THE PURITY OF SUFFRAGE AND THE PRESIDENTIAL ELECTORAL TRIBUNAL

Introduction.

The Constitution speaks of sovereignty which resides in the people from whom all government authority emanates. This is an eloquent restatement of the generally-accepted theory of government that in a representative democracy the elected represntatives of the people are merely projections of the popular conscience. To the extent that the figures appearing on the national screen are prefect equivalents of their originals, credit must be conceded in favor of the efficient working of the projector. And to the extent that such figures are either confused or represent a false magnification, then the projector needs closer investigation. Here lies the far-reaching significance of our electoral processes.

For while the people may be betrayed by those in whom they had reposed the stewardship of government, the pain is not as great when they are to blame for their wrong choice in a clean and free election than when they feel they choose right but their will is frustrated by wholesale fraud and terrorism. Indeed, if the ballot loses its power, is not revolution the logical alternative?[2]

If the people may be fairly expected to use the "ballot and not the bullet,"[3] elections must be clean and free.[4] In the words of Mr. Justice Bengzon:

> "Periodic elections are thus essential to every democratic nation, to afford its people opportunity to express their desires whether to retain or to retire those in authority...."[5]

Thus, if the people must revolt, let them go on a national revolution in the peaceful ways of democracy.

Antecedents of the Presidential Electoral Tribunal.

The electoral process can be an instrument for the expression of the people's choice or it can be used as a weapon of abuse.[6] How far it may be perverted to serve the ends of power in the thin veneer of democracy, we need only recall for the moment the presidential election in 1949. As one keen observer of the Philippines has put it, "The campaign was the dirtiest and bloodiest in all Philippine history. Election incidents reached a climax in open revolt by disgusted

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1 PHIL. CONST. Art. II, sec 1.

2 SINCO, PHILIPPINE POLITICAL LAW 66 (10th ed. 1954).

3 Mr. Justice Albert in People v. Dava, 40 O.G. 5th Supp. to 9, 80 (1939).

4 In the language of Van Amringe v. Taylor, 12 S.E. 1005, 1006 (1891), "an election without the sanction of the law expresses simply the voice of disorder, confusion and revolution, however, honestly expressed." *Accord*, Hontiveros v. Altavas, 24 Phil. 632, 636-637 (1913); SINCO, *op. cit. supra* note 2, at 402.

5 BENGZON, *Clean Elections and the Constitution*, 30 PHIL. L. J. 910 (1955).

6 "To be sure, we have the Commission on Elections, constitutionally independent, having exclusive charge of the administration of all laws relative to the conduct of elections, and empowered to call on other law enforcement agencies to act as its deputies to ensure 'free, orderly and honest electoins.'

"But if any one of such deputies attempts to pervert the popular will, the Commission on Elections has no power to dismiss him from the Government. *Id.* at 913. "And the President has it within his power to refuse to aid the Commission." MALCOLM, FIRST MALAYAN REPUBLIC 293 (1951).

political dissidents in Laurel's home Province of Batangas, following announcement of the outcome and revelations of the chicanery, fraud and terrorism utilized to attain it. There was even an intimation from unbiased sources that mature democracy, Philippine brand, was a snare and a delusion...."[7]

To a people educated under a government of laws and not of men, and who have been taught to seek redress not with clubs but with reason before our duly constituted courts, the 1949 election presented a sad spectacle. Where the law has taken care to provide for that which would seem to border the category of "de minimis", it appears paradoxical that it has left out the problem of contests of presidential elections. It seems that in the shadowy borderlines of government, there may be instances of *damnum absque injuria.*

There is a void concerning contest of presidential election not only in our statutory law[8] but also in our fundamental law itself. The Constitution expressly provides for Electoral Tribunals to try election contests of senators and representatives,[9] but does not have any similar provision when it comes to presidential election contests. A clear case of a legal hiatus exists.[10] The absence of such a provision is also true in the case of the United States Constitution.[11]

[7] *Ibid. Accord,* "The election of 1949 in which, as some writers put it, 'Philippine democracy was ruthlessly raped,' was certainly not in accordance with the constitutional system that the framers of the Philippine charter meant to establish." LAUREL, BREAD AND FREEDOM 31 (1953).

[8] This is true until recently with the effectivity of Rep. Act No. 1793 (June 21, 1957), which is published elsewhere in this issue.

[9] PHIL. CONST. Art. VI, sec. 11.

[10] "The 1949 election revealed a void in the Constitution. Loud complaints of irregularities and illegalities were aired. But to no avail. The Constitution had made no provision for action in connection with presidential elections." MALCOLM, *op. cit. supra, note* 6.

[11] 1 ARUEGO, THE FRAMING OF THE PHILIPPINE CONSTITUTION 409-410 (1936). Former Senator Vicente Francisco has been credited with having filed the first bill for the creation of a presidential electoral tribunal. The explanatory note to the bill reads as follows: "Due perhaps to an oversight, our Constitution and our laws have failed to provide for the manner of filing and prosecuting an electoral protest against the election of the President and the Vice-President of the Philippines." L. E. Adriano, *The Presidential Electoral Tribunal,* 22 THE LAWYERS JOURNAL 339 (1957). Whether the legal void is attributable to oversight is open to doubt when we consider the following discussion at the Constitutional Convention:

> "*President Recto.* — Under the Executive Power, the first important amendment which the committee recommends to be accepted is the elimination of the Electoral Commission for protests for the position of President and Vice-President; and I ask that it be voted upon without debate.
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> "*The Acting President.* — Is there any objection to this proposition? (Silence). The Chair does not hear any. Approved.
>
> "*Delegate Saguin.* — For an information. It seems that this Constitution does not contain any provision with respect to the entity or body which will look into the protests for the positions of President and Vice-President.
>
> "*President Recto.* — Neither does the American Constitution contain a provision over the subject.
>
> "*Delegate Saguin.* — But, then, who will decide these protests?
>
> "*President Recto.* — I suppose that the National Assembly will decide that." 1 ARUEGO, *op. cit. supra,* at 410.

