but appointed a replacement. In these cases of serious crimes, it is a matter of public interest. It does not matter how brilliant the person is. Public interest demands that a non-lawyer who insists to defend himself by his lonesome should be represented by counsel.

It is important to note that there are cases where legal representation is not allowed. In the conciliation proceedings before the *barangay*, lawyers are not allowed because they will only prolong the negotiations. The Bureau of Patents is a unique office. It is the only office where a notarized special power of attorney is required before a lawyer may be allowed to appear for somebody else. In the first level courts, a party can be represented by a non-lawyer. In fact, there is actually a practicum program in some schools, where fourth year law students are allowed to handle cases in the first level courts. This is a situation where non-lawyers may represent a party.

In my talk I was able to discuss three doctrinal pronouncements and certain problem areas in legal ethics, namely conflict of interest, conflict of duties, the scope of authority given to lawyers, the attorney-client privilege and representation. It is hoped that the foregoing discussion was able to shed some light on these problem areas as well as provide guidelines in approaching similar issues in the future.

Social, Ethical and Conflict Resolution Aspects of the Davide Impeachment Case

Atty. Carlos P. Medina*

The Impeachment Case against Chief Justice Hilario Davide basically concerned a technical issue — whether or not the Judicial Development Funds ("JDF") were misused. And when you want to answer technical issues, you need a technical body to do that. In this kind of situation, you would need the Commission on Audit. That is why some people are even opposed to the Senate having a trial to determine the truth behind the use of the JDF because they think that in a Senate trial, they will not be after the truth. The Senate is a political body and so whatever decision is made will be a political decision. That was a big reservation to having a Senate trial for many citizen groups and political organizations. Because for them, even the Impeachment itself was not meant to discover the truth but was basically a "power play" between and among vested interests.

There are basically two responses to this controversy. One was political, with so many people going out into the streets and demonstrating. The other was the work of lawyers, the legal part, which tried to deal with the technical questions and that is why we have the Davide Impeachment case.

Briefly, what happened in this case? On June 20, 2003, former President Joseph Estrada filed an impeachment case against eight Justices of the Supreme Court, including Chief Justice Davide. The grounds were violation of the Constitution, betrayal of the public trust and other high crimes. The Justice Committee of the House of Representatives dismissed the complaint for being insufficient in substance. It said that the complaint was sufficient in

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form but that the complaint was insufficient in substance and therefore, it was dismissed by the Committee. But the Committee never came up with a report that was acted upon by the general collective body of the House of Representatives.

On October 23, within one year from the time that the first Impeachment complaint was filed, a second impeachment complaint was filed by Congressman Teodoro and Congressman Fuentebella against Chief Justice Davide. The grounds were graft and corruption, betrayal of the public trust and culpable violation of the Constitution. Why graft and corruption? Because according to them, the JDF was misused. Twenty-percent was supposed to be for facilities and eighty-percent for allowances for personnel. This was to be allocated according to where the money came from. For example, if the courts of Camarines Norte were able to raise a certain amount of money, then the money should go to the court personnel of that area. Chief Justice Davide had decided that this would be unfair to the courts which would be unable to raise the money so why not just pool these funds together and allocate them according to where they are needed? And that was the reason why one of the grounds was graft and corruption –that the law was not followed. Allegedly, there was betrayal of the public trust because Chief Justice Davide had tried to avoid the impeachment complaint. He tried to talk to Speaker De Venecia, to persuade Congress not to proceed with the impeachment complaint. And then there was also culpable violation of the Constitution because he tried to make an interpretation of the JDF law, according to his own interpretation. So those were the grounds.

Now what were the issues raised in the second impeachment complaint? Basically these were the issues:

1. The first was whether or not the Court could exercise judicial review, whether or not the Court has jurisdiction and whether its jurisdiction can extend to impeachment cases.
2. The second was whether or not the requisites for the proper exercise of judicial review were complied with.
3. The third was whether or not the second impeachment complaint was barred, following the one-year prohibition.

We go to the first issue. The question was whether the Court had jurisdiction. Is the question here a political question? The lawyers who were pro-impeachment were arguing that this was a political question because that there a textual commitment to the House of Representatives. That under Article II Section 3 paragraph 1 of the Constitution, the House of Representatives is granted the exclusive power to initiate the impeachment cases, so this is a clear textual commitment of the Constitution which therefore

makes the question a political one, because the power is vested exclusively in Congress.[1] However, the question is whether the power is really exclusive; whether or not the Congress, or the House of Representatives in particular, has the sole discretionary power when it comes to the initiation of impeachment cases.

