission. Hence, it came to pass that a Supreme Court, consisting entirely of Federalist appointees, was called upon to judge the claim of a fellow Federalist appointee, William Marbury, against a Republican secretary of state, James Madison." And the rest, as they say, is history.[1]

I. Introduction

From the outset, each student of the law is taught that the Constitution has "blocked out with deft strokes and bold lines the allocation of powers between

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[1] WILLIAM REHNQUIST, THE SUPREME COURT 24-28 (2002 ed.).

the three great branches of government."[2] However, there is the caveat that in times of social disquietude and political excitement, these lines "are apt to be forgotten or marred, if not entirely obliterated."[3] Faced with the prospect of a national failure of election, a post-election vacancy in the chief justiceship, a decision of the Supreme Court declaring the legitimacy of appointments during what was thought to be a prohibited period, and the possibility of a hold-over President, the period leading to the May 2010 National Elections was indeed a time of political excitement for the Philippines.

This paper seeks to use the case of *De Castro v. Judicial and Bar Council*[4] to revisit the state of the system of checks and balances in the present system of Philippine government. Proceeding from there, it will attempt to draw insight from this case as to how the system may be understood beyond its traditional conceptions.

II. The Conventional View

In every government there exist three kinds of power: first the power to make laws; second the power to execute those laws; and third, to decide disputes arising from the implementation of such laws.[5] Even during the time of Aristotle in Ancient Greece, the tripartite division of powers of government was an accepted truth.[6] If there is to be liberty in the body politic, there must be moderation in the government's exercise of these powers. Charles Baron de Montesquieu, in his eminent work, *The Spirit of Laws*, expounded on the evils that would descend upon the state should a moderate government be not achieved:

> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

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[2] Angara v. Electoral Commission, G.R. No. 45081, 63 Phil. 139, Jul. 15, 1936. *See also* ARISTOTLE, THE POLITICS, at 151 (Sinclair trans. 1979); Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803).

[3] Angara v. Electoral Commission, G.R. No. 45081, 63 Phil. 139, Jul. 15, 1936.

[4] G.R. No. 191002, Mar. 17, 2010.

[5] CHARLES DE MONTESQUIEU, THE SPIRIT OF THE LAWS, Book XI, *Ch.* 6. *in* 38 GREAT BOOKS OF THE WESTERN WORLD 69 (Hutchins ed. 1984). In *Kilbourn v. Thompson*, the U.S. Supreme Court pronounced that "one of the chief merits of the American system of written constitutional law is that all the powers instructed to government are divided into three grand departments, the executive, the legislative, and the judicial."

[6] *See* ARISTOTLE, THE POLITICS 178 – 88 (Sinclair trans. 1979). Aristotle classifies governmental powers into deliberative, executive, and judicial. Whatever the form of government, these three elements are said to be present.

> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
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> There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.[7]

Echoing this pronouncement of Montesquieu, the U.S. Supreme Court in *Kilbourn v. Thompson*[8] held that:

> It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall, by the law of its creation, be limited to the powers appropriated to its own department, and no other.[9]

Thus, it became desirable that the three powers of government be separate and distinct from one another so that tyranny will not beset the state.[10]

Though they may be separated, each kind is nonetheless power in itself. Montesquieu himself acknowledged that "every man invested with power is apt to abuse it, and to carry his authority as far as it will go."[11] Indeed, it has been common wisdom since time immemorial that "power tends to corrupt, and absolute power corrupts absolutely."[12]

To prevent abuse of power it was proposed that each power should check the other.[13] And certainly, for each power to be able to effectively check the other, these powers must be balanced and their status equal. Thus, in a government that adheres to the separation of powers,[14]there must necessarily exist a system of checks and balance.

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[7] *Id.* at 70. *See also* THE FEDERALIST NO. 47, at 301-03 (James Madison) (Clinton Rossiter ed. 1961).

[8] 103 U.S. 168 (1880).

[9] *Id.* at 191.

[10] THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed. 1961). James Madison here describes Montesquieu as the "oracle" that is the author of the invaluable precept of separation of powers.

[11] MONTESQUIEU, *supra* note 5, at 69.

[12] Lord Acton., *Letter to Bishop Mandell Creighton* (1887). William Pitt, the Elder, in a speech to the House of Lords in 1770, also said that "unlimited power is apt to corrupt the minds of those who possess it".

