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THE PRESIDENTIAL VEIL OF 'ADMINISTRATIVE AUTHORITY' OVER FOREIGN-FINANCED PUBLIC CONTRACTS IN THE PHILIPPINES

Diane A. Desierto*

ABSTRACT

Over the past decade, incumbent Philippine President Gloria Macapagal-Arroyo has been besieged by accusations of corruption, bribery, and influence-peddling in the approval and allocation of foreign-financed public contracts. The latest scandal directly implicating the President involved a proposed National Broadband Network (NBN) to be undertaken by a Chinese contractor, ZTE Corporation, under a foreign loan financing agreement with the Chinese government. During Senate investigations of the NBN contracts, then-Secretary of the National Economic Development Authority (NEDA) Romulo L. Neri disclosed that he was offered a 200 million Philippine peso (Php) bribe to favorably endorse the contract. A subsequent NEDA whistleblower was later abducted by government authorities, apparently to prevent him from testifying on multimillion dollar kickbacks demanded for the NBN project, and how NEDA had been reduced to a rubber-stamp in the evaluation and approval process. On the heels of public riots, impeachment threats, and the near-toppling of the Arroyo government, the President declared the cancellation of the NBN contract in October 2007.

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This paper examines the Presidential use of “administrative authority” within the process of approving, policing, and monitoring of foreign-financed contracts, specifically in the form of projects financed through Official Development Assistance (ODA) or through “tied loans” that require selection of the project contractor from the donor country. Analysis of Philippine administrative law and jurisprudence reveals that the President’s broadly-construed authority to conduct administrative reorganizations grants her virtually full control of the ODA approval, evaluation, and monitoring process and seriously undermines the functional independence of NEDA (and its Investment Coordination Committee). This is contrary to the legislative intent of ensuring inter-agency checks and proper project vetting under the Official Development Assistance Act of 1996.

To date, however, the Philippine Supreme Court has set a relatively low threshold of “good faith and administrative efficiency” for affirmation of the validity of administrative reorganizations. The Court has exhibited an almost-automatic deference to the President’s assertion of “good faith and administrative efficiency purposes.” In light of important constitutional policies that regulate foreign loan contracting, this paper proposes that the Court reconsider its minimal test for the validity of administrative reorganizations, particularly when they occur against the sensitive context of ODA project approvals and allocations. When the President’s administrative fiat is apparently deployed to circumvent legislative standards and constitutionally-mandated independent agency oversight, the Court should exercise its expanded power of judicial review under the 1987 Philippine Constitution to impose higher scrutiny on the President’s exercise of power to reorganize the Executive Branch.

CONTENTS

I. INTRODUCTION	73
II. THE PHILIPPINE ADMINISTRATIVE FRAMEWORK AND THE ODA PROCESS.....	79
III. ADMINISTRATIVE REORGANIZATIONS: COMPARATIVE PRACTICES	93
IV. DELIMITATIONS TO THE PRESIDENT’S ADMINISTRATIVE AUTHORITY IN THE ODA PROCESS.....	100
A. CASE STUDY: ANALYSIS OF PRESIDENTIAL JUSTIFICATIONS IN THE NBN CONTROVERSY ..	104
V. CONCLUSION.....	116

I. INTRODUCTION

Since 2000, the Philippines has received relatively increasing levels of Official Development Assistance (ODA), or development aid loans, from donor countries as well as international financial institutions.¹ As of the end of 2008, total Philippine

1. See NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY, 16TH (2007) ANNUAL ODA PORTFOLIO REVIEW, http://www.neda.gov.ph/progs_prj/16thODA/16th_odamain.htm (last visited October 18, 2009).

The CY 2007 ODA Loans Portfolio amounted to US\$9.747 billion covering 130 loans composed of 119 project and 11 program loans. Seventy-eight percent or US\$7.576 billion of the portfolio is accounted for by project loans while the remaining 22 percent or US\$2.171 billion by program loans (Annex 2-A). Of the 130 loans in 2007, 103 are ongoing (including 9 newly effective loans), 5 are newly-signed and 22 loans closed within the year. The amount of ODA loans has been decreasing since 2000 and only slightly increased by 3 percent in CY 2007, from the US\$9.477 billion CY 2006 figure. Starting CY 2005, there was a noted increase in program loans, consistent with the country's commitment to the program-based approach espoused by the Paris Declaration. The concessionality of ODA loans is measured by their grant element which is the reduction enjoyed by the borrower when debt service payments (principal and interest) expressed at their present values discounted at 10 percent are less than the face value of the loans or loan and grant. Per the ODA Act, the weighted average grant element of all ODA at anytime shall not be less than 40 percent and each ODA must contain a grant element of at least 25 percent. Per DOF computation, the grant element of all ODA loans, from effectivity of the ODA Act in 1996 to December 2007, is 53.31 percent (Annex 2-B). For the past years, the Infrastructure Sector has consistently been the recipient of the largest share of the ODA loans portfolio. In CY 2007, 57 percent or US\$5.532 billion was the sector's share, broken down as follows: (i) Transportation with 35 loans amounting to US\$3.833 billion or 39 percent of the portfolio; (ii) Energy, Power and Electrification with five loans worth US\$852 million (9 percent); (iii) Water Resources with 16 loans involving US\$695 million (7 percent); and, (iv) Social Infrastructure with five loans amounting to US\$152 million (2 percent) (Annex 2-C). The Agriculture, Agrarian Reform and Natural Resources Sector came second, with 20 loans worth US\$1.672 billion (17 percent). Meanwhile, the Social Reform and Development Sector is the third largest recipient which accounts for 12 percent of the portfolio or US\$1.153 billion involving 24 loans. This is followed by the Industry, Trade and Tourism Sector which received a seven percent share of the portfolio with nine loans worth US\$706 million, and the Governance and Institution Development Sector which accounts for the remaining seven percent of the portfolio or US\$683 million for six loans. Notable improvements in the CY 2007 distribution is the significant increase in the ODA share of the Governance and Institutions Development Sector which received US\$683 million (7 percent of the portfolio) in 2007 from only US\$22 million in CY 2006 (0.2 percent). Four new governance projects implemented by the Department of Finance (DOF), Bureau of Customs (BOC) and Bureau of Internal Revenue (BIR) became effective in CY 2007. The Government of Japan through the Japan Bank for International Cooperation (GOJ-JBIC) is still the biggest source of ODA loans accounting for 37 percent or US\$3.646 billion with 46 loans. This is followed by other sources (Austria, Belgium, China, Germany, International Fund for Agricultural Development [IAFD], Korea, Kuwait, Nordic

foreign debt stood at US\$87 billion, over thirteen percent higher than at the end of 2007. Foreign debt accounts for 43% of total government debt. In January 2009, the Philippines issued the first global bonds in Asia for the year, raising US\$1.5 billion from an offer of ten-year bonds.² As of this writing, the Philippines is ranked 47th out of 203 countries with respect to the total volume of external debt.³

Economists and fiscal experts have raised serious concerns about the surge of ODAs to the Philippines, reminiscent of the cheap credits frequently used by the 1970s Marcos dictatorship that predicated the expansion of the national debt. According to these experts, the growing supply of ODAs from China has led to Philippine government agencies relaxing their supervision of project evaluation.⁴ As a consequence, Chinese ODA loans end up being allocated to “projects of doubtful social or economic value.”⁵

A recent example of such dubious ODA-financed projects involved the 2007 contracts for the National Broadband Network (NBN) and Cyber-Education Project.⁶ Varying allegations of

Development Fund [NDF], Netherlands, Organization of Petroleum Exporting Countries [OPEC], Saudi Arabia, Sweden, Spain, and United Kingdom) which funded 35 loans worth US\$2.282 billion or 23 percent of the portfolio. The Asian Development Bank (ADB) had a share of 20 percent (or US\$1.980 billion with 23 loans) while the World Bank accounted for 19 percent (or US\$1.838 billion with 26 loans) of the portfolio.

2. See Rosemarie Francisco, *Philippine government debt at end-2008 falls slightly*, REUTERS, March 12, 2009, <http://in.reuters.com/article/asiaCompanyAndMarkets/idINMAN5414220090312> (last visited October 18, 2009).

3. See CIA, THE WORLD FACTBOOK, <http://www.cia.gov/library/publications/the-world-factbook/rank/html?countryName=Philippines&countryCode=ph®ionCode=as&rank=47#ph> (last visited October 18, 2009).

4. Efren L. Danao, *Clip Palace's power on loans – Mar*, THE MANILA TIMES, October 16, 2007, http://www.manilatimes.net/national/2007/oct/16/yehey/top_stories/20071016top3.html (last visited 10 March 2009).

5. Roel R. Landingin, *ODA surge sparks scandals for Arroyo, debt woes for RP*, SUN STAR, February 12, 2008, <http://www.sunstar.com.ph/static/net/2008/02/12/oda.surge.sparks.scandals.for.arroyo.debt.woes.for.rp.html> (last visited October 18, 2009).

6. See DEP'T OF TRANSP. & COMMC'NS, CONTRACT FOR THE SUPPLY OF EQUIPMENT AND SERVICES FOR THE NATIONAL BROADBAND NETWORK PROJECT BETWEEN THE REPUBLIC OF THE PHILIPPINES THROUGH THE DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS AND ZTE CORPORATION (2007), available at <http://www.inquirer.net/specialfeatures/nbndeal>. The Philippine government, through the Department of Transportation and Communications, entered into a 21 April 2007 Supply Contract (hereafter, “ZTE Supply Contract”) with a Chinese contractor, ZTE Corporation for the establishment of the NBN. The ZTE Supply Contract specified three (3) other agreements: 1) a July 12, 2006 Memorandum of Understanding between the Government of the Republic of the Philippines and ZTE International Investment Limited, “in respect of the Nationwide Government Broadband Communication Infrastructure Project”; 2) an Executive Agreement between the Republic of the Philippines and the People's Republic of China “where

massive corruption and contractual illegality prompted three committees of the Philippine Senate (the Committee on Accountability of Public Officers and Investigations, the Committee on Trade and Commerce, and the Committee on National Defense and Security) to conduct a joint investigation of the circumstances surrounding the execution and financing of the NBN and Cyber-Education contracts. When then-National Economic Development Authority (NEDA) Secretary Romulo L. Neri was called upon to testify, he disclosed that the Chairman of the Commission on Elections had offered him a bribe to favorably endorse the NBN contract. Neri also stated that he had informed President Gloria Macapagal-Arroyo about the bribe offer. The disclosure prompted Senators to ask whether President Arroyo followed up the NBN project with Neri, whether President Arroyo directed Neri to prioritize it, and whether President Arroyo directed Neri to approve the project. Neri responded to each question with a claim of executive privilege.⁷

After the abduction of a NEDA whistleblower who was instructed to “moderate the greed” of corrupt intermediaries⁸ sparked public protests and political turmoil, President Arroyo abruptly cancelled the NBN contracts.⁹ The controversy over the NBN contracts illustrates the weaknesses of agency oversight and administration in the evaluation, approval, and allocation process for ODAs. NEDA is constitutionally-mandated as the “independent planning agency of the government”¹⁰ and has a critical role

the latter agreed to finance the National Broadband Network Project”; and 3) a Loan Agreement with Export-Import Bank of China “subject to the condition that the Equipment and Services to be procured from the proceeds of the loan come from ZTE Corporation.” None of these agreements, apart from the ZTE Supply Contract, is available to the Senate or the rest of the public.

7. The Philippine Supreme Court, voting 9 to 6, held that Neri was entitled to the claim of executive privilege. *See Romulo L. Neri v. Senate Committee on Accountability of Public Officers and Investigations, Senate Committee on Trade and Commerce, and Senate Committee on National Defense and Security*, G.R. No. 180643, March 25, 2008 and September 4, 2008 (denial of reconsideration). *See Diane A. Desierto*, “Universalist Constitutionalism in the Philippines: Restricting Executive Particularism in the Form of Executive Privilege”, *Journal of Law and Politics in Africa, Asia, and Latin America/Verfassung und Recht in Übersee* (2009).

8. *See Veronica Uy*, “Senate to include Lozada abduction in NBN probe Friday”, February 7, 2008, *Philippine Daily Inquirer*, <http://newsinfo.inquirer.net/breakingnews/nation/view/20080207-117366/UPDATE-NBN-hearing-set-Friday-says-Cayetano> (last visited 10 February 2009).

9. *See Michael Lim Ubac*, “Arroyo decides ‘not to continue’ with the ZTE deal — Bunye”, October 2, 2007, *Philippine Daily Inquirer*, *full text of article available at* http://newsinfo.inquirer.net/topstories/topstories/view/20071002-92067/Arroyo_decides_%27not_to_continue%27_with_ZTE_deal—Bunye (last visited 10 February 2009).

10. *See CONST.* (1987), Art. XII, § 9:

“The Congress may establish an independent economic and planning agency headed by the President, which shall, after consultations

in project evaluation and recommending ODA approval to the President. However, in recent years, the President has wielded her administrative authority to bypass NEDA's strict processes and enabled agencies to approve foreign-financed projects outside of NEDA standards.¹¹

with the appropriate public agencies, various private sectors, and local government units, recommend to Congress, and implement continuing integrated and coordinated programs and policies for national development. Until the Congress provides otherwise, the National Economic and Development Authority shall function as the independent planning agency of the government."

11. See Roel R. Landingin, *ODA surge sparks scandals for Arroyo, debt woes for RP*, PHIL. CTR. FOR INVESTIGATIVE JOURNALISM, Feb. 11, 2008, <http://www.pcij.org/stories/2008/oda3.html> (last visited Oct. 22, 2009) (emphasis added):

From evaluating government projects to "moderating greed," the role of NEDA and the economic planning secretary has evolved in ways that may shock its former officials. Among them is Ruperto Alonzo, a former NEDA deputy director-general, who says that until the 1990s, NEDA staff refused to entertain phone calls from officials of implementing agencies, instructing them instead to communicate in writing. He himself was "hiding every so often from consultants of implementing agencies."

The transformation in NEDA's role was not sudden. Long before the NBN project, the Arroyo administration had been moving to give implementing agencies more power to approve big state projects, without going through the strict but often time-consuming evaluation process of NEDA and its Investment Coordinating Committee (ICC). Early last year, Arroyo proposed new BOT law implementing rules that would diminish NEDA-ICC's powers in approving infrastructure projects funded and implemented by the private sector. Under these rules, which ostensibly aim to hasten the BOT evaluation process, implementing agencies such as government departments, state-owned firms, and local government units would have the authority to approve the projects.

