From Selection to Succession of the Chief Justice: A Note on the Next-in-Rank Rule

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I. INTRODUCTION

Colonization is largely credited with causing the birth of the first Philippine Constitution.[1] The imprint of American constitutional law remains an

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indelible feature of the Philippine Constitution. In fact, the concept of Philippine constitutionalism started as a transplant from American soil.[2] Writings of the likes of Locke[3] and Montesquieu[4] figured as strong influences for the Framers of the Constitution of the United States. Separating and allocating executive, legislative and judicial powers to different branches, each coordinate with and in some degree a check on

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1. This is a reference to the Tydings-McDuffie Act of 1934, also known as The Philippine Independence Act, providing for Philippine independence in ten years from the date of the inauguration of the new government under the 1935 Constitution. More specifically, Section 10(a) of this Act provides:

   > On the 4th day of July immediately following the expiration of a period of ten years from the date of the inauguration of the new government under the constitution provided for in this Act the President of the United States shall by proclamation withdraw and surrender all right of possession, supervision, jurisdiction, control, or sovereignty then existing and exercised by the United States in and over the territory and people of the Philippine Islands, including all military and other reservations of the Government of the United States in the Philippines (except such naval reservations and fueling stations as are reserved under Section 5), and, on behalf of the United States, shall recognize the independence of the Philippine Islands as a separate and self-governing nation and acknowledge the authority and control over the same of the government instituted by the people thereof, under the constitution then in force.

2. JOAQUIN G. BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILPPINES: A COMMENTARY xxxvii (2003) [hereinafter BERNAS].
3. JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 143, 144, 150, 159 (1689) (John Locke noted the temptations to corruption that exist where the same persons who have the powers of making laws also have in their hands the power to execute them.).
4. BARON DE MONTESQUIEU, THE SPIRIT OF LAWS chap. 17 no. 9 (1748) (influenced by Locke, Montesquieu expounded on the doctrine of separation of powers to include the blending or overlapping of functions in order to check the excesses of one or the other branch.).

others,[5] aimed to prevent the tyranny of government. This is known as the *doctrine of separation of powers*.[6] Separation of powers has found expression in Justice Miller's canonical definition of a constitution as a "written instrument by which the fundamental powers of government are established, limited, and defined, and by which these powers are distributed among several departments, for their more safe and useful exercise, for the benefit of the body politic."[7] To paraphrase Justice Brandeis, the doctrine of separation of powers was adopted, not to avoid friction but to save the people from autocracy;[8] and yet it is precisely this very same arrangement of checks and balances essential to the principle of separation that conveniently leads the entire Philippine system to politicization and abuse.

The notion of separate powers and functions is not an indispensable feature of Philippine constitutions, but it has been the dominant precept upon which most governments have been organized.[9] Under the 1987 Constitution, however, legislation is the domain of Congress,[10] execution that of the President,[11] and settlement of legal controversies and the application of laws that of the Supreme Court and other lower courts.[12]

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5. ARCHIBALD COX, THE COURT AND THE CONSTITUTION 36 (1987) [hereinafter COX].

6. The doctrine of separation of powers divides the institutions of government into three branches: Legislative, Executive and Judicial. The powers and functions of each are separate and carried out by different personnel thereby preventing any agency from exercising complete authority. This set-up of equality, independence and interdependence enables the three branches to act as checks and balances of each other.

7. SAMUEL F. MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 64 (1891).

8. Myers v. United States, 272 U.S. 52, 293 (1926) (The words of Brandeis are as follows:

> "The doctrine of separation of powers was adopted... not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among the three governments, to save the people from autocracy.").

9. Under the 1973 Constitution, there was a fusion of the executive and legislative functions as a result of the parliamentary form of government and the infamous Amendment No. 6, conferring legislative power upon the Chief Executive. *Cf.* Rodolfo Ponferrada, *Of Construction and Excavation: An Examination of the Power of Judicial Review in Light of La Bugal B'laan*, 49 ATENEO L.J. 84, 88 (2004).

10. PHIL. CONST. art. VI, § 1.

11. PHIL. CONST. art. VII, § 1.

12. PHIL. CONST. art. VIII, § 1.

Each branch reigns supreme in its respective sphere and is theoretically equal, independent, yet interdependent, of the other.

The system of checks and balances is most evident in the constitutive processes ordained by the fundamental law. For instance, legislation needs the final approval of the President;[13] the President cannot flout laws passed by Congress and must obtain the concurrence of Congress to complete certain significant acts;[14] money can be released from the treasury only by the authority of Congress.[15] Likewise, the Supreme Court may declare the nullity of legislative and executive acts.[16] As a consequence, each branch is restrained from abusing its power through constitutive processes which require the authority of other branches to affirm or validate its acts. If one branch exceeds constitutional limits, its acts are void.[17]

Interestingly, Madison's echoing of Montesquieu in *The Federalist* seems almost prophetic: where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.[18]

While former President Marcos wielded both executive and legislative powers, judicial power resided in the Supreme Court. [19] This notwithstanding, the pervasive influence of Marcos remained evident, particularly by his insistence in ignoring the rule of seniority in the selection of the Chief Justice to bypass the independent-minded Justice Claudio

13. PHIL. CONST. art. VI, § 27.

14. PHIL. CONST. art. VII, § 18, ¶ 1.

15. PHIL. CONST. art. VI, § 25, ¶ 4.

16. PHIL. CONST. art. VIII, § 1.

17. *See* Angara v. Electoral Commission, G.R. No. 45081, 63 Phil. 139 (1936).

18. James Madison, *The Federalist No. 47: The Particular Structure of the New Government and the Distribution of Power Among Its Different Pats*, New York Packet (1788), *available at* http://www.constitution.org/fed/federa47.htm (last accessed Dec. 10, 2005).

19. Amendment No. 6 of the 1976 Amendments to the 1973 Constitution provides:

> Whenever in the judgment of the President (Prime Minister), there exists a grave emergency or a threat or imminence thereof. Or whenever the interim *Batasang Pambansa* or the regular National Assembly fails or is unable to act adequately on any matter for any reason that in his judgment requires immediate action, he may, in order to meet the exigency, issue the necessary decrees, orders, or letters of instructions, which shall form part of the law of the land.

Teehankee.[20] The 1987 Constitution is but a reactionary response to the concentration of powers during Martial Law; regrettably, the 1987 Constitution attempted to correct judicial timidity by introducing the so-called expanded jurisdiction of the Court without necessarily limiting executive influence.[21]

This Note is addressed to issues regarding the unwarranted influence accorded the chief executive in the composition of the Philippine Supreme Court. The specific proposal to ordain an order of succession to the office of the Chief Justice of the Supreme Court is based on a long-standing custom called the *Next-in-Rank* rule, and a sound rejection of its counterpart practice in the United States.

To be sure, the timing of this discussion could not be more auspicious. Just last October, Mr. John Roberts was appointed Chief Justice of the American Supreme Court.[22] Drawing closer to home, on 20 December 2005 Chief Justice Hilario Davide retired. Justice Artemio Panganiban[23] was

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20. At that time, there was a clear intention on the part of Mr. Marcos to prevent Mr. Justice Teehankee from becoming Chief Justice for fear that this might lead to an uncontrollably independent, or even antagonistic, Supreme Court.

21. PHIL. CONST. art. VIII, § 1. This provision contains the grave abuse of discretion clause:

> Section 1. The judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law.
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> Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

22. Charles Babington & Peter Baker, *Roberts Confirmed as 17th Chief Justice*, WASHINGTON POST, Sept. 30, 2005, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/09/29/AR2005092900859.html (last accessed Dec. 20, 2005).

23. Lira Dalangin-Fernandez, *Panganiban "Eminent Choice" as SC Justice Chief — Palace*, Dec. 21, 2005, *available at* http://news.inq7.net/top/inex.php?index=18story_id=60664 (last accessed Dec. 24, 2005)(Arroyo, through her presidential spokesperson Ignacio Bunye, said that Panganiban was an eminent choice for the post of Chief Justice citing his extensive professional background, experience and proven wisdom. Panganiban was known to have helped install Arroyo to power during EDSA 2 which resulted in the ouster of Arroyo's predecessor Joseph Estrada. Arroyo bypassed the more senior Reynato Puno and Leonardo Quisumbing in the process. The last president to have violated the seniority rule was Marcos when he twice bypassed Claudio Teehankee in favor of Justice Makasiar and then Justice Aquino.).

appointed by President Gloria Macapagal-Arroyo on the same day,[24] bypassing the more senior Justice Reynato Puno and breaking what is well-nigh a customary practice in the appointments to the esteemed office. More significantly, there is at the time of this writing, a fashionable clamor from some sectors for the amendment or revision of the Constitution.[25]

This Note is divided into six parts. The first part delves into the concept of separation of powers. The second part explores succession in the various branches of government, briefly reviewing the constitutional provisions pertaining to the Executive and Legislative before focusing on the Judiciary. Inevitable is a discussion on the Executive power of appointment of Supreme Court Justices, especially where the office of the Chief Justice is concerned, and its susceptibility to political posturing especially in a scenario like that of the Philippines where the process is not defined. This is provided for in the third part. The fourth part contains the thrust of this Note highlighting the existence of the *Next-in-Rank* rule, a tradition observed by the President in the appointment of every senior associate Justice to the office of the Chief Justice of the Supreme Court of the Philippines from the time of Quezon to Estrada. The fifth part recounts the instances of deviation from the *Next-in-Rank* rule. The sixth and final part of this Note concludes with an analysis of the deviations and a proposal to include an order of succession to the office of Chief Justice as a constitutional provision in the advent of charter change.

