

[p]atience, moderation, candor, urbanity, quickness of perception, dignity of deportment, gentleness of manners, genius which commands respect, and learning which justifies confidence.³⁵

CONCLUSION

The immediate effect of the *Marbury* decision was to diffuse the political crisis. While the Republicans were annoyed by the lecture the President received in the first part of the opinion, they got what they wanted and were generally happy with the end result. In the meantime, the Supreme Court had claimed for itself a far more transcendent power, which led to results then unforeseen.

On the hand, *Marbury's* version of judicial review is a conservative, essentially defensive act aimed at protecting the proper province of the judiciary in the context of the departmental theory. On the other hand, the modern doctrine is a broader, more encompassing power, akin to policy-making. By defending judicial prerogatives, however, *Marbury* laid the initial foundations for the independence and power that the Supreme Court would eventually enjoy.

Nonetheless, this essay did not treat *Marbury* as an origin but as a result. It looked not to the future of judicial review and the American Supreme Court, but further into their past. In so doing, it is hoped that this essay has helped clarify how the peculiar and fortuitous convergence of developments in American political theory and law, politics, and personalities produced the articulation of a theory of judicial power in *Marbury v. Madison*.

The Origins of Philippine Judicial Review,

1900-1935

Anna Leah Fidelis T. Castañeda

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INTRODUCTION

This essay studies the origins of the power of judicial review in Philippine history and law. It will focus on the manner by which this power was exercised and its doctrine developed by the Supreme Court of the Philippine Islands

* A.B. '89, *Summa Cum Laude*, J.D. '93, *with honors* (Class Salutatorian), Ateneo de Manila University; LL.M. '96, Harvard University; Visiting Scholar, East Asian Legal Studies, Harvard Law School (1996-1997) and Department of History, Dartmouth College (1997-2000); 1993 Awardee, Ten Outstanding Students of the Philippines.

The author was Managing Editor, Volume 36 and Editor-in-Chief, Volume 37, *Ateneo Law Journal*. The author is profoundly grateful to the following people: Professor Jere Daniell of Dartmouth College, for his incisive comments and helpful suggestions and for his continuing generosity, interest, and encouragement; Louie Llanzon and the *Ateneo Law Journal* staff, for their diligent and indispensable research assistance; her husband Monchie Anastacio and their boys Victor and Timmy, for their support and understanding. All rights reserved.

Cite as 46 ATENEO L.J. 121 (2001).

35. STORY, DISCOURSE in 3 LIFE, CHARACTER AND JUDICIAL SERVICES (Dillon ed.), in HOBSON, *supra* note 5, at 373.

from the beginning of the American colonial period of Philippine history and ending with the Philippine Commonwealth.

Judicial review is the power of courts to determine the validity of the acts of the Legislative or Executive departments of the government. In the United States, judicial review "includes the authority, when the issue is presented in a case within the court's jurisdiction, to declare federal and state statutes unconstitutional."¹

In the Philippines, the power to invalidate laws first appeared in the text of an organic law in Article VIII, Sec. 2(1) of the 1935 Philippine Constitution, which conferred upon Philippine courts jurisdiction over "all cases in which the Constitutionality or validity of any treaty, law, ordinance, or executive order or regulation is in question." Although the 1935 Constitution marked the first time an organic law acknowledged this power in courts, Philippine courts had been passing upon the validity of acts of the other two branches of the Insular Government for over thirty years. It was the manner in which this power was exercised by the insular Supreme Court that found expression in the Constitution that was drafted towards the end of the American colonial period.

The power of judicial review in the text of the 1935 Philippine Constitution contemplated a broad power which encompassed not only the authority to determine the validity of acts passed by the national and provincial legislatures, but also acts of the Executive department in the form of executive orders or administrative regulations. In the oft-quoted landmark case *Angara v. Electoral Commission*,² the Supreme Court of the Philippine Commonwealth expounded on the meaning of judicial review, locating the Judiciary's exercise of the power in the context of the principle of separation of powers. The decision was penned by Justice Jose Laurel, who, together with fellow delegates Norberto Romualdez and Vicente Francisco, drafted the Article on the Judiciary in the 1935 Constitution.

But in the main, the Constitution has blocked out with deft strokes and in bold lines, allotment of power to the executive, the legislative, and the judicial departments of the government. The overlapping and interlacing of functions and duties between the several departments, however, sometimes makes it hard to say just where one leaves off and the other begins...In cases of conflict, the judicial department is the only Constitutional organ which can be called upon to determine the proper allocation of powers between the several departments and among the integral and constituent units thereof.³

1. DAVID CURRIE, *THE CONSTITUTION OF THE UNITED STATES: A PRIMER* 14 (1988).

2. *Angara v. Electoral Commission*, et al., 63 Phil. 139 (1936).

3. *Id.* at 157.

The bold and confident assumption by the Commonwealth Supreme Court of its role as "the final arbiter" was in stark contrast to its origins. The Supreme Court of the Philippine Islands was neither so quick nor so eager to seize upon the opportunity to exercise its judicial prerogatives, be it to strike down legislation that violated individual rights or to play gatekeeper to the Executive and Legislative departments of the Insular Government. Indeed, early enunciations of the doctrine of judicial review display restraint and deference.

This essay will examine the beginnings of judicial review in Philippine law and history. Specifically, this paper will begin by tracing the origins of judicial review in the Philippines and identify when it was that Philippine courts started exercising this power. The paper will then situate selected judicial review cases by the Philippine Supreme Court within the institutional context of the Insular Government and relate them to the political struggles between American colonial officials and the leaders of the Filipino people. In doing so, this paper hopes to explain how history shaped the Philippine doctrine of judicial review from its tentative origins at the start of the American colonial period to its relatively sure-footed articulation in *Angara v. Electoral Commission*. Finally, it will comment on the implications this doctrine had, if any, on the relationship among the departments of the Insular Government and on the government that was fashioned by the 1935 Constitutional Convention.

I. THE JUDICIARY AS THE MOUTHPIECE OF THE LAW DURING THE SPANISH COLONIAL PERIOD

Courts of law existed in the Philippine Islands as early as the 16th century, but like the courts of other continental European countries, they were neither separate from nor autonomous of the governing or magisterial branch. Moreover, Philippine courts of the Spanish colonial period did not exercise anything like the power of judicial review as students and practitioners of law understand the concept today.

For almost 200 years, from 1582 to 1776, the Spanish colonial government offices performed Executive, Legislative, and Judicial functions. For example, the Governor-General, who was the highest colonial officer, was also president of the *Audiencia* or the highest court in the land. The *Audiencia*, which was designed to work in concert with the Governor in many critical areas of the colony's administration, performed administrative and executive duties,⁴ as well as passed colonial decrees. This arrangement between the Governor-General and the *Audiencia* was designed to afford the Governor-General the advice and support of the members of the *Audiencia*, called *oidores*, and at the same time,

4. These duties included monitoring prices of goods, conducting censuses, allotting lands to settlers, appointing magistrates, auditing reports, supervising the treasury, and inspecting accounts of local government heads.

permit the *oidores* to act as a check on the Governor's improvidence. In other words, a system of checks-and-balances was achieved, not by the separation of functions, but by the creation of offices with essentially the same functions. This scheme shared the same rationale as the separation of powers principle, which was to control abuse of office by competition. But rather than rely on the competition created by "mechanical devices and institutional contrivances"⁵ as the Americans did, the Spanish model depended instead on competition between individuals with the same powers. Local government offices followed this pattern of investing mixed functions in the same office. Thus, the *alcaldes* and *gobernadorcillos* headed the provinces and towns, respectively, and also resolved disputes.

It was only in the 19TH century that the concept of Judicial independence found expression in the Spanish government. Spanish liberals attempted to reform Spain's absolute monarchy by Constitutionalism. Inspired by the French Constitution and the ideas of Montesquieu, the various Spanish Constitutions enacted between 1812 and 1876 introduced the concept of separating the functions of government departments. The logic of the doctrine of separation of powers required the Judiciary to be independent. To achieve this independence, Montesquieu wrote that it was necessary to invest the Judiciary with the essential privileges of independence, autonomy, and irremovability.⁶ Although independent, Montesquieu's judge was little more than an automaton, exercising highly restricted discretion:

But though the tribunals should not be fixed, judgments should be fixed to such a degree that they are never anything but a precise text of the law. If judgments were the individual opinion of a judge, one would live in this society without knowing precisely what engagements one has contracted.⁷

Law Professor Abram Chayes described the judge in Montesquieu's scheme as "the mouthpiece of the law, nothing more, confined to the mechanical task of announcing consequences in particular cases."⁸ Unlike its American counterpart, therefore, the Judiciary in Montesquieu's program did not have a "substantive role in governing the polity."⁹ In Spain, ordinary courts did not have the power of judicial review. Instead, the power to pass upon the validity

5. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 425-29 (1969).

6. See REYNALDO S. FAJARDO, ET AL., *THE HISTORY OF THE PHILIPPINE JUDICIARY 193-99* (1998).

7. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 158 (Cohler et al. eds. 1999).

8. Abram Chayes, *How Does the Constitution Establish Justice?* 101 *HARVARD L. REV.* 1026, 1027 (1988).

9. *Id.*

of ordinary laws would later be vested in special Constitutional Courts by the Constitution which Spain adopted when it became a republic in 1931.¹⁰

The impact of Spanish Constitutional reform on the Manila *Audiencia* was that the Governor-General was eased out of his role and was replaced by a regent, and the *Audiencia* became a purely Judicial body. Reforms soon followed at the local government level, as judicial function was wrested from the *alcaldes* and the *gobernadorcillos* and vested in judges of the Courts of First Instance and Justices of the Peace. It was this newly independent court system that was functioning when the Spaniards surrendered to the Americans at the close of the century and the end of the Spanish-American war.

Peace did not come even after Spain had signed the Treaty of Paris on December 10, 1898 and ceded the Philippine Islands and Puerto Rico to the United States. The Americans had to contend with a full-blown Filipino insurrection, which had erupted in 1896 against Spanish rule, and was now redirected against them. While in the process of quelling the insurrection, the American military first suspended the courts and then later reorganized and reactivated them in the pacified areas of the Islands.¹¹ The old *Audiencia* was renamed the Philippine Supreme Court by military order, and appointed to serve on this tribunal were five Filipinos and three Americans.¹²

A month after the signing of the Treaty of Paris and the outbreak of the Filipino-American War, U.S. President William McKinley sent the First Philippine Commission to the Islands. Headed by Cornell University President Jacob Gould Schurman, the Schurman Commission¹³ was ordered "to facilitate the most humane, pacific, and effective extension of authority" throughout the islands¹⁴. Contrary to the opinions held by its President, the Schurman

10. *Angara v. Electoral Commission*, 63 Phil. at 161, citing 1931 SPAIN CONST. arts 121-123, Title IX.

11. General Orders No. 21 and 22 (1899).

12. General Order No. 20 (1899). Appointed to head the tribunal were Chief Justice Cayetano Arellano, Manuel Arullo (President of the civil sala), and Raymundo Melliza (President of the criminal sala). Comprising the civil sala were Associate Justices Gregorio Araneta and Lt. Col. E.H. Crowder. Comprising the criminal sala were Associate Justices Ambrosio Rianzares, Julio Llorente, Maj. R.W. Young, and Capt. W.E. Brinkheimer.

13. Other members of the Schurman Commission were General Elwell Otis, who was Military Governor over the Philippine Islands, Admiral George Dewey, Dean C. Worcester, a young zoologist from the University of Michigan, and Charles Denby, a Democrat from Indiana who had served as minister to China for fourteen years.

14. FRANK HINDMAN GOLAY, *FACE OF EMPIRE: UNITED STATES-PHILIPPINE RELATIONS, 1898-1946* 48 (1997), quoting Instructions of the President to the Commission, in *Report of the Philippine Commission to the President, 1900-1901*, 56th Cong. 1st sess., S. Doc. 138, 1:185-186 (1899).

Commission recommended retention¹⁵ Professor Frank Hindman Golay described the Commission's attitudes towards the Filipinos and the "Philippine question" as reflecting the right wing of current Republican opinion, to wit:

[T]he United States cannot withdraw... We are there and duty binds us to remain. The Filipinos are wholly unprepared for independence... there being no Philippine nation, but only a collection of different peoples.¹⁶

II. THE COLONIAL PROJECT:

TRANSPLANTING AN AMERICAN GOVERNMENT TO THE PHILIPPINE ISLANDS

Americans were new to the experience of colonialism. In trying to fashion a civil government for its newly acquired territories, Secretary of War Elihu Root initially consulted books written about the English Colonial system for guidance, but concluded that "the precedents of other countries were less important than the legal rights and moral traditions of his own."¹⁷ Root drafted President McKinley's Instructions to the Second Philippine Commission,¹⁸ which was headed by William Howard Taft of Ohio, a young Federal Court judge from the Sixth District of the Court of Appeals,¹⁹ and tasked with establishing a civil government in the Philippine Islands. Because the representative nature of American government precluded the United States from being a colonizer and imperialist in the traditional sense, the Instructions reminded the Taft Commission that the aims of the Philippine project were altruistic. "The Commission should bear in mind," the Instructions read, "that the government which they are establishing is designed not for our satisfaction

15. According to Golay, the Schurman commission's members quickly found themselves polarized. Opposed to retention were Schurman and Dewey, with Otis and Worcester in favor of suppressing the insurrection and extending American control over the islands. Denby was also in favor of retention, because he felt that an American presence in the Philippines would halt the partition of China and promised commercial advantages to the United States. See *id.* at 48.
16. *Id.*, quoting *The Government of the Philippine Islands, in Report of the Philippine Commission, 1900-1901*, 1:4.
17. PETER STANLEY, *A NATION IN THE MAKING: THE PHILIPPINES AND THE UNITED STATES, 1899-1921* 60 (1974).
18. The Second Philippine Commission will be referred to as the Taft Commission for the period during it which it made its investigation of conditions in the Islands and as the Philippine Commission from the time it acted as the civil government.
19. Other members of the Taft Commission were Dean C. Worcester, the only holdover from the Schurman Commission, Luke E. Wright, a former Confederate Army Officer and attorney general of Tennessee, Henry C. Ide, who was a native of Vermont and recently a member of the U.S. Court of Samoa, and Professor Bernard Moses, a historian of Spanish America at the University of California. See GOLAY, *supra* note 14, at 62.

or for the expression of our theoretical views, but for the happiness, peace, and prosperity of the people of the Philippine Islands."²⁰

Because the stated goal was to set up a government for the Filipinos, the measures to be adopted by the Taft Commission should as far as practicable conform to the people's customs, habits, and prejudices, without compromising the "indispensable requisites of just and effective government." Thus, while the Islands' penal and civil laws were retained, the inquisitorial features of its trial system were expunged and replaced by American adversarial procedures, and some protections were afforded the accused by provisions of the U.S. Constitution that were included in the Instructions.²¹ Notwithstanding the accommodations to be made for local circumstances, the Instructions specified certain non-negotiables:

At the same time, the Commission should bear in mind, and the people of the Islands should be made plainly to understand, that there are *certain great principles of government which have been made the basis of our governmental system*, and of which they have, unfortunately, been denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law, and that these principles and these rules of government must be established and maintained in their islands for the sake of their liberty and happiness, however much they may conflict with the customs or laws of procedure with which they are familiar....²²

A. Variations on the American Model

In truth, Root's assumptions were actually the reverse of the argument presented by the Instructions. His impressions of the Filipinos were similar to those reflected in the Schurman Commission report. Since he was convinced that the majority of Filipinos were ignorant, savage, and cruel, Root thought it would be ludicrous to apply the doctrine of consent to them,²³ despite this doctrine being a central feature of American government. Instead, modifications would have to be made to the American model of government, as Filipinos would be tutored in democracy and prepared for eventual independence, assuming they still desired it. In other words, it was not that American-style government would be adapted to the Filipino, but rather, the Filipino would be readied for American government.