If you look at the Constitution there are several limitations to the initiation of an impeachment case. There are only a number of ways by which you can file or initiate an impeachment complaint and it needs the approval of the House before it can be brought to the Senate and that you cannot initiate an impeachment proceeding against the same person within one year from the first one. Because of these clear Constitutional limitations, the Supreme Court decided that the House of Representatives does not have full discretionary authority to initiate impeachment cases, and that the power of judicial review can be exercised in case of grave abuse of discretion.

Now, the issue of whether or not the requisites for the exercise of the power of judicial review have been complied with. The first issue here is standing. The pro-impeachment members of Congress were arguing that the petitioners who filed the impeachment cases did not have standing. Why? Because the party who is injured here is the Chief Justice and the Chief Justice himself decided to remain silent. The Chief Justice decided not to question the acts of Congress. Who were these people questioning the acts of Congress? These were people not related to the Chief Justice. These were people the Chief Justice did not even ask to file or oppose the impeachment in his behalf. They were saying these petitioners are not injured parties, so they do not have standing to bring this case to the Supreme Court. The Supreme Court considered all these arguments. Who filed these cases? There were members of Congress, there were ordinary citizens, there were concerned citizens and taxpayers. And the Supreme Court said that since the Senate trial, if ever a Senate trial shall proceed, will involve the expenditure of public funds, then taxpayers have standing. Also, because this involves an issue of transcendental importance.

Now, the question of ripeness or whether the issues raised are ripe for judicial determination. The real question here before the Court was really whether or not the Court should be an activist Court or an advocate Court. There was a long discussion between activism and non-activism, between judicial restraint and judicial activism. The court was saying that they used to think that the activist school is the University of the Philippines and that the non-activist school is the Ateneo. Why is it that the lawyers now who are in favor of judicial interference come from the non-activist school?

1. PHIL. CONST. art. XI, § 3 (1), which states: "The House of Representatives shall have the exclusive power to initiate all cases of impeachment."

So then there was a big debate, a big discussion on what activism means, what is non-interference and what is judicial restraint. That was a major issue before the Court because one group was saying that the Court should not intervene –let the process take place, give the Senate the chance to resolve the issue because in any case this will be brought before the Senate. The other side of the question is the argument that this is a justiciable issue and the Court should not abandon its duty to rule when there is a justiciable issue. So, in any case, the Court decided to act in favor of judicial activism. And basically, it also used the suggestion of Fr. Bernas that the Court can be an activist court and rule on this issue without ordering the Congress to do something.

Now this is what actually happened. If you look at the decision, the Court made a decision but left it at that. It did not order Congress to withdraw the second impeachment complaint. It was really for the Congress to decide whether or not to comply with the Court's decision.

And then the last issue, whether or not the second impeachment complaint was prohibited. The issue here was whether "to initiate" meant "to file." Of course, there were very good lawyers on both sides. The lawyers for the members of Congress were saying that initiating is not filing. Because according to the rules of Congress, the updated rules, an impeachment complaint is filed in three ways: when there is a verified complaint by a House member, when a citizen files a complaint and it is endorsed by a member of the House and when one third of the members of the House file a complaint. That is filing but it is not initiating the complaint. This is the argument of Congress. If you look at the rules of Congress, the old rules basically say that filing is initiating. Because of the experience under the first impeachment case, Congress changed the rules. In the new rules, Congress said that filing is when you file. A complaint is initiated after filing. That means the initiation occurs when Congress itself, as a collective body, has approved the filing of the complaint. Once there is a complaint, it is only deemed initiated when the Justice Committee finds that the complaint which has already been filed is sufficient in substance. Only when the Justice Committee makes that decision is the impeachment complaint deemed initiated.

In fact, the rules were questioned before the Supreme Court and the Supreme Court said that the rules were in violation of the Constitution because if you look at the records of the Constitutional Commissioners, the impeachment complaint is initiated when it is filed. They also made use of the argument of Fr. Bernas. He said that if you look at the Constitution, it says, the House of Representatives has the power to initiate impeachment cases.[2] Then if you look down further the provision, it says, no impeachment proceeding can be initiated within one year from the first impeachment complaint.[3] So, there was a distinction between the initiation of a case and the initiation of a proceeding. The Supreme Court said, following the argument of Fr. Bernas, that an impeachment *case* is transmitted to the Senate but before the decision to transmit a case is made by the House of Representatives, a *proceeding* must first be initiated. And a proceeding is initiated upon the filing of a complaint. So that was the distinction made and the Supreme Court followed the argument by Fr. Bernas which also said that if you look at the Constitutional provisions, according to the Constitutional Commissioners, the case is initiated upon the filing of the complaint.