II. CONSTITUTIVE PROCESSES FOR CHANGES OF LEADERSHIP

A. Succession in the Executive Department

Two sets of well-defined rules for filling a vacancy in the presidency are provided in the 1987 Constitution;[26] Section 7, Article VII, applies when the

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24. *Id.*

25. Creating a Consultative Commission to Propose the Revision of the 1987 Constitution in Consultation with Various Sectors of Society, Executive Order No. 453 (2005).

    Section 1 provides for the creation of a Consultative Commission which shall conduct consultations and studies and propose amendments and revisions to the 1987 Constitution, principally the proposals to shift from the presidential-unitary system to a parliamentary-federal system of government, to refocus economic policies in the Constitution to match the country's vision for global competitiveness, and to review economic policies which tend to hinder the country's global competitiveness and adversely affect the people's welfare.

26. BERNAS, *supra* note 2, at 816.

vacancy occurs at the beginning of his term,[27] and Section 8, Article VII, when the vacancy occurs midterm.[28]

According to Section 7, should the President-elect fail to qualify or should not have been chosen, the Vice-President-elect shall act as President.[29] The Constitution foresees other contingencies and similarly provides a method of succession. If at the beginning of the President's term, he dies or becomes permanently disabled before qualifying for office, the Vice-President-elect shall become President.[30] The Vice-President also succeeds and serves the unexpired term in case of death, permanent disability, removal from office or resignation of the President should a midterm vacancy occur.[31]

The succession provision in Section 8 figured in the controversy surrounding the Estrada impeachment proceedings and the ascension of Gloria Macapagal-Arroyo to the presidency on 20 January 2001.[32] In turn, Arroyo's assumption of the presidency created a vacancy in the office of the Vice President, necessitating the application of Section 9, Article VII of the Constitution which empowers the President to nominate a member of either the Senate or House of Representatives to the office of the Vice President.[33] The nominee shall only assume office upon confirmation by a majority vote of the members of both Houses voting separately.[34]

A rather strange option can be found in Section 11, Article VII, allowing the President to transmit to the President of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, obligating the Vice-President to act as President, until he transmits another written declaration to the contrary.[35] This provision also allows Congress, in certain cases, to determine whether the President's inability to discharge the powers and duties of his office is permanent or temporary in nature. This section was the very provision relied upon by petitioner Estrada in the case of *Estrada v.*

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27. PHIL. CONST. art. VII, § 7.
28. PHIL. CONST. art. VII, § 8.
29. PHIL. CONST. art. VII, § 7.
30. PHIL. CONST. art. VII, § 7.
31. PHIL. CONST. art. VII, § 8.
32. Estrada v. Desierto, G.R. Nos. 146710-15, 353 SCRA 483 (2001).
33. PHIL. CONST. art. VII, § 9. Then Senator Teofisto Guingona was nominated Vice President.
34. PHIL. CONST. art. VII, § 9.
35. PHIL. CONST. art. VII, § 11.

Desierto,[36] although petitioner's contentions in that case were rejected by the Court.

The order of succession proceeds further. In case of death, permanent disability, removal from office or resignation of both the President and Vice President either at the beginning of or during the term, the Senate President or, in the case of his inability, the Speaker of the House of Representatives shall act as President.[37]

B. Selection in the Legislative Department

The Constitution provides a different, yet no less definitive, treatment for Congress.

While not as exhaustive as the provisions on succession in the Executive department, the Constitution recognizes the complete independence of the Legislative, allowing each House to elect its own officers[38] and, in doing so, determine the rules of its proceedings.[39] Section 16, Article VI of the Constitution authorizes the Senate to elect its President and the House of Representatives its Speaker, by a majority vote of all its respective members,[40] but this does not necessarily preclude both Houses from having other officers.

The Constitution completely entrusts to Congress the matter of its leadership. In fact, to highlight this branch's independence, the Constitution bestows upon both Houses the power to determine the rules of its proceedings,[41] and more often than not, the Supreme Court, in deference to the principle of separation of powers, has refused to intervene and assume jurisdiction in cases where the election of Congressional officers is disputed.

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36. *See Estrada*, 353 SCRA at 508 (in this case, Estrada invoking Section 11, Article VII, contested Arroyo's assumption of the presidency, claiming that she was only an Acting President. The Supreme Court took into consideration various events particularly the fact that Congress passed resolutions supporting Arroyo as President and sent bills to be signed by Arroyo as President. Based on these irrefutable facts, Congress recognized Arroyo as the President. The Supreme Court held that Estrada's inability was no longer temporary but permanent.).

37. PHIL. CONST. art. VII, § 8.

38. PHIL. CONST. art. VI, § 16, ¶ 1.

39. PHIL. CONST. art. VI, § 16, ¶ 3.

40. PHIL. CONST. art. VI, § 16, ¶ 1.

41. PHIL. CONST. art. VI, § 16, ¶ 3.

The unequivocal language of the Court in *Avelino v. Cuenco*[42] characterizes the power of Congress to select its officers:

> The subject matter of this *quo warranto* proceeding — to declare petitioner the rightful President of the Philippine Senate and oust respondent — is not within the jurisdiction of the Supreme Court, in view of the separation of powers, the political nature of the controversy and the constitutional grant to the Senate of the power to elect its own president, which power should not be interfered with nor taken over by the judiciary.[43]

To be sure, the ruling in *Avelino* remains unchanged in jurisprudence, despite the twice rewritten Constitution. The Court reached a similar result under the 1987 Constitution in *Santiago v. Guingona*.[44]

C. *Executive Discretion in the Judiciary*

It is interesting to note that while the Constitution provides for an order of succession to the leadership in the Executive and Legislative departments, it does not explicitly provide for a method of replacement to the office of Chief Justice. The Constitution, in Section 9, Article VIII, merely provides for the appointment of the members of the Supreme Courts and judges of the lower courts from a list of at least three nominees prepared by the Judicial and Bar Council.[45] These appointments are exercised by the President and are not subjected to Congressional confirmation.[46]

Corollarily, the Constitution also enumerates instances when the President's appointing power is to be applied, namely when a vacuum is

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42. Avelino v. Cuenco, G.R. No. L-2821, 83 Phil. 17 (1949).

43. *Id.* at 21 (citing Alejandrino v. Quezon, G.R. No. 22041, 46 Phil. 83 [1924]).

44. Santiago v. Guingona, G.R. No. 134577, 298 SCRA 782 (1998) (the principle of separation of powers ordains that each of the three great branches of government has exclusive cognizance of and is supreme in matters falling within its own constitutionally allocated sphere. Constitutional respect and a becoming regard for the sovereign acts of a coequal branch prevents this Court from prying into the internal workings of the Senate. Where no provision of the Constitution or the laws or even the Rules of the Senate is clearly shown to have been violated, disregarded or overlooked, grave abuse of discretion cannot be imputed to Senate officials for acts done within their competence and authority.).

45. PHIL. CONST. art. VIII, § 9.

46. PHIL. CONST. art. VIII, § 9.

created by: (1) compulsory retirement at the age of 70;[47] (2) incapacity to discharge the duties of the office;[48] and (3) removal through impeachment.[49]

At first glance, there seems to be nothing controversial about this provision. Upon closer analysis, however, this placidity seems to be the immediate problem. Any of the aforementioned grounds create a vacancy in one of the great branches of government but it is not clearly provided how the vacancy will be filled. Where the process is not defined, it lends itself to politicization.[50] This susceptibility is all the more compounded by the fact that the system followed in the Philippines requiring a nomination from the Judicial and Bar Council and appointment by the President is far less than ideal.[51] The succession to the office of Chief Justice is a critical concern and the absence of any provision supplying such a mechanism does not seem to engender the stability envisioned by the Constitution, which is to forestall the influence of partisan politics.[52]

The President is elected.[53] The Congress composed of the Senate[54] and the House of Representatives is elected.[55] Supreme Court Justices on the other hand are not elected[56] but hold office during good behavior and serve until the compulsory retirement age of 70 or become incapacitated to discharge the duties of their office.[57] Yet these unelected Justices are given a power, called judicial review, under which they may nullify acts of an elected President and the elected representatives of the people assembled in Congress.[58] In passing on these matters likely to concern and affect the larger issues of society, the Supreme Court exercises wide discretion and wields to some extent, great political power.[59] The result is likened to a

47. PHIL. CONST. art. VIII, § 11.

48. PHIL. CONST. art. VIII, § 11.

49. PHIL. CONST. art. XI, § 2.

50. Dean Jose M. Roy III, Address given at the Claudio Teehankee Center for the Rule of Law Lecture on Constitutional Reform (Sept. 30, 2005) [hereinafter Roy Address].

