OPINIONS OF THE SECRETARY OF JUSTICE

On the NSDB Chairman as Director of a Depositary Bank and the Anti-Graft Law

OPINION NO. 160, S. 1960

In your letter of the 3rd instant, you state that sometime in the early part of this year, that Office chose and constituted the Philippine Banking Corporation (PBC) as the official depository of its research funds; and that on June 21, 1960 — for reasons which had nothing to do with the above act — you were offered membership in the Board of Directors of the said Bank, which you accepted. You now desire an opinion on whether your continuance as a director of the PBC is violative of Republic Act No. 3019, otherwise known as the Anti-Graft and Corrupt Practices Act.

By Section 11(2) of Article VII of the Constitution and the specific provision of Section 22 of the Science Act of 1958 (Republic Act No. 2067), the Chairman of the National Science Development Board (NSDB) "shall not, during (his) continuance in office x x x intervene, directly or indirectly, in the management or control of any private enterprise which in any way may be affected by the functions of (his) office x x x".

That a member of the board of directors of a private business entity, such as the PBC, intervene in the management or control thereof, there can be no question. For the body of which he forms a part is the ruling group that lays down business policies and passes upon the more momentous corporate matters, all calculated to insure the financial success of the enterprise it governs. Thus, this Department has ruled that the above interdiction clearly disables an officer subject thereto from holding a controlling interest and/or from being an officer, *such as director,* in a private enterprise which in any way may be affected by his official functions." [See attached copy of Opinion No. 34, series of 1960, citing Hernandez v. Solidum and Concepcion, Jr., CA — GR No. 25177-R (promulgated January 23, 1960) in which pertinent deliberations in the Constitutional Convention are reproduced.]

Equally clear, it seems to me, is the import of the phrase "which in any way may be affected by the functions of (his) office". There need not be an actual dealing with the Government; it suffices that there is a probability or reasonable possibility that a private business may be affected by one's official functions. (ibid.)

In the instant case, however, it is wholly unnecessary to make a determination on this point. For it is conceded and a matter of record that the PBC was in fact affected by the functions of the NSDB when the latter chose the former, among other qualified banks, as its depository.

Independently, therefore, of the provisions of the Anti-Graft and Corrupt Practices Act, your continuance as a director of the PBC constitutes a violation of the constitutional and statutory edict quoted above.

But such continuance is likewise covered, in my opinion, by Section 3(h) of Republic Act No. 3019, which renders a public officer criminally liable for —

"Directly or indirectly *having financial or pecuniary interest in any business,* contract or transaction in connection with which he intervenes or takes part in his official capacity, or *in which he is prohibited by the Constitution or by any law* from having any interest." (Emphasis supplied.)

The query is answered accordingly.

(Sgd.) ALEJO MABANAG
Secretary of Justice

On The Parole of An Insane Inmate

OPINION NO. 164, S. 1960

You ask: May an insane inmate be granted parole or conditional pardon, if his relatives promise to take care of him upon release from prison?

A parole is akin to a conditional pardon: (Tesoro v. Director of Prisons; 68 Phil. 154) both are, in a sense, contractual in nature; both impose conditions to be performed or complied by the convict, and both *require the assent of the person to whom it is tendered, for its efficacy.* Can an inmate prisoner accept *voluntarily* and in good faith, a parole or conditional pardon? Quite obviously not. And, therefore, they cannot be thus favored. *An insane person is incapable, because of such insanity, of accepting a conditional pardon, and its nonacceptance is fatal to its efficacy.* The assumption that a right was vested in one granted a conditional pardon by such pardon carries with it the conclusion that his mental condition was such as enabled him to accept the express conditions upon which the right depended. (39 Am. Jur. s. 67, p. 561). We might add that one of the conditions of a parole and a pardon is that the prisoner shall not violate any of the laws of the Philippines during the term thereof. No one would seriously dispute that an insane person cannot clearly bind himself to observe such a condition — or that anyone else can do so for him.

Finally a prisoner's sentence is suspended when he becomes insane or an imbecile. He cannot, therefore, be paroled for the suspended sentence; as a matter of fact, the period of prescription runs in the insane prisoner's favor during his insanity. (Art. 79, R.P.C.)

The query is answered accordingly.

(Sgd.) ENRIQUE A. FERNANDEZ
Undersecretary of Justice

On The Exportation of Low Grade Abaca Containing High Grade, and The Anti-Graft Law

OPINION NO. 168, S. 1960

This is in reply to your letter requesting my opinion on "whether or not the Board in approving the applications for the barter of low grade abaca containing high grade in conformity with its Resolution No. 47, adopted on August 8, 1960, could be held liable for violation of Section 3, paragraph (j) of R. A. 3019, otherwise known as the Anti-Graft Law."

The cited provision reads as follows:

"(j) Knowingly *approving* or *granting* any license, permit, privilege or benefit in favor of any person not qualified for or not legally entitled to such license, permit, privilege or advantage, or of a mere representative or dummy of one who is not so qualified or entitled." (Underscoring mine.)

You state that on August 24, 1959, the National Economic Council issued a certification as required by Republic Act No. 2261 regulating the exportation on a commodity-to-commodity trade basis of marginal domestic or mineral products therein enumerated, which includes "low-grade hemp"; that this certification contains a list of the different grades of low-grade abaca (see pages 2-6 of Appendix I) but the same was revised by the NEC at its meeting of November 19, 1959, when it approved a proposal to allow, in addition, "the barter of the following grades: *S2, S3, I, J1, G,* and all grades below AD1," provided it "shall be granted only to producers;" and that in view of a report dated February 11, 1960, submitted by the Fiber Inspection Service to the Secretary of Commerce and Industry, to the effect that "grades 'S2' and 'S3' and 'I', 'J' and 'G' belonging to excellent and good groups of cleaning, respectively, should be considered *high grade* abaca," the Producers Incentives Board at its meeting of August 1, 1960, decided to act favorably on pending barter applications of abaca producers only "insofar as they involved low grade abaca from 'J2' and below," i.e., not including grades S2, S3, I, J1 and G, mentioned above.