So, what are the legal ethics issues here? Probably, the way that lawyers argue and the way Congress knew from the beginning that it had to change the rules, because it wanted to go around the Constitutional provision. Because the first set of rules of Congress was based on the provision which says that no impeachment proceeding can be initiated within the same year and it was initiated by the filing of the complaint. That was the first rule. However, Congress changed it because it wanted to go around the Constitutional provision. It came up with it a new set of rules that filing is filing, it is not initiating. It said that filing is when you just filed and initiating is when the House's Justice Committee has approved the filed complaint as being sufficient in substance. I am sure there were also good lawyers behind that argument.

If you look at the crucial ethical and conflict resolution aspect of the impeachment, the Davide impeachment case was actually a political and a legal event which almost led to a Constitutional crisis. It almost brought our country down politically and economically. It could have resulted in very grave political and economic consequences. People were saying that the military was prepared to intervene. People were also saying that there will be another EDSA and investors were very afraid.

From the perspective of conflict resolution, this was a conflict between the House of Representatives, at least the pro-impeachment people, against the Supreme Court represented by Chief Justice Davide. Of course, we know that conflict is natural, it pervades all our relationships. There is a paradox, it destroys but it also builds relationships. Because we have conflicts and it is natural in humanity, we have lawyers. Otherwise, if there is no conflict, probably there will be no lawyers. We need conflict in our profession. So here we have a conflict, or we had a conflict between Congress and the Supreme Court.

2. *Id.*

3. PHIL. CONST. art. XI, § 3 (5), which states: "No impeachment case shall be initiated against the same official more than once within a period of one year."

The Constitution is prepared for ordinary conflicts. That is why the system of government is based on the doctrine of separation of powers — because we always see this conflict between the Legislature, the Supreme Court and the Executive department. So we have the system of checks and balances. Because conflict is normal and natural, the challenge is not to do away with conflict. We cannot eliminate conflict. There is a set of laws based on the existence of conflict. The law on conflict for example does not seek to do away with wars. It accepts war as part of human reality and it tries to manage conflict. In the end, what we really want in conflict management is peace, not just the absence of war but also positive peace where there is reconciliation.

Now here in the conflict between the House and the Supreme Court, what caused the conflict? Was it a question of different values? Was the conflict structural? Was there a misallocation of powers? Was it a conflict of different perceptions, misinterpretation, misinformation or lack of data? Was there conflict because of relationships? Was it a conflict because of different interests? You can probably say it was a conflict of values, a conflict of data or information. What was the reason for the conflict? The House was saying that the Supreme Court administers the fund and based on the computations, the funds were misused. On the other hand, the Supreme Court said, well according to our auditors, according to our data, the funds were not misused. So different data, different interpretations. The conflicts and estranged relationships began when Congressman Fuentebella had to get some information from the Supreme Court and the Chief Justice Davide, perhaps knowing that it will lead to a filing of an impeachment case against him, gave instructions to court personnel not to give access to Congressman Fuentebella. So, he went to his political party. They got angry, other members of Congress got angry, the relationship was strained so it led to the conflict.

The other cause of conflict was interest. Aside from the personal issues, the House wanted to protect and exercise its power of oversight over the purse. The JDF is based on a law and it is an expenditure of public funds and under our Constitution, the power of the purse resides in Congress.[4] The Supreme Court, on the other hand, wanted to protect its independence, its fiscal autonomy.[5] So two different interests led to this conflict. Now how is the conflict resolved? Basically, there are three modes of resolving a conflict. One is based on power, one is based on interest and the other is based on rights.

4. *See* PHIL. CONST. art. VI, § 24. *See also* PHIL. CONST. art. VI, § 29 (1).

5. PHIL. CONST. art. VIII, § 3. The Constitution provides in full: "The Judiciary shall enjoy fiscal autonomy. Appropriations for the Judiciary may not be reduced by the legislature below the amount appropriated for the previous year and, after approval, shall be automatically and regularly released."

The conflict was initially attempted to be resolved by means of power. The members of Congress went to the media, the Supreme Court went to the media. The members of Congress mobilized their colleagues and the political parties while the Supreme Court tried to mobilize the citizenry. So it was a conflict of power which was costly for the divided nation. It also caused some economic problems. During that time the exchange rate worsened.