The need for a machinery which would decide election protests of presidential candidates has been considered long overdue.[12] Therefore, the third Congress of the Philippines, in enacting Senate Bill No. 645 during its fourth session and approved by the President on June 21, 1957 as Republic Act No. 1793, was merely responding to the pressing demand for a Presidential Electoral Tribunal.[13]

Creation of the Tribunal.

The creation of the Tribunal may yet go on record in Philippine legislation as a distinct attempt to uphold the rule of law and safeguard the purity of suffrage. In the words of the Chairman of the Senate Committee on Privileges and Election Laws:

> "I think that this would be a wise and prudent legislation, and the Philippines will perhaps go in the annals of political legislation as the first country that passed such a kind of legislation and I hope other countries will follow."[14]

Senate Bill No. 645 was originally filed by Senator Lorenzo Tañada. The Committee on Privileges and Election Laws invited the Chairman and Members of the Commission on Elections to sit down with the Committee, and the Committee decided to report the bill out with an amendment by substitution.[15]

The bill was certified to as urgent by the President of the Philippines, so that it was passed with extraordinary dispatch by Congress. It was submitted to the President for approval, and on June 21, 1957 it took effect into law, it being provided by section 8 thereof that it shall take effect upon its approval. Before going, however, into any further discussion of the extrinsic aspects of the creative law, it may be in order to dwell in passing on its salient features.

The law provides for the creation of an independent Presidential Electoral Tribunal which shall be the sole judge of all contests relating to the election, returns, and qualifications of the President-elect and Vice-President-elect of the Philippines.[16] It shall be composed of the Chief Justice, as chairman, and the other ten Members

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[12] "There has long been a need in this country for a statutory machinery for contesting presidential elections. This need was first felt when in 1949 the Liberal Party was split into two wings — the Quirino Liberal Party and the Avelino Liberal Party. . . . Senator Avelino had announced his decision to run for President of the Philippines against Quirino. . . . Another candidate was Jose P. Laurel who ran as the standard bearer of the Nacionalista Party. President Quirino was proclaimed the elected President in that election. Then as now, die-hard members of the defeated parties wistfully claim that had there been some means under the law to contest the presidential election then, President Quirino would not have remained in Malacañang up to 1953." L. E. Adriano, *op. cit. supra*, note 11.

[13] For brevity, the Presidential Electoral Tribunal shall be referred to as the "Tribunal" in subsequent discussions.

[14] Remarks of Senator Francisco Rodrigo who, also, sponsored the bill, ORIGINAL TRANSCRIPT OF SENATE CONGRESSIONAL RECORD NO. 60 (May 3, 1957).

[15] Note 14 *supra*.

[16] Rep. Act No. 1793, sec. 1.

of the Supreme Court.[17] Provision is made for the designation by the Chief Justice of Members necessary to constitute a quorum in cases falling under the Rules of Court,[18] and also for him to designate retired Justices of the Court of Appeals in the extreme case where no retired Justices from the Supreme Court or actual Justices of the Court of Appeals are available.[19]

A majority of the Tribunal shall be sufficient to constitute a quorum.[20] For the regulation of the procedure to be followed in the filing and hearing of contests,[21] the Tribunal is authorized to pro-

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[17] Note 16 *supra*. On the question of whether the six Justices of the Supreme Court, who are members of the Senate and House Electoral Tribunals, respectively, are disqualified from becoming members of the Tribunal, the following discussion of the bill on the floor of the Senate provides an illuminating indication that they are not incapacitated:

> "*Senator Rodrigo.* — However, in the other proviso it is provided precisely that when there are Justices of the Supreme Court who are not capacitated to sit in the Tribunal, among whom are the members of the House and Senate Electoral Tribunals, then the Chief Justice will appoint additional members from (1) retired Justices of the Supreme Court, (2) members of the Court of Appeals, and (3) retired members of the Court of Appeals.
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> "*Senator Primicias.* — I am aware of that provision also. I ask the first question because I would like to know what is the incompatibility of members of the Supreme Court sitting with the Presidential Electoral Tribunals of both Houses. Why should we disqualify a member of the Supreme Court to act as a member of the Presidential Electoral Tribunal if he is a member of the Electoral Tribunal of either of the Senate or of the House?
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> "*Senator Rodrigo.* — There is no substantial incompatibility, but there is the fact that Justices who will be members of either Electoral Tribunal will be so busy with two functions as Justices of the Supreme Court and as members of the Senate and House Electoral Tribunals and I think there will be no time left for them to devote to the Presidential and Vice-Presidential electoral tribunal.
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> "*Senator Primicias.* — It might happen that there might be no protest in either House of Congress and also it might serve the best interest of the people if as members of the Electoral Tribunal of both Houses, they may have knowledge of facts connected with the same election.
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> "*Senator Rodrigo.* — I think the point is well taken and I will have no objection if this is left to the discretion of the Chief Justice." ORIGINAL TRANSCRIPT OF SENATE CONGRESSIONAL RECORD NO. 60 (May 3, 1957). The Senate Committee on Privileges and Election Laws introduced an amendment to the original bill filed by Senator Tañada which included the three members of the Commission on Elections aside from the eleven Justices of the Supreme Court. This amendment was, finally, rejected, however, to avoid any doubt as to the constitutionality of such an inclusion, inasmuch as it was doubted whether Congress could legally engraft judicial powers to an administrative organ like the Commission on Elections. *Id.*

[18] RULES OF COURT Rule 126.

[19] Note 16 *supra*.

[20] Rep. Act No. 1793, sec. 2.

[21] Note 20 *supra*.

mulgate its own rules.[22] Any registered candidate for President or for Vice-President of the Philippines who received no less than five hundred thousand votes may contest the election of the President or the Vice-President.[23]

The Tribunal has twenty months within which to decide election contests, and within the same period it shall declare who among the parties has been elected.[24] In case of a tie between the candidates for President or Vice-President, as the case may be, a majority vote of the members of Congress in joint session shall be sufficient to break the deadlock.[25] The Tribunal shall hear and decide *in banc* all presidential election contests, and the concurrence of at least seven members of the Tribunal shall be necessary for a final decision thereon.[26]

The Tribunal: Its Place in Our Scheme of Government.