It appears, however, that the applicants adversely affected by this decision of the PIB, who claim that they have already invested heavily in the form of interests on loans, accumulated stocks and other expenses, have succeeded in persuading the Board to take into account alleged "reasons of equity, fair play and justice" and to modify, as it did, its decision in order that "all applications for barter of low grade abaca *containing grades* above grade 'J2' as per NEC certification of November 19, 1959, . . . [may] be processed and given due course." (See Resolution No. 47 adopted on August 8, 1960.) The Board apparently is aware that its final approval of the pending applications would result in the exportation of high grade abaca for purposes of barter in contravention of the explicit provisions of Republic Act No. 2261 which includes in its listing of barterable products, "*low-grade* hemp" only. For this reason, the Board now seeks legal advice as to whether if it should do so it would violate the above-quoted provision of the Anti-Graft and Corrupt Practices Act, which went into effect on August 17, 1960.

We have been informed verbally by your office that the Board actually has not yet approved the pending barter applications insofar as they relate to high grade abaca. Indeed, as regards such applications which might have been approved prior to the effectivity of the aforementioned Act, it is obvious that the Board members cannot be held liable criminally therefore even if they exceeded their authority since penal statutes as a rule operate prospectively. (See Article 22, Rev. Penal Code; U.S. v. Soliman, 36 Phil. 5.)

It will be noted that in the exportation of any of the barterable products enumerated in section 1 of Republic Act No. 2261, the National Economic Council is merely called upon to ascertain and certify to the existence of two conditions, namely: (1) that the products cannot be sold profitably for dollars or other freely convertible currency in foreign markets, and (2) that there is an adequate supply of said products to meet local requirements. The NEC is also entrusted with the responsibility for conducting a continuous study and survey of all marginal and submarginal industries and directed to make the necessary recommendations to Congress, every year, as to the industries that deserve to be given or deprived of the incentive granted by said Act. None of its provisions, however, vests in the NEC the power to add to or enlarge by construction the list of marginal products which may be exported, under the said conditions, on a commodity-to-commodity trade basis. I have already indicated this in a previous opinion. (See Opinion No. 6, s. 1960). The Producers Incentives Board evidently entertained the same view when it decided on August 1, 1960, to approve barter applications only with respect to "*low grade* abaca from 'J2' and below," after taking into account the report of the Fiber Inspection Service that hemp classified as S2, S3, I, J1, or G is or should be considered as *high grade abaca.* While it is true the PIB subsequently approved, on grounds of "equity", a resolution pursuant to which pending applications for the barter of such grades of abaca filed in

good faith (on or before June 17, 1960) may "be processed and given due course", this action of the Board is actually a reiteration of its position that abaca so graded or classified is not "low-grade hemp" and that the NEC certification insofar as it relates to the said grades is contrary to the statute and should be disregarded.

I think that the refusal of the PIB to allow the exportation, for purposes of barter, of such high grade abaca is well taken. The findings or conclusion of the Fiber Inspection Service should be accorded great weight since, as admitted by the applicants' counsel, it is the government agency charged with the "classification and inspection of abaca intended for export." It may be pointed out, too, that the NEC itself states, in its certification, that "definitions and classifications were largely those of government agencies except in a few cases where trade definitions were accepted."

Upon this posture, I believe that the question raised as to whether the final approval by the Board of pending barter applications in accordance with its resolution No. 47 would constitute a violation of Section 3(j) of Republic Act No. 3019, should be, as it is hereby, answered in the affirmative. For by approving such applications the Board would be allowing the applicants to export, on a barter basis, certain grades of abaca knowing the same to be high grade abaca, which is absolutely not barterable under the provisions of Republic Act No. 2261.

The equitable consideration invoked by the applicants, and adverted to in Resolution No. 47, constitute in my opinion no legal justification or excuse for an act plainly in contravention of the statute. The law, it is often said, is presumed to be equitable and just. It is the duty of the courts and administrative agencies "to declare the law to be that which the legislature, acting within its constitutional power, enacts, even though such legislation appears . . . to be unfair or unjust." And the statute may not be changed by the court or administrative agency "to make it conform to its conception of right and justice in particular cases." (50 Am. Jur. 379.)

(Sgd.) ALEJO MABANAG
Secretary of Justice

On The Use Of Textbooks in The State University, and The Anti-Graft Law

OPINION NO. 170, S. 1960

Having prepared a revision of an old book previously used in the U.P. College of Law, you desire to know whether you may, in your capacity as professor, adopt the use thereof after having secured approval of its price in accordance with University regulations, without violating the provisions

of the Anti-Graft and Corrupt Practices Act. In this connection, you state that your revised book will be published by a private party with whom you have no business connections except that you will be paid a certain percentage on gross sales as royalty.

The use of textbooks in the University of the Philippines is governed by Article 28 of Chapter 4 of the University Code, the relevant provisions of which read as follows:

"Sec. 93. No class text, either in the form of a book or outline or readings, or the like, or any new edition thereof, shall be used by any member of the faculty in the course of instruction, or recommended to students unless and until (1) a Committee of the Faculty of the College or school in which it is proposed to be used, such Committee to be appointed by the Dean or Director thereof, has recommended to the Dean or Director that such book, or readings, or outlines, or the like, be prescribed and the Dean or Director has approved such recommendation, and (2) the price thereof has been approved by a Committee to be designated by the President for the purpose. x x x"

As I see it, the intervention of the dean and college textbook committee in the screening and approval of textbooks is designed for the limited purpose of determining their intrinsic merit and pedagogical suitability. The inquiry is directed at the books alone. And the resulting action, be it favorable or adverse, entails no commitment or obligation for anyone, much less the government or the University of the Philippines, to purchase the books. No government contract or transaction either with the author or publisher is involved; nor will the approval of a particular book lead to such a contract or transaction. If approval is obtained, the use of a given book may be officially adopted. But no compulsion is placed upon the students to buy it.

