

CHECKING JUDICIAL REVIEW: THE PRESIDENT'S TOTALITARIAN TEMPTATION*

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I. THREE PRESS CONFERENCES

In August last year, Chief Justice Ma. Lourdes Sereno spoke in the now-annual “Chief Justice Meets the Press,” devoting time to address President Benigno Aquino III’s reactions to the Court’s decision in *Araullo v. Aquino*.¹ The President had been vocal about his disagreement with the Court in the resolution of that case and threatened to amend the Constitution to curb the Court’s review powers.

Responding to questions regarding the tension between the Chief Executive and the Court, the Chief Justice said, “The repercussions and reactions [of our decisions] are already beyond the control of the judiciary, meaning it should not shirk from its constitutional duty even if it may result in inconvenience.” It is not her duty, she added, to mend ties with the President for any inconvenience the Supreme Court’s decisions might have generated.²

A few months later, the Chief Justice was still schooling the Chief Executive on the role of courts. During the Foreign Correspondents Association of the Philippines (FOCAP) forum, Sereno dismissed President

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¹ *Araullo v. Aquino*, G.R. No. 209287, 728 SCRA 1, July 1, 2014, *mot. recons. partially granted*, En Banc Op., Feb. 3, 2015, available at <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2015/february2015/209287.pdf> [hereinafter “*Araullo*”].

² Tarra Quismundo, *Sereno: SC is an Independent Court*, PHIL. DAILY INQUIRER, Aug. 29, 2014, available at <http://newsinfo.inquirer.net/633699/sereno-sc-is-an-independent-court>.

Aquino's allegations of "judicial overreach" when the Court struck down his economic stimulus project, the Disbursement Acceleration Program (DAP), in *Araullo*. She said that the Court could not have refused to hear the case: "[We] will have a Court that is criticized for not stepping up and defending the rights of the people in accordance with existing Constitution," she said. Once again she explained that the Court cannot refuse to hear a case "because it can lead to more complications for other branches."³

President Aquino proved to be a difficult student. When it was his turn to speak before the FOCAP, he announced his plans for constitutional amendments to clip the powers of the judiciary before his term ends in June 2016. He said that they were still studying a proposed constitutional amendment to strike a balance between the powers of the executive and the judiciary.

Aquino cited the DAP case where the Supreme Court voted unanimously to declare the stimulus fund scheme unconstitutional and several more cases where, he said, the Court "should not have invoked jurisdiction."⁴

Aquino also mentioned the case of *Reyes v. Commission on Elections*⁵ where, according to the President, the Court still took cognizance of the electoral protest case when the Constitution is very specific that only the House of Representatives Electoral Tribunal has jurisdiction over such cases.⁶

President Aquino also said that he was willing to go to jail for approving the DAP. The President, however, qualified that he could probably go to jail only under an "unjust judicial system." Aquino explained, "[A]ll the decisions I made were never spur of the moment. They were well studied and arising from the best advice I could get from various sectors. Now, at the end of the day, I think I can defend all of the decisions that we made."⁷

³ Tetch Torres-Tupas, *Sereno Debunks Aquino on 'Judicial Overreach' Rap*, PHIL. DAILY INQUIRER, Oct. 16, 2014, available at <http://newsinfo.inquirer.net/645188/sereno-debunks-aquino-on-judicial-overreach-rap>.

⁴ Delon Porcalla, *Noy Wants Judiciary Powers Clipped Before Term Ends*, THE PHIL. STAR, Oct. 23, 2014, available at <http://www.philstar.com/headlines/2014/10/23/1383419/noy-wants-judiciary-powers-clipped-term-ends>.

⁵ G.R. No. 207264, 699 SCRA 522, June 25, 2013, *mot. recons. denied*, 708 SCRA 197, Oct. 22, 2013 [hereinafter "*Reyes*"].

⁶ Porcalla, *supra* note 4.

⁷ Nikko Dizon, *Aquino: I'm Willing to Go to Jail...*, PHIL. DAILY INQUIRER, Oct. 23, 2014, available at <http://newsinfo.inquirer.net/646372/aquino-im-willing-to-go-to-jail>.

The President recognized threats of legal action, but said that he can defend his decisions, including those related to the DAP. When asked if he was ready to be arrested and locked up in jail, the President replied, “If there is a situation where we’re back to an unjust judicial system, then that is a necessary consequence.”⁸

II. THE ARROYO COURT

The President is no stranger to locking horns with the judiciary. The President’s Liberal Party managed the first successful impeachment of a public official, no less than the Chief Justice of the Supreme Court. At that time, it was easy to believe that the impeachment of the Chief Justice was the peak of a campaign designed to dismantle a blatantly pro-Arroyo Court. Indeed, the Supreme Court did a poor job in dispelling the notion that it was an Arroyo Court. Some cases quickly come to mind:

In *Gudani v. Senga*,⁹ the Supreme Court created a military exception for the Commander-in-Chief, allowing her to prevent military officers from testifying before congressional investigations.

In *Neri v. Senate Committee on Accountability of Public Officers and Investigations*,¹⁰ the Supreme Court micromanaged the Senate, filtering questions which the Senate may ask in their inquiries.¹¹

In the 2010 Presidential elections, then-candidate Senator Aquino opined that outgoing President Gloria Macapagal-Arroyo was constitutionally barred from filling a vacancy in the Supreme Court. The Supreme Court reversed case law and sided with Arroyo. In *De Castro v. JBC*,¹² the Supreme Court reversed *In re Valenzuela*¹³ and held that the Constitution did not bar the President from appointing members of the judiciary in the months before the next Presidential elections.