51. *Id.*

52. *See* I RECORD OF THE CONSTITUTIONAL COMMISSION 437.

53. PHIL. CONST. art. VII, § 4.

54. PHIL. CONST. art. VI, § 2.

55. PHIL. CONST. art. VI, § 5, ¶ 1.

56. PHIL. CONST. art. VII, § 16.

57. PHIL. CONST. art. VIII, § 11.

58. COX, *supra* note 5, at 45.

59. Harry Kalven, Jr., *The Supreme Court, 1970 Term — Foreword: Even When a Nation is at War*, 85 HARV. L. REV. 3, 4 (1971).

balancing act, with the Court performing a hybrid role,[60] requiring it to exercise this accidental political role without deviating from its functions as an arbiter of disputes. What must be borne in mind is that the Court wields judicial, not political, power.

Finally, of the three major departments, it is the Judiciary which was once described as the "least dangerous" branch.[61] This is a grave misconception. Archibald Cox, commenting on the United States Supreme Court, is of the opinion that no other country has given its courts such extraordinary power.[62] Having been originally patterned after the U.S. Supreme Court, perhaps the same thing can be said about the Philippine Supreme Court, particularly considering its expanded jurisdiction under the 1987 Constitution.

III. POWER OF APPOINTMENT

A. The Power of Appointment is an Executive Function

While the Constitution vests executive power in the President[63] and mandates him to take care that the laws are faithfully executed,[64] the concept of executive power is actually more nebulous than this and includes the power *to do anything not forbidden by the Constitution.* In *Marcos v. Manglapus*,[65] the Court is instructive on the existence of other powers not clearly defined yet undeniably possessed by the President, *viz*:

> To the President, the problem is one of balancing the general welfare and the common good against the exercise of rights of certain individuals. The power involved is the President's residual power to protect the general welfare of the people. It is founded on the duty of the President, as steward

60. *Id.* This means exercising judicial powers over a wide domain while remaining realistic and alert as to the political significance of what it is doing.

61. Alexander Hamilton, *The Federalist No. 78: The Judiciary Department*, INDEPENDENT JOURNAL (1788), *available at* http://www.constitution.org/fed/federa78.htm (last accessed Dec. 10, 2005).

62. COX, *supra* note 5, at 45 (Cox observes that no other country has given its courts such extraordinary power. Not Britain, where an act of Parliament binds the courts. Not India, where there is a written constitution and a Supreme Court but where constitutional rights can be suspended by the government's declaration of an emergency. Not even West Germany or Ireland, where the power of judicial review is established but is exercised on a narrower scale.).

63. PHIL. CONST. art. VII, § 7.

64. PHIL. CONST. art. VII, § 17.

65. Marcos v. Manglapus, G.R. No. 88211, 177 SCRA 668 (1989).

> of the people. To paraphrase Theodore Roosevelt, it is not only the power of the President but also his duty to do anything not forbidden by the Constitution or the laws that the needs of the nation demand. It is a power borne by the President's duty to preserve and defend the Constitution. It also may be viewed as a power implicit in the President's duty to take care that the laws are faithfully executed.[66]

Even conceding the almost unbridled discretion of the President, it does not appear that the Philippine constitutional culture entitles him to subordinate the other branches of government to his political whim. The equality of the great branches can never be overcome, notwithstanding the fact that the power of appointment is decidedly the exclusive prerogative of the executive.

Traditionally, the power of appointment has been described as an intrinsically executive act.[67] In *Government v. Springer*, the Supreme Court said that since the power to appoint is neither legislative nor judicial, it must be executive. [68] Comparatively speaking, the relationship between appointment and executive function are not far removed from the almost mysterious nature of residual powers.

Unlike the other two branches where the powers are exercised collegially, executive discretion is wielded solely by the President. Specifically, the power of appointment is the exclusive prerogative of the President;[69] and in the exercise of this power, he has wide and nearly unlimited discretion. Limitations to this power exist by virtue of law and in a number of forms[70] but these are generally for executive department positions and are insufficient, especially where the appointment to the office of Chief Justice is concerned.

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66. *Id.* at 694. *See* EDWARD CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957 153 (1957); *see also* HYMAN, THE AMERICAN PRESIDENT (where the author advances the view that an allowance of discretionary power is unavoidable in any government and is best lodged in the President.).
67. Concepcion v. Paredes, G.R. No. 17539, 42 Phil. 599, 603 (1921).
68. Government v. Springer, G.R. No. 26979, 50 Phil. 259, 283 (1927).
69. PHIL. CONST. art. VII, §§ 14-16.
70. The first involves qualifications for office. Obviously, those who are underage cannot be appointed. They must be nationals or residents. As for disqualifications, among those disqualified are persons serving sentence, in jail or convicted criminals, including those who have been removed by impeachment. Another limitation is the timing of the appointment such as in the case of recess, ad-interim and temporary appointments.

B. Uncertainty and Opportunism

The absence of any provision providing for an order of succession to the office of Chief Justice most assuredly poses a problem.

The Constitution prescribes certain requirements for membership in the Supreme Court. The appointee must be: (1) a natural born citizen of the Philippines;[71] (2) at least 40 years of age;[72] (3) for 15 years or more, a judge of a lower court or engaged in the practice of law in the Philippines;[73] and (4) a person of proven competence, integrity, probity, and independence.[74] As can be plainly gleaned, these criteria are qualifications rather than a method or procedure to be strictly followed by the President in determining the next Chief Justice.

The source of the President's power to appoint the members of the Supreme Court is contained in Section 16, Article III of the Constitution, *viz*:

> The President shall nominate and, with the consent of the Commission on Appointments, appoint the heads of the executive department, ambassadors, other public ministers and consuls, or officers of the armed forces from the rank of colonel or naval captain, and other officers whose appointments are vested in him in this Constitution. He shall also appoint all other officers of the Government whose appointments are not otherwise provided for by law, and those whom he may be authorized by law to appoint. The Congress may, by law, vest the appointment of other officers lower in rank in the President alone, in the courts, or in the heads of departments, agencies, commissions, or boards.[75]

In that entire Section, no express provision applies to the Chief Justice or the other members of the Court, except by way of a default clause empowering the President to "appoint all other officers of the Government whose appointments are not otherwise provided for by law."[76] Nowhere in the Constitution is there any other reference to the appointment of the Chief Justice. Neither can the authority be found in any judicial order. The Rules of the Judicial and Bar Council are similarly irrelevant as they address the matter of filling up vacancies[77] by simply reiterating the Constitution.[78]

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71. PHIL. CONST. art. VIII, § 7, ¶ 1.

72. PHIL. CONST. art. VIII, § 7, ¶ 1.

73. PHIL. CONST. art. VIII, § 7, ¶ 1.

74. PHIL. CONST. art. VIII, § 7, ¶ 3.

75. PHIL. CONST. art. III, § 6.

76. PHIL. CONST. art. VII, § 16.

77. RULES OF THE JUDICIAL AND BAR COUNCIL, RULE 1, § 1.

The absence of a clear provision leaves the Judiciary at a disadvantage. Additionally, the mere fact that the appointment is made by the Executive poses a question of the propriety of one department determining the leadership of another co-equal branch and department.[79] No comfort can be derived from the example of judicial stability in the United States where the appointment of members of the Supreme Court are entirely a matter of executive discretion, save for congressional confirmation. Certainly, there are material differences in the development of the Philippine judicial system that negate the U.S. practice as a viable model worthy of emulation.

When the system is not clearly defined, it becomes susceptible to attempts of political importunity. This is an open invitation to political posturing that undermines the independence of the judiciary. What aggravates this dilemma is the absence of viable forum against which corrective redress can be sought. Surely, it is unlikely, if not embarrassing, that the Supreme Court would entertain a petition questioning the appointment of one justice over another for the position of Chief Justice! The Supreme Court, as the constitutionally designated arbiter of all legal disputes, should at all times maintain its independence and remain immune from undue influence but not at the cost of sacrificing comity with the co-equal branches.[80] Needless to say, the importance of retaining its dignity and propriety bars any attempt to embroil the Court in a divisive petition as to which among its number is better suited to become Chief Justice.

On the other hand, the existence of a system, cut and dried with the black letter law applied, eliminates political wrangling,[81] leaving no alternative but to apply the law.

IV. NEXT-IN-RANK RULE IS THE CUSTOMARY RULE IN THE SELECTION OF CHIEF JUSTICE

There is a saving grace, however; the *Next-in-Rank* rule, or the principle of seniority, has long since been established as the mode of succession to the Office of the Chief Justice.[82] This practice is appreciably discrete from the

78. *Id.* RULE 2 § 1 (a), (b), (c); § 2.