It is also relevant to note that what may be authorized to be adopted for official use in any subject is not, so I understand, necessarily limited to a single book. Where there are several professors teaching the same subject, they may submit for approval books of different authors. And if the books submitted meet the required standard, all of them, after approval, may be used as class texts.

But there is another circumstance worthy of consideration. In view of the purpose of the University requirement first mentioned above and as intimated in your letter, textbooks prepared by a dean do not, it seems, require prior approval by college authorities before they may be prescribed for official use. For it may reasonably be supposed that a dean is sufficiently responsible and competent to prepare textbooks of the requisite standard. Moreover, it would be idle to require him to pass upon the merit of his own work. There is therefore no occasion for you, as the Dean of the College of Law, or any subordinate body under you to pass upon and approve the teaching materials you have prepared.

For all the foregoing, the query is answered in the affirmative.

(Sgd.) ALEJO MABANAG
Secretary of Justice

On The Licensing Of Pleasure Yachts

OPINION NO. 179, S. 1960

Opinion is requested on "whether or not a yacht owned in common by a Filipino citizen and an American citizen to be used and employed exclusively for pleasure, may be licensed by the Bureau of Customs under Section 812 of the Tariff and Customs Code", which insofar as pertinent reads:

"SEC. 812. *License of Yachts Exclusively For Pleasure.* — The Commission may license yachts used exclusively as pleasure vessels *owned by Filipino citizens,* on terms which will authorize them to proceed from port to port of the Philippines and to foreign ports without entering or clearing at the customhouse: x x x." (Underscoring supplied.)

This section is embodied in Republic Act 1937, known as the Tariff and Customs Code of the Philippines, which took effect on July 1, 1957.

Prior to the enactment of the said Act the customs law of the Philippines was found in Chapter 39 of the Revised Administrative Code and the specific provision thereof governing the licensing of pleasure vessels was Section 1176 1/4 which provided in part as follows:

"Sec. 1176 1/4. — *License of Yachts Exclusively for Pleasure.* — The Commissioner of Customs may license yachts used and employed exclusively as pleasure vessels *owned by Filipino or American citizens,* on terms which will authorize them to proceed from port to port of the Philippines and to foreign ports without entering or clearing at the customhouse: x x x." (Underscoring supplied.)

This provision, it will be observed, is almost identical to the provision of Section 812 of the Tariff and Customs Code hereinabove quoted except that in the latter, the words "or American" found in Section 1176 1/4 of the Revised Administrative Code have been deleted. The elimination of the said words was in line with the policy of Republic Act No. 76 which repealed "all existing laws or the provisions of existing laws granting privileges, rights or exemptions to citizens of the United States of America . . . which are not enjoyed by citizens or nationals of any other foreign state . . ." except such rights as may have "already vested under the provision of the Constitution or . . . extended by any treaty, agreement or convention between the Republic of the Philippines and the United States of America."

It will thus be seen that pursuant to Section 812 of the Tariff and Customs Code, construed in the light of its historical background, the licensing of pleasure yachts is limited only to Filipino citizens. The same right or privilege may accrue to American citizens if it has been extended

to them under the Constitution or by any other law, treaty, agreement or convention between the Philippines and the United States.

The so-called "Parity Amendment" to the Constitution extends to American citizens and business enterprises whatever privilege is given to Filipinos in the "disposition, exploitation, development and utilization of all agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, and all forces and sources of potential energy, and other natural resources of the Philippines, and the operation of public utilities." Obviously, the privilege accruing from a license on a pleasure yacht, such as the privilege to proceed from port to port of the Philippines and to foreign ports without entering or clearing at the customhouse, is not included within the purview of this constitutional amendment.

The Office is not unmindful of the fact that a license for a pleasure yacht is substantially much less important than any of the rights extended to American citizens under the "Parity Amendment" and it may be argued that if such fundamental rights as exploiting, developing and utilizing our natural resources and operating public utilities are granted to American citizens, the lesser privilege of a license for a vessel used exclusively for pleasure should also be extended to them. This must be the point of view of the Commissioner of Customs when he said in his letter of April 27, 1960, that his Office "does not see any valid reason to deny the licensing of said yacht." This view would undoubtedly by correct in the absence of a specific provision on the matter but considering the explicit language of Section 812 of the Customs Code, that view must yield to the intendment of the law.

It must be understood, however, that non-issuance of the license contemplated in Section 812 of the Customs Code will not debar the yacht in question from being used exclusively for pleasure in Philippine waters. In Opinion No. 141, series of 1947, reiterated in Opinion No. 273, series of 1951, this Office ruled that there is "no law prohibiting aliens from owning vessels in the Philippines and operating them for private use, subject of course to the laws and regulations regarding registration, inspection and other forms of control by the Bureau of Custom." In other words, the said vessel, though ineligible for license under Section 812 of the Customs Code in view of its ownership, may nevertheless be operated in Philippine waters exclusively for pleasure but it has to enter or clear at the customhouse in proceeding from port to port of the Philippines and to foreign ports.

Wherefore, this Office believes that the query should be answered in the negative.

(Sgd.) ALEJO MABANAG
Secretary of Justice

On the Issuance of Permits for the Holding of Benefits for Charitable or Public Welfare Purposes

OPINION NO. 183, S. 1960

This is with reference to the question raised by your Office regarding the provisions of Section 1 of Act No. 4075 and Section 3 of Republic Act No. 2264 which govern the issuance of permits for the holding of benefits for charitable or public welfare purposes.