⁸ *Id.*

⁹ G.R. No. 170165, 498 SCRA 671, Aug. 15, 2006.

¹⁰ G.R. No. 180643, 549 SCRA 77, Mar. 25, 2008, *mot. recons. denied*, 564 SCRA 152, Sept. 4, 2008.

¹¹ See also H. Harry L. Roque, Jr., *The Neri Ruling on Executive Privilege: Issues and Challenges for the Accountability of Public Officers and Separation of Powers*, 6 NAT’L TAIWAN U. L. REV. 435 (2011).

¹² G.R. No. 191002, 615 SCRA 666, Mar. 17, 2010.

¹³ A.M. No. 98-5-01-SC, 298 SCRA 408, Nov. 9, 1998.

In *Biraogo v. Philippine Truth Commission of 2010*,¹⁴ the Supreme Court ended President Aquino's first efforts at investigating corruption in the Arroyo Administration by declaring his Truth Commission unconstitutional.

The congressional investigation cases shielded the Arroyo Administration from potential prosecution because the Senate had difficulty extracting information from her cabinet and the military. *Biraogo* ground inquiry to a halt because, evidently, one can invoke the equal protection clause to crush investigations into possible corruption.

Biraogo was the last straw. During the First Criminal Justice Summit at the Manila Hotel in 2011, the President openly criticized the Supreme Court and shortly thereafter, Congress impeached the Chief Justice.

But during the impeachment proceedings, the Supreme Court assumed jurisdiction over three cases that were directly related to the Chief Justice's trial at the Senate. In all three cases, the Court supported the defense of the Chief Justice. As I discussed elsewhere,¹⁵ the Court, in *Philippine Savings Bank v. Senate Impeachment Court*,¹⁶ *In re Mendoza*,¹⁷ and *In re Production of Court Records and Documents*,¹⁸ ruled consistently in Corona's favor.

The impeachment of Chief Justice Corona was packaged as a campaign to clean the judiciary, even a sign of political maturity of the Filipinos. The excitement eventually settled down and it seemed that the balance of power was restored.

Until *Araullo*.

¹⁴ G.R. No. 192935, 637 SCRA 78, Dec. 7, 2010.

¹⁵ *Impeachment as a Popular Check on Official Misconduct*, 37 INTEG. BAR PHIL. J. 146, 152-54 (2012).

¹⁶ G.R. No. 200238, 686 SCRA 35, Nov. 20, 2012.

¹⁷ *In re* Letters of Atty. Estelito P. Mendoza re: G.R. No. 178083 – Flight Attendants and Stewards Association of the Philippines (FASAP) v. Philippine Airlines, Inc. (PAL), et al., A.M. No. 11-10-1-SC, 668 SCRA 11, Mar. 13, 2012.

¹⁸ *In re* Production of Court Records and Documents and the Attendance of Court officials and employees as witnesses under the subpoenas of February 10, 2012 and the various letters for the Impeachment Prosecution Panel dated January 19 and 25, 2012, Feb. 14, 2012, available at <http://sc.judiciary.gov.ph/jurisprudence/2012/february2012/notice.pdf>.

III. LAYING SIEGE TO THE COURTS

On July 1, 2014, the Supreme Court issued its ruling¹⁹ on the constitutionality of the Aquino Administration's DAP.²⁰ It struck down certain practices of the executive branch, including the use of alleged savings by other branches of government.

The President's response to the Supreme Court's decision was fierce. In his address on the evening of July 14, the President expressed his disagreement with the Supreme Court's decision, and then announced his administration's intention to file a motion for reconsideration. The President then feigned confusion over *Araullo*, suggesting that the Supreme Court itself illegally juggles its own funds. Then in a barely veiled threat, Aquino suggested that Congress might have to intervene to settle the disagreement between the Court and the President.²¹

It is widely believed that the President threatened the Supreme Court with two things: impeachment, or legislation to cripple the judiciary.

The President's allies then began to scrutinize the judiciary's budget and are threatening to repeal the Judiciary Development Fund (JDF). Congressman Niel Tupas Jr., part of the administration Liberal Party, filed House Bill No. 4738 which seeks to repeal Presidential Decree No. 1949, the bill creating the JDF. The Administration is framing the JDF as a "judicial pork barrel" to whip up popular sentiments against the judiciary.²²

As I explained elsewhere, the JDF is different from the discretionary funds that are within the control of the legislative and executive branches of government. First, it is not allocated by Congress, but is generated by the operations of the judiciary. Second, there is little room for discretion. Presidential Decree No. 1949 requires that the Fund shall be used to augment the allowances of the members and personnel of the judiciary and to finance the acquisition, maintenance, and repair of office equipment and

¹⁹ *Araullo*, 728 SCRA 1 (2014).

²⁰ For a background on the program, see *The Disbursement Acceleration Program*, OFFICIAL GAZETTE, available at <http://www.gov.ph/featured/dap/> (last visited Aug. 11, 2014).

²¹ Aquino, National Address on the Supreme Court's Decision on DAP, Malacañan Palace (July 14, 2014), available at <http://www.gov.ph/2014/07/14/english-national-address-of-president-aquino-on-the-supreme-courts-decision-on-dap>.

