TOWARDS A DEFINITION OF "ADMINISTRATIVE DUE PROCESS" IN REGULATORY PROCEEDINGS *

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I. *Introduction*

The first victim of any political upheaval is due process. This is probably because due process is seen by the victors of any revolution as the last refuge of scoundrels.

The relevance of due process is highlighted in administrative agencies in the Philippines against the backdrop of political upheavals because of two principal factors: first, following changes in political leadership, there also occur corresponding changes in the highest levels of the administrative agency or tribunal concerned, and most respondents summoned before such agencies and tribunals happen to be associated with the old regime; and, second, there is the inherent tendency of administrative agencies, with their specialist and narrow tunnel vision, to treat persons appearing before them summarily and sometimes harshly, unless the respondents belong to big corporations or to powerful vested interests.

Definition of the Problem

This paper seeks to define the scope and content of administrative due process as evolved by the courts through half a century of administrative law. The expertise of administrative agencies which they have used to solve some of our social and economic ills has likewise been used to short-circuit procedural rights in proceedings before them. The focus of this paper is on the regulatory operations of such agencies, not on criminal fact-finding in quasi-judicial proceedings of administrative tribunals. It is in this area of administrative adjudication that the concept of due process has been crystallized.

The problem lies in how to preserve the strength of specialized agencies as they bring their expertise to the solution of social maladies before them, without compromising the idea of fair play and just treatment. The question to be answered is how much procedural due process should be accorded to parties in operations of or proceedings before administrative regulatory agencies. Cases on due process decided in the context of adjudicative proceedings before administrative tribunals will not be discussed in this paper.

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The absence of due process in administrative proceedings has been magnified in the last few years, first, because of the authoritarian nature of the past martial law regime and, second, because of the increased quasi-judicial powers given to administrative agencies by presidential decree, especially to agencies like the SEC, NLRC, CB, OIC, and even to the regular Ministries under the office of the President. The problem has not faded away with the passing of the old Marcos regime, since the agencies are still operating under the same presidential decrees, not to mention the broad and far-ranging powers of sequestration recently granted to the PCGG.

II. *Historical Background*

a. *Evolution of administrative due process*

Administrative due process as a legal principle was gradually conceived from the wedlock of government restrictions on business with that of judicial review of administrative action. The creation of a number of administrative agencies and tribunals during the New Deal regime of FDR had a backwash effect in the Philippines. Derisively called "alphabet agencies" at that time, administrative agencies and tribunals were created to solve specific problems within their narrow area of specialization and, in the process, they had to decide disputes and claims brought before them. Fortunately, judicial review was superimposed on their proceedings, and there followed the clash of judicial and administrative processes, which in turn led to a concretization of the concept of administrative due process. Such clash was bound to occur, considering the specialized orientation of administrative agencies, against the broader and more generalized approach of regular courts applying clear and systematic guidelines and procedural guarantees. And such clash was bound to revolve around due process concepts not only because of the varying approach of the two institutions involved, but also because of the different nature of the proceedings before them: proceedings before administrative agencies are usually inquisitorial, while that of judicial bodies are adversarial in character.

Yet it would be myopic to view the evolution of administrative due process as just a consequence of the friction between the inquisitorial approach of the administrative agency and the adversarial technique of the judicial tribunal.

b. *Ideological implications of administrative due process*

The evolution of administrative due process must also be seen as part of the history of the struggle of political ideas. For the movement to reform the administrative process has been based not only on legal considerations but on political factors as well.

Administrative regulation expanded and matured during the New Deal era. It became closely identified with restrictions on property rights, with

changes in the law of contracts which reduced the protections previously accorded private economic transactions, and with the narrowing of the scope of personal business freedom.[1] The growth of the discretionary power of the regulatory commissions were regarded by some as the tools of socialism and denial of individual freedom.[2]

It was at this point that conservative lawyers in the United States became concerned with administrative procedure. At this stage in the constitutional history of the United States, the role of the courts as guardians of substantive due process in economic affairs began to decline. By 1937, after the shift in the trend of judicial decisions in the US Supreme Court, the conservative forces began to shift from substantive to procedural due process. This movement spilled over into the administrative process, where procedural due process was seen as a way of keeping governmental regulation within reasonable bounds and within the limits of fairness to private businesses. The seeds of the movement to restrict regulatory agencies was planted by one of the bulwarks of conservatism in the United States during his time, Justice Brewer of the US Supreme Court, who eyed the regulatory movement with askance.[3]

It was thus that the villain pilloried by the conservative lawyers at the time was "administrative absolutism." It was the American Bar Association which spearheaded a campaign to surround the regulatory process with procedures and rules to protect private parties from unfair and arbitrary action of the independent commissions. Its members succeeded in focusing the attention of Congress, the courts, and law schools on the growth of administrative discretion and the problems of judicial review.[4] In this crusade, the ABA was supported by the ideas of one of the pillars of constitutionalism, Judge Thomas Cooley, who railed against regulatory legislation by the independent commissions. Regulatory legislation, according to him, violated the law of supply and demand, not to mention the higher constitutional law upon which a republican government was formed.[5]

As if by a stroke of fate, and not without a tinge of irony, it was Cooley who became the first chairman of the Interstate Commerce Commission. Initially, he was in a quandary as to whether to accept the position or not,

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[1] See generally Swisher, "Toward the New Deal," Ch. 34, in American Constitutional Development, pp. 847-874 (1954).