The new BOT rules followed previous moves by Arroyo "to authorize agencies to approve contracts (worth) less than Php 500 million, except BOT, without going through the NEDA-ICC process, as long as the DBM (Department of Budget and Management) can certify the availability of funds," according to a March 2005 ICC policy directive. Malacañang has put off issuing the new BOT rules after multilateral lenders and the foreign chambers of commerce objected to clipping the powers of the NEDA-ICC. *But the erosion of NEDA's powers and independence continues, with the creation of new Cabinet groupings with powers that overstep those of existing NEDA bodies.* In May 2007, Arroyo issued an administrative order creating the so-called NEDA Cabinet Group that makes major economic decisions, including the approval of proposed projects, in between the monthly meetings of the NEDA Board. She also set up the Pro-Performance System Steering Committee that would monitor and evaluate "all increases in project cost, whether local or foreign funded." Until then, it was the NEDA-ICC that approved cost increases in foreign-assisted projects, without which the Department of Budget and Management could not release additional funding.

Tough standards for project approval are being relaxed. In a memorandum issued after the October 9 meeting of the NEDA Cabinet group, Cabinet Secretary Ricardo Saludo told NEDA to review the 15-percent minimum economic internal rate of return (EIRR) required for ICC approval of proposed projects "with the

The President's erosion of NEDA's functional independence through administrative "reorganizations" or the creation of *ad hoc* administrative groupings that supersede NEDA's oversight powers has been accepted as a valid exercise of her administrative authority in the process of ODA approval and allocation. Whether or not this erosion is legal, however, depends on how one construes the actual breadth of the President's administrative authority under the 1987 Constitution, the Philippine Administrative Code of 1987, and other relevant laws.

This paper argues that the scope of the President's administrative authority in the particular context of ODAs or foreign development loans should be reassessed. Part I (The Philippine Administrative Framework and the ODA Process) describes the President's administrative authority within the Philippine constitutional and statutory framework, and places Presidential authority in the position contemplated by the Official Development Assistance Act of 1996. Part I also explains the constitutional role of NEDA, and shows how this role animates NEDA's oversight mandate with respect to foreign loan evaluations and approvals.

Part II (Administrative Reorganization: Comparative Practices) then juxtaposes Presidential power to reorganize administrative agencies as interpreted by the Philippine Supreme Court against the comparative origins of such authority in the United States. As will be shown in Part II, administrative reorganization is not inherently or purely an executive function. Rather, the President's authority to reorganize the Executive Branch has frequently been wielded pursuant to legislative delegation. Generally, the scope of oversight of the Executive is directly proportional to the extent of after the fact agenda control and access to information retained by the Legislature.¹² This diffusion of authority to conduct administrative reorganizations does

end in view of reducing it." Alonzo, who notes that other administrations also had *ad hoc* economic policy groups, nonetheless warns they create opportunities for "forum shopping" for officials and agencies pushing for projects that do not pass muster with the ICC or NEDA staff. The erosion of NEDA's power and independence diminishes the gains made by the agency in recent years to improve the project evaluation system.

See also Lala Rimando, *New BOT Rules Undermine NEDA*, Nov. 30 2007, NEWSBREAK, available at http://www.newsbreak.com.ph/index.php?option=com_content&task=view&id=3973&Itemid=88889053; Cai U. Ordinario, *Strengthen NEDA through reforms, urge former chiefs*, Oct. 8, 2007, BUSINESS MIRROR, available at <http://www.businessmirror.com.ph/10082007/economy01.html>.

12. See David Epstein & Sharyn O'Halloran, *Administrative Procedures, Information, and Agency Discretion*, 38 AM. J. POLITICAL SCI. 703-09 (1994), reprinted in THE ECONOMICS OF ADMINISTRATIVE LAW 35-41 (Susan Rose-Ackerman ed., 2007).

not threaten the concept of a unitary executive.¹³ As American jurisprudential practice affirms, the Legislature can specifically delegate regulatory decision-making to independent agencies, whose decisions may not be pre-empted or substituted for by the President as head of the Executive Branch.¹⁴ Moreover, the American Constitution significantly influenced early textual formulations of executive power in the constitution of its former colony, the Philippines. Due to this transmission, the Philippine Supreme Court has, at times, given persuasive weight to comparative interpretations seen from American jurisprudential practices.¹⁵

A comparative review of US jurisprudential practice also demonstrates that the President's barefaced assertion of "administrative efficiency and economy" does not by itself justify administrative reorganizations. This relevant comparative practice should be taken into account in examining trends in the Philippine Supreme Court's adjudicatory and evidentiary policies in administrative reorganization cases. In these cases, the Court almost automatically defers to the President's stated justification of "administrative efficiency and economy." Petitioners questioning the administrative reorganization assume the burden of proving "bad faith" based on the policies set by the Court in *Larin v. Executive Secretary* and *Dario v. Mison*.¹⁶ These cases do not show that the President cannot be compelled to assume a counterpart burden of proof to show that administrative reorganizations are conducted in good faith.

13. See Robert V. Percival, *Presidential Management of the Administrative State: the Not-so-Unitary Executive*, 51 DUKE L.J. 963, 973-76 (2001).

14. See *Morrison v. Olson*, 487 U.S. 654, 685-97 (1988); *U.S. ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139 (1937); *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534 (9th Cir. 1993).

15. See Diane A. Desierto, "A Universalist History of the 1987 Philippine Constitution (I)", *Historia Constitucional (Electronic Journal of Constitutional History)*, vol. 10 (2009), pp. 389-44, at 431-433, available at <http://www.seminariomartinezmarina.com/ojs/index.php/historiaconstitucional/article/view/236/209> (last visited Dec. 2, 2009).

See also Milagros Santos-Ong, "Philippine Legal Research", at <http://www.nyulawglobal.org/globalex/philippines.htm> (last visited Dec. 2, 2009):

"Persuasive mandatory authority is law created by other jurisdictions but which have persuasive value to our courts e.g. Spanish and American laws and jurisprudence. These sources are used specially when there are no Philippine authorities available or when the Philippine statute or jurisprudence under interpretation is based on either the Spanish or American law."

16. *Larin v. Executive Sec'y*, G.R. No. 112745, (October 16, 1997), available at <http://sc.judiciary.gov.ph/>; *Dario v. Mison*, G.R. No. 81954, (August 8, 1989). <http://www.lawphil.net/>.

Finally, Part III (Delimitations to the President's Administrative Authority in the ODA Process) rounds out the argument that the President's administrative authority in the ODA approval, evaluation, and allocation process is circumscribed by express constitutional considerations made for the role of NEDA, the Monetary Board, and Legislative oversight. Not only does the 1987 Constitution deliberately eschew a strong model of the unitary executive, but the authority of other independent agencies such as NEDA and the Monetary Board was expressly provided for in the constitutional text precisely to avoid a repeat of the Presidential abuses in foreign loan contracting that occurred under the Marcos dictatorship. Higher constitutional considerations militate against a broad construction of administrative reorganization powers when they undermine the constitutional independence of other agencies. Thus the President infringes critical constitutional policies in the ODA process when she: 1) "reorganizes" executive agencies that appropriate NEDA's role in project evaluation, ODA assessment, and approval; 2) bypasses the required prior Monetary Board concurrence for obtaining foreign loans; 3) denies public access to information on foreign loans obtained or guaranteed by the government; and 4) altogether subverts the required Legislative approval by entering into "executive agreements" with ODA donor countries.

When administrative reorganization powers are invoked within an ODA process context, the judiciary should be vigilant in assessing the genuineness of the assertion. Naked claims of "administrative efficiency and purpose," without proof that the reorganization does not intend nor effect the violation of constitutional policies in foreign loan contracting, should not direct the Philippine Supreme Court. The 1987 Constitution purposely vests the Court with expanded powers of judicial review and rule-making, precisely to safeguard against these kinds of excesses of executive power.

II. THE PHILIPPINE ADMINISTRATIVE FRAMEWORK AND THE ODA PROCESS

The canonical bases for the President's administrative authority are found in two provisions of the 1987 Constitution. Article VII, Section 1 states that "[t]he executive power shall be vested in the President of the Philippines," while Article VII, Section 17 provides that "[t]he President shall have control of all the executive departments, bureaus, and offices. He shall ensure that the laws be faithfully executed."¹⁷ The President's encom-

17. CONST. (1987), Art. VII, §§ 1, 17.

passing administrative power flows from these broad constitutional grants of authority:

As head of the Executive Department, the President is the Chief Executive. He represents the government as a whole and sees to it that all laws are enforced by the officials and employees of his department. He has control over the executive department, bureaus and offices. *This means that he has the authority to assume directly the functions of the executive department, bureau and office, or interfere with the discretion of its officials.* Corollary to the power of control, the President also has the duty of supervising the enforcement of laws for the maintenance of general peace and public order. Thus, he is granted administrative power over bureaus and offices under his control to enable him to discharge his duties effectively.

Administrative power is concerned with the work of applying policies and enforcing orders as determined by proper governmental organs. It enables the President to fix a uniform standard of administrative efficiency and check the official conduct of his agents. To this end, he can issue administrative orders, rules and regulations.¹⁸

The Administrative Code of 1987 likewise reflects the underlying constitutional bases for the President's general administrative authority.¹⁹ It provides an enumeration of the President's administrative powers: 1) the Ordinance Power (e.g., the President may issue administrative orders, proclamations, memorandum orders, memorandum circulars, and general or special

18. Blas F. Ople v. Ruben D. Torres et al., G.R. No. 127685, July 23, 1998 (en banc) (emphases added).

19. *Id.* at note 17: The Administrative Code is a:

general law and incorporates in a unified document the major structural, functional and procedural principles of governance and embodies changes in administrative structures and procedures designed to serve the people. The Code is divided into seven (7) Books: Book I deals with Sovereignty and General Administration, Book II with the Distribution of Powers of the three branches of Government, Book III on the Office of the President, Book IV on the Executive Branch, Book V on the Constitutional Commissions, Book VI on National Government Budgeting, and Book VII on Administrative Procedure . . . These Books contain provisions on the organization, powers and general administration of the Executive, Legislative and Judicial branches of government, the organization and administration of departments, bureaus and offices under the Executive Branch, the organization and functions of the Constitutional Commissions and other constitutional bodies, the rules on the national government budget, as well as guidelines for the exercise by administrative agencies of quasi-legislative and quasi-judicial powers. The Code covers both the internal administration of government, i.e., internal organization, personnel and recruitment, supervision and discipline, and the effects of the functions performed by administrative officials on private individuals or parties outside government.

orders²⁰); 2) Power over Aliens (e.g. deportation, change of non-immigrant status to permanent residency, power to countermand decisions of the Board of Commissioners of the Bureau of Immigration, and power over aliens as are recognized under generally accepted principles of international law²¹); 3) Powers of Eminent Domain, Escheat, Land Reservation and Recovery of Ill-gotten Wealth;²² 4) Power of Appointment (e.g., appointment and temporary designation²³); and 5) Power over Local Governments.²⁴

Apart from the enumeration the Code recognizes the President's other "constitutional" and "residual" powers.²⁵ The Code specifically grants continuing authority to the President to reorganize administrative structure:

20. *Id.* at note 18, Book III, Chapter 2, Sections 2-7:

"SECTION 2. Executive Orders. — Acts of the President providing for rules of a general or permanent character in implementation or execution of constitutional or statutory powers shall be promulgated in executive orders.

SECTION 3. Administrative Orders. — Acts of the President which relate to particular aspects of governmental operations in pursuance of his duties as administrative head shall be promulgated in administrative orders.

SECTION 4. Proclamations. — Acts of the President fixing a date or declaring a status or condition of public moment or interest, upon the existence of which the operation of a specific law or regulation is made to depend, shall be promulgated in proclamations which shall have the force of an executive order.

SECTION 5. Memorandum Orders. — Acts of the President on matters of administrative detail or of subordinate or temporary interest which only concern a particular officer or office of the Government shall be embodied in memorandum orders.

SECTION 6. Memorandum Circulars. — Acts of the President on matters relating to internal administration, which the President desires to bring to the attention of all or some of the departments, agencies, bureaus or offices of the Government, for information or compliance, shall be embodied in memorandum circulars.

SECTION 7. General or Special Orders. — Acts and commands of the President in his capacity as Commander-in-Chief of the Armed Forces of the Philippines shall be issued as general or special orders."

21. *Id.* at note 18, Book III, Chapter 3, Sections 8-11.

22. *Id.* at note 18, Book III, Chapter 4, Sections 12-15.

23. *Id.* at note 18, Book III, Chapter 5, Sections 16-17.

24. *Id.* at note 18, Book III, Chapter 6, Section 18. This power has been substantially modified under the Local Government Code of 1991. *See* Republic Act No. 7160 (otherwise known as the Local Government Code of 1991).

25. *Id.* at note 18, Book III, Chapter 7, Sections 19-20:

"SECTION 19. Powers Under the Constitution. — The President shall exercise such other powers as are provided for in the Constitution.

SECTION 20. Residual Powers. — Unless Congress provides otherwise, the President shall exercise such other powers and functions vested in the President which are provided for under the laws and which are not specifically enumerated above, or which are not delegated by the President in accordance with law."

SECTION 31. *Continuing Authority of the President to Reorganize his Office.* — The President, subject to the policy in the Executive Office and in order to achieve simplicity, economy and efficiency, shall have continuing authority to reorganize the administrative structure of the Office of the President. For this purpose, he may take any of the following actions:

(1) Restructure the internal organization of the Office of the President Proper, including the immediate Offices, the Presidential Special Assistants/Advisers System and the Common Staff Support System, by abolishing, consolidating or merging units thereof or transferring functions from one unit to another;

(2) Transfer any function under the Office of the President to any other Department or Agency as well as transfer functions to the Office of the President from other Departments and Agencies; and

(3) Transfer any agency under the Office of the President to any other department or agency as well as transfer agencies to the Office of the President from other departments or agencies.²⁶

The Philippine Supreme Court has broadly construed the President's continuing authority to reorganize the National Government. The latest statement of this broad construction can be found in *Malaria Employees and Workers Association of the Philippines, Inc. (MEWAP) et al. v. Honorable Executive Secretary Alberto Romulo et al.*²⁷ Writing on behalf of the Court, Chief Justice Reynato Puno explicitly defined reorganization as the "reduction of personnel, consolidation of offices, or abolition thereof by reason of economy or redundancy of functions," which "alters the existing structure of government offices or units therein, including the lines of control, authority and responsibility between them." According to the Court:

[A]s far as bureaus, agencies, or offices in the executive department are concerned, the President's power of control may justify him to inactivate the functions of a particular office, or certain laws may grant him the broad authority to carry out reorganization measures. The President's power to reorganize the executive branch is also an exercise of his residual powers under Section 20, Title I, Book III of E.O. No. 292 which grants the President broad organization powers to implement reorganization measures.

These residual powers are "too broad to be construed as having a sole application to the Office of the President," and that

26. *Id.* at note 18, Book III, Chapter 10, Section 31.

27. *Malaria Employees and Workers Association of the Philippines, Inc. (MEWAP) et al. v. The Honorable Executive Secretary Alberto Romulo et al.*, G.R. No. 160093, July 31, 2007.