79. Roy Address, *supra* note 50.

80. *The Davide Watch: Leading the Philippine Judiciary and the Legal Profession towards the Third Millenium*, Policy Statement, *available at* http://supremecourt.gov.ph/ (last accessed Dec. 16, 2005).

81. Roy Address, *supra* note 50.

82. Emil Jurado, *To the Point, Chief Justice, Ombudsman Appointments Waited*, MANILA STANDARD TODAY, Nov. 30, 2005, *available at* http://www.manilastandardtoday.com/?page=emilJurado_nov30_2005 (last accessed Dec. 26, 2005) [hereinafter Jurado].

preference embodied in the *Next-in-Rank* rule as applied to public officers, pursuant to Civil Service Law and applied to promotions in Executive department positions.[83] A distinction should still be made, notwithstanding the fact that they share the same wisdom, the *raison d'etre* for this preference being the possession of superior skills and greater dedication to the public as a consequence of prolonged tenure.[84]

It is the submission of this Note, albeit with much diffidence, that the *Next-in-Rank* rule is the customary rule in the selection of Chief Justice, and by *Next-in-Rank* is meant to refer not to the most senior in terms of age but the next most senior in terms of appointment to the Supreme Court.[85] The only point of reckoning becomes the order of appointment to the Supreme Court.

In this connection, it will be recalled that the appointment of Chief Justice Hilario G. Davide raised some speculation about the import of seniority. Though he was not the Senior Associate Justice of the Court, some quarters[86] took the view that Justice Josue N. Bellosillo was more senior since he had served in the judiciary for nearly 37 years[87] at the time Chief Justice Narvasa retired. In contrast, Justice Davide joined the Supreme Court following a professional career that included service in the Legislature,

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83. HECTOR S. DE LEON & HECTOR M. DE LEON, JR., THE LAW ON PUBLIC OFFICERS AND ELECTION LAW 194 (5th ed. 2003) (the rule neither grants a vested right nor does it impose a ministerial duty to the appointing authority to promote such person to the next higher position. The person next-in-rank is given preferential consideration for promotion to a vacant position, but it does not necessarily follow that he alone and no one else can be appointed.).

84. *See* Torio v. Civil Service Commission, G.R. No. 99336, 209 SCRA 677 (1992).

85. Roy Address, *supra* note 50.

86. *See* Isagani Cruz, *Separate Opinion: Impeaching the Chief Justice,* PHILIPPINE DAILY INQUIRER, Oct. 25, 2003, *available at* http://news.inq7.net/opi/2003/oct/25/opi_iacruz-1.htm (last accessed Jan. 30, 2006). Justice Cruz was one of the many in favor of Justice Davide's promotion as Chief Justice in 1998 over those who were for ignoring the seniority rule.

87. Josue N. Bellosillo was, at the beginning of his career in the Judiciary, a judge of the Court of Agrarian Relations, Iloilo from 1971-1975. After this, he was judge of the Court of First Instance of Iloilo from 1975-1982. He was Executive Judge from 1980-1982. He served as judge of the Court of First Instance of Rizal from 1982-1983 then was made judge of the Regional Trial Court of Pasig from 1983-1986. He was promoted to the Court of Appeals where he served from 1986-1991. Bellosillo was appointed Court Administrator in 1991. Ultimately, he was appointed to the Supreme Court where he served as Associate Justice from 1992 until his retirement on November 13, 2003.

as Chairman of the Commission on Elections and of the so-called Davide Commission, created to investigate a failed *coup d'etat* against the administration of President Corazon C. Aquino.[88] Justice Davide served in the judiciary for first time when he was appointed to the Court. The issue seemed to be resolved in favor of seniority of appointments to the Supreme Court in light of Davide being named Chief Justice on 30 November 1998.

The seniority rule is not mandated by the Constitution, but has been observed as a tradition[89] throughout the history of the Philippine Supreme Court from the time of Quezon to Estrada.[90] There is sufficient basis to contend that this tradition has ripened into rule or custom, a repeated

88. Hilario G. Davide first served as private secretary to the Vice Governor then Governor of Cebu from 1959-1963. He was a delegate to the Constitutional Convention (CONCON) representing the 4th District of Cebu in 1971 then became Minority Floor Leader from 1978-1979. He was an Assemblyman of the Interim *Batasang Pambansa* representing Region VII from 1978-1984. He was made Commissioner of the Constitutional Commission (CONCOM) of 1986 which drafted the 1987 Constitution. Davide then served as Chairman of the Commission on Elections (COMELEC) from 1988-1990 and was Chairman of various fact-finding commissions from 1989-1991. He was appointed to the Supreme Court in 1991 and served as Associate Justice for a number of years before he finally became Chief Justice of the Supreme Court in 1998. He held this position until his retirement in December 2005.

89. All the past Presidents from the time of Quezon to Estrada have promoted the most senior Associate Justice to the Chief Justiceship, except in two instances during Martial Law. President Quezon appointed Senior Justice Jose Abad in December 1941. President Osmeña appointed Senior Justice Manuel V. Moran as Chief Justice in July 1945. President Quirino appointed Senior Justice Ricardo Paras as Chief Justice in April 1951. President Garcia appointed Senior Justice Cesar Bengzon as Chief Justice in April 1961. President Marcos appointed Senior Justice Roberto Concepcion in June 1966, Senior Justice Makalintal as Chief Justice as Chief Justice in October 1973, Senior Justice Fred Ruiz Castro as Chief Justice in January 1976, and Senior Justice Enrique M. Fernando in July 1979. Tradition was broken in the appointments of Justices Felix Makasiar and Ramon Aquino. Upon Aquino's assumption of the presidency in 1986, she appointed Claudio Teehankee as Chief Justice. Teehankee was succeeded by Chief Justice Pedro Yap. Upon Yap's retirement, Marcelo Fernan was appointed Chief Justice on July 1, 1988. Fernan was followed by Chief Justice Andres Narvasa. When Narvasa retired in 1998, President Estrada also upheld the practice of seniority in appointing Senior Associate Justice Hilario Davide as Chief Justice.

90. Isagani Cruz, *Separate Opinion: Who will be the Next Chief Justice?,* PHILIPPINE DAILY INQUIRER, Dec. 4, 2005, *available at* http://news.inq7.net/opinion/index.php?index=2&story_id=58727&col=61 (last accessed Dec. 16, 2005) [hereinafter Cruz Separate Opinion].

uniform practice that partakes of the nature of a legal duty[91] under which the President must abide lest he violate respected and established norms of the legal profession, the entire Judiciary and the people,[92] which is most highly unlikely.[93] As a practical matter, however, it should be pointed out that there appears no viable forum for the enforcement of this legal duty. It is this precise reason that compels the amendment of the Constitution to conform with established practice.

A. Request of Clerk of Court Tessie L. Gatmaitan, CA, for Payment of Retirement Benefits of CA Justice Jorge S. Imperial

The observance of the seniority rule has been recognized by no less than the Supreme Court itself. In the case of Justice Jorge Imperial, the Court granted to him monetary benefits given to the Presiding Justice, although no rule of law authorized the payment of these benefits to the next most senior member of the Court. It would seem that the only nexus between Justice Imperial and these benefits was his entitlement to the same solely on the basis of his being next-in-rank.

At the time of his retirement from service, Justice Jorge Imperial was the Acting Presiding Justice of the Court of Appeals. Imperial was the most senior justice when the office of the Presiding Justice was vacated,[94] and no successor had been appointed until the time of his retirement. A petition was filed seeking a determination of whether Imperial is entitled to receive retirement benefits accorded to and at the rate of the Presiding Justice of the Court of Appeals.

The question of his retirement benefits was favorably resolved by the Court, recognizing the right of Justice Imperial to the salary and emoluments of a Presiding Justice. The Court stated that this right to the benefits of the Presiding Justice was of statutory origin, and not a result of mere designation as contended by former Court Administrator Benipayo.[95] Being the most senior Associate Justice,[96] Jorge Imperial became Acting Presiding Justice by

91. Roy Address, *supra* note 50.

92. Jurado, *supra* note 83.

93. Cruz Separate Opinion, *supra* note 91.

94. Then Presiding Justice Arturo Buena was appointed to the Supreme Court.

95. Request of Clerk of Court Tessie L. Gatmaitan, CA, For Payment of Retirement Benefits of CA Justice Jorge S. Imperial, A.M. No. 9777-Ret., 313 SCRA 139 (1999).

96. *Id.* at 135.

operation of the Judiciary Reorganization Act of 1980[97] and the Revised Internal Rules of the Court of Appeals.[98] Both provisions provide that in case of vacancy, absence or inability of the Presiding Justice to perform the powers, functions and duties of his office, the Associate Justice who is *first in precedence* shall take his place.[99] This ruling of the Court sustains seniority as a tradition in the Judiciary, but more importantly, applies the provisions which crystallized this tradition. It is particularly significant as it confers upon the person next-in-rank the privileges and benefits of the Presiding Justice, despite the absence of any indication in the law entitling the senior justice to the same.