[2] Bernstein, Regulating Business by Independent Commissions (1955), p. 189.

[3] "So it is that the mischief makers in this movement strive to get away from courts and judges, and to place the power of decision in the hands of those who will more readily yield to the pressure of numbers, that so-called demand of the majority." (Justice Brewer, quoted by Mason, (Ed.), Free Government in the Making (1949), p. 616).

[4] Bernstein, *id.*, at p. 54.

[5] "...the capability of property, by means of the labor or expense or both bestowed upon it, to be made available in producing profits, is a potential quality in property, and as sacredly protected by the Constitution as the thing itself in which the quality inheres." (Cooley, "State Regulation of Corporate Profits." North Am., Rev., quoted in Bernstein, p. 33).

but in the end he accepted it as part of his crusade. Thus, when he assumed the chairmanship of the ICC he established a pattern of operations similar to that of a court of law: there was a case by case consideration of all regulatory matters. Under Cooley, the ICC regarded itself more as a tribunal for adjudication of disputes between private parties instead of an aggressive promoter of the public interest in railroad transportation.[6]

The crusade against administrative absolutism cannot be laid at the doors of the ABA and of the conservative commentators of the period alone. In the US Supreme Court itself, there was a perceptible shift in judicial thought to curtail the exercise of police power by means of administrative regulation.

It was thus that when the *Morgan* cases cropped up during the New Deal era, the psychological conditioning for administrative due process had already been set.[7] These cases, which raised the issue of validity of proceedings before the Department of Agriculture establishing rates for some Kansas City market agencies under the Packers and Stockyards Act of 1921, gave the Supreme Court an opportunity to lecture the agency on essential elements of fair procedure in administrative adjudication. These cases are significant not only as legal precedents, but because they mark a watershed in the struggle to protect the rights of private parties against arbitrary and unfair procedure.

The legal effects of the *Morgan* cases began to be felt in the Philippines immediately. Thus, in the *Pantranco v. PSC* case[8] decided in 1940, the Philippine Supreme Court relied on the first two *Morgan* cases in holding that due process rights must be respected even in administrative proceedings before the Public Service Commission. The Court, through Justice Laurel, held that —

> "There are cardinal primary rights which must be respected even in proceedings of this character. The first of these rights is the right to a hearing, which includes the right of the party interested or affected to present his own case and submit evidence in support thereof.... Not only must the party be given an opportunity to present his case and to adduce evidence tending to establish the rights which he asserts but the tribunal must consider the evidence presented.... This principle emanates from the more fundamental principle that the genius of constitutional government is contrary to the vesting of unlimited power anywhere."[9]

The two *Morgan* cases were also the precedents cited by Justice Laurel in the now landmark case of *Ang Tibay v. CIR*.[10] In that case, the Court

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[6] Bernstein, *id.* at p. 29.

[7] Morgan v. U.S., 298 U.S. 468 (1936); Morgan v. U.S., 304 U.S. 1 (1937); U.S. v. Morgan, 307 U.S. 183 (1939); and U.S. v. Morgan, 313 U.S. 409 (1949).

[8] 70 Phil. 221.

[9] *Id.* at p. 235.

[10] 69 Phil. 536 (1940).

enumerated the cardinal primary rights of parties before administrative tribunals as follows:

1. Right to a hearing;
2. Right to adduce evidence which the tribunal must weigh and consider;
3. Right to a decision supported by substantial evidence;
4. Such substantial evidence must be evidence presented at the hearing or contained in the record and disclosed to the parties;
5. The tribunal must act on its own independent judgment and not simply accept the views of a subordinate in arriving at a decision; and
6. The decision must be rendered in such a manner that the parties can know the issues involved and the reasons for the decision.

These rights, however, would be applicable only to quasi-judicial tribunals exercising adjudicative functions. Even if the Supreme Court enumerated these procedural rights to be observed in "administrative proceedings," it was clear from the context in which these pronouncements were made that these rights pertained only to trial-type hearings before administrative tribunals. The analogy between adjudicative proceedings before administrative tribunals and regular court trials is all too easy to apply, and therefore there would be no difficulty in applying procedural due process requirements in court trials to proceedings before administrative tribunals in the exercise of their adjudicative functions.