“[i]n fact. . .the President’s power to reorganize the executive department even finds further basis under Sections 78 and 80 of R.A. No. 8522.”²⁸ The only limit set by the Court to the President’s broad authority to reorganize is the test of good faith:

Be that as it may, *the President must exercise good faith in carrying out the reorganization of any branch or agency of the executive department. Reorganization is effected in good faith if it is for the purpose of economy or to make bureaucracy more efficient.* R.A. No. 6656 provides for the circumstances which may be considered as evidence of bad faith in the removal of civil service employees made as a result of reorganization, to wit: (a) where there is a significant increase in the number of positions in the new staffing pattern of the department or agency concerned; (b) where an office is abolished and another performing substantially the same functions is created; (c) where incumbents are replaced by those less qualified in terms of status of appointment, performance and merit; (d) where there is a classification of offices in the department or agency concerned and the reclassified offices perform substantially the same functions as the original offices; and (e) where the removal violates the order of separation.²⁹

“Administrative efficiency” supplies the rationale for the Legislature’s delegation of continuing authority to the President to reorganize the Executive Branch.³⁰ Briefly explaining this provision as formulated in Book III, Chapter 10, Section 31 of the Administrative Code of 1987, the Court held in *Rosa Ligaya*

28. *Id.* at note 27, citing Sections 78 and 80 of R.A. No. 8522:

“Section 78. Organizational Changes — Unless otherwise provided by law or directed by the President of the Philippines, no organizational unit or changes in key positions in any department or agency shall be authorized in their respective organizational structure and funded from appropriations provided by this Act.

Section 80. Scaling Down and Phase-out of Activities of Agencies within the Executive Branch — The heads of departments, bureaus, offices and agencies are hereby directed to identify their respective activities which are no longer essential in the delivery of public services and which may be scaled down, phased-out or abolished subject to Civil Service rules and regulations. Said activities shall be reported to the Office of the President through the Department of Budget and Management and to the Chairman, Committee on Appropriations of the House of Representatives and the Chairman, Committee on Finance of the Senate. Actual scaling down, phase-out or abolition of the activities shall be effected pursuant to Circulars or Orders issued for the purpose by the Office of the President.”

29. *Id.* at note 27 (emphasis added).

30. Apart from the Administrative Code of 1987, Congress has enacted subsequent legislation that provides standards for administrative reorganizations. *See* Republic Act No. 6656 (An Act to Protect the Security of Tenure of Civil Service Officers and Employees in the Implementation of Government Reorganization), June 10, 1988.

*C. Domingo et al. v. Hon. Ronaldo D. Zamora, et al.*³¹ that “[t]he law grants the President this power in recognition of the recurring need of every President to reorganize his office ‘to achieve simplicity, economy and efficiency.’ The Office of the President is the nerve center of the Executive Branch. To remain effective and efficient, the Office of the President must be capable of being shaped and reshaped by the President in the manner he deems fit to carry out his directives and policies.” Likewise in *Anak Mindanao Party-List Group v. Ermita et al.*, the Supreme Court characterized the Administrative Code of 1987 as a law that “expressly grants the President the broad authority to conduct reorganization measures” as a matter of policy, since: “[I]n carrying out the laws into practical operation, the President is best equipped to assess whether an executive agency ought to continue operating in accordance with its charter or the law creating it. This is not to say that the legislature is incapable of making a similar assessment and appropriate action within its plenary power. The Administrative Code of 1987 merely underscores the need to provide the President with suitable solutions to situations on hand to meet the exigencies of the service that may call for the exercise of the power of control.”³²

Thus, with some notable exceptions³³, the President’s bare assertion of “administrative efficiency” in carrying out administrative reorganizations in the Executive Branch (in one case³⁴ even extending to the merger of administrative regions) has been generally accepted by the Philippine Supreme Court.³⁵

31. *Rosa Ligaya C. Domingo et al. v. Hon. Ronaldo D. Zamora*, in his capacity as Executive Secretary, et al., G.R. No. 142283, February 6, 2003.

32. *Anak-Mindanao Party-List Group v. Ermita*, G.R. No. 166052, (S.C., Aug. 29, 2007), available at <http://sc.judiciary.gov.ph/>.

33. There are few landmark cases in which the Court did not rely on the bare claim of “administrative efficiency,” and found instead that administrative reorganizations were done in bad faith and with grave abuse of discretion. Generally these cases involved reorganizations undertaken in the transition from the Marcos dictatorship to the restoration of democratic government under the Aquino presidency. *Mendoza v. Quisumbing*, G.R. No. 78053, (S.C., June 4, 1990), available at <http://www.chanrobles.com/scdecisions/>; *Dario v. Mison*, G.R. No. 81954, (S.C., Aug. 8, 1989), available at <http://www.lawful.net/>; *But see Larin v. Executive Sec’y*, G.R. No. 112745, (S.C., Oct. 16, 1997), available at <http://elibrary.judiciary.gov.ph> (which involved an attempted reorganization during the administration of then President Fidel V. Ramos).

34. *Congressman James L. Chiongbian et al. v. Hon. Oscar M. Orbos*, Executive Secretary, et al., G.R. No. 96754, June 22, 1995 (en banc).

35. *Malaria Employees and Workers Ass’n of the Phil., Inc., (MEWAP) v. Romulo*, G.R. No. 160093, (S.C., July 31, 2007), available at <http://sc.judiciary.gov.ph/>; An Act to Protect the Security of Tenure of Civil Service Officers and Employees in the Implementation of Government Reorganization, Rep. Act No. 6656 (June 10, 1988) (Phil.), available at <http://www.chanrobles.com/republicactno6656.htm>; *Tondo Medical Center Employees Ass’n v. Ct. App. Phil.*, G.R. No. 167324, (S.C., July 17, 2007), available at <http://sc.judiciary.gov.ph/>; *Anak-Mindanao Party-List Group v.*

It is not surprising that the incumbent President has fully availed herself of the Court's series of broad interpretations of the President's administrative reorganization power. Using "administrative efficiency" in many of the preambulatory clauses in her executive orders, the President has been able to transfer functions from one agency to another, create new agencies, as well as confer discretion on chosen agencies over investments, contracts, and other specialized economic issues.³⁶ For example, in November 2005, the President created an agency called the Philippine Strategic Oil, Gas, Energy Resources and Power Infrastructure Office (PSOGERPIO), which had the nebulous authority to: 1) "certify energy projects as national priority"; 2) "undertake agreements with private entities in accordance with and in realization of strategic and 'national priority' projects"; 3) "undertake project development from project conceptualization, feasibility study, and detailed design preparation, project management and construction supervision"; and 4) "arrange and negotiate financing from public finance, bilateral and multilateral Official Development Assistance (ODA) institutions, and from the private sector, subject to existing procurement, accounting and auditing rules and regulations."³⁷ Energy industry players sharply criticized the creation of PSOGERPIO as an illegal en-

Ermita, G.R. No. 166052, (S.C., Aug. 29, 2007), available at <http://sc.judiciary.gov.ph/>; *Bagaoisan v. Nat'l Tobacco Admin.*, G.R. No. 152845, (S.C., Aug. 5, 2003), available at <http://sc.judiciary.gov.ph/>; *Sec'y of the Dep't of Transp. and Comm'n v. Mabalot*, G.R. No. 138200, (S.C., February 27, 2002), available at <http://sc.judiciary.gov.ph/>; *EIIB v. Zamora*, G.R. No. 142801-802, (S.C. July 10, 2001), available at <http://sc.judiciary.gov.ph/>.

36. See Executive Order No. 184 (Directing the Reorganization and Streamlining of the National Development Company), March 10, 2003; Executive Order No. 366 (Directing a Strategic Review of the Operations and Organizations of the Executive Branch and Providing Options and Incentives for Government Employees who may be affected by the Rationalization of the Functions and Agencies of the Executive Branch), October 4, 2004; Implementing Rules and Regulations of Executive Order No. 366, May 11, 2005; Executive Order No. 72 (Rationalizing the Agencies Under or Attached to the Office of the President), February 11, 2002. *The President has been criticized by her own appointee, former Civil Service Commission Chairperson Karina Constantino-David, for having hired the biggest number of undersecretaries, assistant secretaries, advisers, assistants, and consultants in excess of caps set by law, and without civil service eligibility. Constantino-David has also accused the President of populating mid-level positions of bureau directors and agency heads with more political appointees and a large number of retired soldiers and police officers.* See Isa Lorenzo and Malou Mangahas, "New CSC Chief Faces Pack of Ineligible Bureaucrats", Philippine Centre for Investigative Journalism, April 24, 2008, at <http://www.pcij.org/stories/2008/ineligible-bureaucrats.html> (last visited 10 March 2009); Isa Lorenzo and Malou Mangahas, "Malacañang is No. 1 in excess exec hires", *Malaya*, March 20, 2009, at <http://www.malaya.com.ph/apr25/news6.htm> (last visited 20 March 2009).

37. Executive Order No. 474 (Creation of the Philippine Strategic Oil, Gas, Energy Resources and Power Infrastructure Office (PSOGERPIO), and Defining the Functions Thereof), Section 2, November 30, 2005. See Donnabelle L. Gatdula, "EO

croachment of the functions of the Department of Energy, and ultimately, as an insidious mechanism set up to favor specific interests.³⁸ The President abolished PSOGERPIO shortly afterwards without explanation.³⁹

A year later, the President issued another Executive Order⁴⁰ which inexplicably transferred the Philippine Mining Development Corporation (PMDC) from the Department of Environment and Natural Resources (DENR) to the Office of the President. Under this order, the Office of the President directly oversaw the execution of mining contracts with foreign investors, much to the skepticism of industry observers.⁴¹ Less than six months later, the President issued a tersely-worded Executive Order that transferred the PDMC back to the DENR.⁴²

The President likewise invoked her administrative authority to change contracting procedures in a manner that demonstrably

474 seen to drive away investors in the power sector”, *Philippine Star*, January 27, 2006, at p. B4:

“The proposed PSOGERPIO is to ‘. . . coordinate efforts of the Department of Energy and other departments and agencies in attracting investors; and in promoting the use of indigenous and renewable energy resources and other energy resources to reduce dependence on imported energy and reduce energy cost to the consuming public.’

But PEPOA [the Private Electric Power Operators Association] believes the creation of such a body is illegal and not within the mandate set by the EPIRA [Electric Power Industry Reform Act]. The groups said this is merely a duplication of the functions of the Department of Energy. In addition, they said the PSOGERPIO will only create problems as it will be another layer of regulation in an industry that is so complex and technical in nature. ‘In fact, it will step on the regulatory powers of the Energy Regulatory Commission (ERC)’, the PEPOA said.”

38. See “Gov’t may assume power firm’s P43M debt: Palace”, *Sun Star Manila*, Dec. 19, 2005; “Mysterious energy superbody”, *Manila Standard*, Dec. 29, 2005.

39. Federico D. Pascual, “MANILA MAIL; Lawyers try smuggling new energy super body”, *Filipino Reporter*, Feb. 2, 2006, at <http://www.highbeam.com/doc/1P1-119635404.html> (last visited Dec. 2, 2009.)

40. Executive Order No. 636 (Transferring the Philippine Mining Development Corporation from the Department of Environment and Natural Resources to the Office of the President), July 18, 2007; Executive Order No. 665 (Conferring Cabinet Rank Upon the Chairman of the Philippine Mining Corporation), Sept. 25, 2007. See Michael Lim Ubac, “Mining out of DENR; now under President’s office”, *Philippine Daily Inquirer*, July 27, 2007, at http://newsinfo.inquirer.net/inquirerheadlines/nation/view/2007072778988/Mining_out_of_DENR%3B_now_under_President%92s_office (last visited Mar. 10, 2009).

41. See Johanna Camille Sisante, “Solon: Mining contract with ZTE disadvantageous to the government”, Nov. 24, 2008, *GMA News*, <http://www.gmanews.tv/story/135289/Solon-Mining-contract-with-ZTE-disadvantageous-to-govt> (last visited 10 March 2009); Carmel Crimmins, “Skepticism greets Philippine mining industry revival”, *Reuters, International Herald Tribune*, Apr. 3, 2008, <http://www.ihf.com/articles/2008/04/03/business/mine.php> (last visited Mar. 10, 2009).

42. Executive Order No. 689 (Transferring the Philippine Mining Development Corporation from the Office of the President to the Department of Environment and Natural Resources), Dec. 27, 2007.

undermines NEDA's crucial role in evaluating and recommending approval of government contracts. In 2002, the President issued an Executive Order that permitted Department Secretaries to forego the statutorily-required NEDA approval for any and all government contracts not exceeding 300 million Philippine pesos (Php,)⁴³ a value of approximately US\$7 million. Justified by the interests of "streamlining" the procedure for approval of government contracts, Department Secretaries were given full discretion to legally determine whether contracts are exempt from public bidding requirements, and where so exempt, Department Secretaries could unilaterally give final approval to the contracts.⁴⁴ After this Executive Order incurred public criti-

43. Republic Act No. 7718 (An Act Amending Certain Sections of Republic Act No. 6957, entitled 'An Act Authorizing the Financing, Construction, Operation and Maintenance of Infrastructure Projects by the Private Sector, and for other purposes), May 5, 1994:

"Section 4. *Priority Projects* – All concerned government agencies, including government-owned and –controlled corporations and local government units, shall include in their development programs those priority projects that may be financed, constructed, operated and maintained by the private sector under the provisions of this Act. It shall be the duty of all concerned government agencies to give wide publicity to all projects eligible for financing under this Act, including publication in national and, where applicable, international newspapers of general circulation once every six (6) months and official notification of project proponents registered with them.

The list of all such national projects must be part of the development programs of the agencies concerned. *The list of projects costing up to Three hundred million pesos (Php300,000,000) shall be submitted to ICC [Investment Coordinating Committee] of NEDA for its approval and to the NEDA Board for projects costing more than Three hundred million pesos (Php 300,000,000). The list of projects submitted to the ICC of the NEDA Board shall be acted upon within thirty (30) working days. . . .*" (Emphasis added.)

44. Executive Order No. 109 (Streamlining the Rules and Procedures on the Review and Approval of All Contracts of Departments, Bureaus, Offices and Agencies of the Government, including Government-Owned or Controlled Corporations and their Subsidiaries), June 7, 2002:

"SECTION 2. Exceptions to Public Bidding — The law and applicable rules and regulations provide for exceptional cases where a Government Contract may be accepted from the requirement of public bidding, as follows:

a. For infrastructure projects, including supply contracts, civil works, and other related contracts, as provided under Section 62, Chapter 13, Book IV, Revised Administrative Code of 1987, Section 4, Presidential Decree No. 1594, and Executive Order No. 40 dated October 8, 2001 [EO 40] and its Implementing Rules and Regulations;

b. For procurement of goods, supplies, materials and related services as provided under EO 40 and its Implementing Rules and Regulations; and

c. For consulting services as provided under EO 40 and its Implementing Rules and Regulations.