There was also an attempt to resolve the conflict by means of interest-based solutions. In the beginning there were negotiations, one-on-one negotiations — which is the best form of actually resolving conflicts — to discuss the problem case to case. But that did not work between Congressman Fuentebella and Chief Justice Davide. They needed third party intervention, they needed mediators. Mediation is a mode of conflict resolution which is actually assisted negotiation. So the negotiation continued with the help of third party intervenors and who were these people? Well, we had Speaker Jose de Venecia, who tried to bring the parties together. We have the different political parties. Even the President tried to mediate between the parties and there were also civil society organizations. Normally, in this type of situation where there is a raging controversy, mediation is normally called for. Why? This is because mediation is not costly. It is confidential, informal and non-confrontational. It preserves relationships and the solution can be enduring. One advantage of mediation is to go for a win-win solution. In fact this was the proposal of Speaker Jose de Venecia and this was also the political settlement that the President Gloria Macapagal Arroyo was looking for. This was an interest based procedure.

The other kind of procedure is rights based which is litigation. When we filed our petition, some groups approached us and said, "I heard that you are among the petitioners, can you please withdraw your complaints? Can you please talk to other petitioners and ask them to also withdraw their complaints? Because we will talk to Congress and we will ask Teodoro Fuentebella and NPC other people to also withdraw their complaints. So that we will not have this political problem anymore, so that we can avoid a crisis, so that we can avoid a military take over." To achieve a win-win solution, the political settlement that people were asking for was to withdraw the case before the Supreme Court. That was a difficult question. On the one hand, people also wanted to go to the courts, which is a rights-based procedure and based on what the law says, ask the Court to decide.

Now, why would people want to go to the courts? One reason is to establish a legal precedent. Another reason is to publicly prove the truth. When we were asked whether or not to withdraw our petition, these were some of the questions in our mind. Are we going to go for a legal precedent

and publicly prove the truth behind this controversy or are we going to try to settle this and avoid a crisis? Either way, the rule of law will be enhanced because if you avoid a crisis, the case will be settled and the constitutional crisis would be avoided. However, by ruling on the matter, that would be upholding the rule of law. The courts were saying that the members of Congress were violating the Constitution. They were violating the rule of law because the Constitution said no second impeachment proceeding can be initiated within the same year. They were not following the rule of law by filing the second impeachment complaint. In the end, we decided to go for litigation. Why? Our main reason was that most probably, in mediation, the issue will be settled but there will be many compromises which would be confidential. We will not find out whether there were concessions in the negotiated settlement. So, we decided to forego the political solution and opt for a court proceeding and file the case. The other reason is, for our decision was that there was, between the first and second impeachment complaints that we know, another impeachment complaint. There was a second impeachment complaint filed against Justice Bellosillo. The lawyers of Justice Bellosillo in preparing for this case knew it was going to the Supreme Court, so in order to address possible problems of standing, they prepared a petition entitled "*Bellosillo v. House of Representatives*." Their argument was that the Constitution bars the filing of second impeachment complaint against the same person within one year. What happened to that petition? Nothing. The complaint was withdrawn, it was settled through mediation. If that went to the Supreme Court, then there would have been no second impeachment complaint against Chief Justice Davide. The Supreme Court would have settled that already. As it was settled by means of a compromise, the whole thing was confidential. We do not know about it nor are we aware of the concessions made in the settlement. So that is why we had this second impeachment complaint against Chief Justice Davide.

When the argument ended in the Supreme Court, some of us were shown another impeachment complaint against Chief Justice Davide, a third one. The basis of the complaint was graft and corruption because the Supreme Court has a seminar house in Tagaytay, a training house for the Philippine Judicial Academy members and the Supreme Court earns money out of those projects. The allegation of graft and corruption was based on the use of those funds. So a third impeachment complaint and many more impeachment complaints were being prepared. Indeed, it was important for the Supreme Court to have settled the case.

Now, there are negative functions of conflict. It destroys. But there are also positive functions of conflict. It builds. Conflicts help the parties assess each other's power. Now the House knows where it stands before the public.

Its image has been tainted and the image of the Supreme Court has been enhanced because of this conflict. It also helped maintain group identities and consolidate political parties. That is a positive function. What happened to the House of Representatives? In a sense, it was consolidated. The Supreme Court was also consolidated. It was a solid Supreme Court. There were dissenting opinions but basically, it was an overwhelming decision against the second impeachment complaint. Lastly, another positive function of conflict which happened in this case was the modification of rules, norms, laws and institutions. Because of this conflict in the impeachment case between the House of Representative and Supreme Court, the rule of law has been upheld. The constitutional provision is now much clearer. We know what it means. The Congress also knows what it means. The parameters of their powers have also been clarified and explained by the Supreme Court. Another consequence is that the benefits, the salaries and allowances of court personnel have been increased. Also, I am sure that the House of Representatives and the Senate are more careful and wary of each other's powers. So we can look at this conflict as having brought positive and negative consequences. However, the positive outweighs the negative as we have avoided a constitutional crisis. The question really for us is, is the conflict really over?