The path of administrative due process in regulatory proceedings is more tortuous and deviating than that in adjudicatory proceedings. Our courts, in conducting judicial review, have acknowledged the basic differences between judicial proceedings and regulatory proceedings, and they have encountered difficulty trying to draw the outlines of due process applied to administrative regulatory proceedings. Tracing the outlines of due process in such proceedings could at best be done by tracing the evolution of judicial techniques in approaching this problem. These techniques have undergone a number of changes since the courts have tackled this problem only a few decades ago.

III. *Recent Developments: Shifts in Judicial Technique*

a. *'Right-privilege' dichotomy*

Procedural due process in administrative regulatory proceedings is of recent vintage in the United States. The constant shift in judicial technique in approaching the issue of whether or not an individual should be granted due process by an administrative agency reveals the difficulty encountered by the courts in defining due process applied to regulatory proceedings.

The first technique evolved by the courts was to use the "right-or-privilege" dichotomy. Thus, in this approach, the Courts directed their question on whether or not the interest affected by administrative action was a "right" or merely a "privilege." This stemmed from the basic phraseo-

logy of the due process clause—due process protects life, liberty, or property; thus, it is essential that there must be personal or property rights affected by adverse administrative action. Where the threatened interest was found to be merely a privilege, due process protection would not be accorded.

This approach was used most frequently in immigration, business licensing, and in government largest cases. Thus, the U.S. Supreme Court reasoned in *Shaughnessy v. U.S. ex rel. Mezei,*[11] an immigration exclusion case:

> "We do not think that respondent's continued exclusion deprives him of any statutory or constitutional right.
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> Whatever our individual estimate of that policy and the fears on which it rests, respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate."

Under this technique, the reasoning is that the government can withdraw the privilege from an individual without affording due process protection. Other corollary principles arose from this. If the government can completely withdraw the privilege from an affected individual, it can also impose any condition upon its exercise, since the power to exclude or deny includes the lesser power to impose a condition.[12]

The Philippine Supreme Court used the same technique also in a deportation case, *De Bisschop v. Galang.*[13] In denying petitioner's plea for prohibition against the Commissioner of Immigration, the Court said that extension of stay of aliens is purely discretionary on the part of immigration authorities, and the fact that the procedure in hearings before immigration authorities does not grant formal hearings would not violate the due process clause. The Court then cited an earlier ruling that—

> "x x x x due process of law is not necessarily judicial process; much of the process by means of which the Government is carried on, and the order of society maintained, is purely executive or administrative, which is as much due process of law, as judicial process. While a day in court is a matter of right in judicial proceedings, in administrative proceedings, it is otherwise since they rest upon different principles."[14]

This approach has been criticized by jurists and textwriters. Schwartz has noted that the "privilege" concept has developed at a time when the role of government was relatively restrained. But in the contemporary welfare state, according to him, this kind of approach would have devastating consequences. "The joyless reaches of the Welfare State will be

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[11] 345 U.S. 206 (1953).
[12] Packard v. Banton, 264 U.S. 140 (1924).
[13] 8 SCRA 244 (1963).
[14] Quoting from Cornejo v. Gabriel, 41 Phil. 188, 192-193.

littered with dependents left outside the pale of legal protection," he concludes.[15] Furthermore, the "right-privilege" dichotomy does not really answer the question as to whether a particular license, contract, or privilege should be taken away without notice or hearing. To quote Justice Frankfurter, "Congress may withhold all sorts of facilities for a better life but if it affords them it cannot make them available in an obviously arbitrary way."[16]

b. *'Severity of injury' test*

It was in *Goldberg v. Kelly*[17] where the U.S. Supreme Court expressly rejected the "right-privilege" approach. In this case, which involved the validity of regulations governing the termination of welfare benefits, the Court struck down the "privilege" concept by stating:

> "The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right'. . . . Such benefits are a matter of statutory entitlement for persons qualified to receive them. . . . (they are) more like 'property' than a 'gratuity.'[18]

The Court shifted its inquiry to the severity of the injury to the interest of the individuals affected, and it noted that the element of emergency tilted the balance in favor of the individual recipient, since the termination of welfare benefits might deprive the individual of the means by which to live. This inquiry focused on whether or not the individual subjected to deprivatory governmental action was "condemned to suffer grievous loss."[19] Thus, where the injury to the affected individual is quite serious, procedural safeguards would have to be observed before deprivatory action by the government could be validated.