SECTION 3. Requirements for Exception from Public Bidding — Where the Department Secretary has made a determination that a Government Contract involving an amount of at least Three Hundred

cism for being incompatible with the statutory requirements of public bidding under the Government Procurement Reform Act⁴⁵ the President issued an amendatory Executive Order that reinstated the requirement of prior NEDA approval for methods of procurement alternative to public bidding.⁴⁶ Two years later, the President again issued another Executive Order to increase the contract amount from 300 million Php to 500 million. Under this Executive Order, Department Secretaries could approve and execute contracts under alternative procurement methods.⁴⁷ By

Million Pesos (P300 Million) falls under any of the exceptions from public bidding described in Section 2 hereof, the Department Secretary shall, before proceeding with the alternative modes of procurement as provided by law and applicable rules and regulations, obtain the following:

a. An opinion from the Secretary of Justice that said Government Contract falls within the exceptions from public bidding; and

b. Approval from the Director-General of NEDA to proceed with a specific alternative mode of procurement under the exceptional cases provided by law and applicable rules and regulations.

After compliance with the foregoing requirements, except for contracts required by law to be acted upon and/or approved by the President, Department Secretaries shall have full authority to give final approval and/or enter into such Government Contracts excepted from the requirement of public bidding, regardless of the amount involved:

Where a Government Contract, not required by law to be acted upon and/or approved by the President; involves an amount below Three Hundred Million Pesos (P300 Million) and the concerned Department Secretary has made a determination that the Government Contract falls under any of the exceptions from public bidding described in Section 2 hereof, the Department Secretary has full authority to give final approval and/or enter into the Government Contract without need of obtaining the foregoing requirements.

The Department Secretary may delegate in writing to appropriate officials, subject to appropriate ceilings, this authority to determine whether a Government Contract involving an amount below Three Hundred Million Pesos (P300 Million) falls under any of the exceptions from public bidding described in Section 2 hereof.”

45. Republic Act No. 9184 (An Act Providing for the Modernization, Standardization and Regulation of the Procurement Activities of the Government and for other Purposes), January 10, 2003. See “Public Says NEDA-ICC Still Needed in BOT Project Approvals”, NEDA Press Release, at <http://www.iro.ph/downloads/pressrelease/052107%20NEDA%20-%20PUBLIC%20SAYS%20NEDA-ICC%20STILL%20NEEDED%20IN%20BOT%20PROJECT%20APPROVALS.pdf> (last visited Mar. 10, 2009); “Line Agencies Authorized to Approve Contracts Costing Below Php 500-M Under Revised NEDA-ICC Guidelines”, Apr. 25, 2005, <http://www.gov.ph/news/printerfriendly.asp?i=8749> (last visited Mar. 10, 2009).

46. Executive Order No. 109-A (Amending Executive Order No. 109 Dated May 27, 2002 Prescribing the Rules and Procedures on the Review and Approval of All Government Contracts to Conform with Republic Act No. 9184, Otherwise Known as the Government Procurement Reform Act), September 18, 2003.

47. Executive Order No. 423 (Repealing Executive Order No. 109-A Dated September 18, 2003 Prescribing the Rules and Procedures on the Review and Approval of All Government Contracts to Conform with Republic Act No. 9184, Otherwise known as the Government Procurement Reform Act), April 30, 2005. *The Government Procurement Policy Board, of which NEDA is a member, passed a Res-*

the time the NBN controversy erupted in late 2007, it was clear that there was little room for agency oversight, discretion, and independence in foreign contracts, since by then the President had near total control over their evaluation, approval, and implementation.⁴⁸

NEDA's institutional independence had been compromised by a slew of Presidentially-authorized "consultants" who conducted project evaluations bypassing NEDA's own Technical Secretariat.⁴⁹ The pattern of stark Presidential control affirms the observation that the incumbent President "very effectively wields the substantial powers of the presidency to keep herself in

olution in 2006 requesting the President to Amend Executive Order No. 423 to indicate that prior approval (for government procurement contracts exempt from public bidding requirements) be obtained from the Government Procurement Policy Board, and not the NEDA. See Government Procurement Policy Board Resolution No. 06-2006 (To Request the Amendment of Section 4 of Executive Order No. 423, Repealing Executive Order No. 109-A Prescribing the Rules and Procedures on Review and Approval of All Government Contracts), January 20, 2006, at <http://www.gppb.gov.ph/issuances/Resolutions/2006/06-2006.pdf> (last visited Mar. 10, 2009).

48. Peter Ritter, "Crisis — Again — for the Philippines' Arroyo", *TIME*, Nov. 1, 2007, available at <http://www.time.com/time/magazine/article/0,9171,1678666-1,00.html> (last visited Mar. 10 2009).

49. Alecks P. Pabico, "Can golf, realpolitik work at SSS?", *MALAYA*, July 18, 2008, available at <http://www.malaya.com.ph/jul18/news7.htm> (last visited Mar. 10, 2009):

"Having consultants is not an issue, explains a senior director, pointing out that the NEDA Secretariat has had consultants all the time in different capacities and at different levels, especially when projects called for it. But what is clear is that the practice had no precedent from the time of Monsod up to Canlas. Of NEDA's directors general, it was only Neri who hired consultants specifically for his office. Monsod, who in her time saw no need for consultants as she relied solely on the expertise of the staff, does agree that as an agency, NEDA can hire consultants. But that privilege, she says, does not extend to the director general. Cielito Habito, the socioeconomic planning secretary during the administration of Fidel Ramos, says he didn't even realize that the director general could hire that many consultants, much more hire consultants at all. By relying on consultants like Lozada, the NEDA staff also point out that Neri did not maximize, and at times even bypassed, the NEDA technical secretariat which serves as the research and technical support of the NEDA board. During his NEDA watch, Neri allowed an unwieldy interplay of the official and unofficial actors and processes of policy, politics and patronage. In the Senate hearings on the NBN-ZTE deal, Lozada, who was almost like Neri's alter ego, admitted that his job as consultant involved looking at the deal structure of proposed projects, or in Neri's own words, 'moderating the greed' of project proponents both from the government and private sector. This set-up, mid-level division heads argue, had a negative effect on the usual flow of information and decision-making critical to the institutional stability of NEDA. 'It's hard for the NEDA Secretariat to own, defend decisions, positions or communications that did not pass through it,' they say.'

office, and in the process she exhibits no qualms about undermining the country's already weak political institutions."⁵⁰

The President's broad administrative authority does not translate as easily to the case of foreign loan contracting. Wary of the foreign loan contracting practices during the Marcos dictatorship which bloated the Philippines' external debt, the Constitutional Commissioners were assiduous in instituting constitutional checking mechanisms to ensure that the President does not have the sole authority and discretion to enter into foreign loans. As such, bills authorizing the increase of the public debt "shall originate exclusively in the House of Representatives."⁵¹ The President can only contract or guarantee foreign loans after complying with requirements from the Monetary Board and Congress.⁵²

Moreover, "no treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate."⁵³

A new Article in the 1987 Constitution, Article XII (National Economy and Patrimony) deliberately provides further institutional checks (from NEDA, the Legislature, the Monetary Board, or the *Bangko Sentral ng Pilipinas*) on the President's power to enter into contracts for particular economic purposes. While the President may "enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils *according to the general terms and conditions provided by law*," the President must also "notify Congress of every [such] contract entered into."⁵⁴ With respect to economic planning, Congress:

50. Paul D. Hutchcroft, "The Arroyo Imbroglia in the Philippines", *JOURNAL OF DEMOCRACY*, Vol. 19, No. 1, Jan. 2008, pp. 141-155, at 142.

51. CONST. (1987), Art. VI, § 24.

52. See CONST. (1987), Art. VII, § 20: The President may:

[C]ontract or guarantee foreign loans on behalf of the Republic of the Philippines with the prior concurrence of the Monetary Board, and subject to such limitations as may be provided by law. The Monetary Board shall, within thirty days from the end of every quarter of the calendar year, submit to the Congress a complete report of its decisions on applications for loans to be contracted or guaranteed by the Government or government-owned and controlled corporations which would have the effect of increasing the foreign debt, and containing other matters as may be provided by law.

53. *Id.* at § 21.

54. CONST. (1987), Art. XII, § 2 (emphasis added). *But see*, the broad interpretation of 'technical and financial assistance agreements' in *La Bugal B'laan Tribal Ass'n v. Ramos*, G.R. No. 127882, (S.C., January 27, 2004), available at <http://www.lawphil.net/>, *rev'd*, G.R. No. 127882 (S.C., December 1, 2004), available at <http://sc.judiciary.gov.ph/> (emphasis added).

[M]ay establish an independent economic and planning agency headed by the President, which shall, after consultations with the appropriate public agencies, various private sectors, and local government units, recommend to Congress, and implement continuing integrated and coordinated programs and policies for national development. Until the Congress provides otherwise, the National Economic Development Authority shall function as the independent planning agency of the government.⁵⁵

Apart from economic planning, the central monetary authority (the *Bangko Sentral ng Pilipinas*, formerly the Central Bank of the Philippines) is made independent from the Executive Branch as a creature of Congress:

[T]he Congress shall establish an *independent central monetary authority*. . . [which] shall provide policy direction in the areas of money, banking, and credit. It shall have supervision over the operations of banks and exercise such regulatory powers as may be provided by law over operations of finance companies and other institutions performing similar functions.⁵⁶

Most importantly, the Constitution stresses that “[f]oreign loans may only be incurred *in accordance with law and the regulation of the monetary authority*. Information on foreign loans obtained or guaranteed by the Government shall be made available to the public.”⁵⁷

The Legislature reflected the same concern for institutional checks in the approval and allocation of Official Development Assistance (ODA) loans. Under the Official Development Act of 1996, the National Economic Development Authority (NEDA) plays a central role in ensuring that “the ODA obtained shall be for previously identified national priority projects which are urgent or necessary. ODA shall not be accepted or utilized solely because of its availability, convenience, or accessibility.”⁵⁸ ODA proceeds are to be used to “achieve equitable growth and development in all provinces through priority development projects for the improvement of economic and social service facilities,” with preference given to “rural infrastructure, countryside development and economic zones established under the PEZA law.”⁵⁹ The Executive Department must obtain “the ex-

55. CONST. (1987), Art. XII, § 9.

56. *Id.* at § 20 (emphasis added).

57. *Id.* at § 21 (emphasis added).

58. An Act Excluding Official Development Assistance (ODA) from the Foreign Debt Limit in Order to Facilitate the Absorption and Optimize the Utilization of ODA Resources, Amending for the Purpose Paragraph 1, Section 2 of Republic Act No. 4860, as amended, Rep. Act No. 8182 § 4 (June 11, 1996) (Phil.), *available at* <http://www.congress.gov.ph>.

59. *Id.*

pressed approval of Congress . . . prior to the negotiation and implementation of projects funded from ODA on or after 1 January 1995 as well as those that have not been finalized.”⁶⁰

The equitable distribution and utilization of ODA funds by the President expressly requires the prior recommendation of NEDA.⁶¹ The President must submit a request to Congress for counterpart funds necessary to implement each ODA project, including funds to cover cost overruns, and regularly report to Congress on the amount of ODA loans and grants incurred.⁶² Oversight functions of the ODA Process are jointly discharged by NEDA, the Constitutional Commission on Audit, and Congress.⁶³ Furthermore, the Official Development Assistance Act entrusts NEDA with the responsibility for continuous monitoring:

[A]ll concerned implementing and oversight agencies shall submit to the NEDA all information and reports as may be required by it to review draft contracts and to assess the performance of individual ongoing projects as well as the overall performance of all projects which are funded in whole or in part by ODA.⁶⁴

To this end, the Legislature authorized NEDA to promulgate its own Implementing Rules and Regulations to realize the Official Development Assistance Act of 1996.⁶⁵ Accordingly, the

60. *Id.*

61. *Id.* at 6.

62. *Id.* at 5, 10.

63. *Id.* at § 8:

“Section 8. *Oversight* – Pursuant to its constitutional duties, the Executive Department, particularly NEDA, the Commission on Audit and Congress shall discharge Oversight functions, to wit:

- (a) The NEDA shall conduct annual review of the status of all projects financed by ODA, identify causes of delays, reasons for bottlenecks, cost overruns, both actual and prospective, and continued viability, and report to Congress not later than June 30 of each year;
- (b) The Commission on Audit shall conduct an audit on each ongoing and completed project and report to Congress not later than June 30 each year; and
- (c) There shall be a Congressional Oversight Committee composed of the Chairmen of the Committee on Ways and Means of both the Senate and the House of Representatives, five (5) members each from the Senate and the House representing the majority and two (2) members each from the Senate and the House representing the minority to be designated by the leaders of the majority and minority in their respective chambers.”

64. *Id.* § 9.

65. *Id.* at § 11. See Implementing Rules and Regulations (IRR) for Republic Act No. 8182, Otherwise Known as the ‘Official Development Assistance (ODA) Act of 1996’, §§ 4, 7 (July 23, 1996), available at <http://pcij.org/philippineodatrail/?p=35> (last visited Oct. 22, 2009):

“RULE 4 ICC Processing and Approval

NEDA's Investment Coordinating Committee (NEDA-ICC) established guidelines for review of foreign-financed projects.⁶⁶

III. ADMINISTRATIVE REORGANIZATIONS: COMPARATIVE PRACTICES

The President's administrative power is anchored on the nature of her executive power. Prior to the overthrow of the Marcos dictatorship and the promulgation of the 1987 Constitu-

Processing of projects proposed to be financed by ODA loans or grants shall be in accordance with the Investment Coordination Committee's (ICC) (i) Guidelines and Procedures and (ii) Project Evaluation Guidelines and Procedures. These guidelines and procedures shall be updated as may be necessary to reflect the developments in government policies, procedures and methodologies regarding investment programming and project evaluation.

SECTION 5.4. Projects with Cost Overruns — Projects with cost overruns, regardless of cause, shall be remanded to the ICC for reappraisal.

The reappraisal will determine the continued viability of the projects and the reasonable levels of cost overruns that shall be the bases for recommending additional appropriations to be included in the annual national expenditure program to be submitted to Congress.

A quarterly report on projects with cost overruns shall be submitted by the NEDA Secretariat to ICC for inclusion in the annual report to Congress.

RULE 7 Continuous and Effective Monitoring

SECTION 7.1. Monitoring of Ongoing ODA-Assisted Projects — THE NEDA SHALL CONDUCT THE CONTINUOUS AND EFFECTIVE MONITORING OF ALL ONGOING ODA-ASSISTED PROJECTS. For this purpose, all concerned implementing agencies with ODA-assisted projects shall submit to the NEDA Secretariat not later than four (4) weeks after the end of every quarter, reports containing the following information:

- a. Physical targets and actual accomplishments;
- b. Budget allocation, project expenditures and loan and grant disbursements;
- c. Statement of expenses submitted to funding agencies per month during the quarter;
- d. Implementation delays experienced and actions taken;
- e. Recommended actions or action plan to resolve implementation problems; and,
- f. Other information which may be relevant in assessing the progress of implementation of the project.