Section 1 of Act No. 4075, entitled "An Act Regulating the Practice of Soliciting or Receiving Contributions for Charitable and Public Welfare Purpose," insofar as relevant, reads as follows:

"SEC. 1. Any person, corporation, organization, or association desiring to solicit or receive contributions for charitable or public welfare purposes shall first secure a permit to do so from the Director of Public Welfare . . ."

Section 3 of Republic Act No. 2264, more popularly known as the Local Autonomy Act, provides:

"*Authority to hold benefits.* — Authority is hereby granted to City Mayors and Municipal Mayors to grant permits to hold benefits, excepting cockfighting and prohibited games of chance, for public and charitable purposes without requiring approval of the Office of the Social Welfare Administrator."

Your Office is of the view that the authority granted to city mayors and municipal mayors under Section 3 of Republic Act No. 2264 should be construed to refer only to "permits issued for the holding of a single benefit at a time, like a cine benefit, dance benefit, and other similar affairs to be held on specific date", and that permits for the "solicitation of contributions covering a certain period" not exceeding two months require the approval of the Social Welfare Administrator pursuant to Section 1 of Act No. 4075.

It is stated that, on the other hand, there are some city and municipal executives who contend that the above-quoted provision of the Local Autonomy Act confers on them the authority to issue permits even for fund-raising activities which may last from 1 to 2 months, without the Social Welfare Administrator's approval.

A distinction indeed should be drawn between the two provisions although not in the sense suggested by your Office. Comparing the texts of the quoted provisions it will be noted that Section 1 of Act No. 4075 regulates *solicitation of contributions* for charitable or public welfare purposes, while Section 3 of Republic Act No. 2264 refers to the *holding of benefits,* except cockfighting and prohibited games of chance, for public and charitable purposes. The former is broader in scope and includes

"solicitation of contributions" *in no way connected* with a contemplated show or performance such as cinema, dances, popularity contests, or the holding of a benefit program like a musical concerts or a literary, oratorical or declamation contest. The latter relates only to the holding of any of such shows or performances as mentioned above to raise funds for public and charitable purposes.

Consequently, it is believed that permits for the holding of benefit shows, programs or performances designed to raise funds for public and charitable ends, regardless of the period that the tickets therefor are to be sold, may now be secured from and issued by city and municipal mayors in accordance with Section 3 of Republic Act 2264. Their authority, however, does not extend to cases of plain solicitation of contributions which fall within the purview of Act No. 4075 and, needless to say, under the jurisdiction of the Social Welfare Administrator.

(Sgd.) ALEJO MABANAG
Secretary of Justice

On the Proclamation Regulating The Price of Prime Commodities

OPINION NO. 190, S. 1960

This is in reply to your letter dated October 20, 1960 requesting opinion on "whether or not the Secretary of Commerce and Industry is duly empowered to exercise the power of the President granted by Section 3 of Act No. 4164."

Act No. 4164, which is entitled "An Act To Prevent The Excessive Increase In The Price Of Certain Prime Necessities Of Life On The Occasion Of A Public Calamity, Penalizing The Violation Thereof, And For Other Purposes," provides in Section 3 that

"The Governor-General may, during the period of emergency, herein provided for, if in his judgment public order so requires, order the seizure of a commodity or merchandise of prime necessity, sell it to the public at the price herein authorized, and reimburse to the owner of the same its legal price."

On October 13, 1960, the President issued Proclamation No. 713 declaring the existence of a state of public calamity in certain provinces and cities named therein. After setting forth the circumstances comprising the public calamity that led to the issuance of the proclamation, the proclamation stated that, during the existence of such calamity, it shall be unlawful to sell certain prime commodities at prices higher by 25 per cent or more

than the average current local prices determined by the Director of Commerce, as well as to hoard or refuse to sell such commodities at the legal price for the purposes of profiteering. The Proclamation then goes on to state that

> *"The Secretary of Commerce and Industry is hereby empowered to carry this Proclamation into effect* and is hereby authorized to call upon such entities and instrumentalities of the Government as may be needed to give the necessary cooperation and assistance for the successful prosecution of this work." (Italics mine.)

It should be emphasized that what the Secretary of Commerce and Industry is empowered by the Proclamation to carry into effect are the terms of the Proclamation itself. The Proclamation itself, however, is entirely silent as to the exercise of the power conferred upon the Governor-General, now the President *by section 3 of Act No.* 4164. There is nothing in the terms of Proclamation to suggest that the President, by issuing such Proclamation, purported or intended thereby to exercise such power, and much less to delegate the exercise of the power to the Secretary of Commerce and Industry.

It is not inopposite to point out that the authority provided for in section 3 of Act No. 4164 is an extraordinary authority: it is a power to take or requisition goods (prime commodities) belonging to private persons for the purpose of selling the same to the public at the controlled price. This power to requisition should be distinguished from the forfeiture of the *corpus delicti* which, under section 4 of Act No. 4164, may be levied as part of the penalty imposed upon a person convicted of profiteering of selling above the maximum permissible prices. The exercise of the power to requisition (or to subject goods to forced sale) is not dependent upon the prior conviction of the owner for profiteering. The extraordinary character of the power involved makes it very difficult, to my mind, casually to imply a purpose on the part of the President — assuming, without deciding, that it were lawful for him to do so — to delegate to the Secretary of Commerce and Industry the authority to order the requisitioning of prime commodities.

The President may, of course, issue an order for the seizure of prime commodities upon the recommendation of the Secretary of Commerce and Industry. In such a case, the determination of whether or not public order requires such an order remains with the President. If the President arrives at an affirmative determination, he may authorize the Secretary of Commerce and Industry to carry out the presidential order for seizure.