A few cases decided after the *Goldberg v. Kelly* ruling followed the doctrine laid down in that case. Thus, the ruling was applied likewise to the termination of unemployment benefits.[20] It was also applied with respect to termination of disability payments.[21]

c. *"Nature of Interest" test*

The Supreme Court shifted its methodology again a few years after *Goldberg v. Kelly* when *Board of Regents v. Roth*[22] cropped up. This case was an action by an assistant professor at a state university who was hired

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15 Schwartz, Administrative Law, p. 220 (1976 ed.).
16 American Communications Asso. v. Douds, 339 U.S. 382; Frankfurter, concurring, at p. 417 (1950).
17 397 U.S. 254 (1970).
18 *Id.* at p. 262.
19 *Id.* at p. 263.
20 California Human Resources Dept. v. Java, 402 U.S. 121 (1971).
21 Richardson v. Wright, 405 U.S. 208 (1972).
22 408 U.S. 564 (1972).

for one year. He was not renewed after expiration of his term, and he claimed that, even if he had no tenure rights, he should have been given a hearing. The Supreme Court struck down his argument, holding that the due process requirements cover only the range of interests included in the Fourteenth Amendment of the Federal Constitution, i.e., liberty or property interests. Holding that respondent had no "property" interests at stake, the Court then restated that the test for application of due process requirements is not really the *weight* but the *nature* of the interests involved:

> "The District Court decided that procedural due process guarantees apply in this case by assessing and balancing the weights of the particular interests involved.... But, to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interests at stake....We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property."[23]

Holding that renewal of a one-year professorial term is not an entitlement within the concept of "property" protected by due process, the Court defined "property interest" in these terms:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.
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> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[24]

This definition of "property interest" was reiterated by the Supreme Court two years later in *Arnett v. Kennedy*[25] when it said:

> "Positive law must be the touchstone for determining whether an interest infringed by governmental action is in the nature of a property interest entitled to constitutional protection. When property interests are created by positive law, they are also defined and limited by the law which creates them, and not by the Constitution."

In the same case, a plurality of the Court introduced the "entire package" theory that laid the basis for disciplinary action:

> "Thus, the very legislation which 'defines' the 'dimension' of the students' entitlement, while providing a right to education generally, does not establish this right to free discipline imposed in accord with Ohio law. Rather, the right is encompassed in the *entire package* of statutory provisions governing education in Ohio — of which the power to suspend is one."[26]

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[23] *Id.* at pp. 569-571.
[24] *Id.* at pp. 576-577.
[25] 416 U.S. 134 (1974).
[26] *Id.* at pp. 586-587.

Later cases followed the *Board of Regents v. Roth* approach. Thus, in *Goss v. Lopez*,[27] where the Supreme Court held that public school students in Ohio cannot be suspended without observing due process guarantees of notice and hearing, the Court said that "as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the due process clause." Here the Court stated that public school children have property and liberty interests in their education that qualify for due process protection.

An early Philippine case used this kind of reasoning, although it reached a contrary conclusion. In *Cornejo v. Gabriel & Provincial Board of Rizal*,[28] where the Supreme Court upheld the preventive suspension of a municipal president under Sec. 2188 of the Administrative Code without hearing, the Court said that a public office could not be considered "property" under the due process clause:

> "For this petition to come under the due process prohibition, it would be necessary to consider an office as 'property.' It is, however, well-settled in the United States, that a public office is not property within the sense of the constitutional guaranties of due process of law, but is a public trust or agency.
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> Notice and hearing are not prerequisites to suspension unless required by statute and therefore suspension without such notice does not deprive the officer of property without due process of law. Nor is suspension wanting in due process of law or a denial of equal protection of the laws because the evidence against the officer is not produced and he is not given an opportunity to confront his accusers and cross-examine witnesses."[29]

A recent Philippine case seems to follow the reasoning in *Goss v. Lopez*. In a case involving expulsion of college students from a private university allegedly because of the students' boycott activities as a result of which they suffered poor academic standing, the Philippine Court held:

> "The imposition of disciplinary sanctions requires observance of procedural due process. And it bears stressing that due process in disciplinary cases involving students does not entail proceedings and hearings similar to those prescribed for actions and proceedings in courts of justice. The proceedings in student discipline cases may be summary, and cross-examination is not, contrary to petitioners' view, an essential part thereof. There are withal minimum standards which must be met to satisfy the demands of procedural due process, and these are, that (1) the students must be informed in writing of the nature and cause of any accusation against them; (2) they shall have the right to answer the charges against them, with the assistance of counsel, if desired; (3) they shall be informed of the evidence against them; (4) they shall have the right to adduce evidence in their behalf; and (5) the evidence must be duly considered

[27] 419 U.S. 565 (1975).
[28] 41 Phil. 188 (1920).
[29] *Id.* at p. 195.