[13] *Id.*

[14] "The separation of powers is an institutional arrangement or situation within government, which combines a definite structure of government with a set of relationships among the component elements of

In a system of checks and balance, though the three powers are kept separate and distinct, they are not absolutely independent of each other.[15] James Madison explains that the three powers of government have control or partial agency in the acts of one another.[16] He cites as an example, among others, the authority to appoint the members of the Judiciary. He points out that under the British Constitution, the Executive has the authority to make such appointments.[17] But, under the constitution of New Jersey, it is the legislative department that is clothed with the authority to appoint members of the Judiciary.[18] The laws in Delaware, however, show an instance where the Chief Executive is joined with the legislative department in the appointment of judges.[19]

A. Appointments: The Hand that Rocks the Cradle

The Philippine Constitution vests in the President the power to make appointments. Consistent with the principle of checks and balance that runs through the Constitution, this prerogative of the President is checked by the legislative department through its Commission on Appointments.[20] Thus the Constitution provides:

> The President shall nominate and, with the consent of the Commission on Appointments, appoint the heads of the executive departments, ambassadors, other public ministers and consuls, or 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. He shall also appoint all other officers of the Government whose appointments are not otherwise provided for by law, and those whom he may be authorized by law to appoint. The Congress may, by law, vest the appointment of other officers lower in rank in the President alone, in the courts, or in the heads of departments, agencies, commissions, or boards.[21]

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the structure called the Tripartite System." Perfecto Fernandez, *Separation of Power as Juristic Imperative*, 58 PHIL. L.J. 245 (1983).

[15] THE FEDERALIST NO. 47, at 302 (James Madison) (Clinton Rossiter ed. 1961); Angara v. Electoral Commission, G.R.No. 45081, 63 Phil. 139, Jul. 15, 1936.

[16] THE FEDERALIST NO. 47, at 302 (James Madison) (Clinton Rossiter ed. 1961).

[17] *Id.*

[18] *Id.* at 305.

[19] *Id.* at 306.

[20] CONST. art. VI, § 18. The provision states:

> Section 18. 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...

[21] CONST. art. VII, § 16.

Among the "other officers" whose appointment is vested in the President under the Constitution those that require confirmation by the Commission on Appointments are the chairmen and members of the Constitutional Commissions, namely: (1) the Civil Service Commission;[22] (2) the Commission on Elections;[23] (3) and the Commission on Audit.[24]

The appointment of the members of the Judiciary – from the Supreme Court down to the lower courts – is likewise placed in the hands of the President.[25] There is, however, a difference in the procedure by which members of this great branch of government are appointed. For those officers mentioned under Article VII, Section 16 and Article IX of the Constitution, it is the President who nominates those who will be appointed. The function of the Commission on Appointments is merely to ascertain whether the nominee satisfies the requirements of the position as provided by the Constitution and by law. In the case of appointments to the Judiciary, the process has been reversed. The1987 Constitution has created a Judicial and Bar Council (JBC) whose principal function is to recommend to the President appointees to the Judiciary.[26] The JBC prepares a list of at least three (3) nominees who are qualified to fill vacancies to the Judiciary and it is from this list that the President must select. Thus, under this process, the prerogative of the President is much narrower compared to that of appointments which only require confirmation by the Commission on Appointments.

Another Constitutional Office which follows this reversed appointment procedure is that of the Ombudsman.[27] The Ombudsman and his Deputies are likewise selected by the President from a list prepared by the JBC.[28]

a. Limitations

The discretion that comes with the power to appoint is tempered by the limitations imposed by the Constitution and the laws. Among the facets of such

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[22] CONST. art IX-B, § 1(2).

[23] Art. IX-C, § 1(2).

[24] Art. IX-D, § 1(2).

[25] Art. VIII, § 9.

[26] Art. VIII § 8.

[27] In *Maceda v. Vasquez* (221 SCRA 464, Apr. 22, 1993) the Supreme Court held that the Ombudsman cannot require the employees of the Court to give access to its records as this would be a violation of the principle of separation of powers. This seems to imply that even between the Offices created by the Constitution and the great branches of government, the doctrine of separation of powers applies.

[28] Art. XI, § 9.

limitations is that which pertains to who may be appointed (qualifications) and when they may be appointed (temporal restrictions).

The law lays down several requirements to ensure that the appointees possess the necessary competence to hold the office, as well as ensure their independence to discharge the functions thereof.

Further, the power of appointment of the President is suspended during presidential elections:

> Two months immediately before the next presidential elections and up to the end of his term, a President or Acting President shall not make appointments, except temporary appointments to executive positions when continued vacancies therein will prejudice public service or endanger public safety.[29]

The Supreme Court in *In re: Valenzuela*[30] expounded on the purpose of this provision in this wise:

> Section 15, Article VII is directed against two types of appointments: (1) those made for buying votes and (2) those made for partisan considerations. The first refers to those appointments made within the two months preceding a Presidential election and are similar to those which are declared election offenses in the Omnibus Election Code.
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> The second type of appointments prohibited by Section 15, Article VII consists of the so-called "midnight" appointments.[31]

This reasoning of the Court is grounded in no less than experience. As to the first type of appointment, it is a reiteration of a fact which the Supreme Court acknowledged in *Luna v. Rodriguez*[32] almost a century ago:

> Experience and observations taught the legislature and the courts that, at the time of a hotly contested election, the partisan spirit of ingenious and unscrupulous politicians will lead them beyond the limits of honesty and decency by the use of bribery, fraud, and intimidation, despoil the purity of the ballot and defeat the will of the people at the polls.[33]

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[29] Art. VII, § 15.
[30] Adm. Mat. No. 98-5-01-SC, 298 SCRA 408, Nov. 9, 1998.
[31] *Id.* at 424-35.
[32] G.R. No. 13744, 39 Phil. 208, Nov. 29, 1918.
[33] *Id.* at 213.