The implementing agencies shall also provide the abovesited information to the Project Monitoring Committees (PMCs) of the regions, provinces, cities and municipalities established under E.O. 93 (s. 1993) amending E.O. 376 (s. 1989) creating the Regional Project Monitoring and Evaluation System (RPMES); at the regional level, these may be forwarded to the NEDA Regional Offices (NROs) which serve as the secretariats of the Regional Project Monitoring Committees (RPMCs).

The NEDA shall report to the President within six (6) weeks after the end of each semester the overall performance of all ongoing ODA-assisted projects."

66. See ICC Project Evaluation Guidelines, http://www.neda.gov.ph/progs_prj/ICC/ICC-guidelines&procedures.htm (last visited Mar. 10, 2009).

tion, the Philippines had followed a strong version of the unitary executive model.⁶⁷ During the Commonwealth period, the Philippine Supreme Court construed broad executive authority for the Governor General of the Philippine Islands, transcending those of the State governors of the United States.⁶⁸ The acceptance of broad executive power under the 1935 Constitution and the 1973 Constitution⁶⁹ presaged the Philippine Supreme Court's early acceptance of the President's broad administrative powers.

The Philippine Supreme Court's jurisprudence on administrative reorganization often reflects statutorily-delegated Presidential powers⁷⁰ to reorganize the bureaucracy for "simplicity,

67. IRENE CORTES, *THE PHILIPPINE PRESIDENCY: A STUDY OF EXECUTIVE POWER*, (1966 ed., University of the Philippines College of Law).

68. *See In re McCulloch Dick*, G.R. No. 13862, April 16, 1918 (en banc); *Lope Severino v. The Governor-General of the Philippine Islands et al.*, G.R. No. 6250, August 3, 1910:

"It having become necessary in the judgment of the President of the United States, he created, as we have been, the office of Civil Governor (Governor-General) and vested in him the executive authority in all civil affairs in the Government of the Philippine Islands, which had theretofore been exercised by the Military Governor. This order of the President was also ratified and affirmed by Congress. all the legislative power in civil affairs was vested in the Philippine Commission, which was exercised by it until the convening of the Assembly, and that legislative power is now exercised by the Philippine Legislature in all that part of the Philippine Islands not inhabited by Moros or other non-Christian tribes, the Commission still retaining its legislative power over the Moro Province and the territory inhabited by non-Christian tribes. This government being modeled after the Federal and State governments in the United States now possesses a complete governmental organization, with executive, legislative, and judicial departments, which are exercising functions as independent of each other as the Federal of State governments. . . While the duties imposed upon the Governor-General of the Philippine Islands are not as great as those imposed upon the President of the United States, we think he holds a more responsible position than those held by the State governors. . . In most of the States there is a significant distinction between the State and local official, such as county and city officials over whom the governors have very little, if any, control; while in this country the Insular and provincial executive officials are bound to the Governor-General by strong bonds of responsibility. So we conclude that the powers, duties, and responsibilities conferred upon the Governor-General are far more comprehensive than those conferred upon State governors."

69. Diane A. Desierto, "A Universalist History of the 1987 Philippine Constitution", *HISTORIA CONSTITUCIONAL/ELECTRONIC JOURNAL OF CONSTITUTIONAL HISTORY*, Volumes 10 -11 (forthcoming 2009).

70. The reorganization statutes were passed in the process of administrative reform following the Philippines' achievement of independence and establishment of democratic constitutional government. *See An Act Creating the Government Survey and Reorganization Commission and Appropriating Funds Thereof*, Rep. Act No. 997 (June 9, 1954) (Phil.) available at <http://www.doh.gov.ph/>; *See also An Act Authorizing the President of the Philippines, With the Help of a Commission on Reorganization, To Reorganize the Different Executive Departments, Bureaus, Offices, Agencies and Instrumentalities of the Government. Including Banking or Con-*

economy, and efficiency,” and the Court has not questioned the veracity of the President’s assertion of administrative efficiency.⁷¹ Instead, the Court tends to focus on the issue of bad faith in the *removal* of civil service employees as a result of administrative reorganizations.

The two most frequently-cited decisions on the bad faith test in administrative reorganizations are *Larin v. Executive Secretary* and *Dario v. Mison*.⁷² Given the extraordinary facts in both of these cases it is vital to note that the Court did *not* preclude the possibility that the President could also assume a counterpart burden of proof to show good faith in an administrative reorganization.⁷³ Otherwise stated, both *Larin* and *Dario* support the po-

trolled by it, Subject to Certain Conditions and Limitations, Rep. Act No. 5435 (Sept. 9, 1968) (Phil.) available at <http://www.chanrobles.com/republicacts/republicactno5435.html>. When President Ferdinand Marcos assumed executive and legislative powers during his twenty-year dictatorship rule, administrative reorganizations were frequently authorized by mere executive order. Interestingly, President Corazon Aquino followed a similar route after the toppling of the dictatorship during the 1986 EDSA Revolution. While she held both executive and legislative powers under the Provisional/Freedom Constitution, President Aquino reorganized the bureaucracy to remove the last vestiges of the Marcos regime.

71. For example, in *University of Santo Tomas v. The Board of Tax Appeals*, the Court limited itself to a textual examination of the President’s executive order implementing Republic Act No. 422, the statute authorizing reorganization. It accepted the assertion of administrative efficiency, but ultimately held that the President’s executive order was unlawful and *ultra vires*, since the executive order’s terms facially transferred the jurisdiction of courts of first instance in internal revenue cases. *Univ. of Santo Tomas v. Bd of Tax App.*, G.R. No. L-5701, (S.C., June 23, 1953), available at <http://www.lawphil.net>.

72. *Larin v. Executive Sec’y*, G.R. No. 112745, (S.C., Oct. 16, 1997), available at <http://elibrary.judiciary.gov.ph>; *Dario v. Mison*, G.R. No. 81954, (S.C., Aug. 8, 1989), available at <http://www.lawful.net>.

73. *Larin* involved the initial de jure, and later, de facto removal of Aquilino Larin, then the Assistant Commissioner of the Excise Tax Service of the Bureau of Internal Revenue (BIR). *Larin*, G.R. No. 112745. Following Larin’s criminal conviction by the Sandiganbayan (anti-graft court) and pending the appeal of the conviction before the Philippine Supreme Court, Larin was administratively charged before the Office of the President in relation to the facts on which the criminal conviction was based. *Id.* The Office of the President held Larin administratively liable and dismissed him from the service. *Id.* Subsequently, the Philippine Supreme Court reversed Larin’s conviction, with the categorical finding that there was “nothing illegal” whatsoever in the acts committed by Larin. *Id.* When Larin invoked the Philippine Supreme Court’s reversal on those factual findings to appeal the administrative dismissal, he discovered that the Office of the President had issued an Executive Order that abolished the Excise Tax Service of the BIR. *Id.* The President appointed new BIR Assistant Commissioners, but Larin was not included. *Id.* The Supreme Court in *Larin* held that the President failed to prove good faith in this administrative reorganization, particularly since the abolition of the Excise Tax Service of the BIR was followed by the creation of another office that substantially performed the same functions. *Id.*

On the other hand, *Dario* involved a more extensive factual review by the Court. *Dario*, G.R. No. 81954. The administrative reorganization subject of this case was an extraordinary one in terms of scope and purpose. *Id.* This reorganiza-

sition that the Court could extend its review beyond the President's mere assertion of "administrative efficiency" to the (actual and prevailing) factual setting of executive conduct.

Notably, the legislative standard to determine the legitimacy of an administrative reorganization was first tested in *Francisco L. Mendoza et al. v. Hon. Lourdes R. Quisumbing, et al.*⁷⁴. In *Mendoza*, the Court had the first occasion to apply Republic Act No. 6656 (An Act to Protect the Security of Tenure of Civil Service Officers and Employees in the Implementation of Government Reorganization). Applying the law's enumeration in Sec. 2 of various badges of bad faith reorganizations, the Court in *Mendoza* treated the reclassification of offices that performed substantially the same functions as the original offices, as one such badge.

Significantly, *Mendoza* included a novel judicial approach, one that categorically denied executive officers full unilateral discretion to ensure "effective implementation" of reorganization. This extreme use of administrative authority, according to the Court in *Mendoza*, amounted to a constitutionally-repugnant "roving commission."⁷⁵

tion took place under then President Aquino's extraordinary executive and legislative revolutionary powers under the Provisional/Freedom Constitution. *Id.* Virtually all government offices were covered by the reorganization, which was undertaken not just for administrative efficiency but for the political purpose of ensuring the removal of "the last vestiges of the Marcos dictatorship." *Id.* The Court in *Dario* copiously reviewed the factual circumstances surrounding the reorganization, and concluded that, notwithstanding the executive claim of "administrative efficiency to streamline bureaucratic procedures," executive officials had been, in fact, impermissibly given roving authority and discretion to abolish government units (and necessarily, remove government employees) at will and without cause. *Id.*

74. *Mendoza v. Quisumbing*, G.R. No. 78053, (S.C., June 4, 1990), available at <http://www.chanrobles.com/scdecisions> (emphasis added).

75. *Id.* at note 73:

"There is no dispute over the power to reorganize - whether traditional, progressive, or whatever adjective is appended to it. However, the essence of constitutional government is adherence to basic rules. The rule of law requires that no government official should feel free to do as he pleases using only his avowedly sincere intentions and conscience to guide him. The fundamental standards of fairness embodied in the bona fide rule cannot be disregarded. More particularly, the auto-limitations imposed by the President when she proclaimed the Provisional Constitution and issued executive orders as sole law maker and the standards and restrictions prescribed by the present Constitution and the Congress established under it, must be obeyed. Absent this compliance, we cannot say that a reorganization is bona-fide.

The public respondents (who are petitioners in some cases) argue that they have followed standards. However, the standard they present is derived from the typical grant of rule-making authority found in all the questioned Executive Orders, to wit:

'The Minister shall issue such rules, regulations, and other issuances as may be necessary to ensure the effective implementation of the provisions of this Executive Order.'

However, the *Mendoza* approach would not be reiterated in subsequent administrative reorganization cases, which tended to defer to the President's bare assertion of "administrative efficiency." In the administrative reorganization cases decided in the last ten years⁷⁶ the Court has displayed a belief in a strong unitary executive through broad interpretations of the President's continuing authority to reorganize the Executive Branch under her express and residual powers in the Administrative Code of 1987.

This tendency towards reifying strong Presidential authority in administrative law appears consistent with Paul H. Brietzke's opinion that administrative laws in the Third World are "least suited to democracy." Considering the influence of colonial history on postcolonial legal traditions in Third World countries, Brietzke observes that "a style of administrative law evolved which suited the Third World's many recurring military regimes: rapid decrees-as orders, usually promulgated during a declared 'emergency.' These orders bear little relation to each other or to more general goals, and they reflect a passion for extending a personalized control."⁷⁷

Problematically, the attitude towards centralization of government power perpetuates the view of Asian exceptionalism even in presumably democratic regimes. Governance reflects strong state corporatism that protects executive prerogatives and discretion. This distrust for diffusing executive authority, in turn, results in a net effect of hostility to institutionalized pluralism. Ultimately, this governance strategy leads to an "anti-politics" position that denies other institutions (e.g. civil society) any sub-

The alleged standard — 'ensure the effective implementation of the provisions of this Executive Order' — is no standard. Under the public respondents concept, their standard is a roving commission giving the executive officer unbridled discretion to do as he pleases as long as, in his belief, his act effectively implements the executive order. As earlier mentioned, the standards are found elsewhere in the governing charters in sufficiently clear and ample language. The grant of quasi-legislative power to implement the reorganization is bound by these standards. Unfortunately the public officials concerned have misread the instructions and decided to implement reorganization according to their full discretion in a manifestly invalid manner."

76. For example, *Tondo Medical Center Employees Association et al. v. The Court of Appeals et al.*, *Anak-Mindanao Party List Group et al. v. The Executive Secretary et al.*, *Drianita Bagaoisan et al. v. National Tobacco Administration et al.*, *Secretary of the Department of Transportation and Communications v. Roberto Mabalot, Buklod ng Kawaning EIIB et al. v. Hon. Executive Secretary Ronaldo D. Zamora et al.*, and *Malaria Employees and Workers Association of the Philippines, Inc. (MEWAP) et al. v. The Honorable Executive Secretary Alberto Romulo et al.* *Id.* at note 35.

77. Paul H. Brietzke, *Democratization and . . . Administrative Law*, 52 Okla. L. Rev. 1, 11 (1999).

stantial role in enforcing the broad right to public accountability.⁷⁸

Even the United States, with its admittedly stronger executive model than the Philippines,⁷⁹ has a less deferential approach to the Presidential authority to conduct administrative reorganizations⁸⁰. The American President's power to reorganize does not exist inherently from the nature of executive power, but from infrequent Congressional delegation.⁸¹ Reorganization was not comprehensively legislated in the US until the Reorganization Act of 1949, which:

[M]andated that the President periodically examine agency structures and suggest changes in light of the following factors: 1) promoting better execution of the laws and more effective management of the Executive branch; 2) reducing expenditures and increasing efficiency and economy; 3) consolidating and coordinating agencies and functions according to major purposes; 4) reducing the number of agencies, and abolishing those which are unnecessary; and 5) eliminating overlap and duplication between the agencies.⁸²

The Reorganization Act of 1949 expired in 1973, was renewed in 1977, and then expired in 1981. Since 1981 "there has been no reorganization authority in place and Congress in the future may be unwilling to establish a statutory authority similar to past grants."⁸³ Nevertheless, it has been observed that, generally, the U.S. President "can still carry out internal reorganizations of agencies even without a reorganization act."⁸⁴ It remains closely contested if the President's "internal" administrative reorganization power extends (and if so, to what degree) to independent regulatory commissions.⁸⁵ Independent regulatory commissions (IRCs) are creatures of statute and do not possess constitutional

78. See Kanishka Jayasuriya, *The Exception Becomes the Norm: Law and Regimes of Exception in East Asia*, 2 APLPJ 108 (2001).

79. See DIANE A. DESIERTO, FREEDOM AND CONSTRAINT: UNIVERSALISM IN THE PHILIPPINE CONSTITUTIONAL SYSTEM AND THE LIMITS OF EXECUTIVE PARTICULARIST POWER (FORTHCOMING 2009).

80. *Id.* at note 14.

81. RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 90-91 (5th ed. 2009). See also FRANK J. GOODNOW, *Comparative Administrative Law* 66-70 (vol. 1 2005).

82. PIERCE ET AL., *supra* note 90, at 90-91.

83. *Id.* at note 80, citing the fact that Congress would likely require a legislative veto for such authority. However, the Supreme Court decision in *INS v. Chadha*, 462 U.S. 919 (1983) has made establishing such a veto virtually impossible.

84. PIERCE ET AL., *supra* note 80, at 91. (Citing the fact that Congress would likely require a legislative veto for such authority). However, the Supreme Court decision in *INS v. Chadha*, 462 U.S. 919 (1983), has made establishing such a veto virtually impossible.