²² Lira Dalangin-Fernandez, *House Moves to Scrap Judiciary Development Fund*, INTERAKSYON, July 15, 2014, available at <http://www.interaksyon.com/article/91236/house-moves-to-scrap-judiciary-development-fund>.

facilities. At least 80 percent of the Fund shall be used for cost of living allowances, and not more than 20 percent of the Fund shall be used for office equipment and facilities of courts where legal fees are collected. The Supreme Court's use of the Fund is limited by law.²³

When Chief Justice Lourdes Sereno refused to attend public hearings regarding the JDF (she claimed that "summoning the head of a co-equal branch might be premature and inappropriate"), Congress threatened to impeach her.²⁴

The judiciary is also having difficulty requesting for the budget it needs. Sereno said that the proposed 2015 national budget "is terribly balanced against" the judiciary, for which only 0.777 percent of the PHP 2.6-trillion national budget is allotted. The Department of Budget and Management cut the Judiciary's PHP 32-billion budget request to PHP 20.25 billion when the proposed budget was submitted to Congress.²⁵

The public's response to the siege on the judiciary, however, was overwhelmingly against the President.²⁶ By the time the President delivered his State of the Nation Address days later, he had made no mention of the Supreme Court or his threat to pressure it into reversing *Araullo*.

Another sign of the siege on the judiciary are the circumstances surrounding the appointment of Francis Jardeleza to replace Justice Roberto Abad in the Supreme Court. Jardeleza was excluded from the list of names given to the President. Jardeleza's integrity came into question after he, as the Solicitor General, deleted part of the memorandum that the Philippines

²³ See Dante Gatmaytan, *Avoid Obscurantism*, U. PHIL. FORUM, Jan. 24, 2014, available at <http://www.up.edu.ph/avoid-obscurantism>. The Fund succeeds in generating additional monies for the judiciary. Given the historically low priority given by Congress in allocating a budget for the judiciary, this nearly 1-billion peso fund provides the money needed to augment the salaries of court personnel and to purchase equipment. There is no need for the executive branch to control the Fund. The check on the use of the Fund can come in the form of the government audit by the Commission on Audit.

²⁴ Gil C. Cabacungan, *Lawmakers Threaten to Impeach Sereno*, PHIL. DAILY INQUIRER, Aug. 7, 2014, available at <http://newsinfo.inquirer.net/627030/lawmakers-threaten-to-impeach-sereno>.

²⁵ Tarra Quismundo, *Sereno: SC is an Independent Court*, PHIL. DAILY INQUIRER, Aug. 29, 2014, available at <http://newsinfo.inquirer.net/633699/sereno-sc-is-an-independent-court>.

²⁶ Tetch Torres-Tupas, *Lawyers Defend SC from Aquino's Tirades*, PHIL. DAILY INQUIRER, July 23, 2014, available at <http://newsinfo.inquirer.net/622794/lawyers-defend-sc-from-aquinos-tirades>. The Catholic Church also chimed in on the side of the Court: Paterno Esmaguél II, *CBCP on Aquino's DAP Speech: Respect SC*, RAPPLER, July 15, 2014, available at <http://www.rappler.com/nation/63317-cbcp-aquino-dap-speech-supreme-court>.

submitted to a United Nations-backed tribunal looking into China's claims in the West Philippine Sea.²⁷ Jardeleza, however, questioned his exclusion from the shortlist before the Supreme Court. Jardeleza won his case.²⁸

Kabataan Partylist Representative Terry Ridon objected to the “last-minute inclusion” in the Judicial and Bar Council (JBC) shortlist of Jardeleza as “power play at its peak” and “a blatant attempt of the Aquino administration to again undermine the independence of the Supreme Court, this time from the inside.”²⁹

Jardeleza's appointment, he added, will make “an irreversible ripple” in the High Court's judicial integrity, saying that Jardeleza defended the government's position in several critical cases, including *Araullo*.³⁰ Ridon fumed: “It's a truly despicable act which reveals the President's desperation to undermine his self-proclaimed arch-enemy, the Supreme Court [...] It's part of Mr. Aquino's ploy to consolidate power for himself.”³¹

The JBC asked the Supreme Court to reverse its decision. In its motion for reconsideration, the JBC said the High Court's decision had set a “dangerous precedent” when it ordered Jardeleza's inclusion to the shortlist even if it was already submitted to President Aquino. “The majority decision resulted in judicial overreach by altering the shortlist. [...] The Constitution gave JBC sole discretion to determine presidential recommendees to the judiciary,” the JBC said. The JBC argued that the Supreme Court's administrative supervision over the JBC “does not include power to overturn a decision and to order a review or change of its rules.”³²

What is troubling about Justice Jardeleza's appointment is the speed at which the case was decided.

Aquino appointed Jardeleza and beat the 90-day constitutional deadline for the President to fill up the vacancy in the Court. Jardeleza's

²⁷ *Jardeleza Appointed as Supreme Court Justice*, RAPPLER, Aug. 20, 2014, available at <http://www.rappler.com/nation/66736-jardeleza-supreme-court>.

²⁸ *Jardeleza v. Sereno*, G.R. No. 213181, 733 SCRA 279, Aug. 19, 2014.

²⁹ Dexter San Pedro, *Aquino names SolGen Jardeleza to SC*, INTERAKSYON, Aug. 20, 2014, available at <http://www.interaksyon.com/article/93626/aquino-names-solgen-jardeleza-to-sc>.