An example of the implications of this policy decision to modify features of American government when transplanted to its newly acquired territories is the

20. The President's Instructions to the Commission, in 1 PUBLIC LAWS OF THE PHILIPPINES lxiii, lxvi (1900).
21. Code of Criminal Procedure, General Order No. 58 (1900).
22. The President's Instructions to the Commission, in 1 PUBLIC LAWS OF THE PHILIPPINES lxiii, lxvi (1900) [italics supplied].
23. Stanley, *supra* note 17, at 60-61.

United States Supreme Court decision *Downes v. Bidwell*,²⁴ which upheld the Foraker Act that imposed duties on goods coming into the United States from Puerto Rico. Since Puerto Rico, like the Philippines, ceased to be foreign territory after the signing of the Treaty of Paris, the Foraker Act was challenged on Constitutional grounds for violating the uniformity clause of the U.S. Constitution, which provided that "all duties, imposts, and excises shall be uniform throughout the United States," as well as its revenue clause, which prohibited states from obliging vessels bound to or from another state from entering, clearing, or paying duties to them.²⁵ This meant that apart from the natural rights of life, liberty, and property to which all people are entitled, whether or not they were U.S. citizens,²⁶ the provisions of the U.S. Constitution applied to newly acquired territories "only when and so far as Congress shall so direct."²⁷ The U.S. Supreme Court ruled consistently with the manner in the U.S. Congress had previously dealt with territories it had acquired earlier in its history and which had subsequently become states, such as the Louisiana territory, Florida, Alaska, and Hawaii, to name a few. The idea was to allow these newcomers to the American system some time and opportunity to adjust:

If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods, of taxation, and modes of thought, the administration of the government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.²⁸

The U.S. Supreme Court was giving the U.S. Congress flexibility, should it decide to later incorporate these newly acquired territories into the Union. In 1900, it did seem that retention and perhaps even eventual incorporation were great possibilities, because after sweeping the 1900 elections, Republican presidents and majorities in Congress throughout the remainder of American rule over the Philippines "behaved as if they believed that the election of 1900 was a mandate for indefinite retention of the Philippine colony."²⁹

In the meantime, what were the implications of this policy to modify the American model of government for the institutional context in which the Philippine Supreme Court operated and exercised the power of judicial review?

24. 182 U.S. 244 (1900). The doctrine in *Downes v. Bidwell* was subsequently extended to the Philippines in *The Diamond Rings* case, 183 U.S. 176 (1901).

25. 182 U.S. 244, 248-49 (1900).

26. See *id.* at 283.

27. *Id.* at 279.

28. *Id.* at 287.

29. GOLAY, *supra* note 14, at 65.

To answer this question, it would be best to first examine judicial review in the United States up to the time the Philippines was ceded to the United States.

B. *The American Model for Judicial Review*

The Supreme Court that existed in the United States at the time of the Philippine conquest was an institution that had grown increasingly powerful and prominent in its role as head of the third great branch of government, largely through its exercise of the power of judicial review. But it was not always so.

The American Judiciary's claim to the power of judicial review in American law was initially neither clear nor exclusive. Chayes argued that more than any other feature of the U.S. Constitution, the Judicial branch "deserves to be called an invention."³⁰ Indeed, judicial review was actually an innovation produced by the inadvertent combination of developments in American legal and political theory and the politics of the Revolutionary period in American history.³¹

Neither the text of the U.S. Constitution nor the framers' intentions conclusively conferred this power on the Judiciary. Professor of Government Robert McCloskey noted that Thomas Jefferson, James Madison, and other illustrious statesmen had argued that Congress, the President, and the individual states were "no less than the courts, guardians of the Constitution and co-equal interpreters of its meaning."³² The U.S. Supreme Court traces its judicial review authority to the 1803 landmark decision *Marbury v. Madison*,³³ but contrary to that case's confident exposition on the Court's right to exercise judicial review, the U.S. Supreme Court's claim to the power was itself shaky and unsure, albeit not wholly unexpected or unprecedented.

Underlying the *Marbury* decision was the common law tradition, which America had inherited from England. That tradition is often described as "judge-made law," and it fostered in Americans an attitude of reverence for judges and predisposed them towards accepting oversight power in their judges. More important, during the quarter century after the American Revolution, state courts had assumed the task of correcting defective laws that were passed by state legislatures run riot. Because its colonial predecessors had vigorously protected the colonists from British tyranny, state legislatures had consequently been strengthened at the expense of the Executive and Judicial branches of the

30. Chayes, *supra* note 8, at 1026 (1988).

31. See Anna Leah Fidelis T. Castaneda, *Making Sense of Marbury*, 46 ATENEO L.J. 107 (companion article).

32. ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 6 (3rd. ed. 2000).

33. 5 U.S. (1 Cranch) 137 (1803), reprinted in 6 *THE PAPERS OF JOHN MARSHALL* 160-187 at 183 (Charles F. Hobson et al. eds., 1990).

new state governments. The result was that the state legislatures had themselves become tyrants, passing laws that were unsound, even unjust. Judges proceeded to invalidate these laws, despite their being founded on popular consent, by drawing on two other conceptions of law that co-existed alongside the popular positivist conception of law as embodying the will of the sovereign people.

The first of these theories was the ancient, natural law notion that for law to be law, it needed to be inherently just and reasonable.³⁴ The second theory qualified the newer positivist conception of law, stating basically that laws were not created equal. There was a hierarchy among laws, and fundamental law, which in America took the concrete, literal form of Constitutions,³⁵ was superior to (hence, "higher law") and acted as a limit to ordinary statutory law.³⁶ At the same time, their experience with "mad democracy" prodded thoughtful Americans to re-examine their theories of government and to undertake Constitutional reform, starting first at the state level and later culminating with the U.S. Constitution of 1789. The Judiciary emerged from this period as the beneficiary of the efforts to reconfigure the powers allotted to the three great departments of government.

It was a similar fear of "mad democracy," this time in the guise of newly elected President Thomas Jefferson and his fellow Republicans who had captured Congress, that spurred the Federalist Chief Justice John Marshall to assert for the first time the right of the U.S. Supreme Court to exercise the power of judicial review in *Marbury v. Madison*:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound, and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably

34. WOOD, *supra* note 5, at 458, citing Arguments and Judgment of the Mayor's Court of the City of New York, in a Cause between Elizabeth Rutgers and Joshua Waddington (N.Y. 1784), in 1 HAMILTON'S LAW PRACTICE 415 (Goebel ed.).

35. McCloskey, *supra* note 32, at 5-6. McCloskey explained that while Europeans were familiar with the concept of a "higher law" acting as a limit on government, they nonetheless believed this restraint to be a moral one, as opposed to a legal limit enforceable in court. For the American colonists, however, their experience of "higher law" was not as an intangible, moral restraint, but as a tangible, literal boundary in the form of colonial charters and decisions of the British Privy Council, which operated to restrict the actions and prerogatives of their colonial legislatures. During the Revolutionary period, the Americans turned the tables on the British, arguing that the rights they claimed under their colonial charters were protected from transgression by Parliament.

36. WOOD, *supra* note 5, at 459-60, citing *Trevett v. Weeden*, September Term, 1786 (Providence, 1787) (Tried before the Honorable Supreme Court in the County of Newport).

to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the essence of judicial duty.³⁷

In the years following the *Marbury* case, the U.S. Supreme Court had, by slow accretion, shored up its claim to the exercise of this awesome power through careful and calculated usage. From what was essentially a pragmatic, defensive response by an embattled court, judicial review became the means through which the U.S. Supreme Court assumed a co-equal role in the formulation of policy and in the governance of the American nation. Thus, the Court of McKinley's time was no longer the tentative, cautious Marshall Court of the early 19TH century.

Likewise, the U.S. Supreme Court's concerns had changed. No longer was it primarily preoccupied with the proper allocation of power³⁸ within the Federal Government and, more important, between the Federal Government and the individual states. After a Northern victory during the Civil War had definitively settled the issue of the Union's viability, the Court then turned its attention towards capitalism and the American economy. Capitalism was a powerful new force that had transformed America's economy, almost overnight, from agrarian to industrial. It fueled the expansion of America's frontier westward to the Pacific and beyond, and so the Court was preoccupied with addressing the issue of how, if at all, this force was to be regulated.³⁹ Beginning the 1890s, the U.S. Supreme Court adopted a *laissez faire* philosophy towards the economy and resorted to the due process clause to protect the business community from governmental regulation. In McCloskey's words, "the fear that the states would wound or destroy the nation was replaced by the fear that Government, state or national, would unduly hinder business in its mission to make America wealthy and wise."⁴⁰

It was this kind of high court, with a century's experience in asserting its power of judicial review over constantly evolving concerns, which was part of the governmental system to which McKinley referred in his Instructions and that existed in the United States at the turn of the century. But what kind of departure from this model would the Philippine experience necessitate?

C. Local Obstacles

Taft proposed to create an "American judiciary here." He told his friend Judge Howard Hollister of Cincinnati, Ohio, that if this goal could not be achieved, "I should feel like giving up the task of securing any progress among these

37. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

38. See 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 6-9 (3rd ed. 2000).

39. McCloskey, *supra* note 32, at 11-60.

40. *Id.* at 69.

people." Taft felt that an American-style judiciary was "the basis of all civil right and liberty," and its role would be indispensable in transmitting American Constitutional values to a Filipino judiciary, which, after centuries of authoritarian Spanish rule, would have "no adequate conception of what practical liberty is."⁴¹

But Taft's goal of recreating the American Judiciary in the Philippine Islands had to be compromised because of serious obstacles. For one thing, there was a language problem. Spanish was the language of the law in the Philippine Islands, and, as a practical necessity, Spanish would remain the official language of the courts until 1906.⁴² For another, it proved difficult to recruit a sufficient number of American lawyers who could speak Spanish in order to fill judicial posts in the Islands.⁴³ The appointment of Americans to the Philippine Judiciary was crucial not only to ensure the proper administration of a new Code of Procedure, to which Filipino lawyers had already expressed strong objections,⁴⁴ but also because these posts could not be filled by either Spaniards or Filipinos.

The Taft Commission found that appointing Spaniards to judgeships was "impracticable," because the degree of animosity that existed between the Spaniards and Filipinos rendered it "practically impossible for a Spaniard to preside as a judge, without exciting a very high degree of ill-feeling."⁴⁵ Unfortunately, the Filipino judges available were found ill-suited for the task:

Charges of corruption and incompetence against the present Filipino judges are common...The number of Filipinos who are fitted by nature, education, and moral stability to fill such positions is very small. Very few can be found among them in whose integrity and ability businessmen have confidence.⁴⁶

What resulted was what Professor Bonifacio Salamanca's described as "an accommodation that made the judicial branch of the government relatively the most Filipinized of all branches."⁴⁷ Appointments to Justice of the Peace Courts, which were the lowest rung in the judicial hierarchy, were filled mostly by Filipinos, but appointments to the Courts of First Instance were filled mostly by Americans.

41. Letters from Taft to Judge Howard Hollister, *quoted in* BONIFACIO S. SALAMANCA, *THE FILIPINO REACTION TO AMERICAN RULE, 1900-1913* 60 (1984).

42. Act No. 190, § 12 (1901). Despite this provision, Spanish remained the language of the courts throughout the Taft era.

43. Salamanca, *supra* note 41, at 61.

44. *Id.* at 60-61.

45. *REPORTS OF THE TAFT PHILIPPINE COMMISSION, Part I*, at 83 (1901).

46. *Id.*

47. Salamanca, *supra* note 41, at 61.

In 1902, there were ten American judges of first instance to six Filipino judges.⁴⁸ When the Philippine Commission reorganized the courts in 1901,⁴⁹ it reduced the Supreme Court's membership from nine to seven and appointed four American and three Filipino justices,⁵⁰ thereby reversing the majority that Filipino justices briefly held under American military rule. Salamanca recounted that Filipinos seemed not to have resented this change and surmised that this was because "they regarded the Supreme Court as the least powerful organ of the government at the time." To them, the real prize was the political departments of the Insular Government.⁵¹

III. THE SUPREME COURT OF THE TAFT ERA: THE LEAST DANGEROUS BRANCH

Philippine historians refer to the early period of American colonial rule, dating from 1901 to 1913, as the Taft era. Apart from being the President of the Second Philippine Commission, Taft was the first Civil Governor of the Islands, and he continued to influence the shaping of Philippine policy and law throughout the era which bears his name as Secretary of War under President Theodore Roosevelt, as President of the United States, and even beyond 1913, as Chief Justice of the U.S. Supreme Court.

The Philippine Supreme Court of the Taft era perhaps had more in common with the early U.S. Supreme Court than the latter's turn-of-the-century version. Like its U.S. predecessor, the Philippine Supreme Court could not point to any law explicitly authorizing it to exercise the power of judicial review. Salamanca bluntly stated that "it lacked powers of judicial review."⁵² Philippine cases of the period show, however, that the courts were asserting this power. But on what did authority did judges base their right to exercise judicial review?

A. *Judicial Review under Commission Rule*

McKinley's Instructions to the Second Philippine Commission operated as the first organic law for the Philippine Islands, and the authority to exercise judicial review was premised on the Instructions' reference to "certain great principles of government" which formed the basis of the American Constitutional system. Among these great principles of government is the principle of separation of powers, with a Judiciary whose role in that scheme was to enforce the

48. *Id.* at 62. At the end of the Taft period in 1913, the number of American compared to Filipino judges of first instance was even, at 12 to 12.

49. The Philippine Commission reorganized Philippine courts by passing "An Act providing for the organization of courts in the Philippine Islands," Act No. 136 (1901).

50. Appointed were Chief Justice Cayetano Arellano and Associate Justices Florentino Torres, Victorino Mapa, James Smith, Joseph F. Cooper, Charles A. Willard, and Fletcher Ladd.

51. Salamanca, *supra* note 41, at 62.

52. *Id.*

Constitution's rules upon the other two departments through the power of judicial review.