85. See PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES (1989, Carolina Academic Press), at pp. 59-77.

status, unlike NEDA in the 1987 Philippine Constitution. The earliest IRCs were “regarded as agents of the legislature and not part of the executive branch,” established to aid Congress in discharging its interstate commerce powers.⁸⁶

The result has been an uneasy relationship between the President and IRCs.⁸⁷ Some scholars strenuously argue in favor of the position that the President has broad power to manage and influence IRCs, which are constitutionally derived from the doctrine of a unitary executive.⁸⁸ From this strong variant of the unitary executive doctrine follows arguments favoring centralized rulemaking and executive review of agency decision-making, which collectively promote political accountability, inter-agency coordination, and cost-effective harmonization of agency rules.⁸⁹

The converse view of IRCs defends their supposedly unique functions and technical expertise, which warrant Congressional insulation from Presidential control. This view depends on a rethinking of the traditional tripartite separation of powers formula⁹⁰ towards an understanding of how government authority is diffused in the modern administrative state where specialized agencies appear best equipped to adapt to changing fact situations and circumstances.⁹¹ IRCs comprise a unique species in American federal government precisely because of their statutorily-provided “independence.” As observed by an American administrative law scholar, this “independence” manifests itself in various characteristic features of IRCs: “the bipartisan appointment requirement, the fixed term requirement, and the requirement that removal be limited to express causes.”⁹² IRCs are also organized predominantly as collegial bodies of multiple decision-makers, reflecting shared, consensual, and pluralistic opinions. The entrenched history of group deliberations, collective research, fact-finding, rule-making⁹³ and adjudication in

86. Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 Admin. L.J. Am. U. 461, 466 (1994). See also *Humphrey's Ex'r v. U.S.*, 295 U.S. 602, 628 (1935).

87. Moreno, *supra* note 85, at 481-88.

88. Christopher S. Yoo, Steven G. Calabresi, Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889-1945*, 80 NOTRE DAME L. REV. 1 (2004).

89. See Nicholas Bagley and Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006).

90. See M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603 (2001).

91. Jeffrey E. Shuren, *The Modern Regulatory Administrative State: A Response to Changing Circumstances*, 38 HARV. J. ON LEGIS. 291 (2001).

92. Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 259-263 (1988).

93. For an analysis of the interaction between Congressional delegation and agency discretion in rule-making or standard-setting, see Robert J. Gregory, *When a*

IRCs presumably leads towards institutionalized expertise in various spheres of government regulation. This view of the IRCs as an emergent “Fourth Branch” of government, however, has not gone unchallenged and continues to be the subject of legal critique.⁹⁴

Nevertheless, what is important for purposes of this comparative analysis is that it is by and large undisputed that the President does *not* have the authority to dictate regulatory decisions entrusted to IRCs by law.⁹⁵ As will be argued in more detail in Part III, this restrictive view of the President’s authority with respect to IRCs’ regulatory decision-making powers should find an even more forceful translation in the Philippine setting, where NEDA’s unique and independent role in project evaluation decisions of ODA-funded projects are predicated not just on statutory, but also constitutional grounds. In this sense, the constitutional and statutory delegation of authority to NEDA in the foreign loan context is more a matter of avoiding Presidential arbitrariness rather than pursuing the usual administrative objective of political accountability.⁹⁶

IV. DELIMITATIONS TO THE PRESIDENT’S ADMINISTRATIVE AUTHORITY IN THE ODA PROCESS

The controversy over the aborted National Broadband Network (NBN) deal in 2007 is not the first time that the Philippine President’s administrative authority has been exercised at the expense of NEDA’s institutional independence. Other ODA-funded public contracts (most of which contain suspect terms, conditions, and warranties) have followed a similar pattern of executive encroachment of NEDA functions.⁹⁷ That this exercise

Delegation is Not a Delegation: Using Legislative Meaning to Define Statutory Gaps, 39 CATH. U. L. REV. 725 (1990).

94. See Richard A. Epstein, *Why the Modern Administrative State is Inconsistent with the Rule of Law*, 3 N.Y.U. J. L. & LIBERTY 491 (2008).

95. See *Rovert v. Percival*, *Presidential Management of the Administrative State: the Not-so-Unitary Executive*, 51 DUKE L.J. 963, 963, 1011 (2001).

96. For the theoretical analysis of arbitrariness as a standard for legitimacy in the modern administrative state, see Lisa Schulz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Modern Administrative State*, 78 N.Y.U. L. REV. 461 (2003).

97. Another public contract which has almost identical project evaluation methods, as well as contract negotiation and execution features, as the NBN controversy is the controversial North Rail project. See also Norman Bordadora, *North Rail, builder subject to RP laws*, Philippine Daily Inquirer, Oct. 13, 2008, <http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20081013-166102/NorthRail-builder-subject-to-RP-laws>; See also Main News Manila Bulletin, *North Rail contract assailed by UP Law professors*, Manila Bulletin Publishing Corp., Sept. 30, 2005. See also Roel R. Landingin, *7 in 10 ODA Projects Fail to Deliver Touted Benefits*, Philippine Cen-

of administrative authority has continued for years without a *certiorari* challenge being brought to Philippine courts says much about the widespread acceptance of the fiction that the President can indeed short-circuit NEDA-ICC project evaluation processes at will, since she is the final repository of executive and administrative power.

When the President issues executive orders that: 1) assert her authority in the ODA process to transfer project evaluations to *ad hoc* bodies or committees of Presidential consultants; 2) raise the threshold amounts exempt from NEDA-ICC project evaluations; or 3) unilaterally alter the standards for ODA project evaluations, her actions amount to an outright substitution of Presidential discretion for NEDA-ICC's regulatory decisions on ODA project approvals and allocations. Under the current trend in Philippine jurisprudence on administrative reorganizations, however, the President should theoretically find safe harbor from judicial review if her executive order simply states "administrative efficiency" as its purpose, pursuant to her express and residual powers under the Administrative Code of 1987.

However, interference with the ODA process implicates complex and interlocking constitutional as well as statutory policies. To reiterate, NEDA is constitutionally-mandated to be the Philippines' "independent central planning agency."⁹⁸ While the President acts as Chairman of the NEDA Board Executive Committee, decision-making in NEDA (especially with respect to the approval of ODA projects) remains a fully collegial process, with each board member retaining the right to vote to approve Board Resolutions. Not all NEDA Board members are members of the Presidential staff or the official Cabinet. For example, the Governor of the *Bangko Sentral ng Pilipinas*, who enjoys a fixed term and is independent from Presidential supervision and control, sits as a board member in the NEDA Board Executive Committee.⁹⁹ When the President creates *ad hoc* bodies that bypass NEDA-ICC project evaluations, therefore, she is not simply transferring functions from one office to another. Rather, her acts deprive NEDA of its lawful jurisdictional prerogatives. The President's continuing authority to reorganize the Executive Branch under

tre for Investigative Journalism, Feb. 13, 2008, <http://www.pcij.org/stories/2008/oda9.html>.

98. CONST. (1987), Art. XII, § 9.

99. See The New Central Bank Act, Rep. Act No. 7653 §§ 1-2, 6, 17-18, (June 14, 1993) (Phil.), available at <http://www.lawphil.net/>. See also Creating the NEDA Board Executive Committee and Facilitating Action on Matters Requiring the Decision of the NEDA Board, Mem. 222 §§1-2 (July 26, 1994) (Phil.), available at <http://www.neda.gov.ph/>.

the Administrative Code of 1987 cannot prevail against the constitutionally-expressed imperative of NEDA independence.

Apart from its constitutionally-mandated independence, NEDA enjoys exclusive jurisdiction to undertake regulatory decisions in relation to ODA approvals. The Legislature made an exclusive express delegation of authority to NEDA under the Official Development Assistance Act of 1996, to favorably recommend the approval of ODA and the subsequent equitable distribution and utilization of ODA funds, as well as to review the status of all ODA-financed projects.¹⁰⁰ Moreover, NEDA has the exclusive responsibility to continuously monitor ODA contracts and ODA-funded projects, as well as to formulate rules to implement the Official Development Assistance Act of 1996. Clearly, the Legislature intended NEDA to function as the primary institutional gatekeeper in the ODA approval and allocation process. Nowhere in the ODA Act of 1996 is the President conferred any unilateral discretion with respect to the ODA process. She must, in fact, obtain Congressional approval for the negotiation and implementation of ODA-funded projects, as well as Congressional appropriation of counterpart funds for ODA projects and as any contingency funds to answer for potential cost overruns.¹⁰¹ With the ODA Act of 1996 being the later statutory enactment, it must be presumed that the Legislature intended to carve out the ODA process from the traditional administrative reorganization powers of the President under the Administrative Code of 1987. Considering that the ODA Act of 1996 explicitly recognized that ODA involves contracts "with governments of foreign countries with whom the Philippines has diplomatic, trade relations or bilateral agreements. . . or multilateral lending institutions,"¹⁰² it would not have been extraordinary if the President invoked her foreign policy powers in this sphere of governance. And yet, Congress specifically denied the President any exclusive discretion or authority to administer the ODA process. The desire to insulate and counterbalance executive prerogative with NEDA as an independent institutional checking mechanism (along with the Commission on Audit and Congress) could certainly not be any clearer.

In this respect, NEDA could be analogized to the independent regulatory commissions (IRCs) in the United States. Ar-

100. See An Act Excluding Official Development Assistance (ODA) from the Foreign Debt Limit in Order to Facilitate the Absorption and Optimize the Utilization of ODA Resources, Amending for the Purpose Paragraph 1, Section 2 of Republic Act No. 4860, as amended, Rep. Act No. 8182 § 4 (June 11, 1996) (Phil.), available at <http://www.congress.gov.ph/>.

101. *Id.*

102. *Id.* at § 2(b).

guably, however, NEDA occupies a larger role in the Philippine legal system, precisely because of its constitutionally-mandated role in economic planning and foreign loan contracting. The United States President who enjoys vast executive and administrative powers cannot substitute his discretion for that of the IRCs in regulatory decision-making within their spheres of competence. If the American system is used as a reference point, the Philippine President, whose executive powers were considerably limited under the structure and design of the postcolonial and post-dictatorship 1987 Constitution,¹⁰³ would be denied leeway in substituting *her* discretion for NEDA's regulatory decisions in the ODA process. Plainly, the President's interference with NEDA's discretion in the ODA process amounts to a classic constitutional violation.

Moreover, if the facts surrounding the NBN controversy are any indication, the President's recent policy of unilaterally executing foreign loans without Legislative and Monetary Board approvals is another instance of glaring Presidential overreaching under the mantle of "administrative authority." The NBN controversy failed to reach the Supreme Court on the merits because the President cancelled the contract even before *certiorari* petitions could be filed to contest the legality of the execution of the NBN contracts. However, the executive practices exhibited were a troubling instance of evading the institutional accountability expressly built into the 1987 Philippine Constitution. Even prior to the 1987 Constitution, the Legislature had already passed statutes to control the President's authority to contract foreign loans.¹⁰⁴ During his twenty-year dictatorship, then-President

103. *Id.* at note 78.

104. *See, e.g.*, An Act Amending Certain Provisions of Republic Act Numbered Four Thousand Eight Hundred Sixty, Rep. Act No. 6142, 66:51 O.G. 11170, (November 9, 1970) (Phil.); An Act Authorizing the President of the Philippines to Obtain such Foreign Loans and Credits, or to Incur such Foreign Indebtedness, as may be Necessary to Finance Approved Economic Development Purposes or Projects, and to Guarantee, in behalf of the Republic of the Philippines, Foreign Loans obtained or Bonds issued by Corporations owned or controlled by the Government of the Philippines for Economic Development Purposes, including those Incurred for Purposes of Re-Lending to the Private Sector, Appropriating the Necessary Funds therefor, and for other purposes, Rep. Act No. 4860 (August 8, 1966) (Phil.), available at <http://www.lawphil.net/>; An Act Authorizing the President of the Philippines to Incur, on Behalf of the Republic of the Philippines, Loans from the International Bank for Reconstruction and Development and/or other Foreign or International Financial Institutions to Finance an Expanded Program of Irrigation Development, and for Other Purposes, Rep. Act No. 4853, IV CPS 667 (Rev. Ed.) (July 18, 1966) (Phil.); An Act to Authorize the President of the Philippines to Negotiate and Contract with the Export and Import Bank of Tokyo, Japan, or with any other Foreign Financial Institutions or Foreign Manufacturing Corporations or their Duly Authorized Agents, in the Name and on Behalf of the Republic of the Philippines, One or Several Loans, for the Purpose of Financing a Nationwide Telecommunications Ex-

Ferdinand Marcos exercised his vast executive and legislative powers to remove many former statutory restrictions and safeguards on foreign loan contracting,¹⁰⁵ which “legitimated” Marcos and his cronies’ reckless use of cheap credits that plunged the Philippines into exorbitant foreign debt in the 1970s and 1980s.

At its worst, the President’s broad use of her executive power and administrative authority in foreign loan contracting exemplifies her wholesale indictment of the overall constitutional and statutory oversight mechanisms in the ODA process and other related laws. Bypassing critical institutions such as NEDA, the Monetary Board, and the Legislature has topographical consequences on accountability and public policy. To highlight exactly how Presidential abuse of administrative authority undermined the ODA process and plunged the Philippines deeper into debt under extremely onerous conditions, Part III concludes with a detailed case study on the illegality of executive actions in the NBN controversy.

A. CASE STUDY: ANALYSIS OF PRESIDENTIAL JUSTIFICATIONS IN THE NBN CONTROVERSY

To justify her unilateral execution of the contract for services to establish the National Broadband Network (NBN) and Cyber-Education project with China’s ZTE Corporation, the President invoked a purported “treaty” exception to the competitive public bidding requirement for public infrastructure projects under Section 4 of Republic Act No. 9184, otherwise known as the Government Procurement Reform Act (RA 9184). RA 9184 defines “Infrastructure Projects” as:

the construction, improvement, rehabilitation, demolition, repair, restoration or maintenance of roads and bridges, railways, airports, seaports, *communication facilities, civil works components of information technology projects*, irrigation, flood control and drainage, water supply, sanitation, sewerage and solid waste management systems, shore protection, energy/power and electrification facilities, national buildings, school buildings, hospital buildings and other related construction projects of the government. (Emphasis added.)

pansion and Improvement Project to be Handled by the Bureau of Telecommunications and to Guarantee the Same for and on Behalf of the Republic of the Philippines, and for other purposes, Rep. Act No. 2612, (July 20, 1959) (Phil.), *available at* <http://www.lawphil.net/>.

105. Presidential Decree No. 81 (Amending Certain Provisions of Republic Act Numbered Four Thousand Eight Hundred Sixty, as Amended (Re: Foreign Borrowing act), December 14, 1972; Presidential Decree No. 150 (Amending Republic Act Numbered Four Thousand Eight Hundred Sixty, as Amended (Re: Foreign Borrowing Act)).