³⁰ *Id.*

³¹ *Id.*

³² Tetch Torres-Tupas, *JBC asks SC to reverse ruling on Jardeleza*, PHIL. DAILY INQUIRER, Sept. 24, 2014, available at <http://newsinfo.inquirer.net/640493/jbc-asks-sc-to-reverse-ruling-on-jardeleza>.

appointment came exactly a day after the Supreme Court granted his petition for *mandamus* contesting his exclusion from the shortlist submitted by the JBC to the President.³³

The Supreme Court could have sat on the case and allowed the deadline to lapse to force the President to select an appointee from the JBC's list. Instead, it resolved the issue with just enough time for the President to appoint his choice for the Supreme Court, despite his exclusion from the JBC's choices. The Supreme Court's decision weakens the independence of the JBC.

There are other stories that show the same sad pattern: the political branches of government are bullying the Court. For example, the Court's decision in *Reyes v. Commission on Elections*³⁴ held that Regina Reyes was not a Filipino citizen and, therefore, she was not qualified to represent Marinduque in the House of Representatives. The House continues to ignore that decision. Reyes herself has threatened to impeach the Election Commissioners and Justices who voted against her.

Together, these circumstances paint a sad portrait of the state of separation of powers. After *Araullo*, the President has threatened to impeach the Chief Justice, abolish the JDF, and even control the composition of the Court.

IV. THE LAW

My frustration at the President stems from his apparent lack of understanding of the constitutional scheme. Following the United States Constitution, Philippine law adopted the separation of powers doctrine. "The theory of the separation of powers is designed [...] to secure action and at the same time to forestall over action which necessarily results from undue concentration of powers, and thereby obtain efficiency and prevent despotism."³⁵ It established the "rule of law" and narrows the range of governmental action, making it subject to control by certain legal devices.³⁶ As every first year law student knows:

³³ Joel Sy, *Jardeleza Appointed to SC*, THE MANILA TIMES, Aug. 20, 2014, available at <http://www.manilatimes.net/jardeleza-appointed-sc/120418>.

³⁴ *Reyes*, 699 SCRA at 542. The Court denied Reyes' motion for reconsideration on October 22, 2013. See *Reyes*, 708 SCRA 197 (2013).

³⁵ *People v. Rosenthal*, G.R. No. 46076, 68 Phil. 328, 343, June 12, 1939.

³⁶ *Id.*

The 1987 Constitution has fully restored the separation of powers of the three great branches of government. To recall the words of Justice Laurel in *Angara v. Electoral Commission*, “the Constitution has blocked but with deft strokes and in bold lines, allotment of power to the executive, the legislative and the judicial departments of the government.” Thus, the 1987 Constitution explicitly provides that “[t]he legislative power shall be vested in the Congress of the Philippines”, “[t]he executive power shall be vested in the President of the Philippines”, and “[t]he judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.” These provisions not only establish a separation of powers by actual division but also confer plenary legislative, executive and judicial power subject only to limitations provided in the Constitution. For as the Supreme Court in *Ocampo v. Cabangis* pointed out “a grant of the legislative power means a grant of all legislative power; and a grant of the judicial power means a grant of all the judicial power which may be exercised under the government.”³⁷

The separation of powers has real consequences in the manner in which government carries out its constitutional functions. Again, according to the Supreme Court:

Each department of the government should be sovereign and supreme in the performance of its duties within its own sphere, and should be left without interference in the full and free exercise of all such powers, rights, and duties which rightfully belong to it. Each department should be left to interpret and apply, within the constitutional powers conferred upon it, without interference, what may be termed its political duties. For one department to assume to interpret, or to apply, or to attempt to indicate how such political duties should be performed, would be an unwarranted, gross, and palpable violation of the duties which were intended by the creation of the separate and distinct departments of the government.³⁸

“The doctrine of separation of powers calls for each branch of government to be left alone to discharge its duties as it sees fit.”³⁹ As such,

³⁷ *Marcos v. Manglapus*, G.R. No. 88211, 177 SCRA 668, 688-89, Sept. 15, 1989. (Citations omitted.)

³⁸ *Abueva v. Wood*, G.R. No. 21327, 45 Phil. 612, 637, Jan. 14, 1924. (Citations omitted.)

³⁹ *Pimentel v. House of Representatives Elec. Comm.*, G.R. No. 141489, 393 SCRA 227, 238, Nov. 29, 2002, *citing* *Guingona v. Ct. of Appeals*, G.R. No. 125532, 292 SCRA 402, 415, July 10, 1998.

“it is not within the province of the judiciary to express an opinion, or express a suggestion, that would reflect on the wisdom or propriety of the action of the Chief Executive on matters purely political in nature.”⁴⁰ “The legislature has no authority to direct the judiciary in the exercise of powers that are strictly judicial[.]”⁴¹

“[I]n accordance with this principle, the Supreme Court is independent of executive or legislative control as the Executive and the Congress are of the judiciary.”⁴² The legislative department is assigned the power to make and enact laws. “But the interpretation and application of said laws belong exclusively to the [j]udicial department. [...] [T]his authority to interpret and apply the laws extends to the Constitution.”⁴³ The Court explained that:

We have already said that the [l]egislature under our form of government is assigned the task and the power to make and enact laws, but not to interpret them. This is more true with regard to the interpretation of the basic law, the Constitution, which is not within the sphere of the [l]egislative department. If the [l]egislature may declare what a law means, or what a specific portion of the Constitution means, especially after the courts have in actual case ascertain its meaning by interpretation and applied it in a decision, this would surely cause confusion and instability in judicial processes and court decisions. Under such a system, a final court determination of a case based on a judicial interpretation of the law or of the Constitution may be undermined or even annulled by a subsequent and different interpretation of the law or of the Constitution by the [l]egislative department. That would be neither wise nor desirable, besides being clearly violative of the fundamental principles of our constitutional system of government, particularly those governing the separation of powers.⁴⁴

In still another case, the Court explained that:

The doctrine of separation of powers calls for each branch of government to be left alone to discharge its duties as it sees fit.