B. Re: 1989 Elections of the Integrated Bar of the Philippines

The preference for seniority is also found in the Supreme Court's *per curiam* decision concerning the 1989 Integrated Bar of the Philippines (IBP) elections.[100]

Respoding to widespread reports from lawyers and newspaper reports about the unprecedented electioneering and overspending of candidates led by the front-runners for the IBP presidency,[101] the Supreme Court,

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97. The Judiciary Reorganization Act of 1980, Batas Pambansa Bilang 129, § 5 (1980).

98. REVISED INTERNAL RULES OF THE COURT OF APPEALS [RIRCA], Rule 1 § 8(a) (1988).

99. Batas Pambansa Blg. 129, § 5 provides:

> Sec. 5. *Succession to Office of Presiding Justice.* – In case of a vacancy in the Office of the Presiding Justice or in the event of his absence or inability to perform his powers, functions, and duties of his office, the Associate Justice who is first in precedence shall perform his powers, functions, and duties until such disability is removed, or another Presiding Justice is appointed and has qualified.
>
> RIRCA, § 8(a) provides:
>
> Section 8. *Application of the Rule on Precedence.* – The rule on precedence shall be observed and applied in the following instances:
>
> a. In case of vacancy in the office of the Presiding Justice or in the event of his absence or inability to perform the powers, functions and duties of his office, the Associate Justice who is first in precedence shall perform his powers, functions and duties until such disability is removed or another Presiding is appointed and has qualified.

100. In the Matter of the Inquiry into the 1989 Elections of the Integrated Bar of the Philippines, Bar Matter No. 491, 178 SCRA 398 (1989).

101. *Id.* at 400.

exercising powers of supervision over the Bar,[102] suspended the oath-taking of the elected officers.[103] Upon investigation, the Court found out that three candidates for the IBP presidency — Drilon, Nisce and Paculdo — traveled around the country to solicit votes of delegates as early as April 1989.[104] Some of the candidates were flown aboard government aircraft.[105] Many of the out-of-town delegates were given free plane tickets[106] and lodged at various hotels, including the Philippine Plaza, Hyatt and the Holiday Inn.[107] There was likewise the officious intervention of certain public officials to influence voting,[108] done in flagrant violation of the IBP By-Laws which emphasized the strictly non-political character of the IBP.[109]

The Court explained that respect for law is gravely eroded when lawyers, who are supposed to be minions of the law, engage in unlawful practices and cavalierly brush aside the very rules that the IBP formulated for their observance.[110] The unseemly ardor with which the candidates pursued the presidency of the IBP detracted from the dignity of the legal profession.[111] Displeased by the shameful display of lawyers bribing and being bribed by each other,[112] the Supreme Court annulled the IBP elections and restored the former system. As modified, the IBP President and Executive Vice-President would be elected by the Board of Governors from among themselves, with the Executive Vice President automatically succeeding as President upon expiration of their respective terms.[113]

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102. *See* PHIL. CONST. art. VIII, § 5. (provides that the Supreme Court shall have the power to promulgate rules concerning the admission to the practice of law and the Integrated Bar.).

103. In the Matter of the Inquiry into the 1989 Elections of the Integrated Bar of the Philippines, Bar Matter No. 491, 178 SCRA 398, 400 (1989).

104. *Id.* at 405.

105. *Id.* at 406.

106. *Id.* at 408.

107. *Id.* at 409-13.

108. *Id.* at 400.

109. Integrated Bar of the Philippines (IBP) By-Laws, art. I, § 4 (1974).

110. *Re: 1989 Elections of the Integrated Bar of the Philippines*, 178 SCRA at 418.

111. *Id.*

112. *Id.*.

113. *Id.* at 419. The Supreme Court is empowered to amend, modify and repeal the By-Laws of the IBP under Section 77, Article XI of the IBP By-Laws. Pursuant to the Court's decision, this amendment is incorporated into Section 47, Article VII of the IBP By-Laws providing that in the Executive Vice President shall automatically become President for the next succeeding term.

The question in need of resolution therefore is whether succession to the office of Chief Justice should be entirely a matter of executive discretion or a process favoring judicial independence, resolved by the Constitution itself, without the intervening whim or caprice of a third party. No less than the Court, determined to insulate the profession from political partisanship, ordained a system of succession for the leadership of the Integrated Bar of the Philippines. It seems quite plain that what is good for the Bar ought to be good enough for the Bench.[114] The same should be done with the succession to the office of Chief Justice. Ideally, this unwritten rule must be ordained into the Philippine system of laws to prevent affording the Executive too much influence in determining the composition of the Supreme Court.[115]

V. DEVIATIONS FROM THE *NEXT-IN-RANK* RULE

Prior to the Panganiban appointment, there have only been three genuine instances of deviation from the *Next-in-Rank* rule. These deviations were unique situations which do not validate or affirm the power of the President to appoint anyone he desires. The principle of seniority was not followed in the case of Secretary Victorino Mapa, who was recalled from the Cabinet to succeed Chief Justice Cayetano Arellano in 1920[116] over Florentino Torres.[117] The second instance involved the cases of Justice Jose P. Laurel and Justice Jose Yulo.[118] The last incident involved the bypassing of Justice Claudio Teehankee in favor of Justices Makasiar and Aquino.[119]

A. Mapa over Torres

The precursor to the Supreme Court was the Spanish *Real Audiencia*,[120] which was ordered abolished with the enactment of Act No. 136 of the

114. Roy Address, *supra* note 50.

115. *Id.*

116. Cruz Separate Opinion, *supra* note 91.

117. Chief Justice Andres R. Narvasa, Supreme Court Centenary Lecture Series, *The Chief Justices in Philippine History* 15 (2000) (on file with Author) [hereinafter Narvasa Lecture]. By way of footnote, there was another Justice who got bypassed, Justice Finley Johnson. It is arguable that this could not have really been considered a case of bypassing since every Chief Justice has always been a Filipino.

118. Cruz Separate Opinion, *supra* note 91.

119. Narvasa Lecture, *supra* note 118, at 39.

120. ISAGANI A. CRUZ & CYNTHIA CRUZ DATU, *RES GESTAE*: A BRIEF HISTORY OF THE SUPREME COURT 11 (2000) [hereinafter CRUZ].

Philippine Commission.[121] Florentino Torres was appointed together with Chief Justice Cayetano Arellano and Justice Victorino Mapa at about the time of the creation of the modern Supreme Court on 11 June 1901.[122] Together, these three men formed the original triumvirate of Filipino Justices that remained intact for more than 12 years until 30 October 1913 when Mapa was appointed Secretary of Finance and Justice.[123]

Florentino Torres was described to be brisk and hardy, a fine figure of a man who strode vigorously through the corridors and attacked his work with like fervor.[124] He was likewise noted most for his strict observance of the proprieties and his healthy store of self-respect.[125] Following the rule of seniority, he fully expected to occupy the position vacated by Chief Justice Arellano on 1 April 1920.[126] This was not to be because after Arellano's retirement, Secretary of Justice Victorino Mapa was summoned from his executive duties and appointed to the post.[127] Torres must have been greatly disappointed, but graciously made no protest.[128] No official explanation was offered,[129] but for whatever reason, Torres earned the dubious honor of being the first associate Senior Associate Justice to be bypassed for the position of Chief Justice.[130] Believing himself bypassed,[131] he resigned from

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121. An Act Providing for the Organization of Courts in the Philippine Islands, Act No. 136 (1901).

122. Narvasa Lecture, *supra* note 118, at 7. Act No. 136 provided that the new Supreme Court would be composed of seven members. Cayetano Arellano was appointed the first Filipino Chief Justice. Two other Filipinos were appointed, namely Florentino Torres and Victorino Mapa. The other four members were Americans: Joseph F. Cooper, Charles A. Willard, James F. Smith, and Fletcher Ladd.

123. *Id.*

124. DELFIN F. BATACAN, THE SUPREME COURT IN PHILIPPINE HISTORY - FROM ARELLANO TO CONCEPCION 95 (1972).

125. CRUZ, *supra* note 121, at 57.

126. *Id.* at 58. Chief Justice Cayetano retired on Apr. 1, 1920 due to failing health. He died seven months later at the age of 73.

127 *Id.*

128 Narvasa Lecture, *supra* note 118, at 15.

129 CRUZ, *supra* note 121, at 58 (Cruz surmises that Mapa had merely been recognized for dutiful service and given a suitable reward. Also, Torres may have been thought too old for the job at 76. Mapa was 68.).