The scope and application of RA 9184 is explicitly limited to: 1) the legislated preference, under Commonwealth Act No. 138, favoring domestic entities in the purchase of materials and supplies for the government; and 2) the observance of any treaty, international, or executive agreement “affecting the subject matter of this Act”:

SECTION 4. Scope and Application — This Act shall apply to the Procurement of Infrastructure Projects, Goods and Consulting Services, *regardless of source of funds, whether local or foreign*, by all branches and instrumentalities of government, its departments, offices and agencies, including government-owned and/or -controlled corporations and local government units, *subject to the provisions of Commonwealth Act No. 138. Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed.* (Emphasis added.)

Commonwealth Act No. 138 (CA No. 1138) otherwise known as “An Act to Give Native Products and Domestic Entities the Preference in the Purchase of Articles for the Government” mandates that preference should be given to “materials and supplies produced, made, and manufactured in the Philippines”¹⁰⁶ subject to specific conditions provided in CA No. 138.¹⁰⁷

106. An Act to Give Native Products and Domestic Entities the Preference in the Purchase of Articles for the Government, Comm. Act No. 138, § 1 (Nov. 7, 1936) (Phil.), *available at* <http://www.gppb.gov.ph/>.

107. *Id.* at §§ 3, 4:

“SECTION 3. Only unmanufactured articles, materials, or supplies of the growth or production of the Philippines or the United States, and only such manufactured articles, materials, or supplies as have been manufactured in the Philippines or in the United States, substantially from articles, materials, or supplies of the growth, production, or manufacture, as the case may be, of the Philippines or of the United States, shall be purchased for public use and, in case of bidding, subject to the following:

- (a) When the lowest foreign bid, including customs duties, does not exceed two pesos, the award shall be made to the lowest domestic bidder, provided his bid is not more than one hundred per centum in excess of the foreign bid;
- (b) When the lowest foreign bid, including customs duties, exceeds two pesos but does not exceed twenty pesos, the award shall be made to the lowest domestic bidder, provided his bid is not more than fifty per centum in excess of the lowest foreign bid;
- (c) When the lowest foreign bid, including customs duties, exceeds twenty pesos but does not exceed two hundred pesos, the award shall be made to the lowest domestic bidder, provided his bid is not more than twenty-five per centum in excess of the lowest foreign bid;
- (d) When the lowest foreign bid, including customs duties, exceeds two hundred pesos but does not exceed two thousand pesos, the award shall be made to the lowest domestic bidder,

The President's interpretation of the "treaty exception" in Section 4 of RA 9184 suffered from several flaws. First, the ZTE Supply Contract is not a treaty or executive agreement that falls within the purported "exception" in Section 4 of RA 9184. The ZTE Supply Contract is *not* a treaty since it was not concluded between States. The parties to this contract are a state, the Republic of the Philippines, and a foreign private corporation, ZTE Corporation. The Vienna Convention on the Law of Treaties categorically defines a treaty as "an international agreement *concluded between States* in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."¹⁰⁸

Moreover, the ZTE Supply Contract does not comply with the legal requirements for execution and entry into force of a treaty. The ZTE Supply Contract was merely signed by DOTC Secretary Leandro R. Mendoza and ZTE Vice President Yu Yong. It did not comply with the constitutional requirement of Presidential ratification, and the guidelines for negotiation and ratification of international agreements under Executive Order No. 459:¹⁰⁹

It should be underscored that the signing of the treaty and the ratification are two separate and distinct steps in the treaty-making process. As earlier discussed, the signature is primarily intended as a means of authenticating the instrument and as a symbol of the good faith of the parties. It is usually performed by the state's authorized representative in the diplomatic mission. *Ratification, on the other hand, is the formal act by which a state confirms and accepts the provisions of a treaty concluded by its representative. It is generally held to be an executive act, undertaken by the head of the state or of the*

provided his bid is not more than twenty per centum in excess of the lowest foreign bid;

- (e) When the lowest foreign bid, including customs duties, exceeds two thousand pesos, the award shall be made to the lowest domestic bidder, provided his bid is not more than fifteen per centum in excess of the lowest foreign bid.

SECTION 4. Whenever several bidders shall participate in the bidding for supplying articles, materials, and equipment for any dependencies mentioned in section one of this Act for public use, public buildings, or public works, the award shall be made to the domestic entity making the lowest bid, provided it is not more than fifteen per centum in excess of the lowest bid made by a bidder other than a domestic entity, as the term 'domestic entity' is defined in section two of this Act."

108. Vienna Convention on the Law of Treaties, art. 2(a), May 23, 1969, 1155 U.N.T.S. 331 (emphasis added); *See also* Bayan v. Executive Sec'y, G.R. No. 138570, (S.C. October 10, 2000), available at <http://sc.judiciary.gov.ph/>.

109. *See Pimental Jr. v. Executive Sec'y*, G.R. No. 158088, (S.C., July 6, 2005), available at <http://sc.judiciary.gov.ph/> (emphasis added).

government. Thus, Executive Order No. 459 issued by President Fidel V. Ramos on November 25, 1997 provides the guidelines in the negotiation of international agreements and its ratification. *It mandates that after the treaty has been signed by the Philippine representative, the same shall be transmitted to the Department of Foreign Affairs.* The Department of Foreign Affairs shall then prepare the ratification papers and forward the signed copy of the treaty to the President for ratification. After the President has ratified the treaty, the Department of Foreign Affairs shall submit the same to the Senate for concurrence. Upon receipt of the concurrence of the Senate, the Department of Foreign Affairs shall comply with the provisions of the treaty to render it effective. Section 7 of Executive Order No. 459 reads:

Sec. 7. Domestic Requirements for the Entry into Force of a Treaty or an Executive Agreement. — The domestic requirements for the entry into force of a treaty or an executive agreement, or any amendment thereto, shall be as follows:

A. Executive Agreements.

i. All executive agreements shall be *transmitted to the Department of Foreign Affairs after their signing for the preparation of the ratification papers.* The transmittal shall include the highlights of the agreements and the benefits which will accrue to the Philippines arising from them.

ii. The Department of Foreign Affairs, pursuant to the endorsement by the concerned agency, shall *transmit the agreements to the President of the Philippines for his ratification.* The original signed instrument of ratification shall then be returned to the Department of Foreign Affairs for appropriate action.

B. Treaties.

i. All treaties, regardless of their designation, shall comply with the requirements provided in sub-paragraph[s] 1 and 2, item A (Executive Agreements) of this Section. In addition, *the Department of Foreign Affairs shall submit the treaties to the Senate of the Philippines for concurrence in the ratification by the President.* A certified true copy of the treaties, in such numbers as may be required by the Senate, together with a certified true copy of the ratification instrument, shall accompany the submission of the treaties to the Senate.

ii. Upon receipt of the concurrence by the Senate, the Department of Foreign Affairs shall comply with the provision of the treaties in effecting their entry into force.¹¹⁰

It has not been shown that the ZTE Supply Contract had been transmitted to the Department of Foreign Affairs for the preparation of ratification papers pursuant to the above guide-

110. *Id.*

lines, much less that the President actually ratified the ZTE Supply Contract. Notably, the President herself subsequently revoked the ZTE Supply Contract following publicized allegations of its defects.¹¹¹

Likewise, the ZTE Supply Contract cannot be deemed an executive agreement. An executive agreement still contemplates an inter-governmental agreement subject to Presidential ratification. In *Abaya et al. v. Ebdane et al.* the Philippine Supreme Court included an exchange of notes as a form of executive agreement.¹¹² However, in its discussion in the case, the Court repeatedly stressed that the exchange of notes must transpire between foreign governments, and not private corporations acting with foreign governments.¹¹³

In *Abaya*, the Philippine Government and the Japan Bank for International Cooperation (JBIC) concluded a Loan Agree-

111. "Arroyo suspends controversial broadband deal", Sun Star Network Online, Sept. 23, 2007, <http://www.sunstar.com.ph/static/net/2007/09/23/arroyo.suspends.controversial.broadband.deal.html> (last visited Dec. 2, 2009).

112. *Abaya v. Ebdane*, G.R. No. 167919, (S.C., Feb. 14, 2007), available at <http://sc.judiciary.gov.ph/> (emphasis added).

113. See *Bayan v. Executive Sec'y*, G.R. No. 138570, (S.C. October 10, 2000), available at <http://sc.judiciary.gov.ph/>:

"Thus, in international law, there is no difference between treaties and executive agreements in their binding effect upon states concerned, *as long as the negotiating functionaries have remained within their powers*. International law continues to make no distinction between treaties and executive agreements: they are equally binding obligations upon nations.

In our jurisdiction, we have recognized the binding effect of executive agreements even without the concurrence of the Senate or Congress. In *Commissioner of Customs vs. Eastern Sea Trading*, we had occasion to pronounce:

[T]he right of the Executive to enter into binding agreements without the necessity of subsequent Congressional approval has been confirmed by long usage. From the earliest days of our history we have entered into executive agreements covering such subjects as commercial and consular relations, most-favored-nation rights, patent rights, trademark and copyright protection, postal and navigation arrangements and the settlement of claims. The validity of these has never been seriously questioned by our courts.

Furthermore, the United States Supreme Court has expressly recognized the validity and constitutionality of executive agreements entered into without Senate approval. (39 *Columbia Law Review*, pp. 753-754) (See, also, *U.S. vs. Curtis Wright Export Corporation*, 299 U.S. 304, 81 L. ed. 255; *U.S. vs. Belmont*, 301 U.S. 324, 81 L. ed. 1134; *U.S. vs. Pink*, 315 U.S. 203, 86 L. ed. 796; *Ozanic vs. U.S.* 188 F. 2d. 288; *Yale Law Journal*, Vol. 15 pp. 1905-1906; *California Law Review*, Vol. 25, pp. 670-675; Hyde on *International Law [Revised Edition]*, Vol. 2, pp. 1405, 1416-1418; *Willoughby on the U.S. Constitution Law*, Vol. I [2d ed.], pp. 537-540; *Moore, International Law Digest*, Vol. V, pp. 210-218; *Hackworth, International Law Digest*, Vol. V, pp. 390-407). (Emphasis Supplied).

ment. The Philippine Supreme Court concluded that the Loan Agreement is an “integral part of the Exchange of Notes” which may be deemed an “executive agreement,” considering that JBIC is an “adjunct of the Japanese government.”

The same cannot be said of the ZTE Supply Contract. There is no showing that ZTE Corporation is an “adjunct” of the Chinese government, or that there has been any “Exchange of Notes” on record between the Philippine government and the Chinese government for which the ZTE Supply Contract is “integral.”

Finally, an “executive agreement” is concluded by the President and becomes binding without need of any vote by the Legislature. The mere signature of DOTC Secretary Leandro Mendoza, however, does not bind the Republic of the Philippines to the contract. The absence of Presidential ratification militates against the characterization of the ZTE Supply Contract as an “executive agreement.” While DOTC Secretary Leandro Mendoza is admittedly an alter-ego of the President, his mere signature does not constitute the act of ratification required for treaties and executive agreements. Ratification is “the formal act by which a state confirms and accepts the provisions of a treaty concluded by its representative. It is generally held to be an executive act, *undertaken by the head of the state or of the government.*”¹¹⁴ There being no actual “conclusion by the President” through ratification, such contract cannot have binding effect on the Philippine government. There cannot be any international obligation created where “negotiating functionaries [have not] remained within their powers.”¹¹⁵

Moreover, even if the ZTE Supply Contract were to be regarded as a “treaty” or “executive agreement,” it cannot be “observed” as an exception to the requirement of competitive public bidding. Section 4 of R.A. 9184 does not contemplate the *deliberate* execution of a treaty or executive agreement in order to summarily remove the requirement of competitive public bidding. All that the qualifying clause in Section 4 of R.A. 9184 states is: “*Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed.*” The question, therefore, is whether “observance” with such “treaty”, “international or executive agreement” affecting the subject matter of R.A. 9184 would permit the deliberate execution of a treaty that

114. *Id.* (emphasis added).

115. *Id.* See generally, Vagts et al., TRANSNATIONAL BUSINESS PROBLEMS 597-606 (3rd ed. 2003).

summarily dispenses with the requirement of competitive public bidding.

It does not appear that the qualifying clause intended such execution of a treaty to circumvent existing Philippine laws. In *Abaya*, the Supreme Court cited the portions of the legislative record referring to the qualifying clause of Section 4 of R.A. 9184. The cited portions reflect the legislators' concern that foreign contracts comply with Philippine laws and international agreements.¹¹⁶ It appears from the deliberations of the Bicameral Conference Committee on the Disagreeing Provision of Senate Bill No. 2248 and House Bill No. 4809 (which formed the basis for R.A. 9184) that the foreign contracts are deemed to have been "brought within the ambit of Philippine law," "subject to any treaty," and to assure that the Philippines will honor *existing* international obligations. It does not appear that the intent behind the qualifying clause in Section 4 of R.A. 9184 is to permit the deliberate execution of a treaty or executive agreement that is not within the ambit of Philippine law.

Significantly, it appears that the Philippine Government has interpreted the qualifying clause in Section 4 of R.A. 9184 in favor of the foreign supplier's participation in competitive public bidding "*where provided for under any treaty or international agreement.*" This interpretation is consistent with the legislative intent to ensure that foreign contracts are "observed" since they are "brought within the ambit of Philippine law" which mandates competitive public bidding. The Government Procurement Policy Board (GPPB) itself set guidelines to determine the eligibility of foreign suppliers for competitive public bidding for infrastructure projects.¹¹⁷

The GPPB's administrative guidelines (issued in relation to R.A. 9184 in conjunction with its Implementing Rules and Regulations,) should be given considerable persuasive weight as they were issued by the same agency tasked to implement R.A. 9184.¹¹⁸ Taken alongside the legislative intent for the qualifying clause of Section 4 of R.A. 9184, it does not appear that Philippine law contemplates the execution of treaties, executive or international agreements in order to circumvent the requirement

116. *Abaya v. Ebdane*, G.R. No. 167919, (S.C. February 14, 2007) (Emphasis added), available at <http://lawphil.net>.

117. Approving and Adopting the Guidelines in the Determination of Eligibility of Foreign Suppliers, Contractors and Consultants to Participate in Government Procurement Projects, Laws & Res No. 018-2005, (Sept. 12, 2005) (Phil.), available at <http://www.gppb.gov.ph/cgi-bin/issuances/files/Resolution%20No.%2018-2005.pdf> (emphasis added).

118. See *Pest Mgmt Ass'n of the Phil. (PMAP) v. Fertilizer and Pesticide Auth.*, G.R. No. 156041, (S.C., Feb. 21, 2007), available at <http://sc.judiciary.gov.ph/>.

of competitive public bidding. As such, DOTC Secretary Mendoza's signing of the ZTE Supply Contract with ZTE Vice President Yu Yong in April 2007, (already tainted with constitutional infirmity due to the lack of prior Monetary Board approval for incurring foreign debt and the lack of Senate advice and concurrence required for a "treaty" or "international agreement,"¹¹⁹) cannot be condoned as a deliberate execution of a treaty or executive agreement that is "not within the ambit of Philippine law." To do so would violate the plain legislative intent behind the qualifying clause in Section 4 of R.A. 9184.