⁴⁰ *Director of Prisons v. Ang Cho Kio*, G.R. No. L-30001, 33 SCRA 494, 504, June 23, 1970.

⁴¹ *Fernandez-Subido v. Lacson*, G.R. No. L-16494, 2 SCRA 1054, 1058, Aug. 29, 1961.

⁴² *Radiowealth, Inc. v. Agregado*, G.R. No. L-3066, 86 Phil. 429, 434, May 22, 1950.

⁴³ *Endencia v. David*, G.R. No. L-6355, 93 Phil. 696, 700, Aug. 31, 1953.

⁴⁴ *Id.* at 701-702.

Being one such branch, the judiciary, Justice Laurel asserted, “will neither direct nor restrain executive [or legislative action.]” The legislative and the executive branches are not allowed to seek its advice on what to do or not to do; thus, judicial inquiry has to be postponed in the meantime. Before a court may enter the picture, a prerequisite is that something has been accomplished or performed by either branch. Then *may* it pass on the validity of what has been done but, then again, only “when [...] properly challenged in an appropriate legal proceeding.”⁴⁵

Furthermore:

The concept of the independence of the three branches of government extends from the notion that the powers of government must be divided to avoid concentration of these powers in any one branch. The division would avoid any single branch from lording over the other branches or the citizenry. To achieve this purpose, the divided power must be wielded by co-equal branches of government that are equally capable of independent action in exercising their respective mandates; lack of independence would result in the inability of one branch of government to check the arbitrary or self-interest assertions of another or others.⁴⁶

The Court is “entrusted exclusively with the judicial power to adjudicate with finality all justiciable disputes, public and private. No other department or agency may pass upon its judgments or declare them ‘unjust’ [upon] controlling and irresistible reasons of public policy and of sound practice[.]”⁴⁷ As the Court explained,

The sound, salutary and self-evident principle prevailing in this as in most jurisdictions, is that judgments of the highest tribunal of the land may not be reviewed by any other agency, branch, department, or official of Government. Once the Supreme Court has spoken, there the matter must rest. Its decision should not and cannot be appealed to or reviewed by any other entity, much less reversed or modified on the ground that it is tainted by error in its findings of fact or conclusions of law, flawed in its logic or language, or otherwise erroneous in some other respect. This, on

⁴⁵ *Guingona v. Ct. of Appeals*, G.R. No. 125532, 292 SCRA 402, 415, July 10, 1998. (Citations omitted.)

⁴⁶ *In re COA Opinion on the Computation of the Appraised Value of Properties Purchased by the Retired Chief/ Associate Justices of the Supreme Court*, A.M. No. 11-7-10-SC, 678 SCRA 1, 9-10, July 31, 2012. (Citations omitted.)

⁴⁷ *In re Laureta*, G.R. No. L-68635, 148 SCRA 382, 417, May 14, 1987.

the indisputable and unshakable foundation of public policy, and constitutional and traditional principle.⁴⁸

To repeat, the theory of the separation of powers is designed to “forestall over action which necessarily results from undue concentration of powers [...] and prevent despotism. Thereby, the “rule of law” [...] narrows the range of governmental action and makes it subject to control by certain legal devices.”⁴⁹

[T]here is a violation of the principle of separation of powers when one branch of government unduly encroaches on the domain of another. US Supreme Court decisions instruct that the principle of separation of powers may be violated in two ways: firstly, “[o]ne branch may interfere impermissibly with the other’s performance of its constitutionally assigned function;” and “[a]lternatively, the doctrine may be violated when one branch assumes a function that more properly is entrusted to another.” In other words, there is a violation of the principle when there is impermissible (a) interference with and/or (b) assumption of another department’s functions.⁵⁰

The President’s insistence that the DAP is constitutional is inexplicable under the constitutional system of checks and balances. It is the Supreme Court that is the final arbiter of legal disputes, not the President. Whether he believes in his heart that he is correct does not matter. As Justice Robert H. Jackson said in his concurring opinion in *Brown v. Allen*, “There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.”⁵¹

V. THE PUBLIC

The President’s unbending stance on *Araullo* is also characterized by a lack of popular support. When he challenged the Supreme Court from the bully pulpit, his once-formidable ratings began to fall. The latest figures

⁴⁸ *In re Borromeo*, A.M. No. 93-7-696-0, 241 SCRA 405, 455, Feb. 21, 1995. (Citation omitted.)

⁴⁹ *People v. Rosenthal*, G.R. No. 46076, 68 Phil. 328, 343, June 12, 1939.

⁵⁰ *Belgica v. Ochoa*, G.R. No. 208566, 710 SCRA 1, 108, Nov. 19, 2013. (Citations omitted.)

⁵¹ 344 U.S. 443 (Jackson, J., *concurring*).

from the Social Weather Stations show that among the three branches of government, the Supreme Court is enjoying a rise in popularity:

The net satisfaction rating of the Senate was *moderate*, at +28 in September, up by 16 points from +12 in June. Out of 17 surveys since September 2010, it was *good* in 8, *very good* in 6 and *moderate* in 3.