130. *Id.*

131. The Manila Times in its April 6, 1920 issue reported:

> Feeling himself bypassed by the appointment of Secretary of Justice Victorino Mapa as Chief Justice, Justice Florentino Torres has tendered

the Supreme Court on 22 April 1920.[132] Ironically, Mapa followed some 17 months later,[133] and resigned due to failing health.[134]

1. The American Tradition

Judicial independence is the most essential characteristic of a free society,[135] the loss of which would endanger the basic values of constitutionalism.[136] To this end, the American Constitution provides life tenure and a guarantee against reduction of compensation[137] and to some extent, it succeeds.

The American Constitution provides that judicial power shall be vested in one Supreme Court and in such inferior courts that Congress may from time to time ordain and establish.[138] Justices of the Supreme Court serve during good behavior[139] and are nominated then appointed by the President with the advice and consent of the Senate[140] through the Committee on the Judiciary.[141] These requirements were put in place to ensure the independence of the Judiciary and to protect them from the pressures of partisan politics.[142]

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his resignation to Governor General Harrison. He told the press that as a man who respects the government, he has no criticism against the appointment of Secretary Mapa. He, however, believes that he has a right to succeed Chief Justice Cayetano Arellano inasmuch as he is *next to him in point of length of service*…

132. Narvasa Lecture, *supra* note 118, at 15.

133. Roy Address, *supra* note 50.

134. Narvasa Lecture, *supra* note 118, at 15.

135. Sam Ervin, Jr., *Separation of Powers, Judicial Independence*, 35 L. & CONTEM. PROB. 108, 121 (1970).

136. COX, *supra* note 5, at 372.

137. *Id.*

138. U.S. CONST. art. III, § 1.

139. U.S. CONST. art. III, § 1.

140. U.S. CONST. art. II, § 2, cl. 1.

141. *United States Senate Committee on the Judiciary, Committee History, available at* http://judiciary.senate.gov/information.cfm (last accessed December 19, 2005).

142. United States Supreme Court, *The Court as an Institution, available at* http://www.supremecourtus.gov/about/institution.pdf (last accessed December 19, 2005) [hereinafter The Court as an Institution].

The history of service of the American Chief Justices is very different from the Philippines. John Marshall served as Chief Justice for 34 years and five months,[143] a record that few others have broken.

Earl Warren was Chief Justice for slightly less than 16 years.[144] Unlike most other Justices, Warren was an immensely popular Republican governor when he was appointed by Eisenhower. Eisenhower had hoped to appoint a moderate conservative but Warren proved to be an unabashed liberal.[145] In a display of independence, the U.S. Supreme Court ruled unanimously in *Brown v. Board of Education*.[146] Speaking for the Court, Warren declared that segregation of children in public schools solely on the basis of race deprives the children of educational opportunities, generating a feeling of inferior status that may affect them throughout their lives, was a violation of the Fourteenth Amendment's guarantee of equal protection of the laws.[147] It was the Warren Court that spoke for the national conscience while Congress and the President were silent.[148]

William Rehnquist sat as Chief Justice for 19 years.[149] His service throughout seven presidencies has been said to rival that of his predecessors John Marshall and Earl Warren.[150] Rehnquist's imprint on the Court is wide-ranging, particularly in the areas of federalism.[151] In *U.S. v. Lopez*,[152] the Supreme Court reversed a federal law banning guns near local schools. Rehnquist, delivering the majority opinion, said, the Supreme Court traditionally deferred to Congress, but this time the power needed to be

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143. *John Marshall, Biography*, *available at* http://www.oyez.org/oyez/resource/legal_entity/13/biography (last accessed Dec. 19, 2005).

144. *Earl Warren, Biography*, *available at* http://www.oyez.org/oyez/resource/legal_entity/88/biography (last accessed Dec. 19, 2005).

145. *Id.*

146. Brown v. Board of Education, 347 U.S. 483 (1954).

147. *Id.*

148. COX, *supra* note 5, at 372.

149. *William Rehnquist, Biography*, *available at* http://www.oyez.org/oyez /resource/legal_entity/100/biography (last accessed Dec. 19, 2005).

150. Bill Mears, *Conservatism, Judicial Restraint Mark Rehnquist Legacy*, CNN Law Center, Sept. 4, 2005, *available at* http://www.cnn.com/2005/LAW/09/03/rehnquist.legacy/ (last accessed Dec. 19, 2005).

151. *Id.* (it was reported that Rehnquist has consistently sided with the states that were sued over violating congressional law, including age discrimination, the Americans with Disabilities Act and the Violence Against Women Act.

152. United States v. Alfonso Lopez, Jr., 514 U.S. 549 (1995).

curbed, or else there will never be a distinction between what is truly national and what is truly local.[153]

The incumbent Chief Justice of the U.S. Supreme Court is John G. Roberts, Jr.[154] Roberts replaced Chief Justice William Rehnquist, who died on 3 September 2005 after a battle with thyroid cancer.[155] Prior to his appointment, Roberts served on the U.S. Court of Appeals for the District of Columbia, considered the most influential federal panel outside of the Supreme Court.[156] Chief Justice Roberts is currently 50 years old.[157] If he lives to be as old as his predecessor who died at the age of 80,[158] he will serve for 30 years. This roughly translates into eight successive presidencies. Clarence Thomas[159] and Antonin Scalia,[160] who are the younger and more conservative members of the Court, expected to have their chance at the Chief Justice-ship but will probably no longer see that day.

The U.S. President holds his office for a term of four years[161] and should he be re-elected, an additional four years.[162] Because of the limited term of his office, the President inherits a Court where the Justices were appointed long before him and who will remain on the Court long after him.[163] As a

153. United States v. A.L.A. Schechter Poultry Corp., 76 F. 2d. 617, 624 (1935).

154. United States Supreme Court, *The Justices of the Supreme Court*, *available at* http://www.supremecourtus.gov/about/biographiescurrent.pdf (last accessed Dec. 19, 2005).

155. Bill Mears, *Roberts Sworn in as Chief Justice,* CNN Politics, Sept. 29, 2005, *available at* http://www.cnn.com/2005/POLITICS/09/25/robertsnomination/ (last accessed Dec. 19, 2005).

156. *Bush Nominates Roberts as Chief Justice*, CNN Politics, Sept. 6, 2005, *available at* http://www.cnn.com/2005/POLITICS/09/05/robertsnomination/ (last accessed Dec. 19, 2005).

157. *Id.*

158. *Id.*

159. *Clarence Thomas, Biography*, *available* at http://www.oyez.org/oyez/resource/legal_entity/106/biography (last accessed Dec. 19, 2005).

160. Antonin Scalia, Biography, *available* at http://www.oyez.org/oyez/resource/legal_entity/103/biography (last accessed Dec. 19, 2005).

161. U.S. CONST. art. II, § 1.

162. U.S. CONST. 22ND AMEND. § 1 (setting a two-term limit for the President of the United States was proposed on March 21, 1947 and ratified on February 27, 1951.).

163. The Supreme Court inherited by President George W. Bush during his first term was composed of the following: (1) Rehnquist, nominated by Reagan; (2) Stevens, nominated by Ford; (3) O'Connor, nominated by Reagan; (4) Scalia, nominated by Reagan; (5) Kennedy, nominated by Reagan; (6) Souter,

general proposition, therefore, under the American system, the Supreme Court Justices serve easily beyond the term of the U.S. President. Diversity has long been a contentious issue with the American Court and over the years, a rough ideological split has developed.[164] On one side the conservatives: former Chief Justice Rehnquist, Scalia and Thomas. On the other, a more liberal bloc: Stevens, Souter, Ginsburg, and Breyer. Justices O'Connor and Kennedy have often been considered as swing votes, moderates who lean conservative in many opinions.[165] When it comes to the current Court, nothing is absolute[166] and because of the long tenure of many of their members, it becomes indeed difficult for the elected President to control the composition of the Court.

To concede to the President full discretion in the selection and appointment of a Chief Justice grants him nothing more than the rare privilege of appointing one member of the Court. Although the long tenure of the Chief Justice virtually assures an indelible imprint in the work and even history of the Court, it is unlikely that his appointment immediately benefits executive influence over the Court in terms of producing a friendly majority. As can be seen from the foregoing, appointments to the Supreme Court are a relatively rare opportunity for the American President. In contrast, the exercise of such wide discretion in appointing he Philippine Chief Justice raises the specter of doubt over the independence of the Court, due to the perception that the President already holds the loyalty of the members of the Court appointed during his term.

2. Inapplicability of the American Tradition to the Philippine System

Since 1789, there have been 16 U.S. Supreme Court Chief Justices all before Roberts,[167] each averaging around 13.5 years of service.[168] In contrast, the

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nominated by Bush; (7) Thomas, nominated by Bush; (8) Ginsburg, nominated by Clinton; and (9) Breyer, nominated by Clinton. Since Rehnquist's death on September 3, 2005 and O'Connor's retirement on Jul. 1, 2005, the composition has changed to include Roberts as the incumbent Chief Justice while Alito's nomination as O'Connor's replacement has yet to be confirmed.