> by the investigating committee or official designated by the school authorities to hear and decide the case."[30]

In this case, the Court observed that the university had never conducted proceedings of any sort to determine whether or not petitioners had led or participated in boycott activities within the university authorities. The Court here invoked the pretermination rights of students contained in provisions of the Magna Carta for Education, BP Blg. 232, citing an earlier decision, *Berina v. Philippine Maritime Institute.*[31]

However, in the United States, the Supreme Court held in *Bishop v. Wood,*[32] that a non-probationary police officer was not entitled to due process protection prior to termination of his employment, relying on relevant state statutes which were construed to grant no right to continued employment but merely conditioning an employee's removal or compliance with certain specified procedures.

The "nature of interest" test devised by the U.S. Supreme Court is more objective and manageable than the "weight of interest" test. The latter involves some delicate balancing of such a subjective and ambiguous nature that ultimately, the test would boil down to the value judgment of the justices concerned. And, more often than not, in measuring the severity of deprivation suffered by an individual against the relative importance of state interests involved, the latter would always prevail over individual interest, especially in the thinking of a career judiciary recruited mostly from the government sector.

d. *"Balancing of interests" approach*

But we have not seen the demise of the "balancing" test in the United States. In just a few years after the *Board of Regents v. Roth* and *Goss v. Lopez* cases, the balancing approach came back with a more sophisticated approach. This time, it is a three-pronged balancing act, instead of the old-fashioned two pronged balance. These prongs are the private interest affected, the risk of an erroneous deprivation of such interest if due process is not observed, and the government's interest.

In *Mathews v. Eldridge,*[33] a recipient of disability benefits under the Social Security Act, brought suit against the Secretary of Health, Education and Welfare, seeking reinstatement of the payments, contending that initial agency procedures which resulted in the termination of benefits denied him due process. During its program of continually monitoring the medical conditions of aid recipients, a state agency reached a determination that the petitioner's disability had ended and recommended that benefits to him

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30 Guzman v. National University, G.R. No. 68288, July 11, 1986.
31 117 SCRA 581 (1983).
32 426 U.S. 341 (1976).
33 424 U.S. 319 (1976).

no longer continue. The agency informed petitioner of its conclusion and, by letter, indicated its reason. The letter also advised petitioner that he might request additional time to submit any other relevant information. In his response, petitioner took issue with one characterization of his medical condition but indicated that he thought the agency had sufficient information already on hand to warrant a conclusion that he was still disabled. The state agency then made a final determination that petitioner's eligibility had terminated and forwarded its recommendation to the Social Security Administration. The latter in turn notified petitioner that he would not be receiving any more payments and advised him of his right to have the agency reconsider its initial determination within six months. Instead of going through this route, petitioner filed this case, alleging that due process required he be given a pretermination hearing to respond to the evidence and present his side. The HEW Secretary, in response, argued that present agency procedures were constitutionally adequate and that in any case, petitioner by electing not to seek reconsideration by the state agency, failed to exhaust all available administrative remedies. The Court, analyzing the governmental and private interests that were affected, indicated the factors it considered essential in the balancing process:

> "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'[34]

The Court put in a parting word on the nature of the balancing process required in administrative proceedings:

> "The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to insure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of the courts.' The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision-making in all circumstances. The essence of due process is the requirement that 'a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it.' All that is necessary is that the procedures be tailored, in light of the decision to be made, to the 'capacities and circumstances of those who are to be heard' to insure that they are given a meaningful opportunity to present their case."[35]

[34] *Id.* at p. 335.
[35] *Id.* at p. 348.

Weighing the essential factors in the balance, the Court here found that, with respect to the first, that is, the private interest to be affected by the official action, it found that the potential deprivation that may be visited upon petitioner is less than that of a welfare recipient as in the *Goldberg v. Kelly,* where welfare assistance is given to persons on the very margin of subsistence, while here in this case eligibility for disability benefits is not based on financial need but on inability to engage in substantial gainful activity. With respect to the second factor, that is, the risk of an erroneous deprivation of such interest through the procedures used, the Court noted that the decision whether to discontinue disability benefits will turn, in most cases, upon routine, standard and unbiased medical reports by physician specialists, plus a further safeguard against mistake in the policy of allowing the disability recipient full access to all information relied upon by the state agency. As regards the third factor, that is, the public interest, including the administrative burden that would be associated with requiring due process as a matter of constitutional right in evidentiary hearing upon demand in all cases prior to termination of benefits, the Court noted the incremental cost resulting from the increased number of hearings and the expenses of providing benefits to ineligible recipients prior to termination of benefits. The Court ultimately concluded that due process requirements does not warrant trial-type hearing before termination of disability benefits.

