

QUI CUSTODIET CUSTODIAS?

"We are under a Constitution
but the Constitution is
what the judges say
it is . . ."

Charles Evans Hughes

No government is needed to reconcile interests which logically cannot come in conflict with one another. But some kind of governmental machinery is necessary to reconcile and balance conflicting or overlapping interests and purposes. Many forms of government are available for this purpose. The Filipinos thought that a republican form of government is the most effective means to preserve, promote and share the general welfare.

The principle of separation of powers is inherent in this form of machinery where the functions of government are divided into three distinct classes—the executive, the legislative, and the adjudicative. Within the limits of its own sphere, each department is supreme. If one department goes beyond the limits set by the constitution, its acts are null and void.¹

Thus, it is clear that if any branch or department controls the rest, effective legal ordering is thwarted.

Because of the more active nature of both Congress and the President, in contrast with the passive nature of the courts, they have more occasion to encroach upon and impair judicial independence than have the courts the occasion to invade the other spheres of functions and powers.

But although judicial encroachment upon congressional and presidential prerogatives is less feared, it is far from being an impossibility. As a matter of fact, judicial activism rears its head by means of the judicial review—the power of the Court to have the final word in the question of whether a law violates the constitution or not, of whether a governmental action is based actually upon the constitution or merely upon a usurpation of a power which the people in its judgment has withheld.²

In the United States, unlike in the Philippines, this power of judicial review, is not expressly conferred by the people thru the constitu-

¹ SINCO, V. G., PHILIPPINE CONSTITUTIONAL LAW, p. 11.

² "The principles of law and political practice which placed the guardianship of the express and implied terms of written constitutions primarily in courts of justice, and the dominance of judge-made law in accordance with common law standards and principles, constitute the basis of what may appropriately be termed the 'American doctrine of judicial supremacy,'" HAINES, C. G., THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY, p. 27.

tion upon the judiciary. There, it was the Court itself who discovered that it had this power of judicial review. The Court formally asserted its possession of judicial review in 1803, when it first struck down a federal law in the case of *Marbury v. Madison*.³

In the Philippines, the power of judicial review, is expressly conferred upon the Supreme Court by the Constitution. Art. VIII, Sec. 2 provides:

"The Congress...may not deprive the Supreme Court of its... jurisdiction to review, reverse, modify, or affirm on appeal, certiorari, or writ of error, as the law or the rules of court may provide, final judgments and decrees of inferior courts in—

(1) All cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order or regulation is in question."⁴

But although the Constitution expressly vests in the Court the power of judicial review, nowhere does it delimit its exercise.

Through the use of the power of judicial review, the courts invade the sphere of policy-making, which is the "proper and peculiar province" of the legislature. In weighing legislative acts in the constitutional balance, the weight of meaning given by the Court to the broad and indefinite clauses often tips the balance against the statute. The Court may thus with impunity substitute its own ideas of what the policy should be for those adopted by Congress. By the use of this power, the Court may constitute itself as a non-elective law-making body.

The executive and its administrative agencies, charged with the faithful execution of the laws, have been likewise harassed by the severe exercise of the same power. When the Court eyes with suspicion broad actions designed to promote administrative efficiency, the President finds himself at his wit's end reconciling the need to immediately implement legislative policies, with the restrictions on administrative action imposed by the courts.

By its very nature, this power is final and all that Congress and the President can do, is to assail decisions with which they disagree. Neither of them can summon the Court before it and demand an account of the use of this power. Even the people, the recognized source of all governmental authority in a republican state, is rather powerless to render void the Court's decision in a case.

Those who worship at the altar of checks and balances may contend that the legislature as well as the executive are endowed with powers which serve as checks on the use of the judicial power of review.

³ 1 Cranch 137 (1803).

⁴ Art. VIII, Sec. 10 of the Constitution impliedly vests the power of judicial review in the Supreme Court: "All cases involving the constitutionality of a treaty or law shall be heard and decided by the Supreme Court *in banc*, and no treaty or law may be declared unconstitutional without the concurrence of two-thirds of all the members of the courts."

Judges hold office by presidential appointment with the consent of the Commission on Appointments.⁵ It may appear from this fact that the President and Congress can wield an effective check on extravagant judicial action. Actually the President's power to appoint does not carry with it his ordinary power to remove because of the security of judicial tenure, which our Constitution guarantees in Art. VIII, Sec. 9. After appointment, the President loses control over the judges. It may be said that even the necessary consent of legislators in the Commission on Appointments to the appointment is no more effective a check on the judiciary than the President's power to appoint.

The President's pardoning power, may be said to negate the judgment of the Court. Let us not overestimate its restraining effect. At best, the pardoning power is a limited, mild and indirect kind of check, in the sense that it merely cures rather than deter "hasty and improvident" judicial action. Moreover, this power can be used to curb judicial error or harshness only in criminal cases.