164. William Mears, *Justice's Long Tenure Brings Stability, Speculation on Retirement*, CNN Law Center, Oct. 8, 2002, *available at* http://archives.cnn.com/2002/LAW/10/07/scotus.justices/index.html (last accessed Dec. 19, 2005).

165. *Id.*

166. *Id.*

167. *John Roberts, Jr., Biography*, *available at* http://www.oyez.org/oyez/resource/legal_entity/850/biography (last accessed Dec. 19, 2005).

168. Roy Address, *supra* note 50.

Philippines since 1901 has had 20 Chief Justices, serving an average term of 5.2 years.[169] Based on the aforementioned data, the term of each U.S. Chief Justice is roughly equivalent to three presidential terms.

In the Philippines, where the President currently serves for a term of six years,[170] the average length of service of the Chief Justice does not even equal one presidential term. Because of this arrangement, a President with a six year term would most likely be able to appoint a majority of the members of the Court during his term in office.[171] In fact, at present time, 9 out of the 15 Justices of the Supreme Court have been appointed by President Arroyo[172] and because of the prevalent practice of appointing members of the Court who are already advanced in years, by the time she ends her term in 2010, she would have had the opportunity to appoint eight more Justices to the Supreme Court.[173] It would seem, in fact, that given the available data, shortening the term of the presidency to permit re-elections may actually lengthen the average tenure of the Presidency, hence exacerbate the degree of executive domination over the Court.

Among the better known principles in the laws on public office is the independence of certain public officers from control of the appointing power. The rule logically provides that an appointee to an independent office is expected to purge himself of any allegiance to the appointing power and must serve only the interests of the nation and the people.[174] Regrettably, this rule does not always find full realization because culturally, Filipinos

169. *Id.*

170. PHIL. CONST. art. VII, § 4.

171. Roy Address, *supra* note 50.

172. Since becoming President in 2001, Arroyo has appointed the following to the Supreme Court: (1) Carpio, appointed on October 26, 2001; (2) Austria-Martinez, appointed on April 12, 2002; (3) Corona, also on April 12, 2002; (4) Carpio-Morales, appointed on September 3, 2002; (5) Callejo, appointed in 2001; (6) Azcuna, appointed on October 17, 2005; (7) Tinga, appointed on July 4, 2005; (8) Chico-Nazario, appointed in 2004; and (9) Garcia, appointed on October 6, 2005.

173. Jurado, *supra* note 83. (The retirement dates of the incumbent members of the Court are as follows: (1) Davide on December 20, 2005; (2) Puno on May 17, 2010; (3) Panganiban on December 7, 2006; (4) Quisumbing on November 6, 2009; (5) Ynares-Santiago on October 5, 2009; (6) Sandoval Gutierrez on February 28, 2008; (7) Carpio on October 26, 2019; (8) Austria-Martinez on December 19, 2010; (9) Corona on October 15, 2018; (10) Carpio-Morales on June 19, 2011; (11) Callejo on April 28, 2007; (12) Azcuna on February 16, 2009; (13) Tinga on May 11, 2009; (14) Chico-Nazario on December 5, 2009; (15) Garcia on October 15, 2007).

174. Roy Address, *supra* note 50.

have a somewhat different appreciation of social expectations and personal duties to others.

According to Professor Sarah Raymundo of the Department of Sociology of the University of the Philippines, bureaucratic capitalism exists in large part due to the Filipino *utang ng loob* (debt of gratitude)[175] and *padrino* (godfather) systems,[176] offshoots of semi-feudal relations that characterized the Philippines' colonial past.[177] Not surprisingly, it is this cycle of *utang na loob, pakikisama*[178] and *palakasan* that spawns misplaced gratitude and improper allegiance to the appointing power well beyond the appointing power's term of office.

Taken to its extreme, should the tradition of *Next-in-Rank* rule be broken, a President may simply appoint some 40 year-old as Chief Justice every time there is a vacancy. This appointee will theoretically serve for 30 years since the Constitution only requires one to be at least 40 at the time of appointment,[179] with probable repercussions on the impartiality of the appointee. It should also be borne in mind, that under the present Constitution, the Chief Justice would also head the Judicial and Bar Council, forming a seamless Mobiüs cord between the appointing power and the body designed precisely to check the exercise of that power.

These aforementioned observations are precisely why the American tradition is no longer viable for emulation. The Philippine system, although

175. Professor Raymundo explains that *utang ng loob* is an offshoot of the feudal system, which emerged in medieval Europe in which the kings would give away grants of land to their important noblemen in exchange for their service and loyalty.

176. Raymundo emphasized: "The padrino system also exists in the government because we have these elites, mostly feudal ones, who have government positions. These elites in the government have to deal with their *kumpares* and those who have funded their election campaign to repay them."

177. Ronnie Calumpita, *Drive against Illegal Logging Doomed, says UP Professor*, THE MANILA TIMES, Feb. 4, 2005, *available at* http://www.manilatimes.net/national/2005/feb/04/yehey/top_stories/20050204top6.html (last accessed Dec. 20, 2005).

178. Literally, "going along" with others. A well-known aspect of Filipino culture that engenders participation, consent or agreement to the flouting of rules or even laws in the name of friendship. It is widely understood in Filipino culture that the failure or refusal to accommodate a request from a relative, friend or associate, particularly when viewed as repayment of some social obligation or debt, results in a loss of face or honor between the parties and may be sufficiently severe in some cases to cause violence and trigger retaliation, if not destroy friendships and relationships.

179. PHIL. CONST. art. VIII, § 1, ¶ 1.

decidedly one of the few progenies of the American judicial system, has since evolved to take a distinct and different path.

B. The Cases of Yulo and Laurel

The second deviation refers to the cases of Justices Yulo and Laurel during the outbreak of World War II in the Pacific. This deviation was preceded by some confusion as to whether Jose P. Laurel was ever appointed Chief Justice. The unusual circumstances then prevailing arose out of the abandonment of the government by most Philippine officials in anticipation of the belligerent occupation of the Japanese Armed Force.

After Abad Santos left with President Quezon to Corregidor, Jose P. Laurel took over as acting Chief Justice[180] by virtue of Executive Order No. 396, dated 24 December 1941.[181] He was, at that time, Secretary of Justice. What ensued was a peculiar set up where the Secretary of Justice was at the same time, acting Chief Justice of the Supreme Court[182] and entrusting to the Chief Justice all the functions pertaining to the Department of Justice.[183] When the Japanese finally brought the Philippines under control in January of 1942, General Masaharu Homma, as commander-in-chief, appointed Laurel as Minister of Justice.[184] At about the same time Laurel was acting Chief Justice of the Supreme Court, General Homma named Jose Yulo, who was then as senator, the sixth Chief Justice of the Supreme Court on 26 January 1942.[185] Laurel was later elected President of the Republic of the Philippines and sworn into office on 14 October 1943.[186]

Prior to his appointment, Jose Yulo had already distinguished himself with a successful career in politics. He was Secretary of Justice of the Philippine Commonwealth in 1935 and Speaker of the National Assembly in 1938.[187] Yulo was eventually elected to a seat in the Senate in 1941, but was precluded from discharging his functions as such because of the advent of

180. Narvasa Lecture, *supra* note 118, at 21.

181. *Id.*

182. *Id.* (The civil service record of President Jose P. Laurel states that he was "Acting Secretary — Department of Justice — designated December 10, 1941," and "Chief Justice of the Supreme Court, in charge of the — Department of Justice-E.O. No. 396 dated December 24, 1941.").

183. *Id.* (E.O. No. 396 provides: "All functions pertaining to the Department of Justice shall be performed by the Chief Justice of the Supreme Court.").

184. *Id.* at 23.

185. Narvasa Lecture, *supra* note 118, at 23.

186. CRUZ, *supra* note 121, at 103.

187. *Id.* at 100.

World War II in the Pacific.[188] Obviously, Yulo was not next-in-rank. It is important to recall that during the Japanese Occupation, the Supreme Court was reorganized and reduced to five members.

Yulo resigned in 1944 at the age of 50[189] and went back to corporate practice and business.[190] The Commonwealth Government was formally re-established on 27 February 1945 with President Sergio Osmeña as chief executive.[191] On 9 July 1945, Justice Manuel V. Moran was appointed as Chief Justice of a newly re-organized Philippine Supreme Court.[192]

C. Makasiar and Aquino over Teehankee

The retirement of Chief Justice Fernando on 24 July 1985, would have elevated Claudio Teehankee as his replacement, but Marcos did not follow the seniority rule and promoted Justice Felix V. Makasiar instead.[193] In November of the same year, Teehankee was again bypassed when Marcos swore in Justice Ramon C. Aquino.[194] The bypassing was the result of executive supremacy at the time of Martial Law.[195]

Teehankee was a notorious anti-Marcos member of the Court who would dissent from cases of interest to Malacañang largely because he was opposed to the martial law regime.[196] Surely, Marcos was not about to reward him for his obstructionism.[197] As observed in a political commentary on Martial law, it took Marcos more than 20 long years to bring the

188. Narvasa Lecture, *supra* note 118, at 22.

189. CRUZ, *supra* note 121, at 105.

190. Narvasa Lecture, *supra* note 118, at 24.

191. *Id.*

192. CRUZ, *supra* note 121, at 105.

193. *Id.* at 199.

