

# Testing Constitutional Waters VIII: Coming Full Circle with the Application of Executive Power and Judicial Consistency in *Marcos v. Manglapus* and *Ocampo v.*

*Enriquez*

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### I. INTRODUCTION

Carved onto a hill in a lush valley in the outskirts of Spain’s capital, Madrid, a towering cross sits atop a basilica-cum-mausoleum commissioned by Spain’s former fascist dictator, Generalissimo Francisco Franco, to commemorate all the souls lost during the Spanish Civil War and to serve as their burial grounds. Named the Valle de los Caídos, or the Valley of the Fallen, it also serves as Franco’s final resting place. Ever since its commission,

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*Philippine Peace Process*, 54 ATENEO L.J. 59 (2009); *An Overview of the International Legal Concept of Peace Agreements as Applied to Current Philippine Peace Processes*, 53 ATENEO L.J. 263 (2008); *The Juvenile Justice and Welfare Act of 2006: Changing Patterns and Responses for Juvenile Offending*, 52 ATENEO L.J. 293 (2007); *Legal Concept of Terrorism Under International Law and Its Application to Philippine Municipal Law*, 51 ATENEO L.J. 823 (2007); *Testing Constitutional Waters: Balancing State Power, Economic Development, and Respect for Human Rights*, 51 ATENEO. L.J. 1 (2006); *Courts and Social Context Theory*; *Philippine Judicial Reform as Applied to Vulnerable Sectors*, 50 ATENEO L.J. 823 (2006); & *The Philippines and the Convention on the Rights of a Child: Evaluating Compliance with Respect to International Standards for Procedural Rules Involving Children*, 49 ATENEO L.J. 1016 (2004).

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the monument has been the subject of controversy,<sup>1</sup> especially over the fact that some political prisoners — who belonged to the losing Republican side — were forced to take part in its construction.<sup>2</sup> Recently, bodies of Republican soldiers interred therein were exhumed through a ruling by a local court.<sup>3</sup> This has since reignited a fierce debate about whether Franco's remains should also be relocated.<sup>4</sup>

Franco is a polarizing figure in Spanish politics.<sup>5</sup> Dictators of other States, such as Nicolae Ceaușescu of Romania or Pol Pot of Cambodia, are more or less objectively denounced. This can be seen by the way Ceaușescu's remains were buried in a simple grave in Bucharest,<sup>6</sup> and Pot's cremated body is interred beneath a simple tin hut in rural Anlong Veng.<sup>7</sup> With regard to Franco, however, there remain both avid supporters and staunch denouncers.<sup>8</sup> "Some Spaniards come here to honor him; others come to make sure he is still dead,"<sup>9</sup> is a striking line delivered in a documentary that featured Franco's grave in Valle de los Caídos, and clearly illustrates the dichotomy in opinion regarding such a controversial leader.

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1. See generally Guy Hedgcock, *Controversy over monument to fascism's fallen*, IRISH TIMES, Apr. 1, 2015, available at <http://www.irishtimes.com/news/world/europe/controversy-over-monument-to-fascism-s-fallen-1.2160494> (last accessed Aug. 10, 2017).
  2. *Id.*
  3. See Ciaran Giles, *Spain court ruling reopens debate over dictator's tomb site*, SAN DIEGO UNION-TRIB., May 10, 2016, available at <http://www.sandiegouniontribune.com/sdut-spain-court-ruling-reopens-debate-over-dictators-2016may10-story.html> (last accessed Aug. 10, 2017).
  4. *Id.*
  5. See generally STANLEY G. PAYNE & JESÚS PALACIOS, *FRANCO: A PERSONAL AND POLITICAL BIOGRAPHY* xi (2014).
  6. See Roger Boyes, *Nicolae Ceausescu is gone — but his ghost still haunts Romania*, TIMES, Dec. 19, 2009, available at <https://www.thetimes.co.uk/article/nicolae-ceausescu-is-gone-but-his-ghost-still-haunts-romania-kl8xmj2r23f> (last accessed Aug. 10, 2017).
  7. See Seth Mydans, *Anlong Veng Journal; Praying to Pol Pot, Seeking Health and Good Luck*, N.Y. TIMES, June 23, 2001, available at <http://www.nytimes.com/2001/06/23/world/anlong-veng-journal-praying-to-pol-pot-seeking-health-and-good-luck.html> (last accessed Aug. 10, 2017).
  8. See PAYNE & PALACIOS, *supra* note 5.
  9. Rick Steves Europe, Video, *The Majesty of Madrid*, May 14, 2014, YOUTUBE, available at <https://www.youtube.com/watch?v=hifYpfW4NjI> (last accessed Aug. 10, 2017) (line begins at 17:47).

On the other side of the world, in what was the colony of New Spain, the remains of former Philippine President Ferdinand E. Marcos were buried in the Libingan ng mga Bayani (LNMB), or the Heroes' Cemetery when translated to English, in Taguig City, Philippines, on 18 November 2016.<sup>10</sup> This was met with both support and widespread outcry.<sup>11</sup> Marcos was the President of the Philippines for 21 years, until he was peacefully overthrown by the 1987 EDSA People Power Revolution.<sup>12</sup> He would later die in Honolulu, Hawaii from heart, lung, and kidney ailments.<sup>13</sup> His body was then returned to the Philippines from the United States (U.S.) in 1991, and the same lay in state in a glass box from 1993 in his native province of Ilocos Norte.<sup>14</sup> The circumstances surrounding his burial in the LNMB, however, are far from simple. It essentially served as a culmination of events that spanned almost two decades, and cases that involved Marcos, his relatives, and close associates.

This Article will focus on two particular landmark cases that centered on Marcos, with around 27 years between them. Further, the facts surrounding the cases can be said to be in stark contrast to each other. However, the legal justifications employed by the Supreme Court seem to be the same — one

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10. Felipe Villamor, *Ferdinand Marcos Is Buried in Philippine National Cemetery*, N.Y. TIMES, Nov. 18, 2016, available at [https://www.nytimes.com/2016/11/18/world/asia/philippines-ferdinand-marcos-burial-duterte.html?\\_r=0](https://www.nytimes.com/2016/11/18/world/asia/philippines-ferdinand-marcos-burial-duterte.html?_r=0) (last accessed Aug. 10, 2017).
  11. Cris Larano, *Burial of Philippines' Ferdinand Marcos in Heroes' Cemetery Draws Outrage*, WALL ST. J., Nov. 18, 2016, available at <https://www.wsj.com/articles/philippines-gives-dictator-marcos-heros-burial-despite-protests-1479449261> (last accessed Aug. 10, 2017) & Ariel Paolo Tejada, *Caravan of loyalists heads for Manila to support Marcos burial*, PHIL. STAR, Oct. 14, 2016, available at <http://www.philstar.com/headlines/2016/10/14/1633562/caravan-loyalists-heads-manila-support-marcos-burial> (last accessed Aug. 10, 2017).
  12. BBC News, *How Filipino People Power toppled Marcos*, available at <http://www.bbc.com/news/av/magazine-35526200/how-filipino-people-power-toppled-marcos> (last accessed Aug. 10, 2017).
  13. Jane Gross, *Ferdinand Marcos, Ousted Leader of the Philippines, Dies at 72 in Exile*, N.Y. TIMES, Sep. 29, 1989, available at <http://www.nytimes.com/1989/09/29/obituaries/ferdinand-marcos-ousted-leader-of-philippines-dies-at-72-in-exile.html> (last accessed Aug. 10, 2017).
  14. It has been averred that the body was a mere wax figure. See Antonio Montalvan, II, *The great hoax on the Marcos burial*, PHIL. DAILY INQ., Apr. 11, 2016, available at <http://opinion.inquirer.net/94244/great-hoax-marcos-burial> (last accessed Aug. 10, 2017).

of the focal points this Article seeks to establish. It will also attempt to clarify the circumstances behind the Supreme Court's ruling regarding Marcos' burial in the LNMB, and shed light on the reasons, particularly the legal justifications, that led the Court to rule in such a way.