Well, we will find out on June 1, 2004 because by that time, there is no more one year bar to the filing of a second impeachment complaint. My hope and prayer is that there will be no second impeachment complaint against Chief Justice Davide and people will decide to move forward whether or not we have a new president. Because the whole issue is related also to what happened to the conflict between President Estrada and President Arroyo. The impeachment complaint was filed against the Justices because according to the allegations, they took sides and the second impeachment complaint was filed because the people behind it believed that the first impeachment complaint will not succeed. I hope that the election settles this conflict, let us keep our fingers crossed and wait for June 1, 2004 to pass.

Raising Issues on the Bar Exams, Ethics and Impeachment

*Rene A. Saguisag**

In August 1963, our first bar examinations subject was Civil Law, which I promptly and gloriously flunked. I had finished law, *cum laude*. I had gifted Civil Law teachers, such as Justices Edgardo Paras, Eduardo Caguioa and Ricardo Puno. It is only now that I reveal my secret shame in true confession style, maybe partly because I would earlier have broken their hearts. Professor Dick Puno survives but it happened, as the ballad goes, oh so long ago so, how important can it be?

That first Sunday, I was tentative in my first answers, which I crossed out and changed. Still, I felt I did well overall. But, first impressions are lasting; the untidiness may have struck the examiner negatively. I settled down as the weeks wore on. I took my time. On the last Sunday, we had Remedial Law, where I got 95%. I ended up sixth among 5,453 examinees,[1] the highest number to take the exams (in 2003, 5,357 did).[2] What if I got 49% in Civil Law? I would have had to repeat all eight subjects.

There must be a better way. Last year's leakage in commercial law forces us to pause and ask again whether there is a better way to test one's fitness for the bar. In my first year law in the University of Negros Occidental (now UNO-Recoletos), I obtained 1.6 in Persons and Family Relations and 1.8 in Obligations and Contracts. In San Beda, my other grades in Civil Law were 93% in Property, 91% in Agency, 84% in Sales, 88% in Credit Transactions, 88% in Partnership, 88% in Succession, and 85% in Civil Law Review. And I would flunk Civil Law?

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1. *1210 out of 5,453 pass bar tests*, MANILA TIMES, Feb. 25, 1964, at 1.
2. Per verification with the Office of the Bar Confidant, Supreme Court, on Jan. 20, 2004, as against the published number of 5,455 which must have been the number of those who applied to take the exams; not all might have started while other may have quit after starting.

But first, the restoration of the integrity of the bar examination must be decisively addressed. The results of the probe ordered by the Supreme Court have some out. The next step is to impose the proper sanctions. The person who caused the leakage must be prosecuted and convicted in a proper case.[3]

The grades may simply be "pass" and "fail", with "outstanding" or "excellent" in a proper case.[4] The inordinate hooplah associated with the bar examinations Top Ten should be down-played or eliminated, as in the tests in the other professions. "Bar operations," unknown in my time, leave me with mixed feelings. In my time it was essentially a solo effort.

Don Claro M. Recto and Gerry Spence did not make it the first time they took the exams. Senator Hillary Rodham Clinton did not make it either in Washington, D.C.[5] But, failure is largely a non-issue in the United States, just another bump in the road. The glamour must go.

On application, an examinee may be asked only to retake the subject or two he may have failed. He may write an appeal to show his failure was a fluke. Transcripts of grades from the consistently top law schools should count for something. (But, I see merit in the assertion that there is no bad school for a good student and no good school for a bad one).

Random chance plays a role. In our pre-week, I got hold of perhaps the only copy in San Beda of Judge Simeon Gopengco's commercial law reviewer, from which the examiner lifted many of her questions. I got 89% in the

3. The Supreme Court issued its Resolution, dated Feb. 4, 2004, concerning the leakage of the questions in Mercantile Law subject in the 2003 Bar Examinations (*In Re* Bar Matter No. 1222), which saw the nullification of the bar examination on the subject and the formal conduct of investigation by an Investigating Committee. The Resolution, adopting the findings of the Investigating Committee, decreed the disbarment of the associate lawyer of the examiner in Mercantile Law, whose act of downloading the questions from the computer of his superior (the examiner) and leaking them to friends was deemed to constitute "a criminal act of larceny." The Court also reprimanded the examiner with a requirement "to make a written APOLOGY to the Court for the public scandal he brought upon it as a result of his negligence and lack of due care in preparing and safeguarding his proposed test questions in mercantile law," and withheld the payment of any *honorarium*.
4. As in the case of a Justice's niece. People v. Romualdez, 57 Phil. 142 (1932). There, interestingly, exams "correctors" were employed.
5. She did pass the Arkansas bar exams which convinced her that her "test scores were telling her something" when she and Bill Clinton talked about their future. H. CLINTON, LIVING PRESIDENCY 64 (2003).

subject. A good chess player, they say, is always lucky but we should minimize the role of chance.