The balancing approach was used in other cases which were decided after the Mathews ruling. In *Memphis Light, Gas & Water Division v. Craft,*[36] a suit filed by a homeowner against a municipal utility which discontinued utility service five times for nonpayment of bills, the Court resorted to the framework of analysis utilized in *Mathews* and said:

> "Under the balancing approach outlined in *Mathews,* some administrative procedure for entertaining customer complaints prior to determination is required to afford reasonable assurance against erroneous or arbitrary withholding of essential services. The customer's interest is self-evident. Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety. And the risk of an erroneous deprivation, given the necessary reliance on computers, is not insubstantial.
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> The utility's interests are not incompatible with affording the notice and procedure described above. Quite apart from its duty as a public service company, a utility — in its own business interests — may be expected to make all reasonable efforts to minimize billing errors and the resulting customer dissatisfaction and possible injury... Nor should 'some kind of hearing' prove burdensome. The opportunity for meeting with a responsible employee empowered to resolve the dispute could be afforded well in advance of the scheduled date of termination. And petitioners would retain the option to terminate service after affording this opportunity and concluding that the amount billed was justly due."[37]

[36] 436 U.S. 1 (1978).
[37] *Ibid.*

In the case of *Board of Curators of University of Missouri v. Horowitz*,[38] which involved dismissal of a medical student on academic grounds, the Supreme Court refused to apply its ruling in *Goss v. Lopez*, which involved dismissal prompted by disciplinary reasons. Using the balancing approach, the Court held that under the facts, the student received all the procedural due process that was due her under the Fourteenth Amendment of the Federal Constitution. Said the Court:

> "Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative fact-finding proceedings to which we have traditionally attached a full hearing requirement. In *Goss*, the school's decision to suspend the students rested on factual conclusions that the individual students had participated in demonstrations that had disrupted classes, attacked a police officer, or caused physical damage to school property. The requirement of a hearing, where the student could present his side of the factual issue, could under such circumstances 'provide a meaningful hedge against erroneous action.' . . . The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making."[39]

Mackey v. Montrym[40] closely followed the balancing process used in *Mathews* case. In this case, Montrym, who was involved in a collision, was observed by a police officer right after the accident to be glassy-eyed, unsteady on his feet, slurring his speech, and smelled of alcohol. He initially refused to take a breathalyzer test, but retracted his refusal by volunteering to take the test. Under Massachussett's implied consent law, a driver's refusal to take a breathalyzer test upon arrest for drunken driving is ground for suspension of his driver's license. The Registrar of Motor Vehicles, according to the statute, must order a ninety-day suspension of the license upon receiving a police report that the driver refused to take the breath test. In its ruling, the Supreme Court noted that the private interest affected was a substantial one — the driver's interest in operating an automobile pending outcome of the hearing due him. Then, on the likelihood of erroneous deprivation of the substantial private interest involved, the court noted that there was a prompt post-suspension review available which may be initiated by simply walking into the Registrar's office and requesting a hearing. As for the third leg of the *Mathews* balancing test, the Court characterized the state's interest in preserving the safety of its public high-

[38] 435 U.S. 78 (1978).
[39] *Ibid.*
[40] 44 U.S. 1 (1979).

ways as "paramount," and that this interest of the state is served by the summary suspension of licenses of drivers who refuse to take the breathalyzer test. The Court emphasized the importance of the summary and automatic character of the suspension.

And in *Mennonite Board of Missions v. Adams*,[41] where the Court invalidated the tax sale of a mortgaged real property because the manner of notice, i.e., publication and posting, was found not to have met the requirements of due process, the Court emphasized the necessity of notice reasonably calculated, under all circumstances, to apprise all interested parties, including mortgagees, of the pendency of the action and to afford them an opportunity to present their objections. Due process would require either personal service or notice by mail, the Court held.

IV. *Application to Sequestration Cases*

The current controversy on the validity of the procedures adopted by the Presidential Commission on Good Government with respect to the sequestration of hidden wealth of Marcos cronies, relatives, and dummies will afford an opportunity for the Supreme Court to define the outlines of administrative due process in the Philippines. Since a number of companies as well as individual respondents have filed cases with the Supreme Court challenging the validity of the PCGG actions, the Supreme Court should be able to draw clearly the limits and boundaries of Presidential action against individual and private interests taken in the name of general welfare.

If the "balancing" test were applied to the sequestration cases, so that we put into the balance the losses suffered by the private interests against the public gain derived from the sequestration of property of respondents, what would be the probable outcome? Probably, it will be found that the public gain arising from the use of summary procedures by the PCGG will outweigh the private loss of property suffered by the respondents. The magnitude of the public interest involved, the effect on the national economy of the possible loss or concealment of such property, the ease and facility with which such property can be transferred to other countries or concealed in the name of others, and the illegality of the means employed to acquire such property, will all weigh against the private interest sought to be protected by due process requirements.

It must also be borne in mind that the sequestration cases involve mostly property or property rights, which do not enjoy as preferred a position in our constitutional hierarchy of rights as human rights. It is enough that the respondents in the sequestration cases will get their day in court once the cases are filed with the regular courts by the PCGG.

[41] 462 U.S. 791 (1983).