## II. THE CASES

### A. *Marcos v. Manglapus*

In 1989, the Philippine political sphere was riddled with turmoil towards the latter months after most of the year was relatively peaceful.<sup>15</sup> Two years detached from the 1987 EDSA People Power Revolution, the first Aquino administration — under President Corazon C. Aquino — had to deal with a hostage crisis in Davao,<sup>16</sup> unremarkable economic growth,<sup>17</sup> attempted coups d'état in Zamboanga<sup>18</sup> and Manila,<sup>19</sup> and notably, the death of Marcos. These facts served as the backdrop for the landmark case of *Marcos v. Manglapus*.<sup>20</sup>

Prior to his death, Marcos had signified his wish to return to the Philippines so he could die there.<sup>21</sup> However, his return was blocked by President Aquino, who reasoned that Marcos' return would brew instability within the government and threaten the economic recovery of the nation.<sup>22</sup> Thus, the petition for *mandamus* and prohibition was filed to order the respondents in the case — then Secretary of Foreign Affairs Raul S. Manglapus, Secretary of Justice Catalino T. Macaraig, Jr., Secretary of

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15. See generally David G. Timberman, *The Philippines in 1989: A Good Year Turns Sour*, 30 ASIAN SURVEY 167 (1990).

16. Teresa Albor, *20 Killed As Attack Ends Filipino Siege*, CHI. TRIB., Aug. 16, 1989, available at [http://articles.chicagotribune.com/1989-08-16/news/8901050085\\_1\\_four-other-hostages-female-hostages-hostage-crisis](http://articles.chicagotribune.com/1989-08-16/news/8901050085_1_four-other-hostages-female-hostages-hostage-crisis) (last accessed Aug. 10, 2017).

17. Timberman, *supra* note 15, at 172-74.

18. *Id.* at 176-77.

19. Sheila Coronel, *Rebels in Phillipine Army Bomb Aquino Palace and Attack Bases*, N.Y. TIMES, Dec. 1, 1989, available at <http://www.nytimes.com/1989/12/01/world/rebels-in-phillipine-army-bomb-aquino-palace-and-attack-bases.html?pagewanted=all> (last accessed Aug. 10, 2017).

20. *Marcos v. Manglapus*, 177 SCRA 668 (1989).

21. *Id.* at 682.

22. *Id.*

National Defense Fidel V. Ramos, Executive Secretary Sedfrey A. Ordoñez, Immigration Commissioner Miriam Defensor-Santiago, and Chief of Staff Renato S. de Villa — to issue the petitioners, composed primarily of Marcos and his immediate family, the necessary travel documents to allow them to return to the Philippines.<sup>23</sup>

The Court, through Justice Irene R. Cortés, in a divided 8-7 vote, upheld Aquino's decision to bar the former dictator from returning to the country. Citing the broad executive powers that the Constitution confers on the President, the Court ruled, to wit —

It would not be accurate [ ] to state that 'executive power' is the power to enforce the laws, for the President is head of state as well as head of government and whatever powers inhere in such positions pertain to the office unless the Constitution itself withholds it. Furthermore, the Constitution itself provides that the execution of the laws is only one of the powers of the President. It also grants the President other powers that do not involve the execution of any provision of law, [e.g.,] his power over the country's foreign relations.

On these premises, we hold the view that although the 1987 Constitution imposes limitations on the exercise of *specific* powers of the President, it maintains intact what is traditionally considered as within the scope of 'executive power.' [Corollary], the powers of the President cannot be said to be limited only to the specific powers enumerated in the Constitution. In other words, executive power is more than the sum of specific powers so enumerated.<sup>24</sup>

Regarding the issue as to whether or not there existed a political question beyond the ambit of political review, and if so, whether President Aquino committed grave abuse of discretion amounting to lack or excess of jurisdiction, the Court held that there was none; therefore, no grave abuse was committed, in this manner —

We find that from the pleadings filed by the parties, from their oral arguments, and the facts revealed during the briefing in chambers by the Chief of Staff of the Armed Forces of the Philippines and the National Security Adviser, wherein petitioners and respondents were represented, there exist factual bases for the President's decision.

The Court cannot close its eyes to present realities and pretend that the country is not besieged from within by a well[-]organized communist insurgency, a separatist movement in Mindanao, rightist conspiracies to grab power, urban terrorism, the murder with impunity of military men,

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23. *Id.* at 668 & 682-83.

24. *Id.* at 691-92.

police officers[,] and civilian officials, to mention only a few. The documented history of the efforts of the Marcoses and their followers to destabilize the country, as earlier narrated in this ponencia[,] bolsters the conclusion that the return of the Marcoses at this time would only exacerbate and intensify the violence directed against the State and instigate more chaos.

As divergent and discordant forces, the enemies of the State may be contained. The military establishment has given assurances that it could handle the threats posed by particular groups. But it is the *catalytic effect* of the return of the Marcoses that may prove to be the proverbial final straw that would break the camel's back.

With these before her, the President cannot be said to have acted arbitrarily[,] capriciously[,] and whimsically in determining that the return of the Marcoses poses a serious threat to the national interest and welfare and in prohibiting their return.<sup>25</sup>

The view that President Aquino's decision to bar Marcos' return was within her powers was reiterated by the Court in its *per curiam* Resolution<sup>26</sup> denying the motion for reconsideration filed by the petitioners, in this wise

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Contrary to petitioners' view, it cannot be denied that the President, upon whom executive power is vested, has unstated residual powers which are implied from the grant of executive power and which are necessary for her to comply with her duties under the Constitution. The powers of the President are not limited to what are expressly enumerated in the article on the Executive Department and in scattered provisions of the Constitution. This is so, notwithstanding the avowed intent of the members of the Constitutional Commission of 1986 to limit the powers of the President as a reaction to the abuses under the regime of Mr. Marcos, for the result was a *limitation of specific powers* of the President, particularly those relating to the commander-in-chief clause, but *not a diminution of the general grant of executive power*.

That the President has powers other than those expressly stated in the Constitution is nothing new. This is recognized under the U.S. Constitution from which we have patterned the distribution of governmental powers among three [ ] separate branches.<sup>27</sup>

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25. *Id.* at 697.

26. *Marcos v. Manglapus*, 178 SCRA 760 (1989).

27. *Id.* at 763-64.

Given the foregoing, it was unthinkable at the time to even consider a burial for Marcos at the LNMB. The passage of around 27 years, however, would prove otherwise.

*B. Ocampo v. Enriquez*

On February 2016, then presidential candidate Rodrigo R. Duterte, speaking in Laoag City, Ilocos Norte, publicly announced that he would allow Marcos' burial in the LNMB should he be elected.<sup>28</sup> He would go on to win the presidency by a considerable margin.<sup>29</sup> Duterte's election came at a time when the Philippines posted the highest economic growth in all of Asia,<sup>30</sup> but suffered from the highest unemployment rate in the region.<sup>31</sup> Around 26 million Filipinos were living in poverty, with around 12 million in extreme conditions.<sup>32</sup> Moreover, such took place at the conclusion of another Aquino administration, this time under the former President's son, President Benigno Simeon C. Aquino, III, whose satisfaction rating took a hit in the first quarter of 2016, just a few months before he left office.<sup>33</sup> Most notably, however, the 2016 elections nearly marked the return of the Marcoses to the executive branch of government, as then Senator Ferdinand R. Marcos, Jr., lost the vice-presidency to the younger Aquino's party-mate,

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28. Pia Ranada, Duterte in Ilocos Norte: I will allow Marcos' burial in Heroes' Cemetery, *available at* <http://www.rappler.com/nation/politics/elections/2016/123061-duterte-marcos-burial-libingan-bayani> (last accessed Aug. 10, 2017). Duterte, in his speech, attributed Marcos' achievements as a former president as the reason why the burial in LNMB was proper. *Id.*
29. Jovan Cerda, *Duterte, Robredo win in final, official tally*, PHIL. STAR, May 26, 2016, *available at* <http://www.philstar.com/headlines/2016/05/27/1587569/duterte-robredo-win-final-official-tally> (last accessed Aug. 10, 2017).
30. Siegfried Alegado & Cecilia Yap, Philippines Posts Strongest Economic Growth in Asia at 7.1%, *available at* <https://www.bloomberg.com/news/articles/2016-11-17/philippine-growth-quickens-to-7-1-on-duterte-s-spending-spree> (last accessed Aug. 10, 2017).
31. Yuji Vincent Gonzales, *PH has worst unemployment rate despite high GDP growth — Ibon*, PHIL. DAILY INQ., May 24, 2016, *available at* <http://business.inquirer.net/210532/ph-has-worst-unemployment-rate-despite-high-gdp-growth-research> (last accessed Aug. 10, 2017).
32. DJ Yap, *12M Filipinos living in extreme poverty*, PHIL. DAILY INQ., Mar. 18, 2016, *available at* <http://newsinfo.inquirer.net/775062/12m-filipinos-living-in-extreme-poverty> (last accessed Aug. 10, 2017).
33. KD Suarez, *Aquino net satisfaction rating lowest since 2015 — poll*, *available at* <http://www.rappler.com/nation/129887-sws-survey-aquino-public-satisfaction-q1-2016> (last accessed Aug. 10, 2017).