"Tips?" There also were, in our time, to which I would listen if only to test my readiness for any question. During pre-week, I barely slept from Monday to Friday. But, on Saturday, I slept long and well; the next day I would be as fresh as a daisy. The others looked bushed, having stayed up late looking for tips, 99.99% of which were spurious. But, there was indeed a widespread leak in International Law involving a few right-on-the-nose questions. The amiable woman reviewee from a southern law school who helped me, unbidden, I met again serendipitously in 1969 in Wisconsin. Yet, the other questions were quite tough. When unsure, I used Latin. I got 92%, a mark higher than I had thought I deserved, the reverse of my Civil Law experience. Things balance out?

Questions should be so framed so that the examinee is not tested on what correct answers to give, but on what questions to ask, "to spot the issues," in other words. In the real world out there, the client does not ask a lawyer to enumerate the ways of extinguishing an agency or define terms. Words tumble out of the client's mouth and the lawyer sifts the chaff from the grain.

A good command of the language is crucial.[6] I look for the ability to reason out with clarity some conclusion that is legally tenable, intellectually respectable and psychologically satisfying, even if it defies settled case law (but the examinee must show an awareness of it).

One problem with clarity is that one can be wrong clearly. But then, who is "wrong" in an 8-7 ruling? From unanimity originally, when no one might have been paying attention during the deliberations, votes may scatter on an edifying move to reconsider. Today, we have a Judiciary seen by some sectors as having members who are intrusive populist political operators and/ or economic regulators (and even regime changers).

Our country has arguably become a very risky place to invest in. Investors put in good hard-earned money. Years later, the Supreme Court rules that the contract, earlier reviewed by government and private lawyers, is illegal. On motions for reconsideration, the earlier unanimous voting gets scrambled. Predictability is gone and one who lives by the crystal ball may end up eating broken glass.

6 I got to Harvard on a full scholarship via a simple letter I dashed off to beat the deadline to gain entry into Brandeis' "sacred precincts of Harvard Yard." I had great grammar teachers from grade school (Makati Elementary School).

The examinees should be hammered as to ethics. The Supreme Court must show the way. For one thing, in controversial cases, the public gets to know the decision in advance. It would thus seem that a number of justices in the collegiate tribunals talk too much (and the rationale of client and counsel is that the other side is doing it and they need to level the playing field).[7]

Years ago, a woman graduate from a prominent Catholic law school (not San Beda), who I had not known existed, called from out of the blue and asked me if I knew Justice Florenz Regalado. I said, yes, very well indeed. Why should she have to know? Because, she said, he was the only one her firm had not yet spoken with. For crying out loud! She had thought that influencing justices was just another day in the office. I said for her not to even think about it. To me, when a friend gets to the Supreme Court, I lose a friend. After the felicitations, I would shun all contact. We should have 15 magistrates who we should help avoid familiarity, even among themselves, if possible.

The Supreme Court is given no role by the Constitution in picking its members. Yet, it intrudes and uses as criterion the ability to get along well with the incumbents, which does not conduce to getting the best composition. The U.S. Supreme Court plays no known role in picking its members who have even been called as "nine scorpions in a bottle," ensuring creative tension.

The U.S. Supreme Court is still criticized for its pro-Bush ruling in December 2000. But no one questions the integrity of the process by which it was reached. I doubt that any member of that Court was improperly approached or worse, initiated the contact. Today, we continue to have serious perceptual problems with our "activist judiciary." Knute Rockne said "[m]ost men, when they think they are thinking, are merely rearranging their prejudices."

7. Thus, one columnist reports confidential matters in the DAILY INQUIRER. *Bantay Kataringan* casually narrated how it obtained equally confidential information from sources in the Sandiganbayan on the issue of President Joseph E. Estrada's motion for permission to travel to the U.S. for medical purposes. This talkativeness would chill chamber debates because taking a devil's advocate position could be twisted in the media. Worse, outside forces could work to influence a rumored outcome. We comment journalistic enterprise but are uneasy with the way magistrates talk about what they say and do which perhaps can wait for their retirement. I continue to be uncomfortable with the idea of such *ex parte* contacts.

Here, to repeat, original decisions, when subjected to reconsideration, at times change drastically, creating the impression that in the first instance, not much attention is really paid to the case; then, someone is reached.[8] We should have 15 citizens, out of 80,000,000, willing to be recluses, forget school or fraternity ties, kinship, or connections and keep lips shut.