And as to the second type of appointment, the Court in *Aytona v. Castillo*[34] already had the occasion to rule upon appointments made by an outgoing president literally the day before he relinquished his office. The Court can also take judicial notice of the fact that such bizarre situation was the backdrop against which the landmark case of *Marbury v. Madison*[35] was decided in the United States.

b. Midnight Appointments

This monicker traces its origins to the United States when in 1801, a defeated Federalist Congress enacted the "Circuit Court Act" three weeks before the Republicans would take over. The statute paved the way for the creation of circuit courts which were to be administered by sixteen new judges, all appointed by the outgoing President, John Adams.[36] Although it was a desirable reform as it would relieve Supreme Court justices of the cumbersome task of sitting as trial judges in various locations in the United States,[37] the Republicans nonetheless called it the "Midnight Judges Act" due to the questionable circumstances under which it was enacted.[38]

Midnight appointments are prohibited for two reasons: First, there is the likelihood that such appointments were made in haste and bereft of careful deliberation on the qualifications of the appointee, to the detriment of the public. Second, is that once the elections are concluded, the people are deemed to have selected a new administration and the outgoing President becomes no more than a "caretaker administrator whose duty [is] to prepare the orderly transfer of authority to the incoming President"[39] and therefore "should not fill positions in the government."[40]

The prohibition, however, is not absolute. It has been held that even after the new President has been proclaimed, the outgoing President may make appointments provided that they are "few and so spaced as to afford some assurance of deliberate action and careful consideration of the need for the appointment and the appointee's qualifications."[41]

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[34] G.R. No. 19313, 4 Phil. 1, Jan. 19, 1962.

[35] 1 Cranch (5 U.S.) 137 (1803).

[36] REHNQUIST, *supra* note 1, at 28.

[37] I CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 185 (1923), *cited in Id.*

[38] WILLIAM REHNQUIST, *supra* note 1, at 27.

[39] In re: Valenzuela, 298 SCRA at 425.

[40] De Rama v. Court of Appeals, G.R. No. 131136, 353 SCRA 94, 109, Feb. 28, 2001 (Mendoza, J., *dissenting*).

[41] In re: Valenzuela, 298 SCRA at 425, *citing* Aytona v. Castillo, G.R. No. 19313, 4 Phil. 1, Jan. 19, 1962.

III. *De Castro v. JBC*

In *De Castro v. Judicial and Bar Council (JBC) and President Gloria-Macapagal-Arroyo*,[42] the Supreme Court was faced with the issue of whether or not the outgoing President has the power and authority to appoint, during the election ban, the successor of Chief Justice Puno who had retired on May 17, 2010.

In resolving the issue presented, the Court immediately proceeded to reconcile two seemingly conflicting provisions of the Constitution. The first being Article VII, Section 15:

> Two months immediately before the next presidential elections and up to the end of his term, a President or Acting President shall not make appointments, except temporary appointments to executive positions when continued vacancies therein will prejudice public service or endanger public safety.

And second, Article VIII, Section 4(1):

> The Supreme Court shall be composed of a Chief Justice and fourteen Associate Justices. It may sit *en banc* or in its discretion, in division of three, five, or seven Members. Any vacancy shall be filled within ninety days from the occurrence thereof.

The Court, in a vote of 9-1-3, came to the conclusion that the prohibition in Article VII, Section II does not apply to appointments to fill a vacancy in the Supreme Court or to other appointments in the Judiciary. In support of its conclusion, the Court relied primarily on the following reasons:

1. The textual arrangement of the three departments into three separate Articles in the Constitution limit the scope of the application of their powers, in keeping with the principle of separation of powers. Since the prohibition is under the Article on the Executive branch, it applies only to appointments to the Executive branch. If the framers intended to extend the prohibition to the appointment of Members of the Supreme Court, which is in a separate Article, they could have explicitly done so.

   In reversing the doctrine in *Valenzuela,* the Court reasoned that the judicial interpretation in that case was not grounded on the intent of the Framers of the Constitution.

2. The prohibition likewise does not apply to other members of the Judiciary because the function of the JBC effectively eliminates the dangers of midnight appointments;

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[42] G.R. No. 191002, Mar. 17, 2010.