I must, for all the foregoing, answer your query in the negative.

(Sgd.) ALEJO MABANAG
Secretary of Justice

On The Authority of "Legal Assistants" To Provincial Treasurers

OPINION NO. 197, S. 1960

This is with reference to your inquiry, which was indorsed to this Office by the Department of Finance, as to whether the lawyer holding the position of "legal assistant" in your office may "appear, prosecute, defend or handle tax collection cases and other cases in court . . . without the knowledge, control or intervention of the provincial fiscal." It is also asked whether the said legal assistant is responsible to the Provincial Fiscal by virtue of his position, and whether his duties should be defined by the said official.

The provincial fiscal is the legal adviser of the provincial government and its officers (section 1682, Rev. Adm. Code), and as such he represents the province in any court, except when he is disqualified by law (section 1683, ibid.). All criminal actions *whether commenced* by complaint or information shall be prosecuted under the direction and control of the fiscal (Rule 106, sec. 4, Rules of Court), and under section 1687 of the Revised Administrative Code, it is provided that a provincial fiscal, an assistant provincial fiscal, and a special counsel appointed under section 1686 of the said Code shall have authority to conduct investigation into the matter of any crime or misdemeanor and have the necessary information or complaint prepared or made against persons charged with the commission of the same.

Unless the said "legal assistant" in the provincial treasurer's office is appointed by the Secretary of Justice pursuant to section 1686 of the Revised Administrative Code as special counsel to assist the provincial fiscal in the discharge of his duties, he may not assume the functions and exercise the authority which by law devolve upon the office of the provincial fiscal. (See Opinion No. 2, s. 1960, Prosecution Laboratory, Department of Justice; Julio Enriquez vs. Hon. Pedro Jimenez, G. R. No. 1-12817, April 29, 1960). Unless so appointed, also, the said "legal assistant" owes no official responsibility to the provincial fiscal. Since he holds a position in the office of the provincial treasurer, the said official may properly define his duties, as long as these do not encroach upon the functions that pertain to the provincial fiscal.

(Sgd.) ENRIQUE A. FERNANDEZ
Undersecretary of Justice

On Participation of Government Officials In Fund Drives For Charitable Organizations, and The Anti-Graft Law

OPINION NO. 211, S. 1960

This is in reply to your letter requesting my opinion on whether the members of the 1960 Malacañang Christmas Festival Committee who are public officers "are prohibited from taking part in the fund raising and solicitation activities of the organization" in the light of the provisions of Republic Act No. 3019, otherwise known as the Anti-Graft and Corrupt Practices Act.

You state that the Malacañang, Christmas Festival for Indigent Children is a private, charitable project undertaken annually at Malacañang under the sponsorship of the First Lady whereby gift bags containing toys, candies, clothes and foodstuffs are given to thousands of indigent children of Manila and suburbs by way of bringing Christmas cheer to them. To raise funds for this purpose, civic spirited members of the community including responsible government officials are, as a matter of tradition, invited to help in soliciting voluntary donations and contributions from the general public.

I am also made to understand that the activities of the Finance Committee — whose membership includes the Executive Vice-President of the Philippine National Bank, the Commissioners of the Bureau of Internal Revenue, Customs, Board of Tourist and Travel Agencies, the Special Assistant to the Governor of the Central Bank of the Philippines in charge of the Import and Export Departments, the Chairman of the Export Control Committee of the Office of the President — consist in said members' "writing letters of appeal addressed to various business firms, government corporations and financial institutions and private individuals", requesting contributions for the festival.

Commenting on the participation of government officials in the Philippine National Red Cross 14th Annual Fund Campaign, this office in Opinion No. 188, series of 1960, said among other things:

"... the mere acceptance by government officials of such fund campaign responsibilities would not be in contravention of the Anti-Graft and Corrupt Practices Act, particularly paragraphs (b) and (c) of Section 3. For the act prescribed and punished thereunder is that of "requesting" or "receiving" any gift, present, share, percentage, or other pecuniary or material benefit, "for himself or for another", either (1) *in connection* with any contract or transaction in which the public officer has to intervene under the law in his official capacity or (2) *in consideration* of the help given or to be given by him, in any manner or capacity, in securing or obtaining any government permit or license. Accordingly, as long as the official soliciting or receiving contributions for the Philippine National Red Cross does so without the slightest suggestion that such contribution bears some relationship to a contract or transaction which he has to pass upon officially, or would be regarded as a sort of consideration for the assistance he has rendered or will render in any way whatsoever in securing a government permit or license for the interested party, he may not be held criminally liable for a violation of the provisions referred to above."

Subject to the qualifications or limitations stated above it may be broadly stated that the participation of a government official in fund drives for charitable organizations is not prohibited by Republic Act No. 3019. It must be emphasized, however, as a reminder, that he still runs the risk of prosecution under the said statute the moment he commits the mistake of receiving or soliciting contributions in an improper or reproachable manner.

I should like to add the observation that since some of the members of the Finance Committee are high government officials whose functions may affect directly or indirectly the many business firms or establishments and individuals expected to give contributions, these officials would be well advised to refrain from signing solicitation letters addressed to the firms or individuals who have pending applications or transactions or business of whatever nature with their respective offices. This could be entrusted to other committee members, preferably the nongovernment officials, in order to demonstrate beyond peradventure of doubt that their individual appeals for voluntary contributions have absolutely no connection with or relation to any official matter or transaction in which the prospective donors or contributors might be interested, and to eliminate any suspicion that it is not so.