In March 1903, policy-making over the Philippine Islands was transferred from the War Department to the U.S. Congress by virtue of the Spooner Amendment.⁵³ The U.S. Congress enacted the Philippine Organic Act in 1902, and section 10 of that law provided clearer, albeit still indirect, basis for the Philippine Supreme Court to exercise judicial review power. Section 10 of the Philippine Organic Act gave the U.S. Supreme Court jurisdiction to

...review, revise, reverse, modify, or affirm the final judgments and decrees of the supreme court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statutes, treaty, title, right, or privilege of the United States is *involved*...⁵⁴ (italics supplied)

Note that the term used in the law is "involved" without specifically mentioning "validity" or "constitutionality." The term "involved" was, of course, broad enough to contemplate issues of validity or constitutionality. Section 10 could justify inquiry into the validity of a Philippine statute based on whether it was consistent with the provisions of the Organic Act, which, in turn, incorporated provisions of the U.S. Constitution. At the same time, the section allowed the U.S. Supreme Court to ensure that the interpretation and application of U.S. laws by a judiciary that was a newcomer to American law were consistent with U.S. jurisprudence.

The 1904 U.S. Supreme Court decision *Thomas E. Kepner v. United States*⁵⁵ helps illustrate how the U.S. Supreme Court kept Philippine decisions in line with U.S. precedents. In that case, the Government of the Philippine Islands appealed from the Court of First Instance's judgment of acquittal, and the U.S. Supreme Court had occasion to expound on the method for construing the Bill of Rights, particularly, the guarantee against double jeopardy. Because the Bill of Rights guarantees, which had been extended to the Philippine Islands by the U.S. Congress in the Philippine Organic Act, had their source, not from Spanish law, but from the U.S. Constitution, Justice Day concluded:

53. The Spooner Amendment was quoted by the Supreme Court in the case of *In Re McCullough Dick*, 38 Phil. 41, 95 (1918). It provided:

[a]ll military, civil, and judicial powers necessary to govern the Philippine Islands, acquired from Spain by the treaties concluded at Paris on the tenth day of December, eighteen hundred and ninety-eight, and at Washington on the seventh day of November nineteen hundred, shall, until otherwise provided by Congress, be vested in such person or persons, and shall be exercised in such manner as the president of the United States shall direct, for the establishment of civil government and for maintaining and protecting the inhabitants in the Islands in the free employment of their liberty, property, and religion.

54. Philippine Organic Act, § 10 (1902).

55. 195 U.S. 99 (1904).

How can it be successfully maintained that these expressions of fundamental rights, which have been the subject of frequent adjudication in the courts of this country, and the maintenance of which has been ever deemed essential to our government, could be used by Congress in any other sense than that which has been placed upon them in construing the instrument from which they were taken?⁵⁶

When Congress transplanted provisions of the U.S. Constitution to the Islands, it also transplanted the interpretation given these provisions by the U.S. Supreme Court through its power of judicial review. The broader grant of oversight power to the U.S. Supreme Court, connoted by the use of the term "involved," facilitated tutelage in U.S. jurisprudence. But the insular Supreme Court's own authority to exercise judicial review was derivative rather than direct: it was inferred from the U.S. Supreme Court's power to review decisions of the insular Court involving the U.S. Constitution and other U.S. laws, as the U.S. Supreme Court's powers did not preclude an inquiry into issues of constitutionality or validity.

In addition to the basis for its powers of judicial review being only implied rather than overt, the insular Supreme Court, like the *Marbury* Court, was a weak body relative to the other two departments of government. Its prospects for acting as a co-equal branch in the Insular Government were rather dim, given that the other two departments of the Insular Government were functionally consolidated in the Philippine Commission. Taft was the first Governor-General of the Islands, but remained President of the Philippine Commission, which, in turn, acted as the Insular Legislature. This hybrid government had a precedent in American history: it was similar in structure to the temporary government that the U.S. Congress designed for the Louisiana Territory in 1804.⁵⁷ Within this framework of government, the Insular Supreme Court was a feeble institution in the face of combined executive and legislative power enjoyed by the Commission. Its relationship to the Philippine Commission, to which Taft appointed three prominent Spanish *mestizos* who had collaborated with him early on,⁵⁸ could perhaps be likened to that which existed between the Manila *Audiencia* of the late 19TH century and the Spanish Governor-General, who was both executive and lawmaker.

Further disproportion in the distribution of power came about when the Philippine Commission passed Act No. 396, giving itself the power to appoint

56. *Thomas E. Kepner v. United States*, 195 U.S. 99, 124 (1904).

57. See *Downes v. Bidwell*, 182 U.S. 255 (1900), discussing the Mar. 26, 1804 Act, 2 Stat. at L. 283, chap. 38 (providing a temporary government for the Louisiana Territory).

58. The three Filipinos who were first appointed to the Commission were Trinidad H. Pardo de Tavera, Benito Legarda, and Jose Luzuriaga. These men were Spanish *mestizos* and members of the elite who had collaborated with Taft early on and formed the *Partido Federal* with his blessing.

and remove judges.⁵⁹ For the most part, the Commission left the courts alone, but when it wished, it could interfere with the court system. A famous example of the Commission's power over the courts was the ease and speed with which Governor-General Taft and the Commission enacted Act No. 1024, which lowered the age requirement for judicial appointments in Act No. 136 from 30 to 25 years of age. This was done in order to facilitate the appointment of Beekman Winthrop, a highly qualified but underaged candidate, to the Court of First Instance.⁶⁰ Finally, judges seemed humbler still because their salaries, which already represented a 20% increase from judicial salary levels under the Spaniards,⁶¹ were still meager. One of the first Justices resigned due to poverty, because his expenses exceeded his salary.

Of the early Supreme Court, Justice George Arthur Malcolm, who was appointed to the insular Supreme Court by President Woodrow Wilson in 1917 and was the first dean of the University of the Philippines' College of Law, had this to say:

The members of the Old Supreme Court were entirely too self-effacing. They performed their functions in a building more like a shack than a palace of justice, and for salaries not comparable to those paid judges in England and the United States.⁶²

Aside from the fact that its legal opinions "make nothing happen," the early Supreme Court of the Philippine Islands was not only the "least dangerous branch,"⁶³ but also the weakest branch when juxtaposed against the Philippine Commission, which exercised executive and legislative powers and controlled judicial appointments, removal, and salaries.

Reading *In Re Patterson*,⁶⁴ the Insular Supreme Court's first judicial review case, in light of the ongoing insurrection and in the institutional context discussed above, helps explain the tentative language of the Court, and why the well-regarded Chief Justice Cayetano Arellano, appointed by President

59. An Act So Amending Act No. 136, Act No. 396 § 3 (1902) (providing for the organization of courts, as to increase the number of judges of Courts of First Instance, and fixing the salaries of the additional judges provided for).

60. FAJARDO ET AL., *supra* note 6, at 339.

61. *Id.* at 293.

62. GEORGE ARTHUR MALCOLM, *AMERICAN COLONIAL CAREERIST: HALF A CENTURY OF OFFICIAL LIFE AND PERSONAL EXPERIENCE IN THE PHILIPPINES AND PUERTO RICO* 140 (1957).

63. See Chayes, *supra* note 7, at 1041 (1988), quoting A. BICKEL, *THE LEAST DANGEROUS BRANCH I* (1962). Chayes explained in note 74 that Bickel adapted the phrase from Hamilton's famous passage in Federalist No. 78: "Whoever attentively considers the different departments of power must perceive, that...the judiciary, from the nature of its functions, will always be the least dangerous."

64. 1 Phil. 93 (1902). The case was decided when the only organic law of the Islands was McKinley's Instructions. See Part III(A), *supra*.

William McKinley in 1901, attempted to justify the Court's review of the executive department's decision to deport as a matter of necessity, rather than right.

Neither can we shut our eyes to the fact that there may be a danger to personal liberty and international liberty if to the executive branch of Government there should be conceded absolutely the power to order the expulsion of foreigners by means of summary and discretionary proceedings.⁶⁵

In the end, the Court bowed to executive discretion and abdicated its prerogative to examine whether reasonable grounds existed for the decision to deport, stating that when a statute "gives discretionary power to an officer, to be exercised by him upon his *own* opinion of certain facts, he is made the sole and exclusive judge of those facts." Despite the law's use of the term "reasonable grounds,"

...it is not to be inferred that this executive officer is required to show the reason for his grounds of belief to a court of justice; what the law desires to impress upon him is the idea that he is not to proceed arbitrarily but with discretion — that is, honestly, tactfully, and prudently.⁶⁶

Similarly deferential was *Barcelon v. Baker*,⁶⁷ a 1905 *habeas corpus* case penned by Justice Elias Finley Johnson, who was appointed to the Court in 1903 by President Theodore Roosevelt. After finding that the Philippine Commission had been empowered by Congress to authorize the Governor-General to suspend the privilege of the writ of *habeas corpus* in case of insurrection, rebellion, or invasion and that the resolution's provisions were in harmony with Congressional authority, the Supreme Court ruled that such determination "conclusively terminates" its investigation.⁶⁸ Reiterating its ruling in *In Re Patterson*, the Court pronounced itself incompetent to inquire into the Governor-General's exercise of executive discretion, once again stressing that the latter was "the sole and exclusive judge"⁶⁹ of whether an insurrection existed.

In *United States v. Ling Su Fan*,⁷⁰ Justice Charles A. Willard, appointed in 1901 by President McKinley, upheld for the Court the validity of Act No. 1411, which prohibited the exportation of Philippine silver coins from the Islands, because it was not *ultra vires* and did not operate to deprive the defendant of property without due process of law. It defined due process,

65. *Id.* at 97.

66. *Id.* at 98.

67. 5 Phil. 87 (1905).

68. *Id.* at 96.

69. *Id.* at 97.

70. 10 Phil. 104 (1908).

however, in less stringent procedural terms.⁷¹ To cover all bases, Justice Willard added that notwithstanding the limitations upon the Commission's powers, the law was still qualified as a valid exercise of police power by the Commission, which power "legislative departments of the Government may exercise and which may not be limited."⁷² A case of overkill? Perhaps the Court's goal was to provide firm basis in Philippine jurisprudence for the Commission's authority to legislate and govern over the Islands.

The U.S. Supreme Court affirmed the Philippine Supreme Court's opinion that the law was indeed a valid limitation on property rights in order to preserve the value of Philippine coins, given that "public law gives to such coinage a value which does not attach as a mere consequence."⁷³ But even if the means chosen by the law were unwise, aimed as it was against the exportation of coins, which was, in turn, contrary to "axioms against obstructing the free flow of commerce," the U.S. Supreme Court concluded:

...there can be no serious doubt that the power to coin money includes the power to prevent its outflow from the country of its origins...The law here in question is plainly within the limits of the police power, and not an arbitrary or unreasonable interference with private rights.⁷⁴

The Philippine Organic Act allowed greater Filipino participation in the Insular Government through the National Assembly, which began to function in 1907. This body would be all-Filipino, and would comprise the lower house of the Philippine Legislature, with the Philippine Commission continuing to function as the upper house. Before the inauguration of the National Assembly on October 16, 1907, the Philippine Commission had passed preemptive legislation "at racing speed" in order to clean up matters that Governor-General William Cameron Forbes expected to be controversial if they were carried over into the new legislature⁷⁵ and there was a "popular house to

71. *Id.* Explaining the meaning of "due process of law," the Supreme Court defined it as process or proceedings according to the law of the land. 'Due process of law' is not that the law shall be according to the wishes of all the inhabitants of the state, but simply - first, that there shall be a law prescribed in harmony with the general powers of the legislative department of the Government; second, that this law shall be reasonable in its operation; third, that it shall be enforced according to the regular methods of procedure prescribed; and fourth, that it shall be applicable alike to all the citizens of the state or to all of a class. *Id.* at 111-12.

72. *Id.* at 114.

73. *Ling Su Fan v. United States*, 218 U.S. 302, 310-11 (1910).

74. *Id.* at 311.

75. GOLAY, *supra* note 14, at 126, quoting Governor-General William Cameron Forbes who said: "We have been passing laws at racing speed and are in a special hurry to get cleaned up before the Assembly meets."

reckon with."⁷⁶ Two weeks before the inaugural, the Commission enacted some 70 laws. That none of these admittedly controversial laws were challenged before the early Supreme Court is perhaps telling of how Filipino leaders perceived that institution's role at that stage of the Insular Government. All eyes were on the new Philippine Legislature as the new field of political battle.

B. *The Supreme Court as Bystander to Governor-General Forbes and the Assembly*

The National Assembly represented a major milestone in the American program to tutor Filipinos in the ways of democracy. Filipinos had earlier participated in the legislative process through minority membership in the Philippine Commission, but this was the first time they would also have a body of the Insular Government all to themselves, which, as the lower house of the Insular Legislature, had the power to block bills passed by the Philippine Commission. The veto worked both ways, however, for the Commission was also empowered to reject Assembly bills. Moreover, through the Governor-General and the American majority in the Philippine Commission, Americans continued to exercise combined executive and legislative powers. Filipino participation in the judiciary grew steadily. By 1909, there were fourteen Americans to nine Filipino judges of first instance.⁷⁷ But the Supreme Court remained a marginal player in the political scene.

The Legislature being deadlocked, the members of in the Assembly, which was controlled by the *Nacionalista* Party, devised a new strategy. Under the leadership of Speaker Sergio Osmeña, a provincial governor who emerged as the preeminent Filipino leader towards the end of the Taft era, the Filipinos in the Assembly would try to encroach upon the stronghold of American power in the Islands, the Executive. Part of their plan was to transform the colonial regime into a "quasi-parliamentary government"⁷⁸ in which Assembly members would partake of executive powers by holding department portfolios in the executive branch.⁷⁹ But this was only one prong in a broader overall strategy. Golay explained that:

...Osmeña's pursuit of enlarged governmental powers for Filipinos was not limited to the achievement of his quasi-parliamentary government. He was resourceful and

76. *Id.*, quoting then resident commissioner Manuel L. Quezon, who commented to his colleagues in the U.S. Congress "that from October 1 to October 12, 1907, four days immediately preceding the inauguration of the Philippine Assembly, the commission, in its desire to cover all subjects of legislation before there was a popular house to reckon with, enacted 70 laws."

77. Salamanca, *supra* note 41, at 62. At the end of the Taft period in 1913, the number of American compared to Filipino judges of first instance was even, at 12 to 12.

78. MALCOLM, *supra* note 62, at 28 (1957).

79. GOLAY, *supra* note 14, at 144.

flexible, and he intended to usurp governmental powers of the Americans whenever the opportunity to do so might arise.⁸⁰

To be effective, this strategy required cooperation between Osmeña and Governor-General William Cameron Forbes. This cooperation would take a number of forms.