> "The usual rule has been that where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.
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> It is sufficient, where only property rights are concerned, that there is at some stage an opportunity for a hearing and a judicial determination."[42]

The PCGG action may also be seen as an "emergency" act of government which constitutes a recognized exception to observance of due process requirements. A number of precedents abound in this instance. In fact, this doctrine is restated in the very case cited by the critics of PCGG action, *Fuentes v. Shevin,* where the Supreme Court said:

> "There are extraordinary situations that justify postponing notice and opportunity for a hearing. (Brodie v. Connecticut, 401 U.S. 379). These situations, however, must be truly unusual. Only in a few limited situations has the Court allowed outright seizure without opportunity for prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the state has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly-drawn statute, that it was necessary and justified in the particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of the national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food."[43]

And this doctrine is not unknown in the Philippines. In *Cornejo v. Gabriel,* the Court held that —

> "In certain proceedings, therefore, of an administrative character, it may be stated, without fear of contradiction, that the right to a notice and hearing are not essential to due process of law. Examples of special or summary proceedings affecting the life, liberty, or property of the individual without any hearing can easily be recalled. Among these are the arrest of an offender pending the filing of the charges; the restraint of property in tax cases; the granting of preliminary injunctions *ex-parte;* and the suspension of officers or employees by the Governor General or a Chief of Bureau pending an investigation."[44]

It is true that a number of recent U.S. Supreme Court decisions involving sequestration can be cited in support of the challenge against the legality of the actions of the PCGG. Foremost of these is *Fuentes v. Shevin*[45] where the Court invalidated a prejudgment replevin procedure of Florida and Pennsylvania which afforded self-help relief to creditors against delinquent debtors. Here the Court rejected the *"weight"* of interest test in favor

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[42] Mitchell v. W. T. Grant, 416 U.S. 600, at 611-12 (1974).
[43] Fuentes v. Shevin, 407 U.S. 67 (1972).
[44] Cornejo v. Gabriel, *supra,* at pp. 193-194.
[45] *Supra.*

of the *"type of interest"* test, and rejected the creditor's argument that the debtor's interest in the uninterrupted use of a stereo equipment was insufficiently weighty. The Court instead resorted to the "nature" of interest test, and held that the right to due process protection was applicable because the debtor's interest in the uninterrupted use of the stereo equipment was an interest in "property" within the meaning of the Fourteenth Amendment of the Federal Constitution. The deprivation of such property right, according to the Court, triggered an entitlement to due process irrespective of the weight of the interest sought to be protected. It must be noted here, however, that the decision was made on a four-to-three vote.

The *Fuentes* ruling was not the last word on sequestration. In *Mitchell v. W.T. Grant*,[46] the same Court upheld the validity of a Louisiana statute on sequestration permitting prejudgment seizure of consumer goods without prior notice or hearing, the Court noting that the procedure did allow a prompt hearing after the seizure where the debtor could test the validity of the sequestration.

Mitchell did not completely knock out the Fuentes ruling, however. The Court was careful to draw some basic distinctions between the two cases. First, the Florida law in *Fuentes* authorized the repossession of goods without any judicial order, approval or participation. In *Mitchell*, the Louisiana sequestration statute did not depend only on bare, conclusory claims of ownership of seller's lien; it authorized sequestration only where the nature of the claim and amount thereof and the grounds relied upon for issuance of the writ clearly appear from specific facts shown by verified petition, all of which must be shown to a judge. Second, in *Fuentes*, the buyer would eventually have an opportunity for hearing only at some time in the future when he becomes the defendant in the trial of the court action for repossession. In *Mitchell*, under Louisiana procedure, there was an immediate hearing and dissolution of the writ unless the plaintiff proves the grounds on which the writ was issued. Third, in *Fuentes*, the Florida and Pennsylvania statutes provided that the property in question can be replevied only if "wrongfully detained" and this broad fault standard, according to the Court, was inherently subject to factual determination and adversarial output. In *Mitchell*, the facts relevant to obtaining a writ of sequestration were narrowly confined, and documentary proof is particularly suited for questions of the existence of the vendor's lien and issue of default on payment.

The *Fuentes* ruling was resuscitated the following year after *Mitchell* in *North Georgia Finishing, Inc. v. Dicrem, Inc.*[47] Here the garnishment of a corporate bank account without a probable cause hearing was invalidated despite a contract conditioning the corporation's property interest in the bank account upon relinquishment of the right to demand such a hearing.

[46] 416 U.S. 600 (1974).
[47] 419 U.S. 601 (1975).