(Sgd.) ALEJO MABANAG
Secretary of Justice

On Recovery of the Commutation of Accumulated Vacation and Sick Leave

OPINION NO. 217, S. 1960

It appears that Mr. Carlos Magalona, immigration officer in the Iloilo Immigration Sub-Port, who was found guilty in an administrative case of highly reprehensible conduct and violation of regulations, was "given sixty (60) days from receipt of this decision within which to look for transfer to another office failing in which he should be considered resigned without prejudice to reinstatement in another office." He filed a petition for the reconsideration of this decision. This was denied by the Bureau of Civil

Service but he was given an additional period of thirty days from ceipt of notice thereof within which to transfer to another office. H ever, before the expiration of the said period, Mr. Magalona decided ins to, and did, tender his resignation which was accepted by the Commissio of Immigration on July 13, 1959.

The question is whether or not Mr. Magalona is entitled to the c mutation of the vacation and sick leave that had accumulated to his cr as of July 13, 1959, pursuant to section 286 of the Revised Administrat Code, as amended, which reads:

> "Vacation leave and sick leave shall be cumulative and any part thereof wh may not be taken within the calendar year in which earned may be carried over the succeeding years, but whenever any officer, employee, or laborer of the G ernment of the Philippines shall *voluntarily resign* or *be separated from the ser through no fault of his own*, he shall be entitled to the commutation of all ac mulated vacation and/or sick leave to his credit . . ." (As amended by Repub Act No. 1081; underscoring ours.)

In Opinion Nos. 144, s. 1958 and 125, s. 1959, his Department he that an employee who is found guilty in an administrative case and by w of penalty is "considerer resigned" is not entitled to the leave privileg granted under the above-quoted provision for the reason that such employ may not be considered to have "voluntarily resigned" or to have be "separated from the service through no fault of his own."

There exists, it is believed, a substantial difference between Mr. M galona's case and those passed upon in the cited opinions. The decisio in the administrative case against Mr. Magalona afforded him the oppo tunity to remain in the service by seeking transfer to another office with a certain period. Instead of doing so, he tendered his resignation an this was accepted by the office head before the expiration of said perio Thus, his separation from the service was brought about by his said resi nation, an act in which the element of violition on his part was significant present. When Mr. Magalona's resignation was accepted, it was the a ceptance of a resignation voluntarily tendered within the contemplation o the provision quoted above.

On the other hand, in the cases dealt within the cited opinions, b way of penalty in the administrative cases the employees who were found guilty were peremptorily "considered resigned", i.e., they were left n choice in the matter or were separated from the service whether they wished it or not.

In view of the foregoing, the commutation of the accumulated vacation and sick leave of Mr. Magalona in accordance with the provisions of sec tion 286 of the Revised Administrative Code may be allowed.

(Sgd.) ALEJO MABANAG
Secretary of Justice

...the Status of the Chairman of the National Research Council (NRC), *...the Anti-Graft Law*

OPINION NO. 226, S. 1960

This is in reply to your request for opinion on whether the Chairman of the National Research Council (NRC), as an ex officio member of the National Science Development Board (NSDB), is a public officer within the meaning of the Anti-Graft and Corrupt Practices Act (Republic Act No. 3019) such that he is subject to the requirement in Section 7 thereof in respect of the filing of statements of assets and liabilities.

By Section 2(b) of Republic Act No. 3019, "public officer" is defined to include "elective and appointive officials and employees, permanent or temporary, whether in the classified or unclassified or exempt service receiving compensation, even nominal, from the government."

The broad sweep of this definition, taken in conjunction with the general purpose of the law, eschews narrow conception as to its scope. For it evinces a patent design on the part of legislature to reach every category of officer and employee receiving compensation from the government.

On the basis of this consideration, I am inclined to believe that an official who occupies a government position in virtue of another office falls within the purview of the Act and should be deemed an appointive or elective official depending upon the mode by which he acquired his first or principal office. Thus, this Department has impliedly ruled that the President of the Philippine National Bank and the Chairman of the Board of Governors of the Development Bank of the Philippines are "public officers" in their capacity as ex officio members of the Monetary Board. (Opinion No. 157, current series.)

The position of NRC Chairman, it is observed, is at present vacant. Anyone who is elected thereto will automatically become an ex officio member of the NSDB. Such officer may therefore quite logically be said to hold the latter position indirectly by election and hence may be considered, in that capacity, as an elective officer within the meaning of the Anti-Graft and Corrupt Practices Act.

That a member of the NSDB receives no regular salary but only per diem is, to me, unimpotrant. If the law covers, as it does, even those receiving nominal compensation from the government such as the one-peso-a-year agents, I perceive no reason why one receiving per diem, which is a more substantial renumeration, should be excluded from the operation of the law.

(Sgd.) ALEJO MABANAG
Secretary of Justice

On Exemption of Magazines and Publications for Schools and Colleges From The Margin Fee Law.

OPINION NO. 230, S. 1960

This is in reply to your letter requesting opinion on whether or not a certification of the Secretary of Education to the effect that magazines or publications "such as the Readers' Digest, Life, Time, Newsweek, Coronet, Saturday Evening Post, The Atlantic Monthly, and medical, engineering and other professional journals and other similar publications", are used as "reference material or reference books" in schools, colleges and universities, "satisfies the requirement" of section 2 (V) of Republic Act No. 2609, "for purposes of exemption from the 25% margin" prescribed by Central Bank Circular No. 95 pursuant to the said Act.

The pertinent statutory provision provides as follows:

"SEC. 2. The margin established by the Monetary Board pursuant to the provision of Section one hereof shall not be imposed upon the sale of foreign exchange for the importation of the following:

x x x x

"V. Textbooks, reference books and religious books approved by the Board of Textbooks and/or certified by the Board of Textbooks and/or *certified by the Secretary of Education; technical* and *scientific books*, as certified by the Secretary of Education." (Underscoring mine.)