If there is any doctrine which is too well-settled to be disputed, it is that in our jurisdiction every act of any of the tripartite branches of our government must find its justification under the Constitution. If the Constitution is silent on what machinery shall pass upon the merits of presidential electoral protests, what is the basis for the act of Congress in enacting Republic Act No. 1793? What is the category of the Tribunal in our judicial hierarchy and its place in our scheme of government?

It may be broadly stated that the basis of Republic Act No. 1793 is Article IV, section 1 of the Constitution which vests the legislative power in the Senate and House of Representatives. More specifically, however, the basis appears to be Article VIII, section 1 which provides that:

> "The judicial power shall be vested in one Supreme Court *and in such inferior courts as may be established by law.*" (Italics supplied.)

In creating the Tribunal, Congress has, by virtue of the constitutional provision just quoted, bridged what one termed a long gap in our law.[27] Our Constitution, however, is both a grant and a limitation of powers or, as Mr. Justice Matthews of the United States Supreme Court would have it, "the law is the definition and limitation of power."[28]

Consequently, while Congress may be expressly empowered to perform certain acts, it should not be forgotten that there are other

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[22] "According to the rules laid down by the Tribunal, any protest against the election of a President or Vice-President should be filed with the Tribunal within thirty days after the proclamation of the election by the Houses of Congress." The Manila Chronicle, July 25, 1957, p. 17, col. 8; Rep. Act No. 1793, sec. 5 par. (2).

[23] Rep. Act No. 1793, sec. 5, par. (1).

[24] *Id.*, sec. 3.

[25] Note 24 *supra.*

[26] Rep. Act No. 1793, sec. 2, par. (2).

[27] L. E. Adriano, *The Presidential Electoral Tribunal,* 22 THE LAWYERS JOURNAL 339 (1957).

[28] Yick Wo v. Hopkins, 118 U.S. 356, 30 L. ed. 220 (1886).

rules of law and provisions embodied in the same Constitution which negate under certain circumstances the exercise of the powers granted. Whether Congress in enacting Republic Act No. 1793 has carefully kept itself within its own sphere of action under the Constitution or whether in so acting it has properly considered the wisdom of the law in the light of the practical workings of our all-too-human institutions of government, the discussion which follows is an attempt to consider these questions.

It may be necessary to observe, at this point, that the motives of the lawmakers are not in question. We are in full accord with them that safeguards must be thrown around our electoral process to the end that the purity of suffrage may be insured and the popular will honestly ascertained. Under our system, however, just motives are not enough. No less important is that the means must be legally justifiable.[29] Are there aspects of Republic Act No. 1793 which lend themselves to doubt and are of questionable validity under settled principles of law?

Doubtful Aspects of the Creative Law.

Congress as Board of Canvassers and the Tribunal.

Under the Constitution, Congress acts as board of canvassers under the following provision:

> "Art. VII, sec. 2. xxx The returns of every election for President and Vice-President, duly certified by the board of canvassers of each province or city, shall be transmitted to the seat of the National Government, directed to the President of the Senate, who shall in the presence of the Senate and the House of Representatives, open all the certificates, and the votes shall then be counted. The persons respectively having the highest number of votes for President and Vice-President shall be declared elected; but in case two or more shall have an equal and the highest number of votes for either office, one of them shall be chosen President or Vice-President, as the case may be, by a majority vote of the Members of the Congress in joint session assembled."[30]

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[29] *Cf.* Villavicencio v. Lukban, 39 Phil. 778, 8 P.D. 573 (1919).

[30] It is said that this provision is influenced largely by identical provisions of the United States Constitution. 1 ARUEGO, THE FRAMING OF THE PHILIPPINE CONSTITUTION 409 (1936). The particular provisions referred to is Art. XII (amending Art. II, sec. 3) of the United States Constitution which runs as follows:

> "The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and they shall make distinct lists of all persons voted for as Vice-President, and of the number of votes of each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be President, if such number be a majority of the whole number of Electors appointed; and if no persons have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President xxx."

There is a wide conflict of opinion as to whether the function exercised by Congress under the foregoing provision is ministerial or discretionary.[31] Reason and authority would seem to support the view, however, that it is ministerial rather than discretionary. The opinion of Justice Bradley in the famous *Hayes-Tilden Election Dispute of 1876*[32] is strong authority in this respect. Although it is said that his decision was largely tainted with political complexion,[33] the fact is that his opinion presents reasons too serious to be drowned under political considerations. He says:

> "I cannot bring my mind to believe that fraud and misconduct on the part of the State authorities, constituted for the very purpose of declaring the final will of the State, is a subject over which the two Houses of Congress have jurisdiction to institute an examination. The question is not whether frauds ought to be tolerated, or whether they ought not to be circumvented; but whether the Houses of Congress, in exercising their power of counting the electoral votes, are entrusted by the Constitution with authority to investigate them. Evidently, no such proceeding was in the minds of the framers of the Constitution. The short and explicit directions there given, that the votes should first be produced before the Houses when met for that purpose, and that 'the votes shall then be counted,' is at variance with any such idea. An investigation beforehand is not authorized and was not contemplated, and would be repugnant to the limited and special power given. What jurisdiction have the Houses on the subject until they have met under the Constitution, except to provide by law for facilitating the performance of their duties? An investigation afterwards, such as the question raised might frequently lead to, would be utterly incompatible with the perform-

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[31] *Compare* SINCO, *op. cit. supra* note 2, at 200, *with* TAÑADA AND FERNANDO, CONSTITUTION OF THE PHILIPPINES 968 (4th ed. 1953) citing Severino v. Governor-General, 16 Phil. 366 (1910); Forbes v. Chuoco Tiaco and Crossfield, 16 Phil. 534 (1910); Concepcion v. Paredes, 42 Phil. 599 (1921); Abueva v. Wood, 45 Phil. 612 (1924); Alejandrino v. Quezon, 46 Phil. 83 (1924); Vera v. Avelino, 77 Phil. 192 (1946). *See also* Torres v. Ribo, 45 O.G. 12, 5390 (1948).