There must be transparency on money matters however. Up to now, we have seen no real compliance with the requirement of Section 3 of P.D. No. 1949 that the Commission on Audit must make a quarterly report of the Judiciary Development Fund (JDF). It sparked a fight that was really between the rank and file and the Chief Justice. But, the spinmeisters succeeded in portraying it as one between the Brat Pack and the Chief Justice. In fact, to the end, 77 Congressmen, including the House's most senior member, the widely respected Congressman Herminio Teves, voted to transmit the Articles of Impeachment to the Senate. They withstood the tremendous pressure from the so-called "civil society," whose ouster of a duly-elected President in 2001 helps explain the phenomenon of "the Inevitability of Ronnie."[9]

Ousting one of 15 justices would not have benefited anyone because the replacement could even be more tractable. But, the media here, unlike say the New York Times, which mainly reports, have king-making publishers and egotistical editors who want to decide for the country, nostalgic for their role as the "alternative press" which helped rid us of the dictatorship. They are, at once, too quick to condemn or absolve without due process.

It is the author's view that in the JDF impeachment case, the Supreme Court swiftly and remarkably judged its own cause.[10] The Senate should have been the proper forum, the constitutionally correct position advanced by Senator Jovito R. Salonga. When public money is involved, technicality is anathema. One accounts to the people. This has not really been done yet as

8. On the lighter side, lawyer jokes speak of the need to file a "motion for reconsideration," or a "motion to see each other." We laugh that judges rule, "Granted, as paid for." Or when the gratification is in the future, it is "Wherefore, promises considered, . . ." Judges are respected when they blurt out indignantly, "I never ask!" but, - in reference to so-called "smiling money," clarify, "I never refuse!" And "took no part" is translated to "*hindi pumarte*," as if the others did.

9. The title of my column in the June 21, 2002 issue of Today on Fernando Poe Jr. who would be leading a quiet life today had it not been for the unconstitutional misadventure in 2001.

10. Francisco v. DeVenecia, G.R. 160261, Nov. 10, 2003; and 17 companion cases.

to the JDF which has become the counterpart of the Countrywide Development Fund of lawmakers. P.D. No. 1949 mandates that the Commission on Audit "shall quarterly audit the receipts, revenues, uses, disbursements, and expenditures of the Fund, and shall submit the appropriate report in writing . . . copy furnished the Presiding [Justice of the Court of Appeals] and all Executive Judges." It has not been done. If we go quarterly we will know what is being done with the JDF. Bulk reports mislead.

I would not mind if a Supreme Court Justice gets P300,000 a month all told as is said, or even more, but only the facts can make the whispers stop. No more rationalizations on how old certain Baguio facilities are.

The money is only for "cost of living allowances, and . . . for office equipment and facilities of the Courts located where the fees are collected." Else, we might imagine technical malversation, if not worse,[11] with all due respect.[12]

I have never understood the strange ruling in this country that an impeachable constitutional official may not be sued without first being impeached, a very difficult process which can hardly compete for the limited time of the legislature. Ombudsman Aniano Desierto was ruled that he may not be disbarred without first being impeached.[13] (What about impeachable non-lawyers?) We are told that the Supreme Court directed the probe of the Chairman and Members of the Commission on Elections for possible criminal

11. Thus, the Philippine Institute of Certified Public Accountants has agreed to conduct a special audit of the JDF, and the COA has agreed, according to Representative Jesli A. Lapus. Court employees raised suspicions that Davide misused the JDF by apportioning amounts more than the allowed limit for the construction and repair of existing cottages in Baguio City and the renovation of the Supreme Court session hall in Manila, resulting in the reduction of the employees' allowances. "This is the only way to satisfy all parties . . ." he said. PEOPLE'S JOURNAL, Jan. 31, 2004 p. 13 col. 1. *See also* TODAY, Feb. 2, 2004, p. 10, col. 1 and DAILY INQUIRER, Feb. 2, 2004, at A6.

12. With all due respect, no public official, from the presidency to the barangay, should appoint his children to bids and awards committees. If the highly-regarded Chief Justice may do so, because he says he is entitled to appoint people of his confidence, then all other public officials, down to the Barangay level, may also do so. I am not sure if the term for this is nepotism, a huge problem in a country where we treat positions as all in the family, perpetuating dynasties.