The net satisfaction rating of the House of Representatives was also *moderate*, at +21, up by 8 points from +13 in the previous quarter. Out of 17 surveys since September 2010, it was *good* in 10 and *moderate* in 7.

It was *good* for the Supreme Court, at +32 in September, up by 2 points from +30 in June. It has been *good* since August 2012.

The net satisfaction rating of the Cabinet as a whole rose by one grade to *moderate* from *neutral*, at +18, up by 11 points from +7 in the previous quarter. It has been *moderate* since September 2010, except when it was a *good* +33 in August 2012 and a *neutral* +7 in June 2014[.]⁵²

The Supreme Court's rise in the ratings shows that it enjoys public support. As a politician, the President should be more attuned to public polls. Instead, he cannot seem to let *Araullo* go. The President is squandering his own political capital and risking his ratings over a single case that by any stretch of the imagination be defined as career-ending.⁵³

Support for the judiciary is evident outside surveys. The legal community has rallied behind the judiciary,⁵⁴ and the Integrated Bar of the Philippines issued a statement criticizing the President's stance against the

⁵² Social Weather Stations, *Third Quarter 2014 Social Weather Survey: Net satisfaction ratings at +52 for Vice-President Binay, +36 for Senate President Drilon, +13 for Speaker Belmonte, and +10 for Chief Justice Sereno*, Oct. 17, 2014, available at <http://www.sws.org.ph/pr20141017.htm>.

⁵³ It should be stressed that the Liberal Party controlled House of Representatives. The House of Representatives justice committee overwhelmingly dismissed three impeachment complaints filed against the President as insufficient in substance. Louis Bacani, *3 Impeach Raps vs Aquino 'Insufficient in Substance'*, THE PHIL. STAR, Sept. 2, 2014, available at <http://www.philstar.com/headlines/2014/09/02/1364603/3-impeach-raps-vs-aquino-insufficient-substance> ("After about four hours of debates, each of the complaints received only four affirmative votes, 54 negative votes and zero abstentions.").

⁵⁴ Tetch Torres-Tupas, *Aquino attacks on SC a threat to democracy*, PHIL. DAILY INQUIRER, Sept. 26, 2014, available at <http://newsinfo.inquirer.net/640874/aquino-attacks-on-sc-a-threat-to-democracy>.

Supreme Court: “To cite the purported need to amend because he lost in the [...] DAP where the program was declared unconstitutional, simply taxes our credulity, undermines and defies reason and puts to great doubt the ability of the President to govern under the Rule of Law.”⁵⁵

The New York Times urged the President to “stop butting heads with the court and gracefully step down when his term is up.”⁵⁶ Even allies of the President were appalled at the President’s actions. Senator Sergio Osmeña III called the President “disrespectful” and childish.⁵⁷

VI. THE PRESIDENT’S CONSTITUTION

The President threatens the fabric of the constitutional order when he adamantly ignores established principles of law. An explanation for this behavior is needed.

The answer may lie in a speech he made three years ago in December 2011, during the First Criminal Justice Summit at the Manila Hotel. We recall that pivotal moment when the President fired the first volley at what turned out to be a battle with the Supreme Court, which ended with the impeachment of the Chief Justice. Most observers viewed the speech as the proverbial gauntlet cast upon the Chief Justice’s feet. Looking back, the speech may have been more significant because it was at that moment when the Chief Executive explained his legal theory for governance:

[T]he power of the Supreme Court, the President, and Congress all emanate from their single Boss: the people. Therefore, we should only favor and fight for the people’s interests. I swore to preserve and defend the Constitution, execute its laws, do justice to every man, and consecrate myself to the service of the Nation. I have no intention of violating my sworn oath; I have no intention of failing the Filipino people.

⁵⁵ Brian Maglunsod, *IBP tells PNoy ‘ridiculous’ basis for Charter change undermines Cory legacy*, INTERAKSYON, Aug. 25, 2014, available at <http://www.interaksyon.com/article/93973/ibp-tells-pnoy-ridiculous-basis-for-charter-change-undermines-cory-legacy>.

⁵⁶ Rochelle Tangi, *NY Times: PNoy’s term extension will “jeopardize Philippine democracy”*, ASIAN JOURNAL, Aug. 28, 2014, available at <http://asianjournal.com/news/ny-times-pnoys-term-extension-jeopardize-philippine-democracy>.

⁵⁷ Macon Ramos-Araneta, *Osmeña: Aquino’s act vs SC impolite*, MANILA STANDARD TODAY, July 24, 2014, available at <http://manilastandardtoday.com/2014/07/24/osme-a-aquino-s-act-vs-sc-impolite>.

It is my obligation—it is everyone’s obligation—to remain focused on a single direction, under one unifying aspiration: to serve and uphold the interests of the nation. To all those who stand shoulder to shoulder with us along this straight and righteous path, have faith: So long as we are on the side of what is right, we will not back down from any fight. And so long as the people are behind us, we will triumph. Let us not let them down.⁵⁸

When we look at the President’s statement on *Araullo*, we find recurrent themes that explain the President’s approach to governance:

Without doubt, any good leader would want to implement projects that benefit the public at the soonest possible time. I do not see any reason to delay benefits for our countrymen, especially because we have the wherewithal to alleviate their plight. It is clear that if you delay the benefits due them, you prolong the suffering of the Filipino people.