[32] This was the controversy which threatened the peace of the United States. It arose in 1870 respecting the electoral vote for Rutherford B. Hayes, the Republican candidate for the presidency, and that of Samuel J. Tilden, the nominee of the Democratic Party. In Louisiana two electoral returns were made under rivals claiming to be governor. The legality of the returns made in some other States to the President of the Senate was also questioned. The claim was made that the President of the Senate (who was then a Republican) should do the counting. On many points the disagreement between the partisans was so wide and apparently hopeless that it was finally determined to leave all questions to an Electoral Commission to be created by an act of Congress and to consist of five members of the Senate, five members of the House of Representatives, and five Justices of the Supreme Court. T. J. NORTON, THE CONSTITUTION OF THE UNITED STATES 230 (1943).

[33] *Ibid.*

ance of the duty imposed."[34]

It would appear, therefore, that if the function of Congress under Article VII, section 2 of the Constitution is ministerial in character, there would be no conflict between this provision and section 1 of Republic Act No. 1793 which relates to the election, returns, and qualifications of the President-elect and the Vice-President-elect.

It is open to serious doubt, however, whether the framers of the Constitution, in expressly providing for the mechanical procedure for the canvass of election returns for the President and the Vice-President, has not, thereby, indicated their intention to prohibit any organ of the government from exercising the power to inquire behind the returns of ballots cast. While the Constitution has expressly provided for Electoral Tribunals for each of the Houses of Congress, it has strangely avoided the question of whether the election, returns, and qualifications of the President-elect and the Vice-President-elect can be inquired into and of the particular governmental machinery that may assume jurisdiction over such questions. The following discussion on the floor of the Senate should serve to highlight this point:

> "*Senator Rodrigo.* — My humble opinion is that there is no express prohibition in the Constitution for Congress to establish such a Tribunal for Presidential and Vice-Presidential protests. While there is no provision, there is only a void in the Constitution, and since there is that void in the Constitution, it can be filled either by a constitutional amendment or by legislation. And I think we can do so by legislation.
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> "*Senator Primicias.* — May there not be a prohibition by omission?
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> "*Senator Rodrigo.* — I do not think so, unless in the deliberations of the Constitutional Convention we can find any part thereof which would indicate that the omission was deliberate. I do not know of any such..."[35]

An examination of the records of the Constitutional Convention shows, however, that in the first draft of the Constitution a body, identical in composition with that of each of the Congressional Electoral Tribunals, was expressly provided for. But in the special committee on style, this provision in the draft was stricken out, which suppression met with ready approval by the Convention on February 8, 1935.[36] Furthermore, it should be remembered that the expression of one thing in the Constitution impliedly excludes the others not mentioned.[37] Where there was already a body provided for in the draft but which was eliminated from the Constitution as

[34] TAÑADA AND FERNANDO, *op. cit. supra* note 31, n. 1 at 971. *Accord,* "It is a common error for a canvassing board to overestimate its powers, but, since such a board is ordinarily a creation of constitution or statute, it may be stated generally that it has such powers and duties, and only such, as are conferred by the constitution or statute creating it, notwithstanding their exercise of certain judicial or discretionary powers, the powers and duties of the members of a board of canvassers are primarily ministerial in nature, being limited generally to the mechanical or mathematical function of ascertaining and declaring the apparent result of the election by adding or compiling the votes cast for each candidate as shown on the face of the returns before them, and then declaring or certifying the result so ascertained . . . ." 29 C.J.S. Elections, sec. 239, 340-342.

[35] ORIGINAL TRANSCRIPT OF SENATE CONGRESSIONAL RECORD NO. 60 (May 3, 1957).

[36] 1 ARUEGO, *op. cit. supra,* note 11.

[37] Concepcion v. Paredes, 42 Phil. 599 (1921).

approved, and where Electoral Tribunals are expressly created for each of the Houses of Congress but none is provided to entertain protests of presidential election, the vehement suggestion is that the canvass of the returns by the Senate President in the presence of, and the subsequent proclamation by, the senators and representatives of the President-elect and the Vice-President-elect are the end of the whole matter.

The Composition of the Tribunal and the Appointing Power of the President.

Let us consider another aspect of the creative law: the appointment of the members of the Tribunal. The Act expressly provides that "it (Tribunal) shall be composed of the Chief Justice and the other ten Members of the Supreme Court."[38] From the brief and clear language used, Congress — far from drawing merely the qualifications of the members of the Tribunal — has definitely declared who those members shall be, namely, the Chief Justice and the other Justices of the Supreme Court. No fairer interpretation can be attached to this clear provision. It would appear that Congress has exercised the power to appoint the members of the Tribunal, inasmuch as the provision is self-executory, no further act being needed except for the members to assume office and exercise their functions.[39] Is Congress empowered to exercise what it did under the afore-quoted provision?

It is a settled principle in our jurisdiction, both under the Constitution and under decisions of the Supreme Court and the preponderant weight of authority, that Congress is not conferred the appointing power, except in a very strictly circumscribed area relating to its own inferior officers and employees to assist it in its work.[40] The power of appointment is vested in the President of the Philippines by provisions of the Constitution.[41] Under Article VII, section 10, (3), Congress may confer upon courts and in heads of departments the power of appointment but Congress, itself, shall not exercise that power. It may sound paradoxical, but the fact is that to confer the power is clearly distinct from the exercise of that power. To quote a recognized authority on Philippine political law:

> "The appointing power is intrinsically executive in nature. For this reason the Constitution vests it almost exclusively in the President. The principle of separation of powers demands that it should be thus. The appointing power which Congress is authorized to place in the hands of Courts necessarily refers to inferior officers needed in the judicial department to assist the judges in their work. The heads of departments may also be given statutory authority to appoint their subordinates for the same reason."[42]

Doubts as to whether or not Republic Act No. 1793 is in derogation of the appointing power lodged in the President are further

[38] Rep. Act No. 1793, sec. 1.

[39] At this writing, for instance, it has been reported that the organization of the Presidential Electoral Tribunal began with the designation of key personnel in the body by the Supreme Court. The Manila Chronicle, July 25, 1957, p. 17, cols. 7-8.