3. As Section 15 is placed between Section 14, which pertains to revocable appointments, and Section 16, which enumerates appointments of the President that require confirmation, this necessarily means that Section 15 relates to appointments of the same character;

4. To hold otherwise would diminish judicial independence as it could lead to the next chief justice being beholden to the incoming President who would appoint him.

a. Doctrinal [D]effect

The true impact of *De Castro* is that it shook the very foundation of the government's system of checks and balance when it pronounced:

> Given the background and rationale for the prohibition in Section 15, Article VII, we have no doubt that the Constitutional Commission **confined the prohibition to appointments made in the Executive Department**...[43](Emphasis supplied)

The sentence that followed such pronouncement evinced the narrow view that the court regarded to the scope of Art. VII, Section 15:

> ...The framers did not need to extend the prohibition to appointments in the Judiciary, because their establishment of the JBC and their subjecting the nomination and screening of candidates for judicial positions to the unhurried and deliberate *prior* process of the JBC ensured that there would no longer be midnight appointments to the Judiciary.

In doing so, it ignored the Constitutional and non-political bodies that exist in the present government which require as much independence as that of the Courts,[44] but do not have the benefit of a "deliberate prior process" of the JBC.

Thus, it could happen that should a vacancy in the membership of the Commission on Elections (COMELEC) occur during the period of prohibition, the President may nonetheless fill the vacancy therein. The "Hello Garci" scandal has already illustrated how one member of the COMELEC can affect the outcome of an entire presidential election. To be able to appoint a person to such position immediately before a presidential election could have dire consequences.

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[43] G.R. No. 191002, Mar. 17, 2010.

[44] CONST. art IX-A, § 1. "The Constitutional Commissions, which shall be independent, are the Civil Service Commission, the Commission on Elections, and the Commission on Audit."

Furthermore, the Court in its decision also laments that "had the framers intended to extend the prohibition contained in Section 15, Article VII to the appointment of Members of the Supreme Court, they could have explicitly done so." In the same vein, had the framers intended to extend the prohibition solely to appointments to the Executive branch, it could also have done so in more unequivocal terms.[45] If the Court's conclusion that Article VII, Section 15 refers only to appointments to the Executive branch is to be followed, this implies that the inclusion of the phrase "to executive positions" in the exception clause would be mere superfluity. However, it is not.

The Court gives much emphasis to the fact that our Constitution allocates to each of the three great branches its own Article. It would seem that the Court takes the simplistic view that the different Articles of the Constitution are compartmentalized and the principle of separation of powers is embodied in such compartmentalization. This interpretation, however, completely ignores Justice Laurel's eminent pronouncement in *Angara v. Electoral Commission* that:

> The separation of powers is a fundamental principle in our system of government. It obtains not through express provision but by actual division in our Constitution.... But it does not follow from the fact that the three powers are to be kept separate and distinct that the Constitution intended them to be absolutely unrestrained an independent of each other. The Constitution has provided for an elaborate system of checks and balances to secure coordination in the workings of the various departments of government.[46]

Though each department is possessed of independence, it is an inescapable reality that they remain largely interdependent. As Justice Holmes opines, "we can no longer lay down with mathematical precision and divide the branches into watertight compartments not only because the great ordinances of the Constitution do not establish and divide fields of black and white but also because even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other."[47]

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[45] The Framers should have worded the provision this way:

"Two months immediately before the next presidential elections and up to the end of his term, a President or Acting President shall not make EXECUTIVE appointments, except temporary appointments to executive positions when continued vacancies therein will prejudice public service or endanger public safety."

[46] Angara v. Electoral Commission, G.R. No. 45081, 63 Phil. 139, Jul. 15, 1936.

[47] Planas v. Gil, G.R. No. 46440, 67 Phil. 62, Jan. 18, 1939, *citing* Springer vs. Government, 277 U. S. 189 (1928); 72 Law. ed., 845, 852.

IV. Rethinking the Concept of Separation and Balance

The separation of powers principle is the embodiment of the rule of law in a democratic republican system of government.[48] Textually reinforced by the Constitution, the three-branch structure of government was intended not only to facilitate specialization and accord supremacy to each department of government on matters within its sphere of competence,[49] but ultimately to enable the government to "rise above a personalized rule of men."[50]

In separating the three great branches, the sovereign people did not intend that they have absolute autonomy in the discharge of their duties.[51] Corollary to such separation, the Constitution instituted a system of checks and balance to temper the official acts of these three great branches of government, without destroying the co-equality on which they stand.[52]

According to the *ponencia* of Justice Conchita Carpio-Morales in the landmark case of *Francisco v. House of Representatives*, these two form the bedrock of a republican government and is intended:

> ...to insure that governmental power is wielded only for the good of the people, mandate a relationship of interdependence and coordination among these branches where the delicate functions of enacting, interpreting, and enforcing laws are harmonized to achieve a unity of governance, guided only what is in the greater interest and well-being of the people.[53]

It is of note that nowhere in *De Castro* was the time-honored principle of checks and balance invoked, nor was it even mentioned. Justice Carpio-Morales, the sole dissenter, succinctly pointed out that the majority placed too much emphasis on the principle of separation of powers, totally ignoring the "concomitant system of checks and balances."[54]

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[48] AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 63 (2005).

[49] Angara v. Electoral Commission, G.R. No. 45081, 63 Phil. 139, Jul. 15, 1936.

[50] AMAR, *supra* note 48.