One such instance of cooperation reached the Supreme Court. In April 1910, Chinese nationals filed a petition for a writ of prohibition against Forbes, along with the city of Manila's secret service chief and chief of police, to prevent the officials from deporting them to China without any legal authorization to do so, whether from Congress or the Insular Legislature, together with a civil suit to recover damages against the respondents. The Court, through Justice Johnson, ruled that even if the Government of the Philippine Islands was not a sovereign government, it nonetheless possessed "such delegated, implied inherent and necessary military, civil, political, and police powers as are necessary to maintain itself."⁸¹ The Government had the inherent power to deport aliens in the interest of self-preservation, and this power, which was of a purely political nature, was lodged in the Executive department. Because the power was inherent in the Government of the Philippine Islands, the Legislature could only regulate its exercise, not withhold it altogether. As Chief Executive of the Islands, the Governor-General "had full power, being responsible to his superiors only to deport the defendant by whatever methods his conscience and good judgement might dictate."⁸² Regarding the issue of damages, the Court ruled that the Governor-General could not be held legally responsible "in damages or otherwise for doing in a legal manner what he had authority, under the law, to do."⁸³ Absent "express legislative authority," the Court would not intervene to either control the exercise of the Governor-General's deportation or to inquire whether he would be liable in damages for the exercise of said power.⁸⁴

The problem with this finding was that it stood on shaky ground. The Organic Act contained no provision defining the nature of the Governor-General's office, but merely ratified previous practice. The power inhered in an office whose nature was, in turn, inferred from previous practice. The Philippine legislature bailed Forbes out by passing a resolution less than three weeks after the original suits were brought in which the former ratified the Governor-General's act of deportation.⁸⁵ This resolution furnished the

80. *Id.*

81. *Forbes v. Chuaco Tiaco*, 16 Phil. 534, 558 (1910).

82. *Id.*

83. *Id.* at 578.

84. *Id.* at 581.

85. See Stanley, *supra* note 17, at 156.

Supreme Court an additional justification for the Governor-General's deportation power, apart from it just being inherent in his office, which the Organic Act had not defined. "But even though we are wrong in our conclusions...in the present case, the legislative department expressly recognized his authority and approved his acts by a resolution adopted by it on the 19TH of April 1910."⁸⁶

The U.S. Supreme Court agreed with the Philippine Supreme Court that the resolution cured the Governor-General's act of any defect, but rejected the Philippine Court's position that the power to deport inhered in the Governor-General "by virtue of his office alone." Rather,

...the deportation is to be considered as having been ordered by the governor general in pursuance of a statute of the Philippine legislature directing it, *under their combined powers, and it is unnecessary to consider whether he had authority, by virtue of his office alone, as declared by statute, or whether, if he had not, he had immunity from suit for such an official act done in good faith.*⁸⁷

Unfortunately for Osmeña and his colleagues, their relationship with Forbes was one-sided. He was open to cooperation, but had no real need for it. For one thing, the U.S. Congress deprived the Assembly of a potentially powerful weapon against the Governor-General. Anticipating the possibility that the Assembly might try to cripple the functioning of the Insular Government by refusing to approve general appropriations bills, Congress had provided for automatic appropriations in the Philippine Organic Act. Not only was Forbes assured of appropriations every year, but from 1910 to 1913, he also took the liberty of changing the allocation of funds from the previous fiscal year's appropriations. In 1912, Forbes made extensive changes to the allocations in the appropriations that carried over from the previous year. He dismissed the anguished and unavailing protests of the Assembly as a "tempest in a teapot."⁸⁸

As a result, despite Osmeña's attempts to encroach upon the power of the Executive, the Legislature ended up yielding more power to Forbes, power which Forbes did not hesitate to wield when he deemed necessary.⁸⁹ Through a series of what Golay called "ad hoc precedents," the Executive's role in the Insular Government, which was already formidable, became even more enlarged. For example, in the legislative session of 1909, Osmeña discovered that the Assembly's expenditures had exceeded its appropriations, giving lie to the Nacionalista Party's campaign promise of fiscal prudence. To solve the

86. *Forbes v. Chuaco Tiaco*, 16 Phil. at 571.

87. *Chuaco Tiaco v. Forbes*, 228 U.S. 549, 556 (1913) [italics supplied].

88. See GOLAY, *supra* note 14, at 159-60.

89. Apart from the dispute over reallocations mentioned previously, another example of Forbes's running roughshod over checks and balances was his diversion of revenues to fund pet projects, such as building roads to Benguet Province. See *id.* at 160.

problem quietly, Osmena enlisted Forbes's cooperation. In exchange for enacting a law authorizing the Governor-General to reallocate any unexpended balances of appropriations at the end of the fiscal years, Forbes would use this authority to prevent exposure of the Assembly's deficit.⁹⁰ There were several other important precedents that concentrated in the Governor-General power over the release or allocation of insular funds, notably those relating to public works.⁹¹

The enlargement of the executive's role during Forbes's administration met no challenge from the Supreme Court. In August 1910, Lope Severino, a local chief of the Nacionalista Party, filed a petition for a writ of *mandamus* in the Supreme Court to compel Governor-General Forbes to hold special elections for the purpose of electing a municipal president in the town of Silay, Negros Occidental. After hearing the election protest, the Court of First Instance had determined that no one was legally elected to the petition. The Governor-General decided to fill the vacancy by appointment.

In earlier cases brought before the Court to review the Governor-General's action the Court yielded to executive discretion, but did not pass upon the issue of whether the Court would assume jurisdiction to control his ministerial acts. What was surprising about this case was that the Court rendered the distinction between discretionary and ministerial acts immaterial with respect to the Governor-General. Speaking through Justice Adam Clarke Carson, appointed in 1904 by President Roosevelt, the Court examined two lines of cases involving state governors. The first line prevented courts from compelling performance of any kind of official duty, and the second line allowed the courts to compel performance only of ministerial duties.⁹²

Quoting *Sutherland v. Governor*,⁹³ whose ponente was the eminent constitutional law expert Judge Cooley, the Court agreed that there was "no very clear and palpable line of distinction" between those duties of the governor which were political and those which were merely ministerial. To undertake drawing this distinction would "open the doors to an endless train of litigation." Besides, it was not customary in a republican system of government to confer upon the Governor duties that were merely ministerial, whose performance did not require him to exercise any discretion whatsoever. Consequently, when the duty pertained to the Chief Executive, rather than an inferior officer, the presumption "in all cases" must be "where a duty devolved

90. *Id.* at 158.

91. *See id.* at 158-159. Other examples were the power to release public works funds and the authority to restore unexpended balances of appropriation to the public works appropriations bill.

92. *Severino v. Governor-General*, 16 Phil. 366, 381 (1910).

93. 29 Mich. 320, cited in *Severino*, 16 Phil. at 392.

upon the Chief Executive of the State rather than upon an inferior officer that it is so because of his superior judgment, discretion, and sense of responsibility were confided in for a more accurate, faithful, and discreet performance than could be relied upon if the duty were devolved upon an officer chosen for inferior duties."⁹⁴

The 1839 case *Hawkins v. Governor*⁹⁵ provided the broad standard of "political necessity and of public policy" as a rationale for exempting the acts of the President of the United States and state governors from court review.⁹⁶

The ponente Justice Grant Trent, appointed in 1910 by President William Howard Taft, examined the powers of the Governor-General and concluded that his powers were more comprehensive than those conferred on state governors, because he was the Executive in the Insular Government, not just the Chief Executive. As a result, if the supreme courts of the states had no jurisdiction to control official acts of governors, then all the more did the Supreme Court have no jurisdiction to control the official acts of the Governor-General. Employing a severe interpretation of the separation of powers principle, the Court wrote:

It no doubt is sometimes very necessary for the Governor-General to perform certain important executive duties without delay, and should this court attempt to distinguish between purely ministerial and discretionary duties, conferred upon him by law, and attempt to determine in each case which are purely ministerial, which are political, or which are discretionary, the Governor-General, to that extent, would become subservient to the judiciary. To avoid this is why the three great coordinate departments of the Government were created and made independent of each other.⁹⁷

The Court ruled that it had no power to control or direct official actions of the Governor-General, whether through *mandamus* or injunction. In effect, the Supreme Court abdicated any authority to subject official actions of the Governor-General to judicial review, saying he was responsible only to the President of the United States. The Court thus insulated the Governor-General from constitutional challenge by presuming that his decision in official matters would be correct and just in all cases.⁹⁸

But what are "official actions"? It seemed any duty, regardless of its nature, would be "official" once it was assigned to the Governor-General by statute. Once an action was official, its performance or non-performance by the Governor-General would be outside the Court's reach. Conceivably, the exercise of appropriations powers, which were transferred by law to Forbes by

94. *Id.* at 394.

95. *Id.* at 397, citing *Hawkins v. Governor*, 1 Ark. 570, 33 Am. Dec. 346 (1839).

96. *Id.* at 398, citing *Hawkins*, 33 Am. Dec. at 351.

97. *Id.* at 401.

98. *Id.* at 402.

the Insular Legislature, would fall outside the Court's jurisdiction, even if the exercise of appropriations powers by the Executive encroached upon the Legislature's domain.

The experience under Forbes provided the wrong lesson through which to impart to Filipinos a respect for and adherence to the separation of powers principle. If anything, the experience conveyed the opposite lesson by showing how easily institutional checks and balances could be subverted.⁹⁹ That this enlargement of the executive role was acquiesced in and even validated by a Supreme Court that adopted a hands-off policy towards official executive action was even more unfortunate and would have repercussions for the future of the Philippine government even beyond the American colonial period.

With respect to judicial review of laws passed by the Insular Legislature, the Supreme Court continued to sustain laws which affected private rights on police power grounds. The Court in *United States v. Torbio*¹⁰⁰ upheld a statute prohibiting the slaughter for human consumption of carabao without first obtaining a permit from the municipal treasurer as a valid exercise of police power. After the rinderpest epidemic had wiped out the carabao population, the Legislature felt it necessary to protect carabaos which were not unfit for agricultural work or draft purposes from being slaughtered while the supply of said animals was being replenished. Justice Carson ruled that his measure was adjudged a reasonably necessary means of achieving the purpose of the act and was a justified limitation on the right of ownership, rather than a deprivation of property without due process.¹⁰¹

In *Churchill and Tait v. Rafferty*,¹⁰² the Supreme Court at first invalidated Section 100(b) of Act No. 2339, which gave the Commissioner of Internal Revenue the power to summarily remove billboards which were "offensive to sight" or "otherwise a nuisance." Speaking through Justice Trent, the Court reasoned that "the police power cannot interfere with private property rights for purely aesthetic purposes."¹⁰³ On rehearing, however, the Court reversed its ruling and upheld the law as valid preventive and corrective legislation which would arrest the expansion of the billboard business before it could reach unsightly extremes, as it had in the United States, and obstruct historic sites from public view.¹⁰⁴

99. See generally GOLAY, *supra* note 14, at 157-61.

100. 15 Phil. 85 (1910).

101. *Id.* at 98.

102. 32 Phil. 580 (1915).

103. *Id.* at 611.

104. *Id.* at 618.

The Supreme Court proved forgiving in its review of ordinances and rules enacted by inferior legislative and executive bodies. To be struck down, the rule had to be "patently unconstitutional." In *United States v. Ten Yu*,¹⁰⁵ defendant Ten Yu challenged a Manila ordinance for being unreasonable in application, because it punished mere presence in a place where opium was smoked, even if the person's presence happened to be inadvertent or innocent. The Court through Justice Johnson sustained the ordinance, despite faulty wording, because it was "competent for the legislature to prescribe that an offense may be presumed from an act done."¹⁰⁶ To save the ordinance, the Court read into it an intent that was not apparent from the text, saying that the ordinance was intended to forbid unlawful presence in a disorderly house and was to be so interpreted.¹⁰⁷ It also prescribed a remedy, to wit: "the presence should be charged in the information as unlawful."¹⁰⁸

The Court had occasion to review an administrative regulation in *De Villata v. Stanley*.¹⁰⁹ The Collector of Customs issued Customs Administrative Circular No. 627 which required vessels engaged in coastwise trade in the Philippine Islands to give prompt advance notice of their sailing "to the postmaster at each port of departure to permit the making up of mails for dispatch." The Court through Justice Carson held that the Collector was empowered to issue the circular and upheld it as a reasonable regulation "made in the interests of the public, which the state has a right to impose when it grants licenses to the vessels affected thereby."¹¹⁰ The Court, however, limited itself only to the Collector's right to require vessels "to hold themselves in readiness to receive and to carry mail," but did not address whether such requirement could be imposed without compensation paid to the vessel owners. This limitation is important, because the circular made no provision for compensation, and if vessel owners would not be compensated for their service, then the circular was in danger of being invalid. The Court had conceded that even if the nature of the shipping business was "public employment" and therefore subject to regulation, the regulations should not amount to a deprivation of property without due process or confiscation of property without just compensation.¹¹¹ To sustain the circular, the Court had to infer that even if the circular did not provide for compensation, it did not preclude it either. They added that the ship had been indirectly compensated by the Government when the latter incurred considerable expenditures of

105. 24 Phil. 1 (1912).

106. *Id.* at 10.

107. *Id.*

108. *Id.*

109. 32 Phil. 541, 544 (1915).

110. *Id.* at 551.

111. *Id.* at 550.

public money for lighthouses, wharves, docks, buoys, and other means of securing the safety and convenience of vessels plying in Philippine waters.¹¹² Requiring vessels to carry mail for free was to the Court akin to *pro bono* work performed by licensed attorneys.¹¹³

The Supreme Court seemed to have bent over backwards in the *Ten Yu* and *De Villata* cases in order to sustain the validity of the rules made by these inferior legislative and executive bodies. As long as the rules fell within the body's legislative authority, the presumption was in favor of their validity. Unlike the enactments of inferior agencies of the Insular Government, the laws passed by the Insular Legislature were not as prone to faulty drafting and were challenged on more substantive grounds. The reason for this, perhaps, was that these laws were of a higher quality to begin with. Golay observed that, on the one hand, the Commission's bills were always well-researched and carefully drafted, thus requiring minimum revision. On the other hand, the inexperienced, inadequately staffed, disorganized, and undisciplined Assembly tended to pass numerous, but sloppy bills, but those bills which survived the legislative process tended to be "trivial" or concerned with "purely local matters."¹¹⁴ Assembly-sponsored laws were relatively inconsequential that they rarely reached the courts.

Taft never believed in Philippine independence. What he envisioned, instead, was a prolonged period of transition, spanning at least two generations. During this period Filipinos would be taught the "methods of well-ordered government"¹¹⁵ and the Islands' economy, developed by American business. The end goal was a relationship short of statehood, involving a combination of American sovereignty over the Islands and Filipino autonomy.¹¹⁶ In 1904, Taft posed the question to the Harvard College Alumni Association:

...Now, under these circumstances, is it impracticable, is it wild to suppose that the people of the islands will understand the benefit that they derive from such association with the United States and will prefer to maintain some sort of bond so that they may be within the tariff wall and enjoy the markets, rather than separate themselves and become independent and lose the valuable business which our guardianship of them and our obligation to look after them has brought to them.¹¹⁷

The Republican defeat in the 1912 elections brought an abrupt end to these long-term plans. Filipinos eagerly anticipated greater autonomy from the

112. *Id.* at 552.

113. *Id.* at 560.