[40] SINCO, *op. cit. supra* note 2, at 271.

[41] *See* PHIL. CONST. Art. VII, secs. 10(3) and 10(7).

[42] SINCO, *op. cit. supra* note 2, at 41.

heightened by the leading case of *Springer v. Government of the Philippine Islands*.[43] The statute involved in this case provided that the members of the committee which it created shall be the Senate President, the Speaker of the House of Representatives, and the Governor-General of the Philippines.[44] In so naming the membership in the statute, the Philippine Supreme Court, affirmed by the Supreme Court of the United States, ruled that the legislative department illegally assumed the appointing power which belongs to the executive department. In the language of Justice Sutherland:

> "Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions...."[45]

It may be argued, however, that Congress in providing for the membership of the Tribunal merely created additional duties for the Justices of the Supreme Court. Since the functions conferred upon them appear to be judicial in nature, there would arise no serious constitutional question because such functions are germane to those which are already exercised by the Justices of the Supreme Court.[46] This would, therefore, be an exception to the general rule that the appointing power is intrinsically executive in nature.[47] It seems no grave doubts may arise as far as the actual members of the Supreme Court or the Court of Appeals are concerned. Neither would any problem crop up when said Justices are incapacitated for causes provided for under section 1 of Republic Act No. 1793, in which event retired Justices of the Supreme Court or of the Court of Appeals may be named by the Chief Justice. In this later case, it is the Chief Justice who exercises the appointing power, with Congress merely conferring upon him such power.[48]

The Validity of the Membership of Supreme Court Justices in the Tribunal.

After considering the question on the appointing power, let us inquire next into the validity of the inclusion of the Justices of the Supreme Court in the Tribunal.

At the outset, it may be interesting to note that the Justices

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[43] 50 Phil. 259 (1927), *aff'd.*, 277 U.S. 189 (1928).

[44] Now the President of the Philippines.

[45] Note 43 *supra*. *Accord*, In Concepcion v. Paredes, *supra*, the Court held that "it is not within the power of the Philippine Legislature to enact laws which either expressly or impliedly diminish the authority conferred by an Act of Congress (Organic Law) on the Chief Executive and a branch of the legislature (commission on appointments). Deliberately considered solely as a question of expediency and of motive, we conclude that the power of appointment and confirmation vested by the Organic Act in the Governor-General and the Philippine Senate is usurped by a lottery of judicial offices every five years. An independent and self-respecting judiciary must continue to exist in the Philippines. The orderly course of constitutional government must be maintained."

[46] *Accord*, Shoemaker et al. v. United States, 147 U.S. 282, 13 S. Ct. 361, 37 L. Ed. 170 (1893).

[47] Springer v. P. I., *supra*.

[48] Rep. Act No. 1793, sec. 1.

under the law in question have been brought down from the rank of constitutionally-created Court to membership in the Tribunal which is merely a creation of Congress and which is an inferior court. It is true, of course, that the decision of the Tribunal is not appealable to the Supreme Court,[49] for that would create an absurdity where the same persons would have the power to review their own acts.[50]

If Congress may validly confer additional functions upon the Justices of the Supreme Court,[51] is it in keeping with the intention of the framers of the Constitution when Congress provided for the membership of said Justices in the Tribunal just created? The absence of a provision in the fundamental law dealing on contests in the election of the President and Vice-President cannot be safely said to have been due to plain oversight because a body to try election protests of such officials was precisely included in the draft of the Constitution.[52] Professor Aruego recounts why it was eliminated:

> "In the special committee on style, this provision of the draft of the Constitution was struck out *because it was feared that the independence and the prestige of the Supreme Court might be dragged down when its members, including the Chief Justice, would be called upon to pass upon election contests for the highest offices of the land.*" (Italics supplied.)[53]

He says further:

> "The suppression of this provision met with ready approval by the Convention on February 8, 1935. Election protests for the Presidency and the Vice-Presidency were left to be judged in a manner and by a body decided by the National Assembly...."[54]

Although Congress is left the discretion to choose the manner of providing for the machinery to decide presidential election protests, the latitude of its discretion is qualified by the intention of the framers of the Constitution to avoid dragging the Supreme Court Justices into the mazes of politics. In short, therefore, it may choose any legally justifiable means except that it may not include any Member of the Supreme Court in the composition of the body it may create. If the Electoral Commission provided for in the draft of the Constitution was eliminated when only *five* Justices of the Supreme Court were proposed to be included in the body, *a fortiori* the inclusion of *all* the Justices of the Supreme Court in the pre-

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[49] *Id.* sec. 3, par. (2).

[50] Manila Electric Co. v. Pasay Trans. Co., 57 Phil. 825 (1933).

[51] *See* note 46 *supra.*

[52] The provision for this matter, which was adopted by the Convention without debate, reads thus: "Whenever the election of the President or the Vice-President shall be contested, the contest shall be tried and determined, in accordance with the procedure fixed by law, by an Electoral Commission composed of ten members of the National Assembly equally divided between, and chosen by the major parties therein, and five members of the Supreme Court including the Chief Justice who shall preside over said Commission. The Chief Justice of the Supreme Court shall designate the four other members who shall sit in the Electoral Commission." 1 ARUEGO, *op. cit. supra* note 11, at 408-409.

[53] Note 11 *supra.*

[54] Note 11 *supra.*

sent Tribunal is clearly in conflict with the intention of the framers of the Constitution.

Separation of Powers: The Wisdom of the Law and the Tribunal in Practice.