* * *

[...] Thus, to the Supreme Court, our message: Do not bar us from doing what we swore to do. Shouldn’t you be siding with us in pushing for reform? Let us, therefore, end this vicious cycle that has taken our people hostage.

* * *

Finally, let me impress upon everyone: DAP is good. Our intentions, our processes, and the results were correct. Bosses, I promise you: I will not allow your suffering to be prolonged—especially if we could do what we can as early as now.⁵⁹

Looking at these speeches, it now becomes evident that the President did more than criticize the Supreme Court for demonstrating partiality in its decisions. He was explaining his philosophy of governance. The President’s fits are not evidence of his childishness. The lengths he is willing to go—the impeachment of the Chief Justice and the amendment of the Constitution—to curb judicial power show a commitment to a unique, if incorrect, view of the function of the President.

⁵⁸ Aquino, Speech at the First National Criminal Justice Summit [English], Centennial Hall, Manila Hotel (Dec. 5, 2011), *available at* <http://www.gov.ph/2011/12/05/speech-of-president-aquino-at-the-1st-national-criminal-justice-summit-english-december-5-2011>.

⁵⁹ Aquino, *supra* note 21.

In his view, the President determines what is right for the people. All other branches that have the same “boss” must follow suit. When the Supreme Court defies the President, the Court is wrong. If the Court refuses to change its ways, then their power must be curbed. While there are three equal branches of government, the Executive Branch is more equal than others.

I say this view is incorrect because the President cannot determine the will of the people on his own. In fact, recent opinion polls show that the President’s assessment of the people’s will is inaccurate.⁶⁰ Our system of government allows for continuous dialogue on the way the country will attain its aspirations.

The other important matter the President overlooks is that the people’s will is already embodied in a document called the Constitution. What the President overlooks is that governance cannot be defined only by the issues of the day or the whims of the people in government. We, the People, laid down rules in 1987 that are meant to endure over time. Some of these rules pertain to the national budget. When the President violates the rules, we call on the courts (in accordance with the same rules) to call him out.

By focusing on other parts of the President’s speeches, we arrive at an uncomfortable realization: The President’s Constitution is different from the one we are reading. The President’s Constitution embodies the separation of powers but not a system of checks and balances. His recent outbursts against the Supreme Court show that his goal is different from a genuine concern for bias that favored the Arroyo Administration. The impeachment of Chief Justice Renato Corona no longer appears to be the culmination of a campaign to ensure judicial independence. The President is attempting to restore the balance of power under the Constitution with the President at the helm and the Supreme Court polite and compliant at the wings.

This is why the President opined that there are times when “the Court should not have invoked jurisdiction”⁶¹ and decided certain cases.

This is why the President can only be jailed under an “unjust judicial system.”⁶² It is an unjust legal system that will find fault in the President because the President can do no wrong.

⁶⁰ Social Weather Stations, *supra* note 52.

⁶¹ Porcalla, *supra* note 4.

Journalist Patricia Evangelista explains it this way:

The President's battle with the High Court is a complicated narrative, difficult to reduce into 10-word answers. Every commentator is compelled to preface criticism with "I'm not a lawyer, but—" Every telling involves convoluted defenses, definitions of terms and repeated quotations on the separation of powers from Oliver Wendell Holmes. It is, certainly, not a story that fires the national imagination.

Perhaps this is why it was easy—and necessary—for Benigno Aquino III to simplify the narrative, and dictate the terms of good and evil.

This is, after all, a president who took office despite a lackluster Senate performance and a decided lack of presidential charm. It was enough that his father was martyred and his mother was offered as sacrifice. The memory of that long and bloodied struggle – coupled with the brutal decade of the Arroyo administration – ensured this President's coronation far more than all the glad-handing and political horse-trading. He was the child of the sun in the land of the morning, and the people crowned him king.

It is perhaps because of this that Aquino responds to all criticism with an injured righteousness. His is a government that stands on the side of the angels. All who oppose him have sold souls to the devil.⁶³

Dean Raul Pangalangan's take on the President's post-DAP response is similar:

We must rise above the din of partisan maneuvering and see that what rages today is not just a contest among political titans but a clash between two competing bases of legitimacy.

The first is the law, which antigraft crusaders deploy against both the Priority Development Assistance Fund (PDAF) enjoyed by legislators and the [...] DAP enjoyed by the President.

⁶² Dizon, *supra* note 7.

⁶³ Patricia Evangelista, *The Good King*, RAPPLER, July 28, 2014, available at <http://www.rappler.com/thought-leaders/64545-sona-good-king-aquino>.

The second is common sense and the public good, which President Aquino has invoked to explain what he has done to jump-start the economy and deliver social projects. He would go beyond legalism and return everyone to the big picture.⁶⁴

When the President makes a major policy pronouncement, he cites the basis for his decision. He cites his mandate from the people, not the Constitution. In his Constitution, all political actors function to attain the same goal the President has set.

Aquino would not be the first politician who felt unduly restrained by the courts. Writing on the American experience, Prof. Jonathan Entin said:

The Constitution [...] provides the framework for our government and our politics. It is, in short, an important part of our culture as well as of our law. Accordingly, the Constitution derives its meaning not only from judicial interpretation but also from shared understandings that emerge from governance and politics. This fact suggests that not every dispute over the appropriate division of authority between Congress and the President requires judicial resolution. Instead, the political branches themselves have resources and obligations to develop their own views and to fashion accommodations of their sometimes conflicting interests. Moreover, just as the Constitution might not apply in a determinative way to particular interbranch disputes, sometimes the wisdom of a proposed statute or policy is more important than its constitutionality. Both politicians and citizens too often forget this mundane point.

