G.R. No. 237428 – REPUBLIC OF THE PHILIPPINES, Represented by Solicitor General JOSE C. CALIDA, *Petitioner* v. MARIA LOURDES P. A. SERENO, *Respondent*.

Promulgated:

May 11, 2018

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RESOLUTION

JARDELEZA, *J.*:

> *On some positions cowardice asks the question, is it safe? Expediency asks the question, is it politic? Vanity asks the question, is it popular? But conscience asks the question, is it right? And there comes a time when one must take a position that is neither safe, nor politic, nor popular but he must take it because conscience tells him it is right.* – Martin Luther King[1]

Respondent Chief Justice Maria Lourdes P. A. Sereno (respondent) in her *Ad Cautelam Respectful Motion for Inhibition* (Motion) seeks to prevent me from participating in this special civil action for quo warranto. She invokes the New Code of Judicial Conduct, which enjoins judges to disqualify themselves from participating in a matter in which it may appear, to a reasonable observer, that they are unable to decide a matter impartially, and where the judge has actual bias or prejudice concerning a party. She further invokes the due process clause of the Constitution.

Determining whether a sitting justice of the Supreme Court should recuse in a case is an exercise fraught with constitutional difficulty. This is due in no small measure to the absence of a clear litmus test by which a jurist's partiality is measured. Walking the tightrope between a judge's duty to decide and inhibition being a matter of conscience, the Court has made largely *ad hoc* decisions that turn on the factual subtleties of each case. This has prevented the development of a bright line rule on inhibition. In the Philippines, this tightrope walk between judicial accountability and judicial independence is made more problematic by the very paucity of formal mechanisms that institutionalize the reconciliation of these two concepts.[2] This gap in the law is complicated by the history, practice and tradition of the Court respecting recusal from within its ranks: the individual justices of the Court decide for themselves whether to inhibit from a case, and whether to explain their decision or remain silent. Finally, because the Court itself

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[1] A PROPER SENSE OF PRIORITIES, February 6, 1968, Washington, D.C. Taken from http://www.aavw.org/special_features/speeches_speech_king04.html, last accessed May 8, 2018.

[2] See *Establishing a Legal Framework for the Development of a Mechanism for the Judicial Responsibility of an Incumbent Supreme Court Justice: Judicial Independence and Judicial Accountability in Light of Recent Jurisprudence and Legal Developments* by Maria Luisa Isabel L. Rosales, Ateneo Law Journal, Vol. 56, pp.558-640.

abides by the Justice's judgment, and because there is no appeal, a Justice's decision on the matter of his recusal is final.

Fully conscious of these sensitivities, I have thus endeavored to: (I) provide, in the interest of transparency and fuller context, the specific charges made against me, as set forth in respondent's Motion, as well as other relevant events which led up to these charges, including my testimony before the Committee on Justice of the House of Representatives (House Committee on Justice); (II) survey the relevant rules and statutes on inhibitions and recusals; (III) study applicable jurisprudence, both local and American, on the subject, including where they seemingly implicate issues of due process; and (IV) consider the practice of the Court with respect to the inhibition and recusal of its own members. I submit this Resolution to show how I have decided, in good conscience, to participate in this case.

I

A

The Motion cites three charges that allegedly evidence my bias or prejudice against respondent, namely that: (1) I have stated that she committed treason; (2) I described her actions during my nomination to the Court as "inhumane" and "not those of a normal person;" and (3) my negative characterization of her persists to this day.

In the interest of full disclosure and to enable the reader to appreciate the context of these charges, I quote respondents' allegation in full.

The first charge cites my statement before the House Committee on Justice that respondent committed "treason:"

> On 11 December 2017, Justice Jardeleza testified before the Committee on Justice of the House of Representatives in relation to the charge that the Chief Justice allegedly "manipulated the shortlist of the Judicial and Bar Council (JBC) to exclude then Solicitor General Francis H. Jardeleza, for personal and political reasons, thereby disgracing then Sol. Gen. Jardeleza and curtailing the President's power to appoint him". There is reasonable basis to conclude from Justice Jardeleza's testimony, that he harboured ill feelings towards the Chief Justice as a consequence of the latter's challenge to his integrity during the nomination process for the Associate Justice position (vice Hon. Justice Roberto A. Abad) in 2014. Justice Jardeleza apparently asserted that the Chief Justice has committed "treason", to wit:
>
> [JUSTICE] JARDELEZA. x x x
>
> So, ngayon mabalik po tayo. Ano po ang paratang sa akin? Ang paratang po at dito nakasaad sa supplemental comment ng Chief Justice. Sinabi na po ni Attorney Capacite, ito pong supplemental comment and reply pirmado ni Attorney Capacite, hindi po ito verified. Subalit

iyong part two po nito, naka-all caps, it's page 13, statement of the Chief Justice on the integrity objection. Ang first sentence po, basahin ko, "This portion is solely attributable to the Chief Justice." Ano pong sinasaad nito? Na iyong diskarte ko na pumanig ako na huwag isama, **ako ay to quote her words, "disloyal to the republic." Iyong disloyalty to the republic, if you check the Pilipino-English dictionary ay naghudas sa ating Inang Bayan. Napakabigat po.**