The framers of the Constitution were practical architects of the framework of our government. They had seen enough of the actual working of Philippine politics to enable them to know how far at times it could go and how twisted very often it could be. The decision to eliminate the proposed Electoral Commission, far from being an indication of lack of trust in the Justices of the Supreme Court, was, precisely, a moving gesture of respect for that high citadel of liberty, a clear manifestation of their deep anxiety lest through their well-meaning solicitude the Court might be enmeshed innocently in politics.[55] Indeed, it must not be forgotten that, however high our respect for the Supreme Court may be, that Court is not a well-spring of redresses for all conceivable injuries under the sky.[56] In the stirring language of Justice Frankfurter:

> "Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law."[57]

This is especially true in our jurisdiction where the doctrine of

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[55] As one write exhorts, "The Supreme Court is our last citadel for a rule of law. Let us not expose it to erosion by messy politics." Olivera, *Thoughts on Election*, The Manila Times, Oct. 18, 1957, p. 20, col. 3. A few may insist that it is not the Supreme Court but only the Justices thereof who are called upon to decide contests of presidential election, so that the fear that the law creating the Tribunal works as an erosion of the Supreme Court, it may be insisted, is unfounded. This argument lays more emphasis on pure technicality rather than on substance, for the truth is that the entire membership of the Supreme Court is involved. The following discussion of the bill at the House of Representatives should make this point clear:

> "*Congressman Cases.* — Suppose a protest is filed against the election of the President-elect, is the *Supreme Court the sole body* to try the case?
>
> "*Congressman Bengzon.* — Yes, under this bill.
>
> "*Congressman Cases.* — Is there no other extraneous element?
>
> "*Congressman Bengzon.* — No other extraneous element." (Italics supplied.) ORIGINAL TRANSCRIPT OF HOUSE CONGRESSIONAL RECORD NO. 70 (May 22, 1957).

[56] In the words of one court, "The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." Colegrove et al. v. Green et al., 328 U.S. 549, 66 S. Ct. 1198 (1946).

[57] Note 56 *supra*.

separation of powers, in all its ferocious rigidity,[58] has been adopted by our Constitution. As one authority has put it, "Whether or not the framers of our Constitution realized the full import of what they did, the fact is that under the provisions of the present fundamental law the greater rigidity of the principle of separation of powers has been returned...."[59] However grave the evil sought to be remedied, courts have on more than one occasion shied from questions which appear wrapped up in justiciable trappings but stink with political questions deep within.[60] As one case vividly said: "Courts ought not to enter this political thicket."[61] For as succinctly stated in another court decision:

> "While it executes firmly all the judicial powers intrusted to it, the court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution."[62]

This brings us to our next point of inquiry: whether the functions that the Justices of the Supreme Court shall exercise under the Tribunal are strictly judicial in character.

It must, of course, be admitted that "a decision or action which is merely recommendatory in character and effect is non-judicial. Consequently, it may not be lawfully exercised by a judge nor may the duty to perform it be intrusted to a court."[63] Thus, when attempt was made to make the Justices of the Supreme Court arbitrators over matters which did not give them the power to promulgate binding decisions, that Court declared:

> "...Just as the Supreme Court, as the guardian of constitutional rights, should not sanction usurpations by any other department of the government, so should it as strictly confine its own sphere of influence to the powers expressly or by implication conferred on it by the Organic Act. The Supreme Court and its members should not and cannot be required to exercise any power or to perform any trust or to assume any duty not pertaining to or connected with the administering of judicial functions."[64]

The newly created Tribunal is made the sole judge of all contests relating to the President's or Vice-President's *election, returns,*

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[58] *See, e.g.*, Abueva v. Wood, 45 Phil. 612, 9 P.D. (1924); Severino v. Governor-General, 16 Phil. 366, 4 P.D. 322 (1910); Barcelon v. Baker, 5 Phil. 87 1 P.D. 650 (1905); Vera v. Avelino, 77 Phil. 192 (1946). *Accord*, "We pay a price for our system of checks and balances, for the distribution of power among the three branches of government...." Mr. Justice Douglas, concurring in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 633-634; Mr. Justice Holmes, dissenting in Springer v. P.I., *supra.*

[59] SINCO, PHILIPPINE POLITICAL LAW 139 (10th ed. 1954).

[60] "The petitioners urge with great zeal that the conditions of which they complain are grave evils and offend public morality. The Constitution of the United States gives ample power to provide against these evils. But due regard for the Constitution as a viable system precludes judicial correction." Colegrove et al. v. Green et al., *supra.*

[61] Note 56 *supra.*

[62] Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (1911).

[63] SINCO, *op. cit. supra* note 59, at 376.

[64] Manila Electric Co. v. Pasay Trans. Co., 57 Phil. 825 (1933). *But cf.* Avelino v. Cuenco, G.R. No. L-2821, March 4, 14, 1957.

and *qualifications*.[65] It is, furthermore, invested with the same powers which the law confers upon the courts of justice.[66] Accordingly, when the cause of action is founded on matters relating to the election and returns of the candidate, the protestant shall file an action contesting the election of the opposing candidate, while a petition for quo warranto is the proper remedy in case it is the qualification of the candidate which is raised at issue.[67]

Miller, in his work *Constitution*, defined judicial power as the "power of a court to decide and pronounce a judgment and *carry it into effect between persons and parties who bring a case before it for decision*."[68] Under Republic Act No. 1793, or for that matter under any accepted rule of law in our jurisdiction, how able is the Tribunal, in case an election protest is lodged with it contesting the returns, election, and qualifications of a President-elect or Vice-President-elect, to "carry its decision into effect"? How binding is its decision?

A number of possibilities are in store for the Tribunal once its machinery starts to grind. The President-elect or the Vice-President-elect may take active participation in the trial of the case, adducing evidence or contesting the constitutionality of the creative law; or each may altogether ignore the proceedings. Once the decision is final, each may obey the judgment, regardless of whether or not he had taken active participation in the proceedings. Or in the extreme case, he may totally disregard the Tribunal's decision, irrespective of whether or not he had participated in the proceedings.

No difficulty can possibly arise in case the President or Vice-President shall give due course to the Tribunal's decision. The dreadful situation would be in case the President-elect decides to let the judgment of the Tribunal go unheeded. Should he do so, we repeat the question earlier posed: How effective and binding would the Tribunal's decision be?[69] In order to appreciate better the tremendous significance of this question, it would be well to keep in mind the following observation of one author:

> "No other single official in the Philippine government represents such concentration of powers as does the President.
>
> "Being the executive department itself, the President is not inferior to but coordinate with the other two departments of the government and independent of them. His acts, decisions, and orders, made within the scope of his constitutional powers, may not be questioned by either the legislative or the judicial department. His discretion in the exercise of his political and executive powers is subject to no limitations by any other agency of the government. In the exercise of that discretion he is responsible to no one. He is accountable to no one. He is accountable only to his country and to his own conscience."[70]

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[65] Rep. Act No. 1793, sec. 1.