114. GOLAY, *supra* note 14, at 152.

115. STANLEY, *supra* note 17, at 111, quoting Taft's statement to the Harvard College Alumni Association.

116. GOLAY, *supra* note 14, at 157.

117. STANLEY, *supra* note 17, at 111.

new administration under the Democrats, because the Democrats had consistently opposed Republicans on the issue of retention. President Woodrow Wilson did not make any changes to the Insular Government in the meantime but sent his former Princeton colleague, political science professor Henry Jones Ford to investigate the political situation in the Islands. The War Department recommended that the new administration affirm the previous administration's policy in order to convey to the Filipinos that it was a national, rather than a party, policy. Ford's assessment of the prospects for stability and continued cooperation between Americans and Filipinos in the Insular Government was more pessimistic.¹¹⁸

In 1913, Wilson appointed Francis Burton Harrison as the new Governor-General of the Philippine Islands. Harrison was Forbes's polar opposite in terms of their views regarding the sharing of power with the Filipinos, and he embarked on a policy of reducing the American presence in the Insular Government by replacing American employees with Filipinos. Prospects for greater self-government also came through Congress's enactment in 1916 of the Philippine Autonomy Act,¹¹⁹ popularly known as the Jones Law and named for its sponsor in the U.S. House of Representatives, Virginia Democrat William A. Jones. Together, Harrison's Filipinization policy and the Jones Law marked the second phase of the American colonial period in the Philippines.

IV. JUDICIAL REVIEW UNDER THE JONES LAW

The preamble of the Jones Law was significant in that it contained the first official commitment by the United States to grant independence to the Philippine Islands and represented a decided shift in its Philippine policy: "whereas it is, as it has always been, the purpose of the people of the United States to withdraw their sovereignty over the Philippine Islands and to recognize their independence as soon as a stable government can be established therein."

The Jones Law wrought no change to the insular Supreme Court's judicial review powers, because Sec. 27 of the new organic act basically reproduced Sec. 10 of the Philippine Organic Act on this issue. Hence, the basis for the Supreme Court's judicial review authority continued to remain unclear.

But the Jones Law wrought great changes in the structure of the Insular Government. Executive power remained in American hands in the person of the Governor-General, but the Legislature was now an all-Filipino branch. The Jones Law abolished the Philippine Commission and created a new Philippine Senate to take its place as the upper house of the Insular

118. GOLAY, *supra* note 14, at 172-73.

119. The Philippine Autonomy Act (1916).

Legislature.¹²⁰ Emerging as the most prominent Filipino leaders of this period were two men. The first man was Manuel L. Quezon, who was a provincial governor elected to the Assembly in 1907 until his appointment as resident commissioner to Washington D.C. He easily won election to the Philippine Senate and was just as easily elected as Senate President. The second was Sergio Osmena, who continued as Speaker of the new House of Representatives.

The Jones Law reserved to the Governor-General vast powers, such as general supervision and control of all the departments and bureaus of the Insular Government. With respect to the Legislature, the Governor-General held veto power over bills passed by either house as well as the right to submit a budget of receipts and expenditures which would furnish the basis of the annual appropriations bill.¹²¹ Should the Legislature override the Governor-General's veto, then the President of the United States had final say. A further check on the Insular Legislature's power lay in Congress, which reserved the power and authority to annul all laws enacted by and reported to it by the Insular Legislature.¹²² The Jones Law also created a new position in the Insular Auditor, whose job was to examine, audit, and settle all accounts pertaining to the revenues and receipts of the Insular Government and audit all expenditures by the government of its fund, and property.¹²³

A. Opening Pandora's Box

Filipinization of the Insular Government was well under way even before the Jones Act took effect. Harrison changed the composition of the Philippine Commission, and Filipinos comprised the majority in the Commission. He fired Americans in the insular bureaucracy and replaced them with Filipinos, stopped civil service recruitment in the United States for the insular service "except for really technical positions."¹²⁴

The Legislature followed Harrison's cue and passed the Osmena Retirement Law. This law granted generous retirement benefits to officials or employees with at least six years of service. Golay noted that in the year that the law was passed, only 50 of the 1,064 eligible Americans applied for benefits by its June 30, 1916 deadline.¹²⁵ The retirement law was reenacted every year throughout the remainder of the Harrison administration.¹²⁶ In mid-1913,

120. *Id.* § 22.

121. *Id.* § 21.

122. *Id.* § 19.

123. *Id.* § 24.

124. GOLAY, *supra* note 14, at 175, quoting Letters from Harrison to Secretary of War (11-7-1913) in FRANCIS BURTON HARRISON PAPERS, CABLEBOOK 1913-14.

125. *Id.* at 191.

126. *Id.* at 207.

Americans occupied 29% of positions in the insular service and one out of seven of the higher offices. In 1919, Americans only occupied 6% of all positions, and one out of twenty higher posts.¹²⁷ Other examples of laws which speeded up Filipinization were those which removed provincial government treasurers who were frequently Americans¹²⁸ and which reorganized the higher levels of the Judiciary such that by mid-1913 Filipino judges of first instance outnumbered their American counterparts fifteen to fourteen.¹²⁹

There were two opportunities to install a Filipino majority in the Supreme Court. In 1917, the Legislature amended the Administrative Code to create two additional seats on the Supreme Court, and at the same time, two American justices resigned from the Court. In 1920, two American justices again resigned from the highest bench. The first time, President Wilson chose to continue the American majority. Although he was willing to create a Filipino majority in 1920, he was unwilling to push the issue with a Republican Senate that was unlikely to confirm the appointments.¹³⁰

Finally, the Insular Legislature also set its sights on the logical end of Filipinization-independence. In 1918, it created the Commission on Independence, which was funded, through Act No. 2933, with a continuing yearly appropriation of one million pesos or \$500,000 and tasked with lobbying Congress for independence legislation.

Diminished American presence in the Insular Government was accompanied by the Legislature's usurpation of executive power, which was the remaining bulwark of American power in the Islands, with the acquiescence of Harrison. Through the Revised Administrative Code of 1917 the Legislature delegated vast executive powers to the executive departments which were beginning to be staffed mostly by Filipinos. On October 16, 1918, Governor-General Harrison issued Executive Order No. 37 creating the Council of State which would be composed of departmental secretaries and as well as Quezon and Osmena. Although intended to be advisory, the Council was vested by the Legislature with executive powers over virtually every bureau and agency. The Legislature also passed Act No. 2803 in 1919 which reduced the Governor-General's power of general supervision and control in the Jones Law to that of general responsibility for overall policy, with department heads assuming final responsibility for all their actions.¹³¹ During the economic boom precipitated by World War I, the Insular Treasury was

127. *Id.* at 175-76.

128. *Id.* at 188.

129. *Id.* at 180.

130. *Id.* at 207.

131. MICHAEL PAUL ONORATO, LEONARD WOOD AND THE PHILIPPINE CABINET CRISIS OF 1923 16 (1988).

awash with funds, and the legislature set about creating an empire of government corporations, such as the Philippine National Bank (PNB) and the National Coal Company.¹³² In the corporate charters of these companies the legislature provided for a Board of Control which would be comprised of the Governor-General, the Senate President, and the Speaker of the House and empowered to vote the Insular Government's shares in the companies.¹³³ The Supreme Court would not get the opportunity to pass upon the validity of these questionable laws during the Harrison administration.

Over what kind of cases did the Supreme Court exercise judicial review during this period? With respect to judicial review of executive action, the Supreme Court had occasion to revisit *Forbes v. Chuaco Tiaco* in another deportation case, *In re McCulloch Dick*.¹³⁴ Governor-General Harrison issued an executive order to effect the deportation of R. McCulloch Dick, the Scotland-born proprietor and editor of the Philippines Free Press, to the Colony of Hong Kong for publishing certain articles which "tended to obstruct the Government of the Philippine Islands in policies inaugurated for the prosecution of the war between the United States and the German Empire and...tended to create a feeling of unrest and uneasiness in the community."¹³⁵

Commenting on the plan to incorporate the Philippine National Guard into the U.S. national forces, McCulloch Dick, wrote an editorial in the February 16, 1918 issue of the Free Press entitled "Know How to Forage." He said: "If the men of the Philippine National Guard can fight like they can steal then the Kaiser and his legions had better beat it before the boys from the Philippines are sent 'over there.'"¹³⁶ On the front page of the same paper, he also wrote the following:

It hasn't come yet, but it is expected soon, that call of President Wilson which will incorporate the Philippine National Guard in the national forces of the United States. And when it comes, look out! For it brings with it an increase on the base pay of a soldier of the Guard from P22 a month to P60 a month, and clothes and chow, and, my, what chow! The best in the world! For Uncle Sam thinks nothing to good for his soldier boys!

And you just watch 'em when the call comes. Talk about a dearth of patriots for the Guard! Why, the moment the news gets around that you can get P 60 a month and your belly full by enlisting, just see them come — see them streak for the

132. The empire of government corporations chartered by the legislature included, apart from the PNB and the National Coal Company: the National Petroleum Company, the National Development Company, the National Iron Company, and a company promoting the merchant marine. The government also bought the stock of the Manila Railroad Company. See *Government v. Springer*, 50 Phil. 259, 289-90 (1927).

133. GOLAY, *supra* note 14, at 213.

134. 38 Phil. 41 (1918).

135. *Id.* at 56.

136. *Id.* at 61.

recruiting office! Behold the cocinero drops his frying pan, the muchacho his dishrag...For who, after slaving for eight and nine and ten and fifteen and twenty pesos a month wouldn't jump at the chance to be a soldier and carry a gun and have a fine and easy time at pesos sixty! Talk about manna from the skies!¹³⁷

In a *habeas corpus* petition, McCulloch Dick argued that the Governor-General's deportation powers under the Organic Act were altered and restricted when the U.S. Congress enacted the Jones Law in 1916 and the Immigration Law in 1917 and laws prescribing the procedure for deportation were passed by the Philippine Legislature. The Court through Justice Carson rejected the contention and said that if the Insular Government could deport aliens despite limited sovereignty under the Organic Act, then with more reason could it do so as a more autonomous entity under the Jones Law. Furthermore, the Court held that the Jones Law continued and ratified laws in force in the Islands.¹³⁸

More important for its implications on the nature of executive power, the Court displayed none of the U.S. Supreme Court's hesitation in the *Forbes* case when the latter refused to say whether the Governor-General could deport aliens by virtue of his office. Instead, the insular Supreme Court boldly stated:

...we think that an examination of the history of the office of the Chief Executive in these Islands under American sovereignty will disclose that, until and unless he is deprived of such authority by some act of Congress or of the Philippine Legislature, the power of the Philippine Government to deport aliens as an act of state is vested in the Governor-General by virtue of his office, subject only to the regulations prescribed in section 69 of the Administrative Code of 1917, or by future legislation on the subject.¹³⁹

By determining that the power of deportation belonged to the Governor-General "by virtue of his office," this case characterized that power as an official act. The conclusions even cited the infamous Alien and Sedition Laws, which the Federalist-controlled Congress passed in 1798 and empowered President John Adams to deport dangerous aliens, in order to bolster the Court's position that it was not unprecedented for the Governor-General to enjoy such a power.¹⁴⁰ Following the logic of the earlier *Severino* case which insulated the Governor-General's official acts from judicial review, the Court's characterization of the deportation as an official act took it out of the Court's reach.

137. *Id.* at 60-61.

138. *Id.* at 75-76.

139. *Id.* at 93-94.

140. *Id.* at 102. The Court noted that even if "as a result of popular agitation, this statute was not reenacted after it had expired under its own terms, that fact furnishes no ground for argument either for or against its constitutionality."

Justices Johnson and Malcolm filed dissents in which they disagreed with the majority's finding that the Governor-General had an inherent right to deport. Instead, they believed that it fell to the courts to determine whether he did possess such power by reason of any law.¹⁴¹ Justice Malcolm however, reiterated the *Severino* doctrine, conceding that once the power could be traced to a law, then the Governor-General's exercise of the power was an official act that was beyond the interference of the courts.

Justice Johnson also argued that the Court could exercise jurisdiction over the case, because the purpose of a *habeas corpus* petition was to allow courts to inquire into the legality of a person's detention. It was different from a petition for *mandamus*, injunction, or prohibition, which would operate to compel or prevent the Governor-General to perform certain acts:

If an act of the legislative or executive department of the Government is to be held illegal upon judicial inquiry, because it deprives persons of their liberties, it is not because the courts have any control over the legislative or executive power, but because the act itself is forbidden by the fundamental law of the land... *In pronouncing a statute, or a particular act of any individual or official in any department of the Government illegal, the courts are simply interpreting the meaning, force, and application of the fundamental law of the State.*¹⁴² (italics supplied)

In other words, the Court could pronounce the detention illegal, even if it could not compel the Governor-General to release McCulloch Dick.

Through the *Severino* decision, the Court once again reinforced the Governor-General's awesome powers by expanding the kinds of actions that were off-limits to the Court. Previously, acts that were assigned to the Governor-General by law were official actions and therefore beyond the Court's jurisdiction. In this case, the Court extended the exemption to include acts that the Governor-General could perform by the nature of his office.

In addition, the Court had closed off the means by which the Governor-General could be challenged in the courts. Previously, the Court ruled that petitions for prohibition, *mandamus*, and injunction as well as civil action for damages were unavailing.¹⁴³ Now, *habeas corpus* petitions were unavailable as well. The grounds as well as the means to challenge the Governor-General before the courts were evaporating.

¹⁴¹ *Id.* at 130, 138-40 (1918).

¹⁴² *Id.* at 111-12.

¹⁴³ *Forbes v. Chuaco Tiaco* involved a petition for prohibition and a civil action for damages, while the Court ruled in *Severino v. Governor-General* that it would neither direct nor control the actions of the Governor-General through a petition for *mandamus* or injunction. See *Severino v. Governor-General*, 16 Phil. 366, 401 (1910).

With respect to judicial review of legislation, the Court in *United States v. Salaveria*,¹⁴⁴ took great pains to sustain another faulty ordinance. The Administrative Code and the Municipal Code empowered municipal councils to prohibit and penalize gambling. Pursuant to this authority, the Municipal Council of Orion passed an ordinance penalizing several games, including one called *panguingue*, except when played on Sundays and holidays. The ordinance, however, failed to describe any of the games as gambling. Neither did the game of *panguingue* fall within the statute's definition of gambling, because it was not a game of chance or hazard. The defendant Justice of the Peace, who was caught playing *panguingue* on a prohibited day, challenged the ordinance's validity on the ground that it exceeded the council's delegated authority. To save the ordinance, Justice Malcolm based the council's authority on the "general welfare clause" in the Administrative Code which "delegates in statutory form the police power to the municipality."¹⁴⁵

Again, the Supreme Court accommodated a badly drafted ordinance. Perhaps one reason it did so was to make an example of the defendant who was a judge. Another is what Justice Thomas A. Street, appointed in 1917 by President Wilson, described in his concurring opinion as a "paternalistic attitude of captious criticism and correction." He said that there was no better way for bodies like the council to learn than through trial and error: "those bodies are undoubtedly destined to make mistakes in the exercise of the powers conferred upon them, but there is no better school than that of experience in which their members may discover what is most likely to promote the welfare of the community and the interests of their constituents."¹⁴⁶

In his dissent, Justice Frederick Charles Fisher, appointed to the Court in 1917 by President Wilson, ridiculed both the badly drafted ordinance and the majority opinion's strained attempts to justify it, commenting sarcastically:

...it appears that the ordinance expressly permits these "immoral diversions" on Sundays and official holidays. I am unable to see how one's morals are to be improved by permitting him to play *panguingue*... all day Sunday, and then sending him to jail for engaging in the same amusement Monday evening... The inhabitants of Orion may play poker - without a wager - to their heart's content on Sunday, but to do it Saturday evening, after the work week is over, is prohibited - the morals are to be "improved" and their industry "stimulated" until midnight. After that they may yield to their depraved instincts until midnight of Sunday, without let or hindrance.¹⁴⁷

To get a sense of how the Supreme Court enlisted judicial review in the service of civil liberties, it is instructive to compare two companion cases

¹⁴⁴ 39 Phil. 102 (1918).