[51] Angara v. Electoral Commission, G.R. No. 45081, 63 Phil. 139, Jul. 15, 1936; Francisco v. House of Representatives, G.R. No. 160261, 415 SCRA 44, 105, Nov. 10, 2003.

[52] Francisco v. House of Representatives, 415 SCRA at 105.

[53] *Id.*

[54] De Castro v. Judicial and Bar Council, G.R. No. 191002, Mar. 17, 2010, (Carpio-Morales, J., *dissenting*).

a. The Commission on Appointments

Article VI, Section 18 of the 1987 Constitution provided for the [theoretically] independent constitutional body known as the Commission on Appointments (CA) to serve as an administrative check on the appointing power of the President.[55] The provision reads:

> 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. The chairman of the Commission shall not vote, except in case of a tie. The Commission shall act on all appointments submitted to it within thirty session days of the Congress from their submission. The Commission shall rule by a majority vote of all the Members.

The rationale for the creation of the Commission on Appointments was further articulated by then Justice Puno in his separate opinion in *Macalintal v. Comelec*:[56]

> Through the power of confirmation, Congress shares in the appointing power of the Executive. **Theoretically**, it is intended to lessen political considerations in the appointment of officials in sensitive positions in the government. It also provides Congress an opportunity to find out whether the nominee possesses the necessary qualifications, integrity and probity required of all public servants.[57] (Emphasis supplied).

It is supposed that the exercise of the oversight powers of Congress under the power of confirmation "acts as a bar against the Executive positions from packing appointive positions with personalities based on political favors and patrimonial ties, rather [than] pure merit."[58]

The Supreme Court in *De Castro*, however, emasculated the independent character of the CA when it exalted the independence of the Judicial and Bar Council (JBC) in the selection of magistrates. The Court stated that "the JBC eliminates the danger that appointments to the Judiciary can be made for the purpose of buying votes in a coming presidential election, or of satisfying partisan

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[55] JOAQUIN BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 735-36 (2003 ed.).

[56] G.R. No. 157013, 405 SCRA 614, Jul. 10, 2003 (Puno, J., *concurring* and *dissenting*).

[57] *Id.* at 711.

[58] Mark Anthony Parcia & Juan Paolo Fajardo, *From Lawmakers to Guardians: A Prolegomenon to Congressional Oversight as a Catalyst for Popular Constitutionalism*, 84 PHIL. L.J. 154, 174 (2009).

considerations"[59] and the "creation of the JBC was *precisely* intended to de-politicize the Judiciary by doing away with the intervention of the Commission on Appointments."[60]

i. Undermining the Constitutional Commissions

In effect, the Court viewed the CA as a politicized body susceptible to influence and partisan considerations, contrary to its conceptualization as an independent body. Indeed, the framers of the 1987 Constitution, in restoring the existence of the Commission on Appointments found in the 1935 Constitution, and removed in the 1973 Constitution, found it in the best interest of judicial independence to exclude appointments to the Judiciary. However, the Court's tactless characterization of the CA lost sight of the fact that unlike the 1935 Constitution, the 1987 Constitution provided for the creation of *independent Constitutional Commissions*, the members of which require confirmation by the CA.

The Constitutional Commissions, while not being part of the three great branches of government, precisely draw their independence from their being removed from the three branches. Thus, like the three great branches, these Constitutional Commissions enjoy a separate Article in the 1987 Constitution. In this sense, these Commissions, individually and collectively, are *separate* from the three great branches. And in satisfaction of the principle of checks and balance, the members of these Commissions are appointed by the President, with the consent of Congress through the CA, and whose actions are susceptible to judicial review.[61]

However, the view taken by the Supreme Court in *De Castro* undermines the independence of the Constitutional Commissions as their members are appointed by a politicized – instead of an independent – Commission on Appointments.

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[59] De Castro v. Judicial and Bar Council, G.R. No. 191002, Mar. 17, 2010.

[60] *Id.* During the Con-Com deliberations, Chief Justice Roberto Concepcion – the originator of the JBC – explained that: "The Judicial and Bar Council is no doubt an innovation. But, it is an innovation made in response to the public clamor in favor of eliminating politics from the appointment of judges." II RECORD OF THE CONSTITUTIONAL COMMISSION 487 (1986).

[61] *See* RULES OF COURT, Rule 64. The Rule provides for review of judgments and final orders and resolutions of the Commission on Elections and the Commission on Audit. As regards the Civil Service Commission, final orders and resolutions thereof can be appealed via petition for review under Rule 43 of the Rules of Court, filed with the Court of Appeals. From the decision of the CA, the party adversely affected can file a petition for review on certiorari, under Rule 45 of the Rules of Court, to the Supreme Court.

V. On Judicial Independence

The Supreme Court in *De Castro* pronounced two facets that are thought to undermine the independence of the Judicial Department:

> (1) To tie the Supreme Court to the fortunes or misfortunes of political leaders vying for the Presidency in a presidential election; and
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> (2) The wisdom of having the new President, instead of the outgoing President, appoint the Supreme Court [Chief] Justice because the appointee can become beholden to the appointing authority.