then Representative Maria Leonor G. Robredo, by a very slim margin.<sup>34</sup> Such circumstances set the stage for *Ocampo v. Enriquez*.<sup>35</sup>

The controversy arose when, on 8 August 2016, respondent Secretary of National Defense Delfin N. Lorenzana issued a Memorandum to respondent Chief of Staff of the Armed Forces of the Philippines (AFP) General Ricardo R. Visaya to implement the verbal command of President Duterte to initiate the steps for the burial of Marcos at the LNMB.<sup>36</sup> The day after, respondent AFP Rear Admiral Ernesto C. Enriquez issued a directive to the Philippine Army Commanding General to, among others, provide Marcos with military honors accorded to a President.<sup>37</sup> Eight petitions were filed in reaction to these issuances.

Among the issues raised, perhaps the most notable was whether President Duterte's determination to have Marcos' remains buried in the LNMB posed a justiciable controversy, and given such, whether the President acted with grave abuse of discretion.<sup>38</sup>

The Court, voting 9-5-1, dismissed the petitions. Speaking through Justice Diosdado M. Peralta, the Court ruled, to wit —

The Court agrees with the [Office of the Solicitor General] that President Duterte's decision to have the remains of Marcos interred at the LNMB involves a political question that is not a justiciable controversy. In the exercise of his powers under the Constitution and the Executive Order (E.O.) No. 292<sup>39</sup> (otherwise known as the Administrative Code of 1987) to allow the interment of Marcos at the LNMB, which is a land of the public domain devoted for national military cemetery and military shrine purposes, President Duterte decided a question of policy based on his wisdom that it shall promote national healing and forgiveness. There being no taint of grave abuse in the exercise of such discretion, as discussed below, President Duterte's decision on that political question is outside the ambit of judicial review.<sup>40</sup>

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34. Only over 200,000 votes separated the candidates. Cerda, *supra* note 29.

35. *Ocampo v. Enriquez*, G.R. No. 225973, Nov. 8, 2016, available at <http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/225973.pdf> (last accessed Aug. 10, 2017).

36. *Id.* at 6.

37. *Id.* at 6-7.

38. *Id.* at 9.

39. Instituting the "Administrative Code of the Philippines of 1987" [ADMIN. CODE], Executive Order No. 292 (1987).

40. *Id.* at 11.

Furthermore, the Court concluded —

In sum, there is no clear constitutional or legal basis to hold that there was a grave abuse of discretion amounting to lack or excess of jurisdiction which would justify the Court to interpose its authority to check and override an act entrusted to the judgment of another branch. Truly, the President's discretion is not totally unfettered. 'Discretion is not a free-spirited stallion that runs and roams wherever it pleases but is reined in to keep it from straying. In its classic formulation, 'discretion is not unconfined and vagrant' but 'canalized within banks that keep it from overflowing.' At bar, President Duterte, through the public respondents, acted within the bounds of the law and jurisprudence. Notwithstanding the call of human rights advocates, the Court must uphold what is legal and just [—] [a]nd that is not to deny Marcos of his rightful place at the LNMB. For even the [f]ramers of our Constitution intend that full respect for human rights is available at any stage of a person's development, from the time he or she becomes a person to the time he or she leaves this earth.<sup>41</sup>

Given both cases, it appears, at first instance, that the Court's two rulings contradict each other. This is true to an extent, especially with regard to the focal point of both controversies — former President Marcos. In *Marcos*, on one hand, the Court upheld the ban on the former strongman's return, citing President Aquino's residual executive powers. On the other, in *Ocampo*, the Court refused to rule on the determination of President Duterte to bury Marcos in the LNMB, as it was within his discretion to do so.

Another contrast was the issue regarding the presence of a political question incapable of judicial review. In *Marcos*, the Court saw that there was none;<sup>42</sup> in *Ocampo*, the Court said there was.<sup>43</sup>

Upon closer examination, however, the Court ruled similarly. This is especially true anent the issue of the presence of a political question, as both cases ruled that Presidents Aquino and Duterte did not act whimsically or arbitrarily, resulting in grave abuse of discretion. Thus, in spite of the seemingly conflicting judgments, both decisions were hinged on one central concept — executive power.

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41. *Id.* at 56.

42. *Marcos*, 177 SCRA at 696.

43. *Ocampo*, G.R. No. 225973, at 11.

### C. Executive Power

Article VII of the 1987 Philippine Constitution<sup>44</sup> deals with the Executive Department of government. Thereunder, Section 1 provides that “[t]he executive power shall be vested in the President of the Philippines.”<sup>45</sup> This Section was adapted from the U.S. Constitution.<sup>46</sup> Philippine jurisprudence has defined it as “the power to enforce and administer the laws. It is the power of carrying the laws into practical operation and enforcing their due observance.”<sup>47</sup> Despite such a definition, however, its meaning is still not well-settled, both in the Philippines and in the U.S.

In terms of the latter, due to the broad construction of the provision in its Constitution, scholars in the U.S. have grappled with the meaning of executive power *per se* even in recent times, especially with regard to its scope and limitations.<sup>48</sup> Because of such broad construction, the American experience has been dictated largely by its Supreme Court, which has used a historical approach in interpreting executive powers, especially when Congress is silent.<sup>49</sup> However, this has posed a problem, because it has been opined that some precedents have gone too far — in terms of implying “unilateral presidential authority” even when confronted by congressional limitations — which then sets the standard for future judgments.<sup>50</sup> Nonetheless, in spite of the attempts by the U.S. Supreme Court, there still

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44. PHIL. CONST. art. VII.

45. PHIL. CONST. art. VII, § 1.

46. Section 1, Article II of the United States Constitution provides that “[t]he executive power shall be vested in a President of the United States of America.” U.S. CONST. art. II, § 1, cl. 1.

47. *Ople v. Torres*, 293 SCRA 141, 150 (1998) (citing ISAGANI A. CRUZ, PHILIPPINE POLITICAL LAW 173 (1996) & 1 LORENZO TAÑADA & FRANCISCO CARREON, POLITICAL LAW OF THE PHILIPPINES 275 (1961)).

48. See Richard H. Fallon, Jr., *Interpreting Presidential Powers*, 63 DUKE L.J. 347, 347 (2013); Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1099 (2011); & Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 703 (2003).

49. Bradley & Morrison, *supra* note 48, at 1105. Justice Robert H. Jackson has stated previously that congressional inaction “may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.” *Id.*

50. Fallon, Jr., *supra* note 48, at 366.

exists no clear-cut definition of executive power and up to what extent it shall operate.

In the Philippines, Section 1 of Article VII has undergone several changes. This is because, as the eminent constitutionalist Father Joaquin G. Bernas, S.J. explains, the 1973 Constitution, the predecessor of the current 1987 version and enacted under the Marcos regime, created a Prime Minister who was vested with executive powers, with the President acting merely as a ceremonial figure. This structure, however, was never actually tested as Marcos would keep his powers under the original 1935 Constitution and serve as both the ceremonial President and the Prime Minister.<sup>51</sup> A 1981 revision reverted the executive power back to the President.<sup>52</sup> Because of the fact that Marcos tested the executive power beyond its limits, the 1986 Constitutional Commission ensured that several provisions were put in place in the 1987 Constitution — with regard to appointments, the faithful execution of laws, being Commander-in-Chief of the armed forces, the grant of clemency, and the power to contract foreign loans.<sup>53</sup> However, Fr. Bernas still admits that “the presidency that emerges from the 1987 text is still a potent institution largely because the primary source of his political authority [—] election by the people at large [—] is still there.”<sup>54</sup> Furthermore, Fr. Bernas has also averred that, “[t]radition recognizes that the powers of the [P]resident are more than the sum of the enumerated executive powers[,]”<sup>55</sup> perhaps citing the opinion of Justice Cortés in *Marcos*.<sup>56</sup> Put simply, due to the fact that the President is elected by the will of the people, putting strict restrictions on his or her power would prove to be difficult.