The judiciary of course needs money to function. Congress holds the purse-strings. Can Congress then make the judiciary dance to its tune? The ready and apparently correct answer is, "Yes!" But Art. VIII, Sec. 9 of the Constitution, in effect loosens the congressional grip on the judicial system. It removes the salary of incumbent judges from the range of the retaliatory axe of Congress. At most Congress has control only over the compensation of incoming judges. The rulings in *Evans v. Gore*⁶ and *Perfetto v. Meer*⁷ and *Endencia v. David*⁸ protect judicial independence even from the exercise of Congress's power to tax their salary.

It may also be claimed that Congress, thru its unappealable power of impeachment may effectively restrain judicial conduct.⁹ Such a power concededly exerts a deterrent influence on irresponsible judicial action. But its efficacy as a real and practical check is not indubitable. In England, where impeachment originated, it has not been used for the last century and a half since the last impeachment proceeding way back in 1806. In the United States, the one and only serious attempt by Congress to exercise a check over the Supreme Court through the use of its impeachment power was in the proceedings against the "irascible" Justice Samuel Chase, whom "no judge ever deserved censure more."¹⁰ Chase was openly violent against the Jeffersonian government, which he did not spare in his decisions. But even this attempt to impeach

⁵ Art. VIII, Sec. 5, Constitution.

⁶ 258 U.S. 245 (1920).

⁷ G.R. No. L-2548 (1950).

⁸ G.R. No. L-6355 (1953).

⁹ Art. IX, Sec. 1, Constitution.

¹⁰ JACKSON, R., *THE STRUGGLE FOR JUDICIAL SUPREMACY*, p. 28 (1941).

Chase failed. In our country also, Congress in 1949 started impeachment proceedings against Justice Gregorio Perfecto. It likewise failed.

Under Art. VIII Sec. 13, it is provided that Congress has the last word in the determination of procedural rules to govern the courts. Congress may exercise this power to diminish jurisdiction of the courts, except that conferred by the Constitution on the Supreme Court. But this power should not be mistaken as an effective check on the judiciary. This is not the be-all and end-all of judicial supremacy over the other "co-equal and co-ordinate" branches. Art. VIII, Sec. 9 of the Constitution in effect provides that Congress may not deprive the Supreme Court of its power to review the constitutionality of treaties, laws, etc. Therefore, the power of Congress to determine ultimately what procedural rules should govern the courts, is not the "check" we are looking for, because it leaves unbridled the power of judicial review.

Since the Court remains the absolute custodian of the Constitution, the question present itself: "*Qui custodiet custodias?*" Who shall oversee the overseer?

Under our present system, no entity or instrumentality can oversee the overseer.

The Court is actually responsible to none, except to its conscience. As Justice Stone has said:

"...while unconstitutional exercise of power by the executive and legislative branches of the government is subject to the judicial restraint, the only check upon our own exercise of power is our sense of self-restraint."¹¹

The nature of a republican state demands that it should be the people who should keep watch over the guardian of the Constitution. Should the judges then be chosen thru popular elections? The answer is, "No!" It is not necessary nor desirable. We can attain the same objective without making the judiciary elective. This means that the people's check on the power of judicial review, shall be confined to those cases where the Court legislates or decides which of conflicting policies should prevail. The proposed check of the people against judicial supremacy may come into play, in cases involving choice of policy. This may come about when the President refuses to enforce the Court's decision because of a substantial, important difference between their policies. These two different policies would be submitted in the proper manner to the people who will then choose which should prevail. If the people should vote in favor of the legislative policy endorsed by the President, the Court's choice of policy should then yield. Thereafter, controversies brought before the Court for judgment would be decided in accordance with the policy determined by the legislature and endorsed by the President. On

¹¹ Diss. op., *U.S. v. Butler*, 297 U.S. 1, 78-79 (1936).

the other hand, if the people should prefer the Court's choice of policy, the President should yield and he may no longer refuse to enforce the Court's choice of policy which has been adopted by the people. The elective nature of his office should exert sufficient force to compel the President to obey the people's choice.

The presumption is that the President will ordinarily enforce the Court's decision, unless the variance between the executive and the judicial choice as to what the policy should be, is substantial and fundamental enough to warrant the President's refusal to enforce the Court's decision. If we can presume that the judges act with the purest of motives, why can we not likewise presume such attribute to exist in the President?

It must be stated that the proposed check has its defects and shortcomings. But so have all the other remedies which have been examined in the search for an appropriate check against improper and indiscriminate use of the power of judicial review. There can be no single flawless device that can, with mechanical precision, steer the legal ordering between the Scylla judicial omnipotence and the Charybdis of judicial subordination.

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