This holding of the Court certainly calls for a re-examination of the meaning of "judicial independence" in our system of government.

a. A "Supreme" Court

Alexander Hamilton, at the inception of the United States Constitution, was of the view that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution."[62] Not long after he expressed such view did the midnight Chief Justice, John Marshall, with the stroke of his pen in *Marbury v. Madison*, draw the Excalibur that is "judicial review" which can strike down the actions of the two great heads of the Leviathan[63] – the Executive and the Legislature.

Dean Pacifico Agabin observes that the martial law experience of the Philippines "has swung the pendulum of judicial power to the other extreme where the Supreme Court can now sit as 'superlegislature' and 'superpresident'."[64] That "with its new found strength and its expanded power [under the 1987 Constitution], the judiciary is no longer the 'least dangerous branch' of government,"[65] such that "if there is such a thing as judicial supremacy, then this is it."[66]

Executive and Legislative enactments, in reality, cannot be considered final until they have passed the constitutional hurdle of scrutiny by the Judiciary.

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[62] THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

[63] This term was used by Thomas Hobbes to refer to the state. *See* THOMAS HOBBES, LEVIATHAN, *in* 23 GREAT BOOKS OF THE WESTERN WORLD (Hutchins ed. 1984).

[64] Pacifico Agabin, *The Politics of Judicial Review Over Executive Action: The Supreme Court and Social Change*, 64 PHIL. L.J. 209-10 (1989).

[65] *Id.*

[66] *Id.*

b. Checking the Balance

Under our scheme of separation of powers, there nonetheless exists "an elaborate system of checks and balance that ensures the coordination in the workings of the various departments of the government." The power of appointment is "an intrinsically executive act involving the exercise of discretion."[67] Such discretion is tempered by the hand of the Legislature in the process of selection by the President.

In the present set-up of appointment of members of the Judiciary, however, there appears to be a certain imbalance in the checks instituted to safeguard the independence of the hallowed temples of justice.[68]

Under the 1935 Constitution, the Chief Justice, like ordinary cabinet officials, was subject to the confirmation of the CA.[69] Thus, while the power to appoint magistrates of the high tribunal was an executive prerogative, such was clearly balanced by legislative fiat.[70]

Under the 1987 Constitution, however, this power of confirmation was removed from the CA. Instead the Judicial and Bar Council was created, whose function is to screen candidates to the Judiciary and submit a short list from which the President will select.[71] The members of the JBC are as follows:

(1) The Chief Justice (*ex officio* Chairman);
(2) A Representative from the Senate (*ex officio* member);
(3) A Representative from the House of Representatives (*ex officio* member);
(4) The Secretary of Justice (*ex officio* member);
(5) A Representative of the Integrated Bar;
(6) A Professor of law,
(7) A Retired Member of the Supreme Court, and

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[67] Concepcion v. Paredes, G.R. No. 17539, 42 Phil. 599 (1921), *quoting* Keim v. U.S., 177 U.S. 290 (1900); Government of the Philippine Islands v. Springer 50 Phil. 259, 278, Apr. 1, 1927.

[68] Dean Merlin Magallona identified three categories of safeguards in the text of the 1987 Constitution that ensure the institutional independence of the Judiciary: (1) **a system of control over the discretion of the President as the appointing power**; (2) **elimination of legislative power as a decisive factor in appointments to the Supreme Court and all judges of inferior courts**; and (3) greater control by the Supreme Court over the system of judicial appointment (emphasis supplied). Merlin Magallona, *Philippine Experience in Judicial Independence: General Context and Specific Problems*, 72 PHIL. L.J. 164, 170 (1997), *cited in* Alfredo Molo III, *Navigating Through the Shifting Sands: Reinforcing Judicial Independence in the Philippine Context*, 77 PHIL. L.J. 48, 55 (2002).

[69] De Castro v. Judicial and Bar Council, G.R. No. 191002, Mar. 17, 2010.

[70] The U.S. Constitution is of a similar essence. Art. 2(2) thereof provides that the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint judges of the Supreme Court.

[71] CONST. art. VIII, § 9; CONST. art VIII, § 8(5).

(8) A Representative of the private sector.

The composition of the JBC, however, seems to tilt the balance in favor of the Chief Executive considering that the four regular members and an *ex officio* member (the Secretary of Justice) are appointed by the President. There is also the possibility that the representative from the Senate or from the House of Representatives, or both, could come from the same political party as that of the Chief Executive.