¹⁴⁵ *Id.* at 109.

¹⁴⁶ *Id.* at 114.

¹⁴⁷ *Id.* at 117.

which touched on the liberty of abode. Both these cases were decided in 1919 and penned by Justice Malcolm. In *Rubi v. Provincial Board of Mindoro*, the Court sustained a provincial board resolution directing the *Manguianes*, an ethnic tribe in the island of Mindoro, to live in settlements or reservations.¹⁴⁸ But in *Villavicencio v. Lukban*, the Court invalidated the Mayor of Manila's rounding up of prostitutes and shipping them off to Davao despite being motivated by "the best of all reasons, to exterminate vice."¹⁴⁹ The reason underlying differential treatment, despite similar acts challenged on identical grounds, was that, on the one hand, the *Manguianes*, like the North American Indians who were also confined to reservations, were "not free, as civilized men are free, and they are not the equals of their more fortunate brothers."¹⁵⁰ Since civil liberties did not apply to those who were yet uncivilized, the *Manguianes* were wards of the state who must be confined for a time "for their own good and the good of the country."¹⁵¹ On the other hand, the prostitutes, as citizens, could not be forcibly taken from Manila and deposited in Davao: "the forcible taking of these women...deprived these women of freedom of locomotion just as effectively as if they had been imprisoned. Placed in Davao without either money or personal belongings, they were prevented from exercising the liberty of going when and where they pleased."¹⁵²

Justice Torres was not likeminded and was ready to strip prostitutes, who were likely to contract all kinds of venereal diseases in pursuit of their profession, of their civil liberties. He compared them to "[a] cholera patient, a leper, or any other person affected by a known contagious disease [who] cannot invoke in his favor the Constitutional law which guarantees his liberty and individual rights...."¹⁵³ By engaging in this "shameful profession," the prostitute renounced her liberty and could no longer join the "society of decent women" and "live within the community or society with the same liberty and rights enjoyed by every citizen."¹⁵⁴ In Justice Johnson's mind, prostitutes were as unfree and uncivilized as the *Manguianes*.

B. Assessing the Record of the Harrison Years

What were the results of Filipinization and increased Filipino autonomy under the Harrison administration? This was precisely the question that newly elected Republican President Warren G. Harding wanted to answer when he

148. *Rubi v. Provincial Board of Mindoro*, 39 Phil. 660 (1919).

149. *Villavicencio v. Lukban*, 39 Phil. 778, 780 (1919).

150. *Rubi*, 39 Phil. at 713.

151. *Id.* at 719.

152. *Villavicencio*, 39 Phil at 790-91.

153. *Id.* at 802.

154. *Id.* at 803.

commissioned General Leonard Wood, an erstwhile rival for the Republican presidential nomination and former military governor of Cuba and the non-Christian Philippine island of Mindanao, and former Governor-General Forbes to tour the Philippines in 1921 and prepare a comprehensive report on the situation of the Islands.

The verdict of the Wood-Forbes Report, prepared after four months of thorough study and investigation was harsh, yet, as even Quezon and Osmena would privately concede, essentially above reproach.¹⁵⁵ The Report emphasized the deterioration of efficiency in the insular service, particularly in the areas of public health and the administration of justice.¹⁵⁶ It recommended that the 60-plus laws passed by the Insular Legislature which affected the powers of the Governor-General be annulled by Congress if the former refused to correct them.¹⁵⁷

As for financial matters, the Report lamented the dismal record of government corporations, which had been run inefficiently and had become sources of patronage for Filipino politicians, and concluded that the government should "get out of and keep out of such business."¹⁵⁸ The Report took special note of the PNB scandal, which precipitated a severe financial crisis. Assuming that the inordinately high wartime prices would prevail, the PNB tapped into the insular Currency Reserve Fund deposited in its New York branch and used these funds to grant unsecured long-term loans. When hard times hit and prices plummeted, the PNB was left with bad loans and the Insular Government, with inadequate reserves and a currency that was no longer backed in gold.¹⁵⁹ The Report described the PNB scandal as "one of the most unfortunate and darkest pages in Philippine history."¹⁶⁰

While the Report found that "everywhere among the Christian Filipinos [was] the desire for independence," it did not equate desire with readiness.¹⁶¹ The Report was quick to qualify that its findings in no way reflected that the Filipinos were inherently incapable of self-government, but only that they lacked the necessary experience; experience that the Filipinos apparently did not get during the heyday of the Harrison administration. The Report urged that the *status quo* be maintained until Filipinos could absorb all the gains that

155. ONORATO, *supra* note 131, at 38.

156. GOLAY, *supra* note 14, at 232.

157. ONORATO, *supra*, note 131, at 37.

158. GOLAY, *supra* note 14, at 232, citing Report of the Special Mission 42.

159. ONORATO, *supra* note 131, at 33.

160. GOLAY, *supra* note 14, at 232, citing Report of the Special Mission.

161. *Id.*

they had already achieved by way of self-government.¹⁶² Independence would have to wait for now:

We are convinced that it would be a betrayal of the Philippine people, as a misfortune to the American people, a distinct step backward in the path of progress, and a discreditable neglect of our national duty were we to withdraw without giving the Filipinos the best chance to have an orderly and permanently stable government.¹⁶³

C. Putting the Genie Back in the Bottle

President Harding opted not to submit the Wood-Forbes report to the U.S. Congress. The new Governor-General Leonard Wood expressed a preference for affording the Insular Legislature the opportunity to take corrective measures, but recommended submission of the Report to Congress if he found it necessary.¹⁶⁴ In a letter to Miss Katherine Mayo in 1923, Wood explained that "working through a legislature...is not a very rapid procedure, but in the long run it is better for the people."¹⁶⁵ Drawing on his experience in Cuba and Mindanao, he conceded that while strong-arming his charges would have been more expedient, "it would not have resulted in the training of the people to handle their own legislation and affairs."¹⁶⁶

Through his inaugural speech, Wood signaled to the Filipinos that he would not be as compliant as his predecessor. Wood clarified that his government would be kept "to the extent provided in the Jones Law" and would maintain "strict separation of powers."¹⁶⁷ During the first two legislative sessions, Wood vetoed 17 bills, more bills than Harrison vetoed in his entire administration.

Nonetheless, the first year of Wood's tenure was not particularly tumultuous. He met resistance in his efforts to enforce fiscal responsibility and "get government out of business" from Quezon and the Nacionalistas, but the conflicts were neither too serious nor damaging. However, the Cabinet Crisis of 1923, where the Filipino members of the Cabinet and the Council of State resigned *en masse* over Wood's refusal to fire an American police detective, drove a permanent wedge between Wood on the one hand and Quezon and the Nacionalista leaders on the other. Quezon inflated the affair to serve multiple political ends.¹⁶⁸ A casualty of the Cabinet Crisis was the Council of

162. ONORATO, *supra* note 131, at 37.

163. *Id.*, citing Report of the Special Mission.

164. *Id.* at 38.

165. *Id.* at 39.

166. *Id.*

167. GOLAY, *supra* note 14, at 235.

168. For a more thorough narrative, see ONORATO, *supra* note 128, at 59-66. By way of summary, the Filipino members of Wood's cabinet and the Council of State resigned *en masse* over his refusal to fire Ray Conley, a corrupt American police detective in Manila.

State, which Harrison created by Executive Order but whose legality he doubted in his final report.¹⁶⁹ After its members resigned, Wood did not appoint replacements. Henceforth, the rest of Wood's administration would be marred by skirmishes between Wood and Quezon, and for the first time in the colonial period, the Supreme Court was brought in from the sidelines to settle the disputes.

In 1924, Wood ordered the Insular Auditor to suspend payments from the continuing annual appropriations of the Commission on Independence. Wood objected to the appropriations for a number of reasons: first, he felt that the continuing nature of the appropriations circumscribed his veto power; second, he resented the use of tax money to oppose American policies; and third, he objected to the way the Nacionalistas treated the appropriation like a slush fund. The options that Wood considered included vetoing all continuing appropriations and challenging the legality of the appropriation "on the ground that the legislature had both created the commission and mandated membership on it for legislators." An opinion from the army's judge advocate general persuaded him against the first option, but Washington encouraged him to pursue the second.¹⁷⁰

Quezon protested Wood's actions by proclaiming a boycott against American goods and American-owned newspapers and by raising funds for the Independence Commission by calling for voluntary contributions and having government disbursing officers collect contributions pledged by Filipinos in the insular service, which scheme Wood quashed by executive order. In the meantime, Quezon initiated a court action to test the Auditor's decision.¹⁷¹ When political solutions proved unavailing, the parties turned to the Supreme Court to play referee. The Court, however, would not be so quick to assume this role.

The case that appears in Philippine Reports involving the Independence Commission and the Auditor is *Abueva v. Wood*, but in that case, Quezon figured as a respondent, not a petitioner. Members of the Independence Commission who were, at the same time, members of the legislature filed a

On its own, the affair would have been insignificant, but Quezon capitalized on it to serve multiple political ends: to secure election of his candidate to a vacated Senate seat, to break the back of the opposition *Democrata* Party, and to try to wrangle greater autonomy from Wood whom he accused of violating "the spirit of the Jones Law" for availing of his powers as executive to exert greater control over the affairs of the Islands. Washington backed Wood, and the new president Calvin Coolidge issued a message emphasizing his determination to stand by Wood and warning Filipinos that further opposition on their part would be construed as a sign of their unfitness for self-rule. It was a stinging rebuff.

169. GOLAY, *supra* note 14, at 226.

170. *Id.* at 253-54.

171. *Id.*

mandamus petition to compel Governor-General Wood, the officers of the Independence Commission, and the Acting Auditor to exhibit to them and to permit them to examine all the vouchers and receipts and like documents in the latter's possession showing disbursements and expenditures of Independence Commission funds. With respect to the Governor-General, the Court, speaking through Justice Johnson, ruled predictably that it could not direct the former's actions, and the decision to exhibit the documents was a "purely political question, and lies within the breast of the Governor-General."¹⁷² The Court also cited a practical reason for not taking jurisdiction: courts were "without power to enforce their orders except in contempt proceedings, and then only with the assistance of the officers of the executive department."¹⁷³ For the same reasons, the Court said that the writ of *mandamus* would not lie against the Legislature when the duty was one that pertained to that particular department of the government.¹⁷⁴ Besides, the members and officers of the Independence Commission were all members of the Legislature. Thus, the remedy of the petitioners lay in "the regular machinery of the Legislature for obtaining the information which they are now seeking."¹⁷⁵ With respect to the Auditor,¹⁷⁶ the Court held that he had exclusive jurisdiction to audit and settle accounts of the government, and his decision regarding those accounts was final, unless appealed according to the provisions of the Jones Law, to the Governor-General. In case of disagreement between the Governor-General and the Auditor, the Secretary of War would have final say.

Another skirmish in which the Court's intervention was solicited, concerned the power of the Senate to indefinitely suspend a Senator appointed by the Governor-General. The Jones Law allowed the Governor-General to appoint and remove two senators and nine representatives from the non-Christian regions of the Philippines. Jose Alejandrino was the Senator

172. *Abueva v. Wood*, 45 Phil. 612, 631 (1924).

173. *Id.* at 634.

174. *Id.*

175. *Id.* at 637.

176. The office of Insular Auditor had no equivalent in the American system of government; thus, legal precedent establishing the exclusive authority of executive officials to review the auditor's decision was lacking. In 1922, the legislature allowed the Insular Government to be sued if the auditor took more than two months to render a decision. An 1925 amendment to the 1922 law to allow suit in case the auditor decides "adversely" to the claimant was vetoed by Wood. But in the same year, the insular Supreme Court in two cases held that decisions of the insular auditor fell within the jurisdiction of Philippine courts. In 1926, the U.S. Supreme Court, speaking through Chief Justice Taft, ruled in *Wright v. Ynchausti*, that decisions of the insular auditor involving protests against the classification of customs duties under the Tariff Act were excluded from the exclusive appeal route specified under the Jones Law.

appointed by Wood to represent the Twelfth District. He was suspended by the Senate for disorderly conduct and deprived of all his privileges and emoluments for one year. By a petition for *mandamus* and injunction, Alejandrino asked the Supreme Court to annul his suspension and to compel the Senate to reinstate him in his official position. In *Alejandrino v. Quezon*,¹⁷⁷ the Court, through Justice Malcolm, pronounced itself without jurisdiction to grant the remedy:

No court has ever held and we apprehend no court will ever hold that it possesses the power to direct the Chief Executive or the Legislature or a branch thereof to take any particular action. If a court should ever be so rash as to thus trench on the domain of either of the other departments, it will be the end of popular government as we know it in democracies.¹⁷⁸

The Court, however, hinted that the resolution was unconstitutional. Comparing the powers of the Governor-General and the Senate under the Jones Law, the Court found that the Governor-General could appoint and remove legislators from the non-Christian provinces, but that the Senate had exclusive authority to punish its members, but not expel them. The problem was that "suspension," while a mode of punishment, was "equivalent to qualified expulsion or removal."¹⁷⁹ But even while the Court conceded that the Senate's power to discipline did not authorize it to suspend Alejandrino for one year, it nonetheless ruled that it was powerless to issue the writ, "for the all-conclusive reason that Supreme Court does not possess the power of coercion to make the Philippine Senate take any particular action."¹⁸⁰ Justice Malcolm seems to have heeded Justice Johnson's suggestion in *In Re McCulloch Dick* that the Court could inquire into the legality of acts of coordinate departments, without necessarily being able to compel or prevent action. Still, it was a step forward for the Court to discuss the validity of the senate resolution.

In concurrence, Justice Ramon Avancena, appointed in 1917 by President Wilson, criticized the insinuation in the majority opinion that the resolution was illegal as being "unnecessary and improper."¹⁸¹ Justice Johnson filed a dissent stating categorically that the resolution was illegal and that the Court could grant the writ prayed for, because the illegal resolution fell outside the Senate's authority to issue. He warned that if the majority's decision were carried to its logical conclusion, it:

177. 46 Phil. 83 (1924).

178. *Id.* at 94.

179. *Id.* at 96.

180. *Id.* at 97.

181. *Id.* at 98.