13. Resolution En Banc dated Dec. 5, 1995 in A.C. No. 4059, Jarque v. Disierto (sic) (unreported).

complicity.[14] If true, why ever not indeed? And it is something which should likewise apply to Supreme Court Justices and the rest of officialdom. We borrowed the impeachment concept from the U.S. where even presidents for centuries have been sued. The last one was President Bill Clinton who was hounded by Paula Jones and Kenneth Starr. The busiest public official of the world had to deal with lawsuits and subpoenas.

My belief that local decisions comprise judicial witchcraft has long been on record.[15] We cannot have a royalty who are above the law. Yet, if the one sought to be sued is a member of a collegial body, its work could go on unhampered. The presidency, on the other hand, is the locus of so much responsibility. Yet, America survived and boomed, even with the Clintons being harassed by grand jurors and impeachers.

In the U.S., even convicted impeachable officials continue to receive their salaries because they have not been impeached and therefore continue to be in public office. But, this only serves to emphasize that an impeachable public official may be prosecuted meantime. Violations of law must be exposed and probed at once. Incumbent President Richard M. Nixon was sued in a civil case in relation to a government contract; he had to pay $142,000 to buy peace and settle the case.[16] Indeed, even in our jurisdiction, it is not at all clear what the source of the claimed immunity is. Maybe blue blood was, but our tradition is to look more to the U.S., born in revolt against royalty.[17] Our Supreme Court should go back to the time when by its compelling leadership by example, even a justice of the peace was respected.

14. Information Technology Foundation of the Philippines v. Commission on Elections, G.R. No. 159139, Jan. 13, 2004.

15. *See generally*, Rene A.V. Saguisag, *A Case of Judicial Witchcraft*, KILOSBAYAN MAGAZINE 9 (Jan. 1996).

16. Nixon v. Fitzgerald, 457 U.S. 731 (1982). Fitzgerald had lost his Air Force job after he revealed to a joint congressional committee, over $ 2 B in cost overruns on the C5-A transport aircraft. The Civil Service Commission ruled that it was illegal to fire him in bad faith in the guise of a general reorganization and ordered him reinstated with back pay.

17. But, I urge the reader not to follow what the Supreme Court says about not relying on American jurisprudence. I say let us look at that, and the traditions of other cultures as well, all the way to Mansfield, Puig, Hammurabi, Confucius and Genesis. I am disappointed we no longer have Roman Law, which I used to teach. Our insularity may lead us deeper into the wilderness and all we have to offer may be "derelicts on the waters of the law," to borrow from Justice Felix Frankfurter. Lambert v. California, 355 U.S. 225, 232 (1957).

Let's kill all the lawyers then? The Bard said this at a time when royalty was in flower, when he in fact paid us in the profession the supreme compliment: those who would take over should get rid of the Tañadas, Dioknos, Salongas and Arroyos. Marcos did not and they validated the widely misunderstood exhortation.[18] A little learning is a dangerous thing.

I write this in February, 2004. Another graduation is nigh. There will be the usual commencement speeches which Justice George Malcolm said, on one such occasion at the Philippine Women's University, no one cares for really. The graduates just want to be with their loved ones, the sooner, the better.

What I said to batch 1992 law class of Ateneo, on the kind invitation of then Dean Cynthia Roxas-del Castillo, not even I really remember. But, there is one commencement speech that, for me, will never be beyond easy recall. The late Justice Pompeyo Diaz delivered it in your great law school. Get a copy of it, read, cherish and live by it, and forget we do or tell you today.

He entitled it a *Passion for Justice*, delivered on March 25, 1981. I dip into it from time to time to help ensure that I do not get deflected from the fixed stars pointed out to us in law school. To borrow from H.L.A. Hart, during several re-readings of the speech, my interest never waned for a moment, and I am certain that I shall return to it to ponder its wisdom and to spur my ever-flagging efforts at self-criticism and self-improvement.[19]

We end where we begin. We must revisit the bar exams, reduce the role of chance and eliminate the conditions that have given the tests inordinate importance. Ethics must be stressed, stressed, stressed.

When Ives, a lawyer, became a saint, the people were astonished. Yet, we can settle for secular models like honest Abraham Lincoln, who did not have any formal schooling in law.

Be lawyers who cannot be bought. Learn to sail against the wind but keep the rudder true. Believe in the Constitution and its presumption of innocence. Do not be intimidated by Cardozo's "hooting throng."

Stay as sweet as you are.

18. "The first thing we do, let's all kill the lawyers." WILLIAM SHAKESPEARE, HENRY VI, Part II, Act IV, Scene II. The speaker was Dick the Butcher, a know-nothing thug in Jack Cade's gang.

19. I continue to admire this magistrate whose excellent judgment showed in his giving me 95% in Evidence. As the reader can see, much of reminiscence is vanity, to paraphrase the Durants.