[66] *Id.*, sec. 6.

[67] 2 MORAN, COMMENTS ON THE RULES OF COURT 203 (Rev. ed. 1952).

[68] Quoted in Muskrat v. United States, *supra*.

[69] Notes 63 and 68 *supra*.

[70] SINCO, *op. cit. supra* note 59, citing Forbes v. Chuoco Tiaco, 16 Phil. 543, 4 P.D. 406, 407 (1910).

The case of *Ex parte Merryman*[71] is a classic illustration of what may happen to show how helpless the Tribunal would be should its decision collide with that of the President. In this case, Chief Justice Taney of the United States Supreme Court issued an attachment against General George Cadwalader, who was acting under orders of the President, for a contempt in refusing to produce the body of John Merryman pursuant to a command by writ of habeas corpus; but the writ of attachment could not be delivered as the marshall had not been permitted to enter the gate to the headquarters of General Cadwalader at Fort McHenry. In a well-reasoned argument for the legality of his stand, the Chief Justice admitted his inability to proceed further for lack of power. He had to content himself with directing that a copy of the record and opinion in the case be sent to the President with these eloquent words of conceded helplessness:

> "It will then remain for that high officer, in fulfillment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced."

The question was finally set at rest in *Mississippi v. Johnson*[72] where the United States Supreme Court admitted that it was powerless to enforce its process against the President.[73] In the light of

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[71] Taney's Reports 246 (C.C.Md. 1861), 2 J. B. THAYER, CASES IN CONSTITUTIONAL LAW 2361, 2373-2374 (George H. Kent, Cambridge, Mass. 1895)

[72] 4 Wall. 475, 18 L.Ed. 437 (1867); *see also* Stanton v. Georgia, 6 Wall. 50, 18 L.Ed. 721 (1867).

[73] SINCO, *op. cit. supra* note 59, at 241. Consider, for instance, the following statements where the sponsor of Senate Bill No. 645, Senator Francisco Rodrigo, admitted that the Tribunal's decision cannot bind the President and generates merely a moral force at best in times of stress:

> "*Senator Sabido.* — What will happen if the President-elect refuses to submit himself to the jurisdiction of this presidential electoral tribunal?
>
> "*Senator Rodrigo.* — Well, that is one of the problems in our form of government which we leave first *to the sense of patriotism* of the President-elect and, secondly, *to the bar of public opinion.* We know that the President once he takes his oath becomes the commander-in-chief of the armed forces, and if the armed forces are disciplined enough to follow the commander-in-chief, well, *there is no power under either the Congress, or the courts or this tribunal that we are creating that can compel the President to follow its orders and decisions,* meaning to say, force. But, however, there is such a thing as *moral force and* the *force of public opinion.*
>
> "*Senator Sabido.* — It should be assumed that when it comes to public opinion, the President-elect would probably have public opinion in his favor." (Italics supplied.) ORIGINAL TRANSCRIPT OF SENATE CONGRESSIONAL RECORD NO. 60 (May 3, 1957).

It may be observed, however, that if the President-elect has really any *sense of patriotism* and respect for the *bar of public opinion,* he should not have assaulted, in the first place, the sanctity of the ballot. But, precisely, he committed excesses of power and made light of the ballot because he had no such patriotism and respect for public opinion and is willing for the sake of power to ride roughshod over our electoral processes, even if he may drag the country to times of national crisis.

this settled principle of law, doubts may be reasonably entertained whether the Tribunal, in passing upon the returns, election, and qualifications of the President and the Vice-President, and in promulgating its decision thereon, shall be exercising a purely judicial power, if by judicial power we mean the power of a court to decide and pronounce a judgment that is both binding and effective upon the parties litigant.[74] Indeed, those who are keenly aware of our system of government have openly doubted the practical wisdom of the Tribunal's creation.[75] But deep reservations and anxiety are not confined to a few isolated quarters.

Right on the floor of the Senate, when the debate over Senate Bill No. 645 was in progress, there were already voices which sounded the ominous warning. Consider, for instance, this observation of Senator Roseller Lim which, undoubtedly, is pregnant with reason and realism:

> "As Senator Sabido stated, in case the incumbent President refuses to submit himself to the decision of the Electoral Tribunal, he being the commander-in-chief of the armed forces, and even in case after the Electoral Tribunal shall have decided against him and unseat him, the President as commander-in-chief of the armed forces refuses to leave Malacañang, there is where the dange rof revolution may come up because if the President refuses to abide by the decision of the Electoral Tribunal, which is final by the way, what power on earth can remove the incumbent President from Malacañang, specially when he counts with the sympathy of the armed forces? If he has won the election by fraud and terrorism which he can only do by the way with the help of the armed forces, it is to be expected that those same armed forces who helped him commit fraud and terorism will back him up if he refuses to abide by the decision of the Electoral Tribunal, and in any event, we would be having revolution...."[76]

However, whether or not the ever-shifting trends of public opinion and the unpredictable loyalties of men — especially in such a matter as politics where loyalty often rises to heights of fanaticism — may crystallize soon enough into one mighty movement of our indignant citizenry in the event that fraud and terrorism shall be resorted to, the almost certain possibility, should the incumbent President refuse to step down and give way to the candidate declared elected by the Tribunal, is that the Philippines may yet see two Presidents each claiming the right to exercise the powers of the office. This possibility is not altogether remote when we consider that under Republic Act No. 1793, "the party who, in the judgment (of the Tribunal), has been declared elected, *shall have the right to assume the office as soon as the judgment becomes final, which shall be ten days after promulgation.*"[77] A situation much worse than that

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[74] Note 68 *supra.*

[75] *See* Olivera, note 55 *supra*, where the fear was expressed that "an awkward situation could arise where a President once proclaimed and seated may refuse to enforce the Supreme Court's order to unseat himself, invoking his right to equal and separate powers."