Finally, the Philippine government cannot invoke R.A. 9184 and the constitutional provisions requiring prior Monetary Board concurrence for incurring foreign debt as well as Senate advice and concurrence to treaties and international agreements as rules of its "internal law of fundamental importance"¹²⁰ that would justify the invalidation of the ZTE Supply Contract. As seen from the Supreme Court's discussion in *Abaya* of the history of Philippine procurement laws, there is a strong and consistent trend of legislative reiteration of the requirement for competitive public bidding for government procurement. This reinforces the clear legislative policy to mandate competitive public bidding.

More crucially, even as a "treaty" or "executive agreement," the ZTE Supply Contract cannot circumvent mandatory constitutional requirements. Contrary to the below stipulation in the ZTE Supply Contract, the Philippine government cannot warrant that there will be "no contravention" of any applicable "treaty, law, regulation."

Clause 40.1.4 of the ZTE Supply Contract states:

40.1.4. *No Contravention.* The execution, delivery and performance of this Contract by the Purchaser do not and will not contravene, violate, or constitute a default under (a) any provisions of any agreements or other instruments to which the Purchaser is a party or by which the Purchaser or any of its assets is or may be bound; or (b) any treaty, law, regulation, judgment, or order applicable to the Purchaser.

119. See CONST. (1987), Art. VI, § 29(1); CONST. (1987), Art. VII, § 20-21.

120. Vienna Convention on the Law of Treaties, art. 46, May 23, 1969, 1155 U.N.T.S. 331:

"Article 46. *Provisions of internal law regarding competence to conclude treaties.*

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent UNLESS THAT VIOLATION WAS MANIFEST AND CONCERNED A RULE OF ITS INTERNAL LAW OF FUNDAMENTAL IMPORTANCE.
2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."

The Philippine government cannot make the foregoing warranty because the ZTE Supply Contract violates the fundamental constitutional requirements of prior concurrence by the Monetary Board before incurring foreign debt and Senate advice and concurrence on any treaty or international agreement. Even as a “treaty” or “executive agreement,” the ZTE Supply Contract cannot circumvent mandatory constitutional requirements. As the Philippine Supreme Court stated in *Government of the United States vs. Purganan*, “[t]reaty laws, particularly those which are self-executing, have equal stature as national statutes and, like all other municipal laws, are *subject to the parameters set forth in the constitution*.”¹²¹

Moreover, even assuming that the ZTE Supply Contract is indeed a “treaty” or “executive agreement,” as provided in R.A. 9184 it cannot supersede municipal law. Where there is a conflict between treaty law and municipal law that is “irreconcilable,” the Supreme Court upholds municipal law “for the reason that such courts are organs of municipal law and are accordingly bound by it in all circumstances.”¹²²

The constitutional requirements of prior Monetary Board approval for incurring foreign debt (presumably under the Loan Agreement supporting the ZTE Supply Contract) and Senate advice and concurrence on every treaty and international agreement cannot be bargained away by the executive through treaty-making. While generally accepted principles of international law form part of the law of the land under the Incorporation Clause of the constitution,¹²³ treaty provisions cannot prevail against the strictures of the constitution.

Neither can the ambiguity of the material provisions in the ZTE Supply Contract be used to circumvent mandatory constitutional and legal requirements. Several ambiguous provisions in the ZTE Supply Contract would presumably perpetuate the circumvention of constitutional and legal requirements:

Article 4: Technical Specifications

Equipment supplied under the Contract shall conform to the standards in Attachment B (Technical Specification) *and when no applicable standard is mentioned, to the authoritative standard appropriate to the Equipment's country of origin*, such standards being the latest issued by the concerned institution.

This provision dilutes the Legislature's authority to properly review appropriations for disbursements for repayment of public

121. *Gov't of the U.S. v. Purganan*, G.R. No. 148571, (S.C., Sept. 24, 2002), available at <http://sc.judiciary.gov.ph/> (Vitug, J., dissenting).

122. *Sec'y of Justice v. Lantion*, G.R. No. 139465, (S.C., Jan. 18, 2000), available at <http://www.lawphil.net> (emphasis added).

123. See CONST. (1987), Art. II, § 2.

debt (from the Loan Agreement.)¹²⁴ Under this provision, the default standard to which equipment should conform is *exclusively* the standards issued by the Chinese government. This provision does not allow for reference to internationally accepted standards for comparable equipment.

Article 7 (Price of the Contract) is similarly suspect, as it is unqualified. It does not provide for any revision in the treatment of the contract price in the event that there is any revision of the Priced Bill of Quantities. The Philippine government would be bound to a fixed contract price for the nearly 20-year term of the contract, and without the opportunity to revise the price if there is delayed delivery or non-conformity of goods and services.

Clauses 2.1, 3.1, and 4.1, and 5.1 commonly stipulate a fifteen percent advance payment of the price (whether for equipment, engineering services, managed services, or training) upon the effectivity of the "Loan Agreement between the Export-Import Bank of China and the Department of Finance of the Government of the Republic of the Philippines." However, these advance payments constitute *public funds*, the disbursement of which must be approved by Congress.¹²⁵ The funds cannot be automatically released by mere assertion of contractual right under the ZTE Supply Contract. Moreover, it should be stressed that the Loan Agreement referred to in these provisions will still require prior Monetary Board approval,¹²⁶ and two-thirds Senate concurrence.¹²⁷ Clause 8.8 also has troubling aspects:

Clause 8.8: Approval of Terms of Payment

Notwithstanding the foregoing, the terms of payment set out in this Article 8 shall be subject to the provisions of the Loan Agreement. The Purchaser and the Contractor agree to make relevant any changes or amendments to such terms of payment as required by the Loan Agreement.

This provision runs counter to constitutional requirements for legislative approval for increasing public debt, obtaining prior Monetary Board approval for contracting foreign loans, and the Senate's power to concur with international agreements. Effectively, this clause renders the contract price and payment terms indeterminate since the Loan Agreement with the Export-Import Bank of China controls the interpretation of terms of payment. This "executive agreement" (through the Loan Agreement) ultimately dilutes, if not removes altogether, the constitutional checks and balances to Presidential power to contract foreign loans.

124. See CONST. (1987), Art. VI, § 24-25.

125. *Id.*

126. See CONST. (1987), Art. VII, § 20.

127. *Id.* at § 21; CONST. (1987), Art. VI, § 24.

Clause 25.4: Change Orders

25.4. Change Orders

25.4.1. *Notwithstanding anything to the contrary contained in this Contract, before either Party acts on a preliminary Change Order, the Parties shall execute a written Change Order (which may be the preliminary Change Order signed by both Parties) incorporating the changes in question and providing for any change in the Implementation Schedule, any increase or reduction of the Contract Price, any change in the Work, or other provisions of this Contract.*

25.4.2. A Party's signature on the Change Order shall indicate such Party's full, final, and unconditional agreement with the matters prescribed in such Change Order. (Emphasis added)

This provision innocuously gives advance and unqualified authority to DOTC and ZTE Corporation to *rewrite the contract terms without legislative approval*. It should be stressed that the ZTE Supply Contract already transgresses the constitutional requirements for prior Monetary Board approval of incurring foreign debt, Senate concurrence on international agreements, and legislative approval of appropriations for disbursement of public funds to pay for such debts. Even worse, this provision would give unbridled authority to DOTC and ZTE Corporation to change material provisions of the contract without any recourse to constitutional checks and balances. Under this provision, parties can simply execute a change order providing for an increase in the contract price, change in the work, and any other provision of the contract.

Clause 32.4: Effect of Termination

32.4. Effect of Termination

In the event of termination of the Contract under this Article 32 (Termination for Cause):

- a) *payment and indemnification obligations arising prior to termination will remain in force; and*
- b) neither Party will be liable for damages of any kind as a result of exercising its right to terminate this Contract under this Article and termination will not affect any other right or remedy of either Party arising from any antecedent breach of this Contract.

Assuming that ZTE Corporation commits a material breach of this contract (defined only as inaccuracy of "representations and warranties" under Clause 40.3) pursuant to Article 32 of the ZTE Supply Contract, and DOTC subsequently terminates the contract for cause, the Philippine government would *still* be liable for all of its payment and indemnification obligations under the ZTE Supply Contract. This violates generally accepted principles of international contract law such as good faith and fair dealing and the doctrine of *imprevisio*n or changed circum-

stances¹²⁸ as well as the fundamental principles of mutuality of contracts, reciprocal obligations, and prohibition against unjust enrichment under the Philippine Civil Code.¹²⁹

Article 33.6: Waiver of immunity

33.6. The Parties irrevocably and unconditionally waives, any immunity to which it may at any time be or become entitled, whether characterized as sovereign immunity or otherwise, from any suit, judgment, service of process upon it, execution on judgment or set-off to which it may be entitled in any legal action or proceedings with respect to this Contract or any of the transactions contemplated hereby or hereunder.

This provision only creates a waiver of sovereign immunity for the Republic of the Philippines. It does not provide for a similar waiver by the People's Republic of China (PRC), which is *not* a party to the ZTE Supply Contract. This will prevent the Philippine government from instituting any proceedings to assert a claim against the PRC for any cause of action arising under the ZTE Supply Contract. Therefore, this provision also subverts the principle of reciprocity in international legal obligations.¹³⁰

Clause 38: Retention of Title

38.1. *Property in the Equipments.*

38.1.1. Notwithstanding delivery and the passing of risk in the Equipments, or any other provision of this con-

128. See UNIDROIT, Principles of International Commercial Contracts, art. 1.7:

“Article 1.7 (Good Faith and Fair Dealing)

(1) Each party must act in accordance with good faith and fair dealing in international trade.

(2) The parties may not exclude or limit this duty.”

See also Bishop, R. Doak, Crawford, James, and Reisman, Michael. FOREIGN INVESTMENT DISPUTES: Cases, Materials and Commentary (Kluwer Law International, 2005 ed.), 314-16.

129. CIVIL CODE, arts. 19 in relation to 21, 1191, and 1306.

130. See Republic of Indonesia et al. v. Vinzon et al., G.R. No. 154705, June 26, 2003 (en banc):

“International law is founded largely upon the principles of reciprocity, comity, independence, and equality of States which were adopted as part of the law of our land under Article II, Section 2 of the 1987 Constitution. The rule that a State may not be sued without its consent is a necessary consequence of the principles of independence and equality of States. As enunciated in *Sanders v. Veridiano II*, the practical justification for the doctrine of sovereign immunity is that there can be no legal right against the authority that makes the law on which the right depends. In the case of foreign States, the rule is derived from the principle of the sovereign equality of States, as expressed in the maxim *par in parem non habet imperium*. All states are sovereign equals and cannot assert jurisdiction over one another. A contrary attitude would “unduly vex the peace of nations.”

See also MICHAEL BYERS, CUSTOM, POWER, AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW (1999), at 89; Bruno Simma, *Reciprocity*, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, (Rudolf Bernhardt, ed.), Vol. IV, 2000; Francisco Parisi and Nita Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT'L L. J. 93 (2003).

tract, *the property in and legal title to the Equipments shall not pass to the Purchaser until the Contractor has received the Contract Price in full.*

- 38.1.2. In the event that the Purchaser does not pay the amount due, the agents of the Contractor may, until full payment is effected, take the equipment out of service, repossess and remove such equipment after thirty (30) days from receipt of a formal written notice by the Purchaser.
(Emphasis added.)

It should be noted that under the ZTE Supply Contract, the Philippine government is obliged to make payments upon *delivery* of the equipment or rendition of services. However, the Philippines will *not* acquire any legal title over the equipment until *all* the components of the contract price (including managed services, engineering services and training) have been paid in full. This prevents the Philippines from exercising any ownership rights over the equipment (such as taking out securities using the equipment as collateral) until the complete payment of the contract price. In the meantime, the Philippines will bear the risk of deterioration or damage during its possession of the equipment despite the Philippines' lack of legal title, per Clauses 28 and 31 of the ZTE Supply Contract.

Clearly, the ZTE Supply Contract inequitably creates binding and protracted international obligations for the Philippine government without creating corresponding reciprocal obligations on the People's Republic of China. The ZTE Supply Contract's execution and implementation appears to bypass constitutional requirements, and the situation created by the contract is highly one-sided and deleterious to Philippine interests. The contractual defects also render it difficult for the Philippine government to have recourse against the PRC in the event of ZTE's non-performance of its obligations under the ZTE Supply Contract. These drafting and content defects could have been timely detected and vetoed long before the execution of the contract, had the President not bypassed the required ODA auditing and monitoring processes on the basis of her broad interpretation of administrative authority.

V. CONCLUSION

In 2007, foreign business investors called the Philippines "the most corrupt country in the Asian region."¹³¹ A summary of the 2008 World Bank report on corruption cases in the Philip-

131. Carlos H. Conde, *Philippines Most Corrupt, Survey Says*, INTERNATIONAL HERALD TRIBUNE, Mar. 13, 2007, available at <http://www.ihf.com/articles/2007/03/13/business/peso.php> (last visited Mar. 14, 2009).

pines (“Accelerating Inclusive Growth and Deepening Fiscal Stability”) highlights the need for legal reforms on public procurement and oversight on foreign contracts. Among the reforms suggested are the abolition of poorly controlled discretionary special purpose funds; reforming the civil service system to avoid political patronage and low compensation; and improving criminal prosecution of tax evaders and corrupt public officials.¹³²

This article attempts to contribute to the reform efforts in Philippine governance by lifting the veil of Presidential administrative authority in the ODA process. As this paper has shown, the structure and text of the 1987 Constitution and other relevant laws passed by the Philippine Legislature created critical gate-keeping institutions over the ODA process, such as the National Economic Development Authority (NEDA), the Monetary Board, and the Legislature. Yet the mere assertion of “administrative efficiency” has proved sufficient for the President to effect administrative reorganizations that thwart NEDA’s crucial role in the ODA process. Presidential administrative interpretation of the exception under the Government Procurement Reform Act has been abused to circumvent the requirement of open and competitive public bidding. Considering the massive encroachments upon constitutional competencies, the fictive defense of “administrative efficiency” cannot be accepted. Under the postcolonial and post-dictatorship 1987 Constitution, which purposely differentiated the bases of administrative oversight power among numerous “independent” institutions and agencies, there is no such thing as a “Presidential wherewithal” to arbitrarily reorganize the Executive Branch’s offices and procedures at the expense of public accountability.

132. Doris Dumlao, *World Bank lists sources of corruption in the Philippines*, PHILIPPINE DAILY INQUIRER, Apr. 1, 2008, available at <http://business.inquirer.net/money/breakingnews/view/20080401-127574/World-Bank-lists-sources-of-corruption-in-Philippines> (last visited Mar. 14, 2009).

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