...may have far-reaching and serious consequences. If one branch of the government may with impunity, and with freedom from judicial intervention, freely usurp the powers of the other branch, it may eventually lead to anarchy.¹⁸²

The Court would not be so tentative in 1927 when it invalidated Act No. 2803¹⁸³ and declared the Board of Control in the government corporations chartered by the legislature unconstitutional. Wood was obsessed with getting government out of business, and he first tried to work through the Board of Control. In 1926, Wood urged his Filipino colleagues on the Board of Control to accept an offer from a Boston group to purchase sugar mills which the PNB held in receivership for PhP26,000,000.00, but Quezon and Manuel Roxas, refused to approve the sale. Roxas was a lawyer and former provincial governor whom Quezon backed to lead the Lower House after Osmena ran for the Senate to challenge Quezon for the Senate presidency.

Later in the year, Wood obtained the Board of Control's approval to sell the Cebu Portland Cement Company to a consortium of American and Filipino business. Quezon and Roxas, however, were castigated by the radical *Nacionalistas* and *Democratas* in the legislature, leading them to change their vote, to the consternation of Wood. Reacting to Wood's threats to annul laws infringing on the Governor-General's powers, Quezon taunted Wood in the press, saying that no such law had yet been invalidated by the courts or annulled by Congress, and challenged Wood by protesting his attempts to nullify said laws.¹⁸⁴

Wood had earlier obtained two opinions stating that the Board of Control was illegal: one came from the Judge Advocate General of the army and the other was solicited by the War Department from the U.S. Attorney General. Armed with these opinions, Wood abolished the Board of Control by Executive Order No. 37 in 1926 and said that he would exercise the power to vote government shares exclusively. Nonetheless, Quezon and Roxas refused to resign from the Board.¹⁸⁵

On November 29, 1926, Quezon and Roxas requested Wood to convene a meeting of the Board of Control's voting committee in order to decide on the slate of directors for the National Coal Company. Wood acknowledged receipt of the notice, but declined to participate. Come the shareholders' meeting on December 6, 1926, Wood's representative asserted the Governor-General's sole power to vote government shares, while Quezon and Roxas filed the minutes of the committee meeting that they held a half hour before the shareholders' meeting. Both parties protested each other's right to vote the government's

182. *Id.* at 143.

183. ONORATO, *supra* note 131, at 16.

184. GOLAY, *supra* note 14, at 265.

185. *Id.*

shares. The chair of the meeting recognized Quezon and Roxas as majority members of the Board of Control, as the persons lawfully entitled to represent and vote the government's shares, to which Wood's representative entered an objection. Both parties proceeded to vote for their own slate of directors. The directors voted in by the Board of Control were recognized, prompting Wood's directors to file a *quo warranto* proceeding to question the former's right to the office.¹⁸⁶

The Court, speaking through Justice Malcolm once more, ruled that the provisions of law vesting in the Senate President and Speaker of the House the power to vote the government's shares in the National Coal Company were unconstitutional and void. The Court reasoned that by becoming a shareholder in the National Coal Company, which was conceded to be a private corporation, the Government did not divest itself of "its sovereign character so far as respects the transactions of the corporation."¹⁸⁷ The National Coal Company remained "an agency or instrumentality of the government"¹⁸⁸ because it was created for a government purpose, which was to develop the natural resources of the Islands. Besides, public funds were used to purchase the shares; thus, the shares were public property. The Court quoted an earlier decision penned by Justice Johnson regarding the same company, to the effect that: "the Government of the Philippine Islands is made the majority stockholder, evidently in order to insure proper governmental supervision and control, and thus to place the Government in a position to render all possible encouragement, assistance, and help in the prosecution and furtherance of the company's business."¹⁸⁹

The Court likened the power to vote corporate stock to the power of appointment, which, together with the duty to look after government agencies, belonged exclusively to the executive department. Thus, membership by legislators in a body that could vote the government's shares in a company "constitutes an invasion by the Legislative Department of the privileges of the Executive Department."¹⁹⁰

In dissent, Justice Avancena, along with Justices Ignacio Villamor and Antonio Villa-Real, who were two other Wilson appointees in 1917, argued that the National Coal Company was a private corporation, and the Government, as shareholder, could appoint a proxy to vote government shares, in this case, the Board of Control. While the Government participated in the management of the National Coal Company every time the proxy voted, it

186. *Government of the Philippine Islands v. Springer*, 50 Phil. 259, 271-73 (1927).

187. *Id.* at 288.

188. *Id.*

189. *Id.* at 289, *citing* *National Coal Company v. Collector of Internal Revenue*.

190. *Id.* at 291.

acted as a corporator and did not exercise any sovereign power.¹⁹¹ Thus, designating legislators as members *ex-officio* of the body acting as proxy did not violate the separation of powers principle.

Moreover, the dissenting justices added that even if the National Coal Company was a public agency, the legislature could still make appointments through its "residuum powers." The Jones Law reserved for the U.S. Congress the right to annul acts passed by the Insular Legislature. The dissenters argued that there would have been no need for such a reservation if Congress had intended to limit the legislature's powers to those enumerated in the Jones Law and those which were purely legislative in character. If these were the only powers possessed by the Legislature, then the courts could invalidate acts done in excess of these authorized powers. By making the reservation, Congress implied that the Legislature had "residuum powers;" that is, powers other than those enumerated and those legislative in character. Congress's failure to annul the law creating the Board of Control, which the legislature passed pursuant to these "residuum powers," was tantamount to ratification.¹⁹²

In the same month during which the National Coal Company shareholders' meeting was held, Wood instructed his director on the PNB board to call for a special shareholders' meeting to remove certain directors, to approve an amendment to the company's by-laws, and to elect his slate of directors. The meeting was held on January 17, 1927, but Quezon and Roxas did not attend, and instead, sent a letter protesting the meeting on the ground that the Governor-General alone had no right to represent the Philippine Government with respect to voting the latter's stake in the bank. The PNB president, acting as chairman of the meeting, ruled that he could not recognize the Governor-General's right to vote the shares without the concurrence of the Senate President and Speaker of the House and declared that no quorum was present. Wood protested the ruling, and the PNB president left the room. Wood stayed on and proceeded to vote in his agenda. During the PNB's regular shareholders' meeting, both sets of directors, that is, those removed by Wood and those recently elected by him, attended. The PNB president recognized the directors removed by Wood, and so the newly elected directors filed a quo warranto petition to question the removed directors' right to participate in the meeting. The Court, speaking again through Justice Malcolm, affirmed the ruling in the *Springer* case, and the same justices who dissented likewise reiterated their arguments in dissent.¹⁹³

By 1927, the Supreme Court finally assumed its role as arbiter between the other two departments of the government. When it did, it acted to check the

191. *Id.* at 338.

192. *Id.* at 342-43.

193. *Id.* at 350-53.

invalid exercise of power by the Legislature. The Governor-General's insulation from suit, however, remained intact.

On appeal to the U.S. Supreme Court, Justice Sutherland, writing for the majority, ruled that the members of the Legislature who constituted a majority of the Board of Control and its voting committee were "not charged with the performance of any legislative functions or with the doing of anything which is in aid of the performance of any such functions by the legislature."¹⁹⁴ The U.S. Supreme Court also added that the Legislature must deal with government property by making rules, not by executing them, and "the appointment of managers (in this instance corporate directors) of property or a business is essentially an executive act which the legislature is without capacity to perform directly or through any of its members."¹⁹⁵

In dissent, Justice Holmes wrote that the Constitution did not "establish and divide fields of black and white." He also characterized membership in the Board of Control as a legislative function, rather than an executive one. Echoing the Filipino justices' residuum argument, Holmes wrote that the Board of Control's functions fell into "the indiscriminate residue of matters within legislative control."¹⁹⁶

The Supreme Court did not hesitate to employ judicial review to prevent the other two departments from undermining judicial independence in two cases that were both written by Justice Malcolm. Writing for the *Illinois Law Journal* in 1914, the Solicitor General to the Philippine Islands George Harvey observed that in a little over a decade of American rule: "...the Filipinos have been taught the possibility of an independent judiciary. They have learned that the judge can be not only independent of the governor, but may be absolutely independent of the executive and legislative departments."¹⁹⁷

While the Solicitor General's statement may have been wishful thinking in 1914, became more of a reality seven years later. In 1921, the Court in *Bonomeo v. Mariano*¹⁹⁸ construed section 155 of the Administrative Code as depriving the Governor-General of the power to "force upon the judge of one district an appointment to another district against his will, thereby removing him from his district." The Court was worried that the power could be used as a means of disciplining a judge or indirectly removing him:

194. *Springer v. Government of the Philippine Islands*, 50 Phil. 259 (1927), and *Agoncillo v. Government of the Philippine Islands*, 277 U.S. 189, 202 (1927).

195. *Id.* at 209-12.

196. *Id.* at 203.

197. George Harvey, *The Administration of Justice in the Philippine Islands*, 1 PHIL. L.J. 330, 351 (1914-1915).

198. 41 Phil. 322 (1921).

A judge who had, by a decision incurred the ill will of an attorney or official, could, by the insistence of the disgruntled party, be removed from one district, demoted, and transferred to another district, at possibly a loss of salary, all without the consent of the judicial officer.¹⁹⁹

Such a power in the executive would severely undermine judicial independence. Because "the sovereign power has given life to the judiciary," then only the sovereign power could "take it away or render it useless." Thus, the Supreme Court concluded that courts could not, under their duty to the sovereign, "permit themselves to be subordinated to any person or official to which their creator did not itself subordinate them."²⁰⁰

As a result of the *Borromeo* ruling, the Insular Legislature amended section 148 of the Administrative Code to allow switching judicial appointments by lottery:

The judges of the first instance with the same salaries shall exchange judicial districts, and the same shall be done by the auxiliary judges as to the respective groups of judicial districts in which they shall serve during the ensuing five year period. The exchange of districts or groups of districts shall be determined by lot between the judges affected....²⁰¹

The Court invalidated Act No. 2941 for subverting the judicial appointments process. While the organic law required that judges be appointed by the Governor-General, with the assent of the Philippine Senate, this law would substitute chance for executive judgment. To appoint by lot, was "to gamble with the office."

Like the U.S. Supreme Court that struck down New Deal programs, the Insular Supreme Court relied on the substantive due process jurisprudence developed by the U.S. Supreme Court to invalidate the Insular Government's attempts at economic regulation, such as, for example, laws which allowed the Governor-General to fix the price of rice in an emergency and that provided for maternity leave benefits.²⁰² In doing so, the insular Supreme Court transplanted the U.S. Supreme Court's conservative economic philosophy to the Islands.

In *United States v. Ang Tang Ho*, the Court through Justice Charles A. Johns, appointed by President Warren G. Harding in 1921, stated that in fixing the price at which a person could sell his rice, the government was dealing not

199. *Id.* at 328.

200. *Id.* at 332.

201. *Concepcion v. Paredes*, 42 Phil. 599, 602 (1921).

202. For a thorough discussion of the Philippine Supreme Court's economic regulation cases, see Hans Leo J. Cacdac, *People v. Pomar Revisited: Substantive Due Process and the Emergence of the Afford Protection to Labor Clause*, 42 ATENELO L. J. 330-80 (1998); and Pacifico A. Agabin, *The Politics of Judicial Review over Executive Action: The Supreme Court and Social Change*, 64 PHIL. L.J. 189, at 193-204 (1989).

with government property, but with private property, "and private rights...are sacred under the Constitution."²⁰³

The maternity leave law challenged in *People v. Pomar* violated property rights, because it created a term in the employment contract without the consent of the parties, thereby depriving the parties, whose equality in bargaining position was assumed under the common law, of their liberty to contract. Moreover, Justice Johnson wrote that the law smacked of forced charity:

To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.²⁰⁴

Wood's health deteriorated seriously during his tenure. He returned to the United States for medical treatment in the middle of 1927, after the U.S. Supreme Court decided the Board of Control cases in his favor, and died in August while undergoing brain surgery.²⁰⁵ President Calvin Coolidge appointed Henry L. Stimson, as Wood's replacement. Stimson attempted to reconcile with the Filipino leaders, and his friendly overtures were reciprocated. After the end of the Wood administration, the Supreme Court saw no more cases in which it was asked to be arbiter between the other two departments of the government.

The onset of the Great Depression during President Herbert Hoover's administration had transformed many previously held attitudes in American society, including its attitudes towards Philippine independence. Filipino leaders turned their efforts away from wrangling greater autonomy from the Insular Executive and towards realizing political independence and trying to ensure the continuation of free trade with the United States even after independence.

Under President Franklin D. Roosevelt's Democratic administration, the U.S. Congress enacted the Philippine Independence Act,²⁰⁶ also known as the

203. *United States v. Ang Tang Ho*, 43 Phil. 1, 17 (1922).

204. *People v. Pomar*, 46 Phil. 440, 450-51 (1924).

205. GOLAY, *supra* note 14, at 271-72.

206. This was the second independence act passed by the U.S. Congress. The first act, the Hare-Hawes-Cutting Law, was secured by the Independence Mission headed by Sergio Osmena and Manuel Roxas during the 1933 Congressional session. Quezon and his followers subsequently maneuvered to have the Insular Legislature "decline" the Hare-Hawes-Cutting Law, purportedly because of its limitations on Filipino immigration to the United States and its military bases provisions. The legislature then appointed a new mission, headed by Quezon this time, to secure a new independence measure. Upon arriving in Washington, Quezon was told by Roosevelt that he could do no better with a

Tydings-McDuffie Law, after its sponsors Senator Millard Tydings of Maryland and Congressman John McDuffie of Alabama. This law provided for Philippine independence at the end of a ten-year Commonwealth Period.

Under the Commonwealth, which was the last bastion of American power in the colonial period, the chief executive would now be a Filipino. Filipinos would run all branches of the Insular Government, with American presence in the Islands being limited to the High Commissioner. Pursuant to the Independence Act, the Insular Legislature called for elections to a Constitutional Convention to draft the Philippine Constitution. Work on the Constitution began in July 1934 and was completed by February 1935. President Roosevelt approved the Philippine Constitution the next month, and the Filipino people ratified it in May 1935.

V. JUDICIAL REVIEW AND THE 1935 CONSTITUTION

The 1935 Constitution formalized the results of a process that had been taking place throughout the American colonial period.

Although Article VIII, Sec. 2 (1) of the 1935 Philippine Constitution marked the first time that an organic law of the Philippines explicitly recognized the power of courts to exercise judicial review, Delegate Vicente Francisco explained that through Sec. 2, "the present jurisdiction of the Supreme Court is ratified."²⁰⁷

By 1935, the Insular Supreme Court had been asserting the power of judicial review for over thirty years, and the existence of such a power in the courts was well accepted among the delegates. In his commentary to the 1935 Constitution, Delegate Jose M. Aruego went into an extensive exposition on judicial power in the charter, and in his last sentence, he mentioned, almost as an afterthought: "The judicial power conferred upon the courts is generally held likewise to include the power of judicial review."²⁰⁸

Doctrinal developments by the Insular Supreme Court through its exercise of judicial review helped shape other provisions of the 1935 Constitution. Justice Malcolm wrote in his memoirs that "it affords me deep satisfaction to recall that I helped provide the background for the constitutional provision prohibiting the designation or transfer of a judge without the approval of the Supreme Court."²⁰⁹ He was referring to two decisions he penned, *Borromeo v.*

new law, and Quezon returned to Manila with the Tydings-McDuffie law, which is almost identical in content to the Hare-Hawes-Cutting Law. See generally, GOLAY, *supra* note 14, at 302-45.