Thus, as can be gleaned from the foregoing, executive power is a concept that cannot be given a specific definition. This is further complicated when there are no clear legal bases to allow or disallow certain actions. This disparity is precisely what led to the justifications employed by the majority decisions in *Marcos* and *Ocampo*. This was largely due to the fact

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51. JOAQUIN G. BERNAS, S.J., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 820 (2009 ed.).

52. *Id.*

53. *Id.* at 821.

54. *Id.*

55. Fr. Joaquin G. Bernas, S.J., *The President*, PHIL. DAILY INQ., Aug. 18, 2014, available at <http://opinion.inquirer.net/77583/the-president> (last accessed Aug. 10, 2017).

56. See *Marcos*, 177 SCRA at 691-92.

that, in both cases, there was the same overarching issue — that there are no clear and categorical laws that direct the discretion exercised by both Presidents Aquino and Duterte. Since the Philippines adheres to a hybrid legal system,<sup>57</sup> the Supreme Court, in both cases, held that the determinations in question were in line with the prerogative granted to Presidents due to the executive powers they possess.

In *Marcos*, the petitioners asserted that Marcos had the right to return based on Sections 1 and 6 of Article III of the Constitution<sup>58</sup> and international law, particularly Article 13 of Universal Declaration of Human Rights<sup>59</sup> and Article 12 of the International Covenant on Civil and Political Rights.<sup>60</sup> However, the Court ruled that neither the Constitution granted him such a right, nor did the international instruments, as follows —

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57. The Philippine Supreme Court interprets the laws of the land, and such decisions likewise become binding law. See Cesar L. Villanueva, *Comparative Study of the Judicial Role and Its Effect on the Theory of Judicial Precedents in the Philippine Hybrid Legal System*, 65 PHIL. L.J. 42 (1990).

58. Section 1 of Article III reads —

Section 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

Section 6 of Article III provides —

Section 6. The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of national security, public safety, or public health, as may be provided by law.

PHIL. CONST. art. III, §§ 1 & 6.

59. Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/RES/3/217 A (Dec. 10, 1948). Article 13 of the Universal Declaration of Human Rights provides —

Article 13.

(1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

*Id.* art. 13.

60. International Convention on Civil and Political Rights, *entered into force* Mar. 23, 1976, 999 U.N.T.S. 171. Article 12 of the International Covenant on Civil and Political Rights provides —

Article 12

It must be emphasized that the individual right involved is *not* the right to travel from the Philippines to other countries or within the Philippines. These are what the right to travel would normally connote. Essentially, the right involved is the right to return to one's country, a totally distinct right under international law, independent from although related to the right to travel. Thus, the Universal Declaration of Humans Rights and the International Covenant on Civil and Political Rights treat the right to freedom of movement and abode within the territory of a state[;] the right to leave a country, and the right to enter one's country as separate and distinct rights. The Declaration speaks of the 'right to freedom of movement and residence within the borders of each state' [(Article 13 (1))] separately from the 'right to leave any country, including his own, and to return to his country.' [(Article 13 (2))] On the other hand, the Covenant guarantees the 'right to liberty of movement and freedom to choose his residence' [(Article 12 (1))] and the right to 'be free to leave any country, including his own.' [(Article 12 (2))] which rights may be restricted by such laws as 'are necessary to protect national security, public order, public health or morals or the separate rights and freedoms of others.' [(Article 12 (3))] as distinguished from the 'right to enter his own country' of which one cannot be 'arbitrarily deprived.' [(Article 12 (4))] It would therefore be inappropriate to construe the limitations to the right to return to one's country in the same context as those pertaining to the liberty of abode and the right to travel.

The right to return to one's country is not among the rights specifically guaranteed in the Bill of Rights, which treats only of the liberty of abode and the right to travel, but it is our well[-]considered view that the right to return may be considered, as a generally accepted principle of international law and, under our Constitution, is part of the law of the land [[Article II, Section 2] of the Constitution.] However, it is distinct and separate from the right to travel and enjoys a different protection under the International

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- (1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
  - (2) Everyone shall be free to leave any country, including his own.
  - (3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals[,], or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
  - (4) No one shall be arbitrarily deprived of the right to enter his own country.
- Id.* art. 12.

Covenant of Civil and Political Rights, [i.e., against] being 'arbitrarily deprived' thereof[.] [(Article 12 (4))] <sup>61</sup>

Thus, due to the fact that the laws invoked by the petitioners could not be used a basis for any substantive right, the Court went to the rule based on executive power, as cited earlier. In effect, the restriction against Marcos' return was well within President Aquino's power and discretion.

The petitioners in *Ocampo* likewise invoked several provisions of the Constitution<sup>62</sup> and several statutes as well, but this time, included both

61. *Marcos*, 177 SCRA at 687-88.

62. These were Sections 2, 11, 13, 23, 26, 27, and 28 of Article II, Section 1 of Article III, Section 17 of Article VII, Section 1 of Article XI, Section 3 (2) of Article XIV, and Section 26 of Article XVIII. *Ocampo*, G.R. No. 225973, at 9. Said Sections provide —

Article II. Declaration of Principles and State Policies

...

SECTION 2. The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.

...

SECTION 11. The State values the dignity of every human person and guarantees full respect for human rights.

SECTION 13. The State recognizes the vital role of the youth in nation-building and shall promote and protect their physical, moral, spiritual, intellectual, and social well-being. It shall inculcate in the youth patriotism and nationalism, and encourage their involvement in public and civic affairs.

...

SECTION 23. The State shall encourage non-governmental, community-based, or sectoral organizations that promote the welfare of the nation.

...

SECTION 26. The State shall guarantee equal access to opportunities for public service, and prohibit political dynasties as may be defined by law.

SECTION 27. The State shall maintain honesty and integrity in the public service and take positive and effective measures against graft and corruption.

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SECTION 28. Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all its transactions involving public interest.

PHIL. CONST. art. II, §§ 2, 11, 13, 23, 26, 27, & 28.

Article III. Bill of Rights.

SECTION 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.

PHIL. CONST. art. III, § 1.

Article VII. Executive Department.

...

SECTION 17. The President shall have control of all the executive departments, bureaus, and offices. He shall ensure that the laws be faithfully executed.

PHIL. CONST. art. VII, § 17.

Article XI. Accountability of Public Officers.

SECTION 1. Public office is a public trust. Public officers and employees must at all times be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency, act with patriotism and justice, and lead modest lives.

PHIL. CONST. art. XI, § 1.

Article XIV. Education, Science and Technology, Arts, Culture, and Sports.

SECTION 3.

...

(2) They shall inculcate patriotism and nationalism, foster love of humanity, respect for human rights, appreciation of the role of national heroes in the historical development of the country, teach the rights and duties of citizenship, strengthen ethical and spiritual values, develop moral character and personal discipline, encourage critical and creative thinking, broaden scientific and technological knowledge, and promote vocational efficiency.

PHIL. CONST. art. XIV, § 3(2).

Article XVIII. Transitory Provisions.

SECTION 26. The authority to issue sequestration or freeze orders under Proclamation No. 3 dated 25 March 1986 in relation to the recovery of ill-gotten wealth shall remain operative for not more than eighteen months after the ratification of this Constitution. However, in the national interest, as certified by the President, the Congress may extend said period.



municipal<sup>63</sup> and international laws.<sup>64</sup> They contended that the Memorandum issued by Secretary Lorenzana violated said statutes.<sup>65</sup> The Court ruled that none of the laws cited were violated by the assailed Memorandum.

In terms of the Constitutional provisions, the Court reiterated that the provisions of Articles II and XI are not self-executing, meaning that they need enabling legislation from Congress,<sup>66</sup> while Section 3 (2) of Article XIV and Section 26 of Article XVIII did not contain any direct or indirect prohibitions on Marcos' burial in the LNMB.<sup>67</sup>

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A sequestration or freeze order shall be issued only upon showing of a *prima facie* case. The order and the list of the sequestered or frozen properties shall forthwith be registered with the proper court. For orders issued before the ratification of this Constitution, the corresponding judicial action or proceeding shall be filed within six months from its ratification. For those issued after such ratification, the judicial action or proceeding shall be commenced within six months from the issuance thereof.