The law is clear that textbooks, reference books, and other religious books, approved by the Board of Textbooks and/or certified by the Secretary of Education and technical and scientific books, certified by the latter, are exempt from the margin authorized to be collected by the Central Bank on all sales of foreign exchange.

Doubts, it appears, have arisen regarding the meaning or scope of the word "books" as used in the provision in question, more specifically, whether magazines, journals, and similar publications are or may be considered "books" within the contemplation of the law, and therefore exempt from the margin fee. We believe that the word "book" is broad and comprehensive enough to cover such reading materials. In its general connotation, the term applies to "every literary composition which is printed" (Bouvier's Law Dictionary); it refers to "a written or printed narrative, record, representation, or series of these". (Webster's Unabridged Dictionary). Our attention has also been invited to a ruling of the General Auditing office, in which we concur, to the effect that maps, including globes, being "also something to be studied", like a book, "may be allowed to have the same category as books" and paid out of the portion allotted

for the purchase of supplementary readers and other library books. (See 1st indorsement dated January 6, 1953, of the Deputy Auditor General.)

At any rate, these reading matters will have to be certified first by the mentioned official or officials, who, it must be presumed, will not give the requisite approval or certification unless it is clearly shown that the magazines or publications are intended to be used as, or are really, textbooks, reference books, religious books, and technical and scientific books. . .

The query is answered accordingly.

(Sgd.) ALEJO MABANAG
Secretary of Justice

On the Validity of A Judgment Rendered But Not Promulgated Before Retirement

OPINION NO. 1, S. 1961

This is with reference to your request for advice regarding the decisions rendered by Honorable Judge Eusebio Ramos which were not promulgated prior to the Judge's retirement on December 17, 1960. One of these decisions, you state, is an order of dismissal in a criminal case rendered last December 14, 1960, and delivered to you on the following day, December 15, 1960. Specifically, you request information whether you should set the promulgation of the said order notwithstanding the fact that Judge Ramos has already retired.

It is well settled that, to be binding, a judgment must be duly signed, and promulgated during the incumbency of the judge who signed it. (Lino Luna vs. Rodriguez, 37 Phil. 186; Garchitorena vs. Crescini, 37 Phil. 675; Barretto vs. Commission on Elections, 45 Off. Gaz., 4457; People vs. Court of Appeals, G. R. No. L-9111-9113, prom. Aug. 28, 1956.) In Lino Luna vs. Rodriguez, *supra.*, Judge Barretto signed his decision on January 14; two days later (January 16), he qualified as Secretary of Finance thereby retiring from the judiciary; and on January 17 his decision was promulgated. The Supreme Court held such decision to be void, because at the time of its promulgation the judge who prepared it was no longer a judicial officer.

In criminal proceedings the rules require the judgment to be "promulgated by reading the judgment or sentence in the presence of the defendant and the judge of the court who has rendered it" (Rule 116, Sec. 6); and although it is true that it may be read by the clerk of court "when the judge is absent or outside the province", it is implied that it may be read,

provided he is still the judge therein. (People vs. Bonifacio So y Ortega, G. R. No. L-8732, prom. July 30, 1957.)

In the case last cited, it appears that former Judge-at-Large Demetrio B. Encarnacion, then presiding over Branch II of the Rizal Court of First Instance, signed his decision in Criminal Case No. 4673 which he had tried in Pasig, and delivered the said decision to the deputy clerk of court on June 18, 1954. The deputy clerk on the same day sent out notice to the parties that decision in the case will be promulgated on June 30, 1954. With the enactment of Republic Act No. 1186 abolishing the position of judges-at-large and cadastral judges, Judge Encarnacion ceased to be a member of the judiciary on June 19, 1954. Over the objection of the Fiscal, the aforementioned decision of Judge Encarnacion absolving the defendant was promulgated on December 12, 1954. The Supreme Court ruled that promulgation of the judgment was null and void and ordered the return of the record of the case to the trial court for adjudication by the judge presiding therein in accordance with the evidence already introduced.

The rule seems to be different, however, where the judgment is one of acquittal. In Cea vs. Cinco, 50 Off. Gaz., 5354, it was held that where judgment is one of acquittal, reading in the presence of the defendant may be substituted by giving a copy of the decision to him, and such act — delivery of copy — amounts to promulgation. This doctrine was cited by the Supreme Court in People vs. Bonifacio So, *supra* with the following clarification:

"It is true that in Cea v. Cinco this section was interpreted to mean that where judgment is one of acquittal, "reading in the presence of the defendant" may be substituted by giving a copy of the decision to him. We declare that such act — delivery of copy — amounted to promulgation. In the case before us, notice that the decision which would be read (on June 30) was sent out, while Judge Encarnacion was still a judge. Yet no copy of such decision was given the accused, and he was not informed thereof during said judge's incumbency. No judgment was therefore validly entered."

Applying now the above principle to the case before you wherein Judge Ramos rendered an order of dismissal before his retirement, it is believed that, if copy of the said order had been delivered to the defendant before Judge Ramos ceased to be a judge that order was validly entered and legally binding (Cea vs. Cinco, *supra*). But if no copy of such order had been given the accused and it is proposed to be promulgated only now that Judge Ramos is no longer a member of the judiciary, the said order may no longer be validly entered. The case must have to be decided by the judge who will succeed Judge Ramos, in accordance with the evidence already introduced (People vs. Bonifacio So, *supra*).

(Sgd.) ENRIQUE A. FERNANDEZ
Undersecretary of Justice

On The Effect of the Parity Amendment On The Right To Register Aircrafts

OPINION NO. 2, S. 1961

This is in reply to your letter requesting my opinion "as to whether under the ordinance appended to the Constitution or under any existing treaty", your Office may "legally register" an aircraft owned by a citizen of the United States.