Granted, the regular members of the JBC are subject to confirmation of the [politicized] CA. However, it is notable that the manner by which they are appointed is no different from the manner by which cabinet officials are appointed. And, unlike the members of the Constitutional Commissions, they serve for a term shorter than that of the appointing power – the President. Thus, it is inevitable that, at some point, majority of the members of the JBC are all appointees of the incumbent President. Such arrangement facilitates the possibility of midnight appointments to the Judiciary toward the end of the President's term. Furthermore, unlike the Constitutional Commissions, the regular members of the JBC may be reappointed to the same post for consecutive terms. This in turn gives premium to an appointee's loyalty to the incumbent – even for those members who were appointed by the predecessor of the incumbent President.

c. Judicial and Political Philosophy

The Supreme Court, in *De Castro,* tried to highlight two facets of the concept of judicial independence. The first facet which the Supreme Court in *De Castro* tried to avoid was "to tie the Supreme Court to the fortunes or misfortunes of political leaders vying for the Presidency in a presidential election." However, no less than the eminent U.S. Chief Justice William H. Rehnquist holds the view that "one factor – and one factor only – will determine the future of the Supreme Court: the outcome of the presidential elections."[72]

Given the expanded judicial power in the Philippines, and the activism by which the Court has exercised this power, the selection of the members of the Supreme Court is no doubt a critical prerogative of the President, one that he or she must carefully exercise. Certainly, a President has "policy goals that are better and more enduringly achieved if the bench is stocked with ideological allies."[73] Thus, as Chief Justice Rehnquist opines, there is no reason in the world why a

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[72] REHNQUIST, *supra* note 1, at 216-17.

[73] David Law & Sanford Levinson. *Why Nuclear Disarmament may Be Easier To Achieve than to End Conflict Over Judicial Appointments.* 39 U. RICH. L. REV. 927 (2005).

President should not seek to appoint people to the court who are sympathetic to his political or philosophical principles.[74]

Dean Marvic Leonen expresses the view that in the ideal sense, Presidents select magistrates to the High Court on the basis of their judicial philosophy – which is most likely aligned with his or her political policies. An aspect of judicial independence of the Supreme Court is that the members of the Court, which at any given time are *usually* appointed by different Presidents, represent various judicial philosophies.[75] Thus, this serves as an internal checks and balance mechanism within the High Court itself.

This opinion of Dean Leonen finds support in Akhil Reed Amar's exposition of one of the aspects of the principle of separation of powers:

> [B]ecause each government entity would be selected in a different way by a different constituency, ultimate government policy would reflect multiple indices of popular sentiment. **Although no single electoral sampling would capture all of the public's will and judgment, different branches chosen at different times through different voting rules might together produce a more accurate and more stable composite sketch of deliberate public opinion.** [The people] would not risk losing everything whenever they acted unwisely on a single election day. Only over a series of elections and selections would public policy change decisively.[76] (Emphasis supplied)

Chief Justice Rehnquist further opines that there is present a "fine balance struck in the establishment of the judicial branch, avoiding subservience to the supposedly more vigorous legislative and executive branches on the one hand, and avoiding total institutional isolation from public opinion on the other."[77] Judicial independence, to a certain extent, remains counterbalanced by the public will – in the person of the popularly-elected President. As the President has a hand in the selection of the membership of the Court, the public will indirectly influences Supreme Court decisions.[78]

From the standpoint of present history, this opinion of Dean Leonen goes into the second facet of judicial independence as discussed in *De Castro*. The Court questioned the wisdom of having the new President, instead of the outgoing President, appoint the Supreme Court [Chief] Justice because the appointee can

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[74] REHNQUIST, *supra* note 1, at 209.

[75] Dean Marvic M.V.F. Leonen, Address at *In Defense of the Constitution and Judicial Independence* University of the Philippines College of Law(Mar. 19, 2010.)

[76] AMAR, *supra* note 46, at 64.

[77] REHNQUIST, *supra* note 1, at 209.

[78] *Id.* at 209-10.

become beholden to the appointing authority. Note that upon retirement of Chief Justice Puno, all the remaining Justices of the Supreme Court were appointees of the outgoing President at a critical juncture in Philippine history.

Hence, the country was faced with the following possibilities: a court that is either sympathetic to the political principles of the outgoing President or a court with a homogenous judicial philosophy; or perhaps even both.

The matter of being beholden to the appointing power is a matter that is perilous to venture into, for at best it can be deemed but speculative. There is no hard and fast rule, whether in law, politics, or sociology when it comes to such matter. U.S. President Dwight D. Eisenhower, when asked whether he ever made a mistake when he was President quipped, "I made two mistakes, and both of them are sitting on the Supreme Court", referring to Chief Justice Earl Warren and Justice William Brennan. Some political observers in the Philippines have diagnosed Supreme Court Justices with a "First Year Syndrome."[79] Suffice it to say, the Constitutional provision according security of tenure to a Justice of the High Court[80] is the safeguard placed precisely to ensure the independence of the Justice from the Appointing Power. Nothing much else can be done, and whether or not such measure has served its purpose well is for history to judge.

d. The Office of the Chief Justice

By way of a side note, the Court in *De Castro* hinted on the validity of the President appointing a Chief Justice, without need of nomination from the JBC, *provided* that such appointee come from the sitting Associate Justices. The Court based its opinion on Art. VIII, Section 9 of the Constitution which provides:

> The Members of the Supreme Court... shall be appointed by the President from a list of at least three nominees prepared by the Judicial and Bar Council for any vacancy. Such appointments need no confirmation.[81]

It is submitted, however, that such opinion of the Court ignores the characterization by the Constitution of the Office of the Chief Justice as one *separate* and *distinct* from that of the Associate Justices. Art. VIII, Section 4(1) of the Constitution provides:

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[79] Aries Rufo & Purple Romero, *A Divided Court,* NEWSBREAK April 2009, at 16.