Direct quote again, iyong diskarte ko na iyon ay is an act of treason. Treason.Sa madaling salita po sa Tagalog ako po ay traydor sa Inang Bayan. x x x

x x x x

So, sa punto na iyon ay ibabalik ko po ang tanong. Hindi ko po ikaila na may diskarte itong American lawyers, may diskarte ang Foreign Affairs, may diskarte rin kami. Eh bakit naman kung nasa kabilang panig ako disloyal sa bayan natin? This is a difference of opinion. And, in fact, on an executive matter, so iyong po ang unang tanong. Ako ay pinaratangan na disloyal o anghudas sa bayan natin, Eh sa pananaw ko po it is the Chief Justice who acted disloyally, naghudas sa bayan natin. Bakit? Eh bakit niya gagamitin itong classified, top secret or secret document? Para sa anong gamit? Hindi siya kasama sa arbitration. Ang ginamit niya du'ng [sic] dokumento ay illegally secured document. **So binabalik ko po sa kanya ang paratang na disloyal to the government.** At noong panahon na iyon hindi pa tapos ang kaso. That was a continuing case. Nagkadesisyon lang po kasi 2016 na. So, sino po ang disloyal sa bansa natin. Sa palagay kop o hindi ako, hindi ang Office of the President, hindi si Chief PLC.

x x x x

[JUSTICE] JARDELEZA.(Continuing) ... largest island in the Spratlys." Salita niya yun, hindi ko salita yun. Ayun nga ang pinag-aawayan. Ang statement na Itu Aba is the largest island in the Spratlys ay taliwas, contradictory sa posisyon ng gobyerno na ang itu Aba ay rock lang. **So ngayon, ang paratang sa akin na ang ginawa ko, ang diskarte ko ay treason, maitanong ko po sa inyo sino ngayon [sic] ang committed an act of treason sa pananalita nya na Itu Aba is an island?** Bagkus, ang posisyon ng gobyerno Itu Aba is a rock. At saka sinabi niya ito na Itu Aba is an island not once but twice. Sinabi niya ulit, inulit niya pa sa paragraph 68, "It must be emphasized that the categorical legal position that characterizes Itu Aba is an island... as an island," inulit pa. **So, ngayon binabalik ko iyung paratang, sino sa amin ang nag-commit ng act of treason? Hindi po ako.** Hirap na hirap iyung team na mabigyan ng pruweba na iyung Itu Aba ay rock at hindi island. Bakit po? Bagkus kasi kahit na hindi... kahit na minensiyon (*mention*) natin, ang mga hukom ng

tribunal ay, at a certain point, ay kusang nagbigay ng order na Pilipinas, isama mo sa diskusyon mo iyung dalawampu, 20 features kung ano ito, island or rock. Kahit hindi natin minensiyon, and arbitral tribunal mismo nagsabi isama ninyo, kasama doon ang Itu Aba. So napilitan tayo na i-discuss na itong Itu Aba up front and center. Now, itanong ninyo sa amin, itanong ninyo sa akin, hanggang sa madesisyunan ba kampante kami na mananalo tayo sa issue na ito? Hindi po. Iyun ang biggest nightmare natin because kapag na-declare ang itu Aba na island, magkakaroon ng 200 miles. But, as they say, the rest is history. Mabuti na lang, mabuti na lang nanalo tayo.

Magbalik ako, habang pending pa ito, **habang pending pa iyung kaso, eh, bakit naman tawagin akong traydor sa Inang Bayan? binabalik ko sa Chief Justice. Sa palagay ko you were the one who committed treason.** While the case was pending, walang pakundangan na ginamit mo ang isang dokumento na top secret, classified secret, nilagay mo sa publiko ang isang pangyayari na mayroong disagreement sa legal team. At saka contrary sa pinaghihirapan ng Pilipinas na iyan ay rock, eh, dalawang beses mo sinabi in writing iyun po ay island. **So sa palagay ko po, kapag kayo ang hukom dito ay kung hindi po iyun treason, hindi ko na alam. And I am not