At the outset, I should like to bring to your attention a similar question which was answered by this Department in the negative in Opinion No. 98, s. 1947, holding that American citizens have no right to operate airplanes in the Philippines except as public utilities. A petition for reconsideration of this opinion was denied by then Secretary of Justice Ramon Ozaeta whose summation of the applicable statutory provisions reads, insofar as relevant, as follows:

"You maintain that the air or, at least, that portion of the air strata above the public domain, forms part of the natural resources and of the forces and sources of potential energy of the Philippines within the meaning of section 1, Article XIV, of the Constitution and of the Parity Amendment, and is consequently open to exploitation, development or utilization by American citizens. Without going into the correctness of this assertion, I think it is a sufficient answer to say that in my opinion the navigation of an airplane cannot be considered as a mode of exploiting, developing or utilizing the air as forces and sources of potential energy within the intent of the Constitution.

"Your next argument is that the right to operate an airplane as a public utility included the lesser right to navigate it for pleasure or business, and that if Americans are allowed to operate land and water transportation facilities there is no reason why they should be denied the right to use airplanes except as public utilities. The answer to this argument is simple. Without the Parity Amendment, Americans would not have been entitled, after the establishment of the Republic of the Philippines, to operate aircraft in the Philippines, whether as a public utility or in furtherance of a business or in connection therewith, because the Civil Aviation Law (C.A. No. 168) permits only aircrafts owned by Filipinos or Filipino partnerships or corporations to engage in air commerce. (Sec. 7(c) and (d). Neither may an American citizen, under the same law (Sec. 7[c]), himself operate an aircraft for pleasure, for the reason that only Filipinos are authorized to act as airmen.

"The Parity Amendment has not repealed these statutory prohibition except to the extent that they conflict with it. As shown in the opinion sought to be reconsidered, here is conflict only in so far as the Civil Aviation Law forbids American citizens and associations from operating an airplane as a public utility, because this is the only right non-recognition of which will contravene the amendment. The other provisions of the act, such as those denying Americans the right to be licensed as airmen or to operate aircraft not as a public utility, remain in full force and effect, since neither of these rights is embraced in the privilege conferred on Ameri-

cans by the amendment to operate public utilities and to exploit the natural resources of the Philippines.

"If Americans may own and operate land and water transportation facilities not constituting public utilities, it is because there is no law forbidding them from doing so."

I mentioned this opinion because the reasoning therein applies with undiminished force to the question now raised and to the arguments advanced in behalf of American citizens who own or operate private aircraft.

The prohibition against the registration of aircraft other than those owned by a citizen or citizens of the Philippines subject only to a single exception is found in section 34 of Republic Act No. 776, to wit:

"SEC. 34. ELIGIBILITY FOR REGISTRATION. — *Except as otherwise provided in the Constitution and existing treaty or treaties,* no aircraft shall be eligible for registration *unless it is owned by a citizen or citizens of the Philippines* and is not registered under the laws of any foreign country. x x x"

In language too plain to be misunderstood, the statute makes the Philippine citizenship of the owner of an aircraft an indispensable prerequisite to its registration, except only where the Constitution or an existing treaty provides otherwise. Since the so-called parity amendment to the Constitution by its clear terms deals only with the disposition, exploitation, development, and utilization of the natural resources of the Philippines and the operation of public utilities, the asserted right of American owners of private aircraft not operated as a public utility to register the same under Republic Act No. 776 must have to be predicated on an existing treaty.

I am not aware of any treaty concluded between the Philippines and the United States pursuant to which aircraft owned by an American citizen may be registered under our laws as an exception to the provision forbidding the registration of non-Filipino owned aircraft. The Revised Philippine-United States Trade Agreement, popularly known as the Laurel-Langley agreement, contains in Article VII, paragraph 1, a commitment on the part of each of the contracting parties "not to discriminate in any manner *with respect to their engaging in business activities,* against the citizens or any form of business enterprise owned or controlled by citizens of the other . . ." It is readily seen, however, that this nondiscrimination provision merely allows United States citizens and enterprises owned or controlled by them *to engage in or carry on business activities* in the Philippines as if they were Philippine citizens or Philippine enterprises. It is far from being a total or unqualified grant of "equal rights" to American citizens in the sense that they may exercise any and all rights or privileges enjoyed by Filipino citizens. At the most, then only American citizens or enterprises engaged in business activities in this country can validly contend that by virtue of the aforementioned agreement they may be allowed to own, register and operate private aircraft provided that they can indubitably

show that the same is indispensable or necessary in carrying on their respective businesses or in furtherance thereof.

Your query is answered accordingly.

(Sgd.) ALEJO MABANAG
Secretary of Justice

On Purchase of Supplies And The Anti-Graft Law

OPINION NO. 17, S. 1961

In your letter of the 4th instant, you inquire whether you may authorize the purchase by the ACCFA of a power cord for a tape recording machine from the H. E. Heacock & Company, in which you are a stockholder, without violating any provision of the Anti-Graft and Corrupt Practices Act (Republic Act No. 3019). In this connection, you state that the needed spare part, which costs no more than ₱15.00, appears to be available only in the said firm.

With much regret, I have to say that the action you contemplate falls squarely under the provisions of Section 3(h) of Republic Act No. 3019 which penalize a public officer, such as you, for —

"Directly or indirectly having financial or pecuniary interest in any business, contractor or transaction in connection with which he intervenes or takes part in his official capacity, or in which he is prohibited by the Constitution or by any law from having any interest."

I suggest that you Office procure the power cord through the Bureau of Supply Coordination which, I have been verbally informed, entertains requests of this nature.

The mode of procurement above suggested is indeed circuitous. But under the circumstances, I can think of no better way of relieving your good self of responsibility under the law.

(Sgd.) ALEJO MABANAG
Secretary of Justice