[80] CONST. art VIII, § 11. *See also* REHNQUIST, *supra* note 1, at 210.

[81] CONST. art VIII, § 9.

> The Supreme Court shall be composed of a Chief Justice and fourteen Associate Justices. It may sit en banc or in its discretion, in division of three, five, or seven Members.[82]

A simple textual reading of the provision clearly shows that the Office of the Chief Justice is different from that of the Associate Justices. The Supreme Court is not composed of fifteen Associate Justices headed by a Chief Justice. Therefore, when an Associate Justice is appointed to become Chief Justice, he necessarily vacates his office as Associate Justice and assumes the Office of the Chief Justice.

Furthermore, "Member[s]" as used in the provision can refer to either an Associate Justice or the Chief Justice – as the Chief Justice sits as part of the en banc or divisions. Thus, reading Section 9 in connection with Section 4(1), it is equally clear that the "Members" of the Supreme Court referred to therein, pertain to both the Associate Justices and the Chief Justice, which shall be appointed by the President from a list prepared by the JBC. Whether the nominee comes from among the members of the Court or outside of it, is of no moment. As the position of Chief Justice is a different office from the one occupied by incumbent Associate Justices, a separate JBC nomination is necessary.

VI. Conclusion

To borrow the words of Justice Padilla in his concurring opinion in *Aytona v. Castillo*:

> The constitutional point involved seems to have been overlooked by the framers of the Constitution. It would seem that the framers, well-meaning as they were, never foresaw an eventuality such as the one confronting the Republic.[83]

In appreciating the complexities of the issue, it must well be remembered that the separation of powers in the Philippines differs greatly from its original incarnation.[84] There is now "more truism and actuality in interdependence than in independence and separation of powers."[85] Thus in construing the Constitution,

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[82] CONST. art VIII, § 4(1)

[83] Aytona v. Castillo, G.R. No. 19313, 4 SCRA 1, 12, Jan. 19, 1962 (Padilla, J., *concurring*).

[84] Oscar Franklin Tan, *It is Emphatically the Duty of Congress to Say What Congress Is,* 79 PHIL. L.J. 39, 41 (2004), *citing* Enrique Fernando, *The Doctrine of Separation of Powers: Its Past Primacy and its Present Relevance,* 24 U.S.T. L.J. 8, 17-19 (1974), *cited in* Parcia & Fajardo, *supra* note 58, at 158.

[85] Parcia & Fajardo, *supra* note 58, at 158.

there is the imperative to take into account the object sought to be accomplished by its adoption, and the evils, if any, sought to be prevented or remedied.[86]

According to Justice Vicente V. Mendoza, the Constitution is the intersection of law and politics. When the Constitutional Commission drafted the present Constitution, they took notice of the events of *Aytona* and decided to engrave in text a prohibition on midnight appointments. Thus, the invalidity of such appointments is no longer grounded on the absence of "good faith, morality or propriety"[87] or an inquiry into the motives of the appointment[88] nor its wisdom.[89] The prohibition is anchored on the very text of the Constitution and the evils sought to be prevented, which still persist in Philippine society.

The full effect of the doctrine laid down in *De Castro v. Judicial and Bar Council,* which virtually obliterated the concept of midnight appointments in the country, is yet to be seen.

Epilogue

The year is 2010, the Republic of the Philippines. In May, a vacancy occured in the chief justiceship by reason of the retirement of the incumbent. From the surveys, it became clear that the coming May 2010 elections would go against the Administration standard-bearer, and President Gloria Macapagal-Arroyo, in the fading months of her term, must have felt a strong need to put a dedicated Administration loyalist on the Bench before the government should come into the hands of the Opposition.

Less than two months before Arroyo relinquished the Presidency, with rumors of a failure of elections looming in the horizon, the Supreme Court promulgated De Castro v. JBC. With this, the lame duck President, Gloria Macapagal-Arroyo, as widely anticipated, appointed her former Presidential Chief of Staff – Justice Renato Corona – as Chief Justice. Hence it came to pass that the Philippines had a Supreme Court consisting entirely of Arroyo appointees. History was repeated.

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[86] Civil Liberties Union v. Exec. Sec., G.R. No. 83896, 194 SCRA 317, 325, Feb. 22, 1991.
[87] Aytona v. Castillo, G.R. No. 19313, 4 SCRA at 11, Jan. 19, 1962 .
[88] *Id.* at 86 (Concepcion, J., *concurring* and *dissenting*).
[89] *Id. at 87* (Barrera, J., *dissenting*).