[76] ORIGINAL TRANSCRIPT OF SENATE CONGRESSIONAL RECORD NO. 60 (May 3, 1957).

[77] Sec. 3, par. (2).

spoken of once by our Supreme Court would arise, where "a dual authority would be created with the resultant inevitable clash of powers from time to time."[78] The practical wisdom of the creation of the Tribunal is, therefore, open to serious question. To quote Senator Laurel referring to the 1949 election:

> "...Unhappily, unlike a single court case, that kind of an election cannot be redeemed by one decision, or even several decisions, of the high tribunal. With the citizens themselves picking up the cudgels for their assaulted freedoms and mutilated rights, they may be able to redress the wrong, not in one election, but in many elections, provided they also see to it that the requisites for a clean, honest, fair and orderly election are fully complied with."[79]

If a tribunal must be created to decide the election of the President and the Vice-President, we cannot bring our mind to believe that the means pursued by Congress in creating the present Tribunal is the best and most practical method. We have no disagreement with the honorable gentlemen of Congress that the election of the President and the Vice-President must be guarded with the best weapons available in our legal arsenal. But, precisely, because of this consideration in mind, we feel constrained to suggest other measures which would be less open to attack either on constitutional or purely practical grounds.

Suggestions.

The Constitution should be amended by providing for an independent tribunal charged with the adjudication of cases relating to the election, returns, and qualifications of the President and Vice-president.[80] In addition to these duties, it may be conferred the jurisdiction over election protests of other elective officials, like the governors of provinces, members of the provincial board, and municipal and city mayors, so as to withdraw these cases from the overloaded dockets of courts of first instance. Or it may be provided that the Supreme Court shall be constituted as such tribunal. The problem here, however, is that this would be throwing additional burden to our already very busy Justices. Another method may be adopted by resurrecting the Electoral Commission as originally proposed in the darft of the Constitution. The composition of this body follows an identical pattern as that of each of the Congressional Electoral Tribunals. As for the fear that the membership of some Justices of the Supreme Court in this body may drag that Court in politics, this can easily be disposed of as unfounded by the example shown by the Senate and House Electoral Tribunals of Congress.

Complementary to, or independently of, the foregoing suggestions, the amendment to the Constitution proposed by Mr. Justice Bengzon would be a much-needed shot in our electoral processes.[81]

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[78] Angara v. Electoral Commission, 63 Phil. 139, 176 (1936).

[79] LAUREL, BREAD AND FREEDOM 31 (1953).

[80] *See* TAÑADA AND FERNANDO, CONSTITUTION OF THE PHILIPPINES 968 (4th ed. 1953).

[81] Bengzon, *Clean Elections and the Constitution*, 30 PHIL. L. J. 912-913 (1955).

For the lucid language used and for fear that his plan may be garbled should we reduce it to our own words, his proposal is here reproduced in its entirety. He says:

> "I was surprised to discover that several of them (American Constitutions) provide expressly for the purity of the electoral processes. The Columbia Constitution for example, says that 'the law shall determine all matters concerning elections and the counting of votes, insuring the independence of both functions.' That of Ecuador directs 'the public forces (to) guarantee the purity of the electoral function.' I would have a similar provision in our Constitution — something like this: 'The Government shall insure free elections and honest counting of votes.' Such provision would be wider in scope than its counterpart in the two Constitutions mentioned. It would be a command not only to the Legislature or to the Army, but to all departments of the Government, laying for their observance a basic mandate, direct and immediate."[82]

One final suggestion: the cracks and kinks in the Revised Election Code should be plugged with an eye to cleaner elections rather than on considerations of political expediency. In the words of one senator, "I believe the safeguard should be put while the elections are being done, we should perhaps eliminate the loopholes in our election processes in order to safeguard against graft and terrorism...."[83] There is much to recommend this suggestion, considering that fraud and terrorism are perpetrated mostly during the election. Accordingly, the best precaution is that which shall strike directly and hard the heart of the threat.

Conclusion: the Tribunal and the Days Ahead.

If the immediate reason for the creation of the Tribunal is to avoid another "1949 election" being repeated, it is unfortunate that it took Congress almost seven years to realize the need for its creation. During this long interval, amendments to our Constitution along lines that follow the foregoing suggestions could have been introduced and presented for approval by the electorate. Instead, it took Congress only this year to wake up to the haunting memory of the 1949 election and to enact with astounding speed and haste the law creating the Tribunal. Of course, we can understand very

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[82] Justice Bengzon explains the advantage of his proposal in this wise: "When and if the duty is imposed expressly upon the whole Government, the President, for all his powers, may not, for the benefit of his partisans, make use of his subordinates, the army, for example, to exert undue pressure upon the voters. If he does that, he violates the Constitution and he may be impeached thereon. And if the majority in Congress should amend the Election Law to permit all Government officials, like judges, fiscals, treasurers, engineers, to campaign for their party, the amendment may be stricken down as in conflict with their constitutional obligation to preserve the purity of the elections. And, again, if the law be amended so as to award all election inspectors to the party in power, that amendment will be void as violative of the constitutional mandate. Without this basic concept, I very much doubt whether the minority would have, in the ordinary course of justice, any means of protecting itself against unfair or fraudulent advantage engrafted by the majority on the Election Law." *Id.* at 913.

[83] Remarks of Senator Lim, note 76 *supra*.

well the position of Congress. This year is a presidential election year.

But whether the speedy action of Congress has effectively bridged the deplorable hiatus in the fundamental law and resulted in creating a Tribunal which can successfully carry out the supreme purposes of its creation, or whether it shall give rise, instead, to decisions that cannot be enforced, to yearnings for justice which cannot be satisfied, or to demands for action that may set the spark of internal dissension and bloodshed — the very evil sought to be avoided and to avoid which the Tribunal was created — all these are big questions that loom large on the days ahead. We hope our fears are without cause. We hope the Tribunal shall be a success.

For whether the constitutionality of the creative law can be successfully defended is for our courts to pass upon with finality, whether the Tribunal shall become a living instrument to uphold and safeguard the purity of suffrage that it was envisioned, only time will tell.

Pablo B. Badong

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