The sequestration or freeze order is deemed automatically lifted if no judicial action or proceeding is commenced as herein provided.

PHIL. CONST. art. XVIII, § 26.

63. These statutes are: An Act Providing for the Construction of a National Pantheon for Presidents of the Philippines, National Heroes and Patriots of the Country, Republic Act No. 289 (1948); An Act Providing for Reparation and Recognition of Victims of Human Rights Violations During the Marcos Regime, Documentation of Said Violations, Appropriating Funds Therefor and for Other Purposes [Human Rights Victims Reparation and Recognition Act of 2013], Republic Act No. 10368 (2012); & Armed Forces of the Philippines, Regulation G 161-375 (2000).
64. These were the: International Covenant on Civil and Political Rights; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of the United Nations General Assembly, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005); & U.N. Econ. and Soc. Council, *Promotion and Protection of Human Rights*, E/CN.4/2005/102/Add.1 (Feb. 8, 2005).
65. *Ocampo*, G.R. No. 225973, at 9.
66. *Id.* at 16-17.
67. *Id.* at 17.

As for the laws, the Court first saw that Republic Act (R.A.) No. 289,<sup>68</sup> which authorized the construction of a National Pantheon, cannot be said to have contemplated the LNMB, as the two are not one and the same.<sup>69</sup> Secondly, R.A. No. 10368,<sup>70</sup> which put into legislation the compensation and recognition of the human rights victims during the Marcos era, from the point of view of the Court, could not be expanded to disallow Marcos' burial at the LNMB, because the provisions of said law do not provide for such a prohibition.<sup>71</sup> Thirdly, with regard to the application of international laws, it was ruled that the Philippines is compliant, given that the instruments cited merely serve as guides for legislation to give life to the treaties, covenants, and other international laws.<sup>72</sup> Lastly, the petitioners contended that based on AFP Regulations G 161-375,<sup>73</sup> Marcos was dishonorably discharged as commander-in-chief; thus, he cannot be entitled to a burial at the LNMB. The Court struck that contention down as well, seeing how it was not shown that Marcos was dishonorably discharged based on existing AFP regulations, nor can it be said that his overthrow in the 1987 EDSA People Power Revolution can constitute such.<sup>74</sup>

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68. An Act Providing for the Construction of a National Pantheon for Presidents of the Philippines, National Heroes and Patriots of the Country, Republic Act No. 289 (1948).

69. *Ocampo*, G.R. No. 225973, at 19.

70. An Act Providing for Reparation and Recognition of Victims of Human Rights Violations During the Marcos Regime, Documentation of Said Violations, Appropriating Funds Therefor and for Other Purposes [Human Rights Victims Reparation and Recognition Act of 2013], Republic Act No. 10368 (2012).

71. *Ocampo*, G.R. No. 225973, at 22-23.

72. *Id.* at 25-26. Justice Peralta cited the clause of the principles on reparation —

*Emphasizing* that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures[,] and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law[,] which are complementary though different as to their norms[.]

*Id.* at 25 (citing Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of the United Nations General Assembly, *supra* note 64, pmb.).

73. Armed Forces of the Philippines, Regulation G 161-375 (2000).

74. *Ocampo*, G.R. No. 225973, at 54-56.

Thus, it is quite clear that the Court refused to base both decisions on substantive law. Instead, executive power was employed and applied, albeit with differing applications. Moreover, given how politically and emotionally charged both cases were, the justices who sat in both Courts had several separate opinions regarding the respective cases brought before them, both concurring and dissenting, that further shed light on the goings-on behind the closed doors of their respective chambers. As such, the next Section of this Article shall look into how consistently the Court applied executive power in the main decisions, together with an analysis of the different opinions of the justices. This way, it can be determined whether executive power was truly applied consistently in both cases and, in a sense, show how the rulings were made — stripped of emotions.

### III. CONSISTENCY OF THE APPLICATION OF EXECUTIVE POWER

#### A. *The Majority Decisions*

With the concept of executive power already put into context, one specific point in the decisions in *Marcos* and *Ocampo* must be emphasized in order to concisely illustrate how the concept was applied in both cases — the political determination of the President.

As was discussed, the Court in *Marcos* and *Ocampo* refused to apply substantive law to something perceived to be within the executive powers of the President. As such, one striking similarity was how the Courts saw the actions of Presidents Aquino and Duterte as being founded on political considerations, which cannot be fettered.<sup>75</sup> As it was likewise discussed earlier, there were certain circumstances surrounding the cases that dominated the political landscape at the time; thus, the President had to make a determination that would not be universally accepted, but he or she deemed to be the correct one.

In *Marcos*, the Philippines at the time was still a nation in transition. In President Aquino's mind, to allow Marcos to return so soon after he was deposed had several possible repercussions. With that said, the Court concluded in this manner —

*The President has determined that the destabilization caused by the return of the Marcoses would wipe away the gains achieved during the past few years and lead to total economic collapse.* Given what is within our individual and common

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75. *Marcos*, 177 SCRA at 696 & *Ocampo*, G.R. No. 225973, at 11.

knowledge of the state of the economy, we cannot argue with that determination.<sup>76</sup>

With regard to *Ocampo*, it was promulgated at a time when the political tides of the nation were shifting. President Duterte's convincing win during the 2016 elections was perceived as a triumph over the conventional political elites,<sup>77</sup> coupled with the fact that Marcos, Jr., almost won the vice-presidency. Thus, the Court had this to say —

In the exercise of his powers under the Constitution and the [E.O.] No. 292 (otherwise known as the Administrative Code of 1987) to allow the interment of Marcos at the LNMB, which is a land of the public domain devoted for national military cemetery and military shrine purposes, *President Duterte decided a question of policy based on his wisdom that it shall promote national healing and forgiveness.*<sup>78</sup>

From this, it is readily apparent that both Presidents' determinations rested on rather subjective foundations largely influenced by the political climate at the time. Given that, such determinations were derived solely from the President's wisdom on matters within his or her executive powers — something that cannot be judicially restrained. Consequently, despite the strong political and emotional circumstances regarding the controversies in both cases, the decisions of the Courts cannot be said to have been patently erroneous. What is interesting to note, as an aside, is that the majority opinion in *Ocampo* did not make any reference whatsoever to *Marcos*, despite the similar invocation of executive power. Regardless, though, on this point, it can be reasonably concluded that both Courts ruled consistently. In fact, such is in accordance with the concept of *stare decisis*, which the Supreme Court adheres to in rendering decisions.<sup>79</sup>

Furthermore, as already mentioned, the majority decision was not without some accompanying opinions. As compared to the majority decision, which becomes part of the law of the land,<sup>80</sup> the separate opinions

76. *Marcos*, 177 SCRA at 698 (emphasis supplied).

77. The Manila Times, *Duterte victory vote vs political elite — analyst*, MANILA TIMES, May 11, 2016, available at <http://www.manilatimes.net/duterte-victory-vote-vs-political-elite-analyst/261496> (last accessed Aug. 10, 2017).

78. *Ocampo*, G.R. No. 225973, at 11 (emphasis supplied).

79. See Villanueva, *supra* note 57, at 43-45.

80. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 8 (1950). This states —

Art. 8. Judicial decisions applying or interpreting the laws or the Constitution shall form a part of the legal system of the Philippines. (n)

merely express the views of the justices who penned them. Despite this, it is still important to briefly look into the dissents in order to garner a more holistic perspective of the Court's overall sentiments and how the political climate affects such opinions. Thus, this Article will now compare and contrast select dissenting opinions from both the *Marcos* and *Ocampo* cases.