The Court held that the fact that the debtor was deprived only of the use and possession of the property, and perhaps only temporarily, did not put the seizure beyond the protection of the due process clause. The Court said that the Georgia garnishment procedure was vulnerable for the same reasons as *Fuentes,* that is, the bank account was impounded without a bond and put beyond the use of the debtor during the pendency of the litigation on the debt, all by a writ of garnishment issued by a court clerk without notice or opportunity for an early hearing. The Court likewise noted that the Georgia statute had none of the saving characteristics of the Louisiana statute in *Mitchell.*

These three cases are not exactly analogous to the sequestration cases in the Philippines for the reason that these involve private interests of creditors and debtors. All of them revolve on the due process aspects of the states' antiquated commercial statutes designed to afford relief to creditors against defaulting debtors enacted at a time when the business philosophy of the United States became unduly protective of the interests of business. No important governmental interest was involved in these cases, unlike in the sequestration cases of PCGG. As noted by the Court in *Fuentes*:

> "The Florida and Pennsylvania statutes serve no important governmental or general public interest. They allow summary seizure of a person's possessions when no more than private gain is directly at stake. The replevin of chattels, as in the present cases, may satisfy a debt or settle a score. But state intervention in a private dispute hardly compares to state action furthering a war effort or protecting the public health."[48]

The more relevant decision to the sequestration cases seems to be *Fahey v. Mallone.*[49] where the U.S. Supreme Court allowed the impounding of bank deposits without hearing by a bank conservator appointed by the state. Here the Court realized the emergency rationale for the sequestration procedure and the ease with which bank deposits could be transferred or concealed elsewhere. The Court stated:

> "It is complained that these regulations provide for hearing after the conservator takes possession instead of before. This is a drastic procedure. But the delicate nature of the institution and the impossibility of preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner. It is a heavy responsibility to be exercised with disinterestedness and restraint, but in the light of the history and customs of banking we cannot say that it is unconstitutional."[50]

In the matter of sequestration of hidden wealth, consisting mostly of bank deposits, shares of stock, titles to real property, and other intangible property, most of these can be easily concealed or transferred by means of inter-bank facilities or through electronic and telecommunications devices.

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[48] Fuentes v. Shevin, *id.* at pp. 92-93.
[49] 392 U.S. 245 (1945).
[50] Fahey v. Mallone, at p. 254.

To accord due process to respondents before sequestration would defeat the purpose of the sequestration process and leave the PCGG holding an empty bag.

This is not to sanction the sequestration procedures of the PCGG on a wholesale basis. The observance of due process requirements would have to be done on a case to case basis depending on the necessity for a pre-sequestration or post-sequestration hearing. But we would reject any presumptive limits upon the powers of the PCGG to temporarily impound hidden wealth pending litigation. Furthermore, the balancing test contains built-in restraints against any total indorsement of sequestration actions taken by an executive body even if this is done in the name of public benefit. For the balancing test carries with it the corollary necessity-of-the-means test, that is, whether the means employed were necessary and reasonable to the ends sought to be achieved by the sequestration process. This means that, in the judicial review, the courts will have to scrutinize the means employed in sequestering property to determine whether such means were really required to achieve the results sought. Of course, the courts will have to fall back on subjective standards like "unreasonable" or "unnecessary", but these standards have acquired technical meanings and are not completely devoid of legal substance and content. Thus, the courts, while tolerating non-observance of due process prior to sequestration, may look into the reasonableness of the means used to effect it as well as the necessity of the specific measures taken to achieve sequestration. The availability of judicial review is always a potent weapon to discourage governmental abuse and the blatant excesses of over-eager investigators whose zeal sometimes outrun their insight.

V. *Conclusion*

Due process as a constitutional requirement is not a fixed rule of thumb that can be reduced to a mechanical tool to gauge the actions of the government against private interest. Rather, it is itself a tenuous balance between individual right and public good. While it is a limitation on the exercise of governmental power, it does not operate in a vacuum but derives its meaning from the push and pull of tensions coming from other legitimate powers of government. It is thus that due process may involve different rules of fair play depending on the circumstances as well as the kind of game being played.

> "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. (Citation omitted) Due process is flexible and calls for such procedural protections as the particular situation demands. Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected."[51]

[51] Mathews v. Eldridge, *supra*.

The concept of due process in administrative proceedings in the Philippines has not developed as fully as in the United States. The few cases delving into due process in an administrative context involve quasi-judicial tribunals or administrative agencies in the exercise of their adjudicative functions. Cases on due process involving the regulatory or executive functions of administrative bodies have been few and far between, and these have been characterized by restrictiveness and cautiousness insofar as judicial pronouncements on the scope and content of administrative due process is concerned. There are no sweeping statements on the meaning of due process; there are no conditions laid down for the exercise of deprivatory governmental power to protect private rights; there are no attempts to reconcile conflicting rights and powers. The Court has been rather timid in striking down Presidential action that deprives individuals of their property rights or that changes the basic relationship between the government and the individual. It is hoped that it will deviate from its traditionally passive role this time in the sequestration cases and define in bold strokes the outlines of administrative due process.

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