194. Narvasa Lecture, *supra* note 118, at 38.

195. Roy Address, *supra* note 50.

196. *See* Javellana v. Executive Secretary, G.R. No. L-36164, 50 SCRA 30 (1973); Benigno Aquino v. Commission on Elections, G.R. No. L-40004, 62 SCRA 275 (1975) (on the issue of Marcos' claimed law-making powers); Sanidad v. Comelec, G.R. No. L- 44640, 73 SCRA 333 (1976) (on the issue of whether or not President Marcos had power to oppose and approve amendments to the Constitution and submit them to the people for ratification); Aquino v. Military Commission No. 2, G.R. No. L-37364, 63 SCRA 546 (1975) (on the issue of whether Aquino had been denied due process); and Buscayno v. Military Commission, G.R. No. L-58284, 196 Phil 41 (1981) (regarding the power of the military to try civilians after the lifting of Martial Law).

197. CRUZ, *supra* note 121, at 199.

Supreme Court down from the pinnacle of honor and integrity to the gutter of partisan politics. Except for the independence and courage exemplified by a few Justices of the Supreme Court, the Court degenerated into a cabal of obsequious, spineless and fearful lawyers for the administration.[198] Marcos consolidated executive and legislative powers in his hand.[199] The Supreme Court had obsequiously become a rubber stamp.[200]

Only after the Marcos regime had been toppled, was Teehankee granted his deserved promotion by President Corazon Aquino.[201] The *Next-in-Rank* rule was restored and has not been broken, until recently.

VI. PROPOSAL TO ORDAIN THE *NEXT-IN-RANK* RULE INTO THE PHILIPPINE SYSTEM OF LAWS

Fortunately, under the 1987 Constitution and up until recently, the President has always appointed the most senior Associate Justice, starting with Claudio Teehankee.[202] Teehankee was succeeded by Chief Justice Pedro Yap.[203] Upon Yap's retirement, Marcelo Fernan was appointed Chief Justice on 1 July 1988.[204] Fernan was then followed by Chief Justice Andres Narvasa.[205] When Narvasa retired in 1998, President Estrada also upheld the

198. This observation was taken from April 1, 1986 issue of the Philippine Daily Inquirer. *See also* PRIMITIVO MIJARES, I THE CONJUGAL DICTATORSHIP OF FERDINAND AND IMELDA MARCOS 415 (1986) (since the advent of Martial Law, Marcos left no doubt that all judges from the highest to the lowest, worked under the threat of dismissal anytime. Section 9 and 10, Article XVII (Transitory Provisions) of the Martial Law Constitution provided that Justices of the Supreme Court may only continue in office until they reach the age of 70 years unless sooner replaced by the President. Judges were booted out, their reputations and careers shattered without being heard or even told of the charges against them.).

199. Roy Address, *supra* note 50.

200. Sheila Coronel, *The Dean's December*, Public Eye, Volume III No. 2, April – July 1997, *available at* http://www.pcij.org/imag/PublicEye/dean.html (last accessed December 20, 2005).

201. Cruz Separate Opinion, *supra* note 91.

202. Narvasa Lecture, *supra* note 118, at 39.

203. *Id.* at 42.

204. *Id.*

205. *Id.* at 44. (Even at that time, there was some talk about the possibility that Narvasa would be bypassed in favor of Justice Ameurfina Melecio-Herrera, who would retire sooner. Unconfirmed reports were rife that President Corazon C. Aquino was inclined to leave a footnote for posterity as the first woman president who appointed the first woman chief justice of the Philippines).

tradition of seniority by appointing Senior Justice Hilario Davide as Chief Justice.[206]

The clear pattern of appointments to the Office of the Chief Justice demonstrates unbending adherence to the *Next-in-Rank* rule. There can be no doubt that the *Next-in-Rank* rule or the tradition of seniority is an established and well-accepted practice. Not even the number of deviations detract from this pattern of consistency, there being present in each of those instances palpably clear extenuating circumstances of a fundamental character explaining the non-observance of the *Next-in-Rank* rule. What cannot be denied, is the presence of a customary rule demanding appointment of the senior associate justice as Chief Justice.

These situations involved instances of diminished popular sovereignty and reduced judicial independence, occurring during periods when the Executive was supreme and dominated the other branches of government. The first two cases occurred when the Philippines was under foreign domination. The third instance, when the Philippines was under martial law and the Marcos dictatorship. Obviously, no similar conditions were prevailing at the time of this recent appointment, though it may be said that the executive has taken a decidedly stronger position in relation to the other branches of government.

The Philippine Judiciary is not immune to politicking. Justice Puno[207] noted the threat of politics to the independence and integrity of the Judiciary,

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206. The Davide appointment brought into focus the question regarding the meaning of seniority. A number of groups supported the appointment of Justice Josue N. Bellosillo, then ranked 3rd in the Court, contending, among other things, that his longer years of service in the judiciary would satisfy the rule on seniority. Unlike Davide who came from a career in politics as a legislator, COMELEC chairman and a presidential appointment as chair of a fact finding commission against leaders of the attempted *coup d'etat* of 1989, Bellosillo was a career jurist, with more than 30 years of service on the bench, starting as a municipal trial judge. One of the supporters of Davide, insists that the interpretation of seniority in terms of tenure in the Court is necessary for the protection of the Court as an institution against possible domination by the executive. Most important about this development is that both camps argued on the basis of seniority in length of service — Bellosillo in the Judiciary, Davide in the Court. Unlike in the case of the supporters of the present appointment, the only argument for seniority in behalf of Justice Panganiban rests thinly on the accidental considerations of his biological birth.

207. Justice Reynato S. Puno was one of the nominees poised to succeed to the post of Chief Justice following the mandatory retirement of Chief Justice Davide on December 20, 2005. He was the most senior among the three nominees, which include Panganiban and Quisumbing.

particularly from those politicians who have "foul means to influence the appointment of judges and Justices."[208] A study conducted by the Asian Development Bank proposed a *Nine-Point Approach to Fighting Corruption in the Philippines*, one of the key elements of which is judicial reform.[209] According to this study, available data suggest considerable room for enhancing the Judiciary's effectiveness and reducing perceptions of corruption within its ranks.[210]

It is proposed that one method of dispelling this perception is to incorporate the *Next-in-Rank* rule as a Constitutional provision in case of charter change. This would favor the smooth transition of power and leadership in the judiciary, insulating it from the whim and caprice of executive selection. Beyond this, automatic succession would reduce speculation on the possibility of concatenation between the executive and the chief justice, if not the perception of executive control or influence over the judicial system.

What bears stressing is that the position of chief justice is the most powerful judicial office. Apart from considerable ascendancy over the associate justices of the Court, the chief wields even greater power as the administrative head and chief executive officer of the entire judicial system. Without doubt, his *ex oficio* position as chairman of the Judicial and Bar Council bears greatly upon all appointments to the judiciary. When the executive is given a free hand in choosing the chief justice, even the system for checking his power to appoint persons to the judiciary comes under his thumb and nullifies the role and purpose of the Judicial and Bar Council. The same can be said for other functions intended to be performed independently.

It would be too much to ask that the people rely on the independence of the hand-picked appointee. There is no need for imposing this blind trust. It would be much simpler to wrest from the executive the appointment of the chief justice, since he will probably appoint a fair number of justices during his tenure. There is no overwhelming need to give him a free hand to include the chief justice to his list of appointees. Retaining the present system leaves unnecessary power in the president, resulting in a diminution

208. Jomar Canlas, *Puno: Politics diminishes Judiciary's Independence*, THE MANILA TIMES, Dec. 16, 2005, *available at* http://www.manilatimes.net/national/2005/dec/16/yehey/top_stories/20051216top9.html (last accessed Dec. 20, 2005).

209. Vinay Bhargava, *Combating Corruption in the Philippines*, *available at* http://www.rips.gov.ph/htm/tool/resourcefile.asp?ID=57 (last accessed Dec. 20, 2005).

210. *Id.*

of the stature, authority and — certainly — the independence of the Court and the chief justice. That is a matter that can be left to a preordained order, if only to restore some measure of parity between the three great branches of government.

Of course, nothing in this proposal prevents the president from appointing to the Court someone eligible who may one day succeed as chief justice, given the ages and order of retirement of the other justices. At the very least, such a system would delay the assumption of the president's pick as chief justice. In contrast, the present system instantly accords the president the benefit of having a hand-picked chief justice. Naturally, this leaves the lingering perception, hopefully mistaken, of immediate influence over the independent, co-equal judicial branch.