This view of the separation of powers assumes a minimum level of interbranch comity. [...] For most of the past generation, we have had a divided federal government, with one party controlling the legislative branch and the other controlling the executive. In addition, each branch has developed sophisticated legal staffs which seek vigilantly to safeguard their constitutional prerogatives. For these and other reasons, powerful incentives exist for conflict rather than cooperation.⁶⁵

⁶⁴ Raul Pangalangan, *President Must Quit Playing Lawyer, the Country Needs a Statesman*, PHIL. DAILY INQUIRER, July 28, 2014, available at <http://newsinfo.inquirer.net/623862/president-must-quit-playing-lawyer-the-country-needs-a-statesman#ixzz3HPGw-WcZp>.

⁶⁵ Jonathan Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 226 (1990).

In the United States, scholars suggest that judicial review, as currently practiced by the judiciary, “is ‘of recent vintage’ and inconsistent with the Constitution’s original design.”⁶⁶

Larry Kramer writes that “American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution”. He argues that the final interpretative authority rested with the people themselves and both their elected representatives and courts were subordinate to their judgments. On the other hand, Mark Tushnet “argues that constitutional interpretation is a function shared by all branches of government and not the exclusive domain of courts.”⁶⁷

As the Supreme Court explained, however, the interpretation of the Constitution in the Philippines is a power vested exclusively in the judiciary: “No other department or agency may pass upon its judgments or declare them ‘unjust’ [upon] controlling and irresistible reasons of public policy and of sound practice[.]”⁶⁸

I wish to add that these two sources of legitimacy—popular support and the Constitution—are not independent of each other. I argue that support for the President is grounded, and this is where I think he may be wrong, on his own fealty to the rule of law. His supporters gave him a mandate for reform, but this mandate is not absolute. The mandate must conform to constitutional strictures. When the President strays from the Constitution, he erodes popular support.

VII. MISGUIDED AMENDMENT INITIATIVES

What does this mean for the attempts to amend the Constitution?

According to the President, the system of government works as long as the other branches of government support him. As President, his job is to serve the people and the other branches of government should follow suit. When the Court displays the smallest hint of independence, it strays from the official path, and therefore, should be sanctioned. The rules of the game should be changed; the Constitution should be amended.

⁶⁶ Dante Gatmaytan, *Politicisation and Judicial Accountability in the Philippines*, 87 PHIL. L. J. 21, 40 (2012).

⁶⁷ *Id.* (Citations omitted.)

⁶⁸ *In re Laureta*, 148 SCRA at 417.

By itself, a campaign to amend the Constitution is not wrong. But when it is fuelled by a misunderstanding of the separation of powers and founded on the idea of executive exceptionalism, then the project is dangerous. It is dangerous because it misconceives the nature of the problem. The President is convinced about the existence of “judicial overreach” only because he thinks the President is immune to judicial review. The President must understand that there was nothing extraordinary about the Supreme Court’s decision in *Araullo*. The fact is that the President, no matter how well-intentioned, is bound by constitutional constraints. It is the Court’s duty to point this out when the proper case arises.

The belief in infallibility can also be used to justify other amendments to the Constitution. When asked about a constitutional amendment to lift the president’s single, six-year term limit, Aquino said he would listen to his “bosses.” He explained that, “‘*Nung pinasukan ko ito, ang tanda ko* one term of six years. [...] *Ngayon*, after having said that, *syempre ang mga boss ko, kelangan kong pakilingan ‘yon.*’ (When I first got into this, I noted, one term of six years. Now, after having said that, of course I have to listen to the people.)”⁶⁹

The President who arrogates to himself the role of identifying what is best for the people sets out on a short road to authoritarianism. The President who does not see himself bound by legal constraints consecrates that road.

Ideally, the President should understand his real role in the constitutional scheme. Checks are present because those in power tend to abuse their powers. Judges are there to make sure he does not stray from the constitutional path—the other “*tunid na daan*” (straight path).⁷⁰

This is the lesson Chief Justice Sereno reiterates: “[B]y constitutional design the Judiciary must rule as it should, and inevitably have to say what

⁶⁹ INTERAKSYON, *President Aquino says he is open to Cha-Cha, 2nd term, and a weaker SC*, Aug. 13, 2014, available at <http://www.interaksyon.com/article/93241/president-aquino-says-he-is-open-to-cha-cha-2nd-term-and-a-weaker-sc>.

⁷⁰ Aquino, First State of the Nation Address, Session Hall of the House of Representatives (July 26, 2010), available at <http://www.gov.ph/2010/07/26/state-of-the-nation-address-2010/> (English translation available at <http://www.gov.ph/2010/07/26/state-of-the-nation-address-2010-en>).

acts transgress constitutional boundaries.”⁷¹ Or, as she quipped, “I do not serve Presidents, excuse me... That’s unforgivable[.]”⁷²

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⁷¹ Leonard Postrado, *Judiciary must rule as it should – Sereno*, MANILA BULLETIN, Aug. 29, 2014, available at <http://www.mb.com.ph/judiciary-must-rule-as-it-should-sereno>.

⁷² Tarra Quismundo, *Sereno: I Do Not Serve Presidents, Excuse Me*, PHIL. DAILY INQUIRER, Oct. 17, 2014, available at <http://newsinfo.inquirer.net/645278/sereno-i-do-not-serve-presidents-excuse-me>.