207. JOSE M. ARUEGO, *THE PHILIPPINE CONSTITUTION: ORIGINS, MAKING, MEANING, AND APPLICATION II* (1972).

208. *Id.* at 26.

209. MALCOLM, *supra* note 62, at 148.

Mariano and Concepcion v. Paredes, through which the Supreme Court struck down attempts by the Executive and the Legislature to transfer judges from one district to another without their consent. A modified version of this doctrine found its way to Article VIII, Sec. 7 of the Constitution, the modification being that transfer could be effected with the consent of the Supreme Court, rather than the judge concerned:

Sec. 7 No judge appointed for a particular district shall be designated or transferred to another district without the approval of the Supreme Court. The Congress shall by law determine the residence of judges of inferior courts.

Not all doctrinal developments were codified in the Constitution. The delegates absolutely rejected the conservative economic *laissez faire* philosophy that animated the *Ang Tang Ho* and *Pomar* decisions by making social justice a national policy.²¹⁰ Article II, Sec. 5 provided that, "the promotion of social justice and economic well-being and economic security of all the people should be the concern of the State." To override *People v. Pomar*, the delegates approved Article XIV, Sec. 6, which provided explicitly that the state should "afford protection to labor, especially to working women and minors, and shall regulate the relations between landowner and tenant, and between labor and capital in industry and agriculture." The delegates seemed to have followed Justice Johnson's suggestion in the *Pomar* case to the effect that, "If the people desire to have the police power extended and applied to conditions and things prohibited by the organic act, they must first amend the law."²¹¹ Reacting to the *Ang Tang Ho* decision, the delegates approved Article VI, Sec. 26:

...in times of war or other national emergency, the National Assembly may by law authorize the President, for a limited period and subject to such restrictions as it may prescribe, to promulgate rules and regulations to carry out a declared national policy.

The new Philippine government was decidedly New Deal in orientation. No doubt the delegates were aware of developments in the United States where the U.S. Supreme Court in 1934 had consistently struck down President Roosevelt's New Deal program. By adopting social justice as a national policy, the delegates eradicated the doctrine that afforded protection to private property and contract rights upon which the Insular Supreme Court had relied. Eventually, the U.S. Supreme Court realized that the Great Depression and the upheaval it caused in the American people's lives and attitudes "devastated the belief that property and its contractually realizable advantages were attributable to some natural order of things implicit in a revealed structure of common law rights."²¹²

210. Pacifico A. Agabin, *The Politics of Judicial Review Over Executive Action: The Supreme Court and Social Change*, 64 PHIL. L.J. 189, 202 (1989).

211. *People v. Pomar*, 46 Phil. 440, 455-56 (1924).

212. TRIBE, *supra* note 38, at 13.

From 1936 onwards, the U.S. Supreme Court backtracked from its assault on government regulation of the economy. The delegates seem to have anticipated the Federal Government's drift towards the regulatory state and created a government that could actively intervene in all areas of life. The government created by the 1935 Constitution is therefore closer in nature to the New Deal government than it was to the Federal Government crafted by James Madison and his fellow delegates to the 1787 Convention.

Why did the New Deal have such great appeal for the delegates? Quezon explained in a speech that "the philosophy of *laissez faire* in our Government is dead. It has been substituted by the philosophy of government intervention whenever the needs of the country required it."²¹³ But a government is made up of people, so the pertinent question is: who would be in the government? Who would decide what the country's needs were? Filipino leaders of Quezon's time were members of the educated elite classes who, from the late Spanish period, had always presumed to speak for their countrymen and had identified the country's interests with their own. The delegates to the 1935 Convention, many of whom had served in various capacities in the insular and provincial governments of the colonial period, were landowners, lawyers, businessmen, and doctors. Perhaps in this context, it makes sense that a paternalistic theory of government would be so appealing to similarly paternalistic elites.

As for the content of the judicial review provision in the 1935 Constitution, it was earlier noted that courts were thereby allowed to examine the validity of acts of both departments. Again, this provision incorporated and made explicit the practice of the Court during the American colonial period. The Supreme Court exercised judicial review in order to inquire into the validity of the acts of the insular and provincial legislatures as well as the acts of the Governor-General and regulatory agencies within the executive department. In its inquiry into issues of validity, the Court enforced the separation of powers principle. Before the Wood administration, however, the Court invoked the principle to justify the judiciary's own ability or inability to interfere in the acts of the other two departments, but not to protect the Legislature from encroachment by the Executive and vice versa.

With respect to legislative bodies and regulatory agencies, the Court initially set a high bar for unconstitutionality. From the Taft period to the 1920s, the Court did not strike down legislation unless they were patently unconstitutional and often deferred to legislative prerogative. That an insurrection was raging goes a long way in explaining the Court's frequent

213. Agabin, *supra* note 203, at 202-03, quoting President Quezon, Address before the Foreign Policy Association (New York, Apr. 13, 1937), in 3 MESSAGE OF THE PRESIDENT 67-68 (1937).

resort to the police power doctrine to justify legislative action. It was forgiving of faulty drafting, perhaps in the interests of tutelage. However, beginning the 1920s, long after the insurrection was squelched and after government bodies had some time to gain experience in governing, the Court began to strike down acts which invaded civil liberties and private property rights.

With respect to the Governor-General, the Supreme Court adopted a hands-off policy by stating that all acts of the Governor-General were official and therefore beyond the reach of the courts. The Court also closed almost every available legal remedy to challenge the Governor-General's actions before the courts. The *Severino* Court suggested that the exemption afforded the Governor-General was premised on public policy and political necessity. Its hands were perhaps also tied in part because the Jones Law vested vast powers in the office of the Governor-General.

None of the political wrangling between Americans in the Executive department and Filipinos in the Legislative department figured in the jurisprudence of the Supreme Court before the Wood administration. The absence of the Supreme Court from the political arena is certainly no indication that the actions of the other two departments were in all instances legally sound. Filipino leaders could have questioned the plethora of laws that Forbes and the Philippine Commission enacted at breakneck speed to preempt the National Assembly, but Filipino leaders chose to challenge Forbes and the Commission through the Assembly rather than the courts. National Assembly laws transferring appropriations powers to Forbes were also questionable, but who would have had the incentive to question them? Forbes benefited from the resulting enlargement of the Governor-General's powers, while the Filipino leaders in the Assembly also used this situation for their own political ends. Harrison acquiesced even when the Legislature passed some sixty laws encroaching on the Governor-General's powers. Meanwhile, Filipino legislators, whose powers were greatly enhanced by these laws, had no reason to have these laws invalidated.

Initially, Wood also preferred to pursue political solutions. Although the Wood-Forbes Report recommended that Congress annul the sixty laws passed in the Harrison administration which affected the Governor-General's powers, Wood opted to let the Filipino legislature take corrective action on its own. However, the breakdown in relations between Wood, on the one hand, and Quezon and the *Nacionalistas*, on the other, because of the Cabinet Crisis of 1923 effectively foreclosed the political route. Since neither side would accommodate the other, the parties turned to the Supreme Court to settle their conflicts. In this sense, the insular Supreme Court truly became "the final arbiter."

Closer examination of the cases of the Wood period, however, reveals that when the Court acted as arbiter, it prevented mostly the Legislature's attempts to encroach on the power of the Executive, but not the other way around. In

Alejandro v. Quezon, the Court hinted that the resolution suspending Wood's appointee was illegal although it refused to take jurisdiction in the end. In *Springer and Agonillo*, the Court invalidated the Board of Control in the corporate charters of the government corporations concerned and annulled Act No. 2803, which reduced the Governor-General's role in the government from supervision and control to mere policy direction. It kept the Legislature in its place, but kept intact precedents insulating official acts of the Governor-General. The reason again could be that the Court ruled consistently with the Jones Law through which the U.S. Congress had concentrated great powers in the office of the Governor-General, held by an American, and imposed numerous restrictions on a legislature, in Filipino hands.

It is telling that when the Commonwealth Supreme Court played arbiter in the 1936 landmark judicial review case of *Angara v. Electoral Commission*, it again acted to check the exercise of power by the Legislature. That case, however, did not involve legislative encroachment on the executive, but rather, on the Electoral Commission, which was a constitutionally created body within the Senate. Unlike the *Alejandro* court, the *Angara* Court took jurisdiction over the case even if what was involved was a Senate resolution and the issue were the qualifications of its members, pertained to that body. What the *Angara* Court had in its favor over the *Alejandro* Court, however, was an explicit constitutional provision that vested jurisdiction over the qualifications of members in the Electoral Commission. Perhaps this accounts for the Court's certitude when it said: "...judicial supremacy is but the power of judicial review in actual and appropriate cases and controversies, and is the power and duty to see that no one branch or agency of the government transcends the Constitution, which is the source of all authority."²¹⁴

The implication is that the Court could limit the acts of the other two departments only to the extent that the Constitution placed limits on these departments. The 1935 Constitution created a very powerful president. Justice Malcolm in his memoirs described the office of Philippine President thus:

The Fathers of the Constitution concentrated power in the Executive Department in one man, the President. He was granted even more explicit authority than his American counterpart. To underline the thought, the President of the Philippines, as the head of the state, determines government policies — both domestic and foreign — guides legislation, and dominates the administration.²¹⁵

By way of explanation, Malcolm quoted General Douglas MacArthur who said in a letter released in 1950 that "it is in the pattern of Oriental psychology to respect and follow aggressive, resolute, and dynamic leadership."²¹⁶ While

214. *Angara*, 63 Phil. 161, 187.

215. MALCOLM, *supra* note 62, at 121.

216. *Id.* at 127.

the Filipino character may have been predisposed to respond to strong leadership, this explanation alone, however, would be incomplete.

Jose Aruego wrote that the delegates to the Constitution did not engage in extended debates over the draft for the Executive department, "principally because they had been taken largely from the Jones Law and the American federal and state Constitutions, which for historical reasons exercised a very dominating influence among the delegates in the determination of their decisions."²¹⁷ The problem was that the Governor-General under the Jones Law was the most powerful official in the Insular Government. His powers were reinforced by an insular Supreme Court which insulated his official acts, be they discretionary or ministerial, from judicial review and which rejected almost every type of legal action to challenge his acts. The remedy, according to the insular Supreme Court, lay with the Governor-General's superior, who was the U.S. President. By basically carrying over to the 1935 Constitution the functions and powers of the Governor-General to the Philippine President and giving the President even more explicit authority than his American predecessor, the delegates also transferred over the way these functions and powers were interpreted by the insular Supreme Court. During the American colonial period, the Supreme Court virtually abdicated its right to subject official actions of the Governor-General to judicial review for reasons of public policy and political necessity. It was likely, however, that the policy reasons that motivated the Court to abstain from reviewing the Governor-General's acts would change after colonial rule; although, the standard was admittedly broad enough to contemplate all kinds of situations that could be invoked as justification.

Unfortunately, during the Commonwealth and especially after independence, the Philippine President would no longer have a superior who could check his exercise of power. The Philippine President, it seemed, would be answerable to no one, except the electoral process. The precedents set by the insular Supreme Court regarding judicial review of the Governor-General's acts, coupled with the vesting by the 1935 Constitution in the Philippine President of the powers and functions of the Governor-General, would pave the way for the emergence of a constitutional dictatorship. First under Manuel L. Quezon during the Commonwealth and much later, under Ferdinand E. Marcos, well after independence. The history of the American colonial period may have shaped the nature of judicial review in the Philippines, but the kind of judicial review that resulted after the American period would help to shape the future of the Philippine government.

217. I. JOSE M. ARUEGO, *THE FRAMING OF THE PHILIPPINE CONSTITUTION* 393 (1949).

CONCLUSION

Philippine judicial review was the legacy of the American colonial period. Courts of the Spanish era exercised no such power and had only been recently separated from the governing branch of the Colonial Government when Spain ceded the Philippine Islands to the United States of America.

None of the organic acts that governed the Islands throughout the American period, namely, McKinley's Instructions, the Philippine Organic Act of 1902, and the Jones Law of 1916, granted explicit authority to Philippine courts to exercise the power of judicial review. Nonetheless, from the earliest days of American rule, Philippine courts had asserted this power. The Supreme Court of the Philippine Islands exercised judicial review to pass upon the validity of acts of the Legislative and Executive departments of the Insular Government, but did so tentatively at first. Owing to the existence of the insurrection and the Supreme Court's own weakness as an institution in the face of the combined Executive and Legislative power of the American-controlled Philippine Commission, the early Supreme Court often deferred to Legislative and Executive discretion.

Filipinos began to assume a greater legislative role in the Islands, first through the National Assembly as the lower house of the Insular Legislature from 1907 to 1916, and later, through the Philippine Senate and House of Representatives from 1916 to 1935. Up to the 1920's, the Court exercised judicial review paternalistically. The Court set a high bar for declaring a statute or rule unconstitutional and tolerated instances of faulty drafting, in part perhaps to accommodate the inexperience of its Filipino charges. The Supreme Court enhanced the Governor-General's awesome powers by consistently insulating official acts of the Governor-General from judicial review.

From the Taft era up to the early part of the Wood administration, the Supreme Court was a marginal player in the political struggle between American officials and Filipino leaders in the Executive and Legislative departments of the Insular Government. After the 1923 Cabinet Crisis, however, conflicts between Wood and the *Nacionalistas* headed by Quezon could no longer be addressed politically. Beginning 1924, the Supreme Court finally assumed the role of arbiter in the disputes between the Governor-General and the leaders of the Philippine legislature. The Court checked legislative encroachment on executive power, but left untouched precedents which prevented judicial review of the Governor-General's official actions. During this period, the Court also invalidated legislation that infringed on judicial independence, civil liberties, and private property rights.

Many doctrines developed by the Supreme Court throughout the American period influenced provisions of the 1935 Philippine Constitution. The delegates to the Constitutional Convention ratified the Court's rulings on judicial appointments, but rejected the economic philosophy in its substantive

due process cases by adopting a New Deal-type social justice philosophy and creating a government that could intervene, not only in the economy, but in virtually all areas of national life.

The scope of the Court's exercise of judicial review was reflected in Article VIII, Sec. 2(1), which conferred on Philippine courts the jurisdiction to examine the constitutionality or validity of acts of both the Legislature and the Executive. However, the Constitution left intact and even enhanced the powers of the Governor-General and vested these powers in the new Philippine President. In so doing, the delegates carried over the jurisprudence of the insular Supreme Court which interpreted the Governor-General's official actions as falling outside the scope of judicial review. During the Commonwealth and after Philippine independence, the Philippine President would be more powerful than the Governor-General, but would no longer be accountable to any superior within the government structure, be they the U.S. President, the National Legislature, or the Supreme Court. This dangerous configuration of power in the national government would have serious consequences reaching far into the future. It facilitated the rise of a Constitutionally-sanctioned dictatorship during the Commonwealth under Manuel L. Quezon and after independence, during the martial law regime of Ferdinand E. Marcos.