### B. *The Dissents*

Among the number of dissents posed by the justices of the Court in *Marcos*, perhaps the most striking one was that of Justice Abraham F. Sarmiento, Sr. First of all, he disagreed with the majority opinion, as he saw that there are only two deterrents to the right of travel or the liberty of abode and the changing of the same, which are: 1) decree of statute; and 2) lawful judicial mandate.<sup>81</sup> Given such, he ruled that “[t]here is no law banning the Marcoses from the country; neither is there any court decree banishing him from Philippine territory.” However, what is more notable in his opinion is that he dissented despite the fact that he had suffered from the atrocities under the Marcos regime, which is something he incorporated in his dissent. He recalled, referring to himself in the third person, to wit —

His son's only 'offense' was that he openly and unabatedly criticized the dictator, his associates, and his military machinery. He would pay dearly for it; he was arrested and detained, without judicial warrant or decision, for seven months and seven days. He was held *incommunicado* a greater part of the time, in the military stockade of Camp Crame. In his last week in detention, he was, grudgingly, hospitalized (prison hospital) and confined for chronic asthma. The deplorable conditions of his imprisonment exacerbated his delicate health beyond cure. He died, on [11 November] 1977, a martyr on the altar of the martial law apparatus.<sup>82</sup>

Moreover, he was put under house arrest together with former President Diosdado P. Macapagal on charges of inciting to sedition and rumor mongering merely because both men oversaw the publication of a book critical of martial rule.<sup>83</sup> Despite this, Justice Sarmiento refused to let his

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*Id.*

81. *Marcos*, 177 SCRA at 725 (J. Sarmiento, dissenting opinion).

82. *Id.* at 727-28. Justice Sarmiento's son, Abraham P. Sarmiento, Jr., was one of the *desaparecidos*, or those who were victims of enforced disappearance during the Marcos regime. Philippine Star, *Justice Sarmiento passes away*, PHIL. STAR, Oct. 4, 2010, available at <http://www.philstar.com/breaking-news/617597/justice-sarmiento-passes-away> (last accessed Aug. 10, 2017).

83. *Id.* at 728.

personal vendettas get in the way of his human rights advocacies, as he ruled in this wise —

I feel the ex-President's death abroad (presented in the dailies as 'imminent') would leave him 'unpunished' for his crimes to country and countrymen. If punishment is due, let this leadership inflict it. But let him stand trial and accord him due process.

Modesty aside, I have staunchly and consistently advocated the human right of travel and movement and the liberty of abode. We would have betrayed our own ideals if we denied Marcos his rights. It is his constitutional right, a right that [cannot] be abridged by personal hatred, fear, founded or unfounded, and by speculations of the man's 'capacity' 'to stir trouble[.]' Now that the shoe is on the other foot, let no more of human rights violations be repeated against any one, friend or foe. *In a democratic framework, there is no such thing as getting even.*<sup>84</sup>

Another dissent worthy to note was that of Justice Teodoro R. Padilla. To him, the respondents in the case failed to prove that there were national security interests that outweighed Marcos' right as a Filipino to return to the country, and that the fears were merely speculative.<sup>85</sup> He further shared how he proffered an interesting fact to the Solicitor General during the oral arguments, as such —

During the oral arguments in this case, I asked the Solicitor General how one could *validly defend* the right of former Senator Benigno S. Aquino, Jr., a Filipino, to return to the Philippines in 1983 and, at the same time, *credibly deny* the right of Mr. Marcos, also a Filipino, to return to the Philippines in 1989. I still have not found a satisfactory answer to that question. Instead, it has become clearer by the day that the drama today is the same drama in 1983 with the only difference that the actors are in opposite roles, which really makes one hope, in the national interest, that the mistake in 1983 should not be made to persist in 1989.<sup>86</sup>

He would go on to conclude —

To one who owes Mr. Marcos, his wife[,] and followers absolutely nothing, personal, political[,] or otherwise, the following are the cogent and decisive propositions in this case —

- (1) Mr. Marcos *is a Filipino* and, as such, entitled to return to, die[,] and be buried in this country;

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84. *Id.* at 728-29 (emphasis supplied).

85. *Marcos*, 177 SCRA at 719 (J. Padilla, dissenting opinion).

86. *Id.* at 721.

- (2) [R]espondents have not shown any ‘hard evidence’ or convincing proof why his right *as a Filipino* to return should be denied him. All we have are general conclusions of ‘national security’ and ‘public safety’ in avoidance of a specific demandable and enforceable constitutional and basic human right to return;
- (3) [T]he issue of Marcos’ return to the Philippines, perhaps more than any issue today, requires of all members of the Court, in what appears to be an extended political contest, the ‘cold neutrality of an impartial judge.’ It is only thus that we fortify the independence of this Court, with fidelity, not to any person, party[,] or group but to the Constitution and only to the Constitution.<sup>87</sup>

In *Ocampo*, Chief Justice Maria Lourdes A. Sereno, compared to the majority decision that made no mention of *Marcos*, cited the landmark case in her disquisition as it was invoked by the respondents in the case.<sup>88</sup> However, she actually used the decision in justifying her disagreement of Marcos’ burial in LNMB, as such —

[T]he residual power of the President cannot be used to justify acts that are contrary to the Constitution and the laws. To allow him to exercise his powers in disregard of the law would be to grant him unbridled authority in the guise of inherent power. Clearly, that could not have been the extent of the residual powers contemplated by the Court in [*Marcos*].

To reiterate, the President is not above the laws but is, in fact, obliged to obey and execute them. This obligation is even more paramount in this case because of historical considerations and the nature of the norms involved, i.e., peremptory norms of human rights that are enshrined both in domestic and international law.<sup>89</sup>

She would also disagree with the points made by the majority of the Court, even opining that only the Marcos family would benefit from the burial.<sup>90</sup> Justice Sereno would go on to lambast the view subscribed to by the majority especially as regards the issue of the military honors that Marcos was supposedly entitled to, concluding her dissent in this manner —

For the Court to pretend that the present dispute is a simple question of the entitlement of a soldier to a military burial is to take a regrettably

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87. *Id.*

88. *Ocampo*, G.R. No. 225973, Nov. 8, 2016, at 31, available at [http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/225973\\_sereno.pdf](http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/225973_sereno.pdf) (last accessed Aug. 10, 2017) (C.J. Sereno, dissenting opinion).

89. *Id.* at 32–33.

90. *Id.* at 69–70.

myopic view of the controversy. It would be to disregard historical truths and legal principles that persist after death. As important, it would be to degrade the state's duty to recognize the pain of countless victims of Marcos and Martial Law. Regardless of the promised national unity that the proposed burial will bring, I cannot, in good conscience, support such an expedient and shortsighted view of Philippine history.<sup>91</sup>

Another salient dissent in *Ocampo* that must be brought to light was that of Senior Associate Justice Antonio T. Carpio.<sup>92</sup> Like Chief Justice Sereno, Justice Carpio also made mention of the *Marcos* case in justifying his view that Marcos should be denied a burial in the LNMB. He had this to say —

In [*Marcos*], the Court described Marcos as ‘a dictator forced out of office and into exile after causing twenty years of political, economic[,] and social havoc in the country.’ In short, he was ousted by the Filipino people. Marcos was forcibly removed from the Presidency by what is now referred to as the People Power Revolution. This is the strongest form of dishonorable discharge from office since it is meted out by the direct act of the sovereign people.

The fact of Marcos’ ouster is beyond judicial review. This Court has no power to review the legitimacy of the People Power Revolution as it was successfully carried out by the sovereign people who installed the revolutionary government of Corazon C. Aquino. The people have spoken by ratifying the 1987 Constitution, which was drafted under the Aquino government installed by the People Power Revolution. The Court has been steadfast in dismissing challenges to the legitimacy of the Aquino government, and has declared that its legitimacy is not a justiciable matter that can be acted upon by the Court.<sup>93</sup>

Further, Justice Carpio found that to allow Marcos’ burial, through the Memorandum, would not serve a public purpose, as such ran counter to certain constitutional provisions, as well as R.A. No. 10368.<sup>94</sup> Coupled with

91. *Id.* at 72.

92. *Ocampo v. Enriquez*, G.R. No. 225973, Nov. 8, 2016, available at [http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/225973\\_carpio.pdf](http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/225973_carpio.pdf) (last accessed Aug. 10, 2017) (J. Carpio, dissenting opinion).

93. *Id.* at 3-4 (emphasis omitted).

94. *Id.* at 9-10. Justice Carpio further states —

Marcos’ interment at the LNMB will cause undue injury particularly to human rights victims of the Marcos regime, as well as the sovereign people who ousted Marcos during the People Power Revolution. Marcos’ interment at the LNMB is thus contrary to public policy.

*Id.* at 10-11.



the fact that he was deposed through the sovereign act of the people, he opined, to wit —

Finally, government funds or property shall be spent or used solely for public purposes. Since Marcos was ousted by the sovereign act of the Filipino people, he was dishonorably discharged from office. Consequently, Marcos' dishonorable discharge serves to convert his burial into a private affair of the Marcos family. Hence, no public purpose is served by interring his remains at the LNMB.<sup>95</sup>

The other two dissenters who rendered opinions — Justices Marvic Mario Victor F. Leonen and Alfredo Benjamin S. Caguioa — had similar justifications in their opinions.<sup>96</sup> Such were founded on the fact that Marcos was not entitled to a hero's burial based on the spirit of the Constitution, current laws, jurisprudence, and international law.<sup>97</sup>

From the discussion, it can be said that the main demarcation between the opinions in *Marcos* and *Ocampo* is in the nature of the legal justifications. In the latter, the dissents were hinged largely on the justices' interpretation of a variety of factors — definitions vis-à-vis statutes, international agreements, treaties, and the like. In terms of *Marcos*, however, the legal bases were founded on human rights considerations. Of course, this is the case considering the circumstances behind the cases, as Marcos was still alive in *Marcos*, while he was long gone in *Ocampo*. Be that as it may, seeing as to how the Court renders decisions based on a majority vote,<sup>98</sup> questions arise

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95. *Id.* at 11. (citing *Fort Bonifacio Development Corp. v. Commissioner of Internal Revenue*, 679 SCRA 566, 590 (2012)) (emphasis omitted).

96. See *Ocampo*, G.R. No. 225973, Nov. 8, 2016, [http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/225973\\_leonen.pdf](http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/225973_leonen.pdf) (last accessed Aug. 10, 2017) (J. Leonen, dissenting opinion) & *Ocampo*, G.R. No. 225973, Nov. 8, 2016, [http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/225973\\_caguioa.pdf](http://sc.judiciary.gov.ph/pdf/web/viewer.html?file=/jurisprudence/2016/november2016/225973_caguioa.pdf) (last accessed Aug. 10, 2017) (J. Caguioa, dissenting opinion).

97. See Patricia Lourdes Viray, *Roundup: Dissenting opinions of SC justices on Marcos burial*, PHIL. STAR, Nov. 11, 2016, available at <http://www.philstar.com/headlines/2016/11/11/1642736/roundup-dissenting-opinions-sc-justices-marcos-burial> (last accessed Aug. 10, 2017).

98. PHIL. CONST. art. VIII, § 4 (2). This provides —

- (2) All cases involving the constitutionality of a treaty, international or executive agreement, or law, which shall be heard by the Supreme Court en banc, and all other cases which under the Rules of Court are required to be heard en banc, including those involving the constitutionality, application, or operation of

regarding the reasons behind a justice's vote, especially when certain justices decide in stark contrast from another group. Naturally, several factors are at play, but perhaps one of the most important of such are the politics surrounding a magistrate, which consequently begs a survey into the connection between appointing power behind a justice, on one hand, and the manner by which said justice voted, on the other.

### *C. Appointing Influence?*

As a preliminary, it should be pointed out that the justices of the Supreme Court are appointed by the President from a list of three nominees submitted to him or her by the Judicial and Bar Council.<sup>99</sup> This is contrasted to what transpires in the U.S., as the President is conferred the power to nominate the justices, subject only to the advice and consent of the Senate.<sup>100</sup> Either way, the ultimate fact is that the President still has the discretion in picking who shall sit on the highest tribunal of the land. Given such, it has been discussed that the process of appointment under the current 1987 Constitution leaves the door open for the "judicialization" of politics.<sup>101</sup> Note, however, that the politics of judicial appointments are more delineated in the U.S., as the composition of the justices are determined by the political alignment of the President who appointed him or her — which is either liberal (Democratic) or conservative (Republican).<sup>102</sup> In the Philippines, political alignments are less pronounced.

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presidential decrees, proclamations, orders, instructions, ordinances, and other regulations, shall be decided with the concurrence of a majority of the Members who actually took part in the deliberations on the issues in the case and voted thereon.

*Id.*

99. PHIL. CONST. art. VIII, § 9. It states that —

SECTION 9. The Members of the Supreme Court and judges of lower courts shall be appointed by the President from a list of at least three nominees prepared by the Judicial and Bar Council for every vacancy. Such appointments need no confirmation.

*Id.*

100. U.S. CONST. art. II, § 2, cl. 2.

101. Dante B. Gatmaytan, *Politicisation and Judicial Accountability in the Philippines*, 87 PHIL. L.J. 21, 28-31 (2012).

102. See Alicia Parlapiano & Karen Yourish, *Where Neil Gorsuch Would Fit on the Supreme Court*, N.Y. TIMES, Feb. 1, 2017, available at <https://www.nytimes.com/interactive/2017/01/31/us/politics/trump-supreme-court-nominee.html> (last accessed Aug. 10, 2017).

This results in a relative uncertainty with regard to how the Court will render a decision concerning a particular issue, especially highly controversial ones, with commentators often resorting to speculation as to how a ruling will go. Such is more apparent in highly controversial cases.<sup>103</sup>

Be that as it may, the Article will now look into the connection between the appointing power and the justices who decided a certain way, in particular regarding the two cases, focusing on those who either joined in the majority opinion, or dissented therefrom. This way, it may be illustrated, albeit superficially, how the politics of appointments affect judicial decision-making in highly contentious cases, or even the lack thereof.

In *Marcos*, all 15 justices were appointed by President Aquino subsequent to the deposition of Marcos in 1986. Despite this, the Court was deeply divided on the issue, as eight justices voted to dismiss the petitions, while seven voted against. Among the seven dissents were the two aforementioned dissents by Justices Sarmiento and Padilla, who set aside personal biases and founded their opinions more on legal bases than anything else.

With regard to *Ocampo*, of the five dissenting justices, only Justice Carpio was not appointed by President Aquino, III, as the former was appointed by the latter's predecessor, President Gloria Macapagal-Arroyo. Those who comprised the majority consisted of one Aquino, III appointee in Justice Estela Perlas-Bernabe, while the rest were appointed by President Arroyo. The lone justice who inhibited due to his close ties not just to President Duterte, but also a party to the case,<sup>104</sup> Justice Bienvenido L. Reyes, was appointed by President Aquino, III.

What is apparent right away is that, regarding the two cases, there is no clear link between the justices who voted either for or against, on one hand, and the president who appointed him or her, on the other. This is not to say, however, that the aforementioned are conclusive proofs of the absence of political leanings with regard to judicial decisions; rather, it merely gives a concrete illustration of the supposed impartiality that a judge, or a justice in

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103. See, e.g., Rappler, SC: Verdict on Marcos burial on hold until November 8, available at <http://www.rappler.com/nation/149502-supreme-court-extends-hold-order-marcos-burial> (last accessed Aug. 10, 2017) & Marites Dañguilan Vitug, It's a close Supreme Court vote on Poe cases, available at <http://www.rappler.com/newsbreak/in-depth/119364-close-supreme-court-vote-grace-poe-cases> (last accessed Aug. 10, 2017).

104. See Karl Kaufman, Duterte fratmate inhibits from Marcos burial case, available at <https://www.msn.com/en-ph/news/national/duterte-fratmate-inhibits-from-marcos-burial-case/ar-AAiidrl> (last accessed Aug. 10, 2017).

this case, is supposed to manifest when rendering decisions — that is, regardless of the appointing power, the justices will decide based on their independent interpretation of the law. Upon this backdrop, the Article will briefly discuss the concept of the “cold neutrality of an impartial judge.”

*D. “Cold neutrality of an impartial judge”*

Jurisprudence is replete with reiterations of the phrase “cold neutrality of an impartial judge” when the Court discusses how judges should render decisions.<sup>105</sup> According to Fr. Bernas, such is “[t]he ideal virtue that is desired of a court, whether it is a single-judge court or a collegial body, [and] is a consummation devoutly wished[,] but not always attained.”<sup>106</sup> Granted, being human institutions, courts cannot be said to be infallible when deciding cases. However, rules have still been put in place to ensure that impartiality is upheld as much as possible.

The New Code of Judicial Conduct<sup>107</sup> promulgated by the Court has an entire Canon devoted to upholding impartiality, as it provides that “[i]mpartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself[,] but also to the process by which the decision is made.”<sup>108</sup> Furthermore, Section 1 of Canon 3 prescribes that “[j]udges shall perform their judicial duties without favor, bias[,] or prejudice.”<sup>109</sup>

Thus, given the foregoing, judges and justices are obliged to decide on cases with objectivity, setting aside biases and other factors that affect his or her judgment. This can come at a cost, however, as at times, objectivity is overshadowed by other supervening factors. Now, this begs the question: was it apparent in both cases?

From the outset, the answer is obviously one that cannot be answered with certainty. Whether there were external factors that affected a justice’s

105. See, e.g., *Pimentel v. Salanga*, 21 SCRA 160 (1967); *Geotina v. Gonzalez*, 41 SCRA 66 (1971); *Mateo, Jr. v. Villaluz*, 50 SCRA 18 (1973); *Ignacio v. Villaluz*, 90 SCRA 16 (1979); & *People v. Opida*, 142 SCRA 295 (1986).

106. Fr. Joaquin G. Bernas, S.J., *Cold neutrality of judges*, PHIL. DAILY INQ., Nov. 28, 2011, available at <http://opinion.inquirer.net/18121/cold-neutrality-of-judges> (last accessed Aug. 10, 2017).

107. Supreme Court, *Adopting the New Code of Judicial Conduct for the Philippine Judiciary*, Administrative Matter No. 03-05-01-SC [SC A.M. No. 03-05-01-SC] (Apr. 27, 2004).

108. *Id.* canon 3.

109. *Id.* canon 3, § 1.

decision-making is a matter only he or she knows. However, the Article shall make an objective perusal of the two cases, taking into account the trends that manifested in the majority and dissenting opinions, as well as several factors that affect the judgment of judges and justices. It is the hope of the Authors that what will be discussed below will only be the start of the conversation regarding true judicial impartiality.

In *Marcos*, it seems that the majority decision was more emotionally charged compared to the dissents. However, both sides based their opinions on legal bases that were well justified. Given the complexity of the case, as well as it being a case of first impression, the vote could have gone either way. In any case, *Marcos* was notable in the sense that the Court was not unanimous in barring Marcos' return to the country — after all, only one vote separated the majority from the dissenters. This is taking into account the political climate surrounding the case at the time, as well as the composition of the Court. Again, it is worth emphasizing the dissents of Justices Sarmiento and Padilla.

With regard to *Ocampo*, it can be said that the dissents therein were more driven with emotion. Despite this, considering that it was another case of first impression — the facts attendant to the case, and the ambiguity in the legal bases surrounding the burial — then it was only natural for some justices, the dissenters in particular, to resort to the spirit of the law rather than the letter of the law, which was actually the underlying focal point of the whole controversy. Given the composition of the Court — this time being a mix of appointees from different political inclinations — as well as the political circumstances of the time, it can be said that the ruling was not one that was based solely on political leanings. That alone, though, would not prove impartiality, but by setting such aside, it would hopefully give the public a clearer picture behind the Court's decision, whether or not one agreed with it.

#### IV. CONCLUSION

The Court, after it promulgated *Ocampo*, was the subject of substantial public outrage. There were rallies conducted<sup>110</sup> and opinions circulated,<sup>111</sup>

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110. See Joseph Hincks, Filipinos Are Outraged at Attempts to Rehabilitate a Late Dictator as a National Hero, *available at* <http://time.com/4583037/philippines-marcos-burial-duterte-human-rights-protest> (last accessed Aug. 10, 2017); Jim Gomez, *Anti-Marcos burial protesters unite at 'Black Friday' rally*, PHIL. STAR, Nov. 26, 2016, *available at* <http://www.philstar.com/headlines/2016/11/26/1647626/anti-marcos-burial-protesters-unite-black-friday-rally> (last accessed Aug. 10, 2017); & Richard C. Paddock, *Hero's Burial for Ferdinand Marcos Draws*

among other things. This is understandable since the public at-large is not aware of the legalities surrounding a case. With that said, what the Article wanted to illustrate was not whether the decision was right or wrong — the question is whether such was legal.

As earlier stated, the Court remains a human institution. It is composed of individuals with their own set of belief systems. Despite this, it rules based on the way the majority of justices see a particular issue from a legal standpoint. More often than not, when it comes to a relatively simple set of facts, the Court will rule on the law almost unanimously. That is not true, however, in situations such as those in the *Marcos* and *Ocampo* cases. When the facts are complicated, sometimes even controversial, the divergence in opinion becomes more manifest. Resolving these matters, however, is precisely the role of the Supreme Court — it is to rule on facts that are complex, complicated, and controversial based on the laws available, with the resulting decision transforming into the law of the land. Indeed, at times, it can seem like a decision was rendered erroneously. However, given that a majority vote was needed and attained, it becomes difficult to question such because that is the result of a democratic system, in which the courts play a major part. Not to mention, it also rules based on precedent, as both cases already established in this Article. The Court rules not individually, but as a collegial body, as a whole.

Going back to the Valle de los Caídos, the fate of Franco's remains was preliminarily voted on to be exhumed by Spanish Ministers of Parliament (MPs).<sup>112</sup> As an aside, Justice Sereno used the site as an example in her dissent,<sup>113</sup> emphasizing how similarly situated the once colonial superpower

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*Protests From Dictator's Victims*, N.Y. TIMES, Nov. 18, 2016, available at [https://www.nytimes.com/2016/11/19/world/asia/philippines-marcos-burial.html?\\_r=0](https://www.nytimes.com/2016/11/19/world/asia/philippines-marcos-burial.html?_r=0) (last accessed Aug. 10, 2017).

111. Particularly online. See Rappler Social Media Team, Outrage, cheers online as SC allows Marcos burial, available at <http://www.rappler.com/technology/social-media/151677-marcos-burial-supreme-court-decision-online-reactions> (last accessed Aug. 10, 2017).

112. Sam Jones, *It's shameful for Franco's victims': Spanish MPs vote to exhume dictator*, GUARDIAN, May 11, 2017, available at <https://www.theguardian.com/world/2017/may/11/its-shameful-for-francos-victims-spanish-mps-agree-to-exhume-dictator> (last accessed Aug. 10, 2017).

113. *Ocampo*, G.R. No. 225973, at 56-58 (C.J. Sereno, dissenting opinion). Chief Justice Sereno elaborated on this matter, citing U.N. Special Rapporteur Pablo De Greiff, who wrote a report regarding the Spanish experience on reparation. *Id.* at 57-58.

is to one of its formerly subjugated possessions. Perhaps those MPs took a cue from the events that occurred in the Philippines. With that said, given what had transpired in *Ocampo*, coupled with the wave of populism attempting to engulf the world,<sup>114</sup> caution should perhaps be exercised in these times, especially in a situation when the decision of one man could rewrite history and, at the same time, set the foundations for how history will be taught in the future. Given the legal ambiguities that were made manifest in both cases, the situation in Spain, as well as the cases discussed herein, should be guides for Congress as it continues to legislate on behalf of the people. That way, controversies so divisive as the ones discussed can be avoided in the future.

Following his disquisition regarding the *Marcos* case, Fr. Bernas predicted that, “[t]he doctrine enunciated in [the] two resolutions will be regretted when another Ferdinand Marcos emerges as President.”<sup>115</sup> Obviously, such has not happened, but the doctrine was already used, albeit not expressly, to bury the same person in the LNMB, after he was previously not even allowed to step foot in his own country to die. In a sense, the circle has all but been completed. What follows subsequent to all this is something only the future holds, but squarely in the hands of the sovereign — the Filipino people.

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114. Adam Taylor, *The global wave of populism that turned 2016 upside down*, WASH. POST, Dec. 19, 2016, available at [https://www.washingtonpost.com/news/worldviews/wp/2016/12/19/the-global-wave-of-populism-that-turned-2016-upside-down/?utm\\_term=.873e8ee297a1](https://www.washingtonpost.com/news/worldviews/wp/2016/12/19/the-global-wave-of-populism-that-turned-2016-upside-down/?utm_term=.873e8ee297a1) (last accessed Aug. 10, 2017).

115. BERNAS, *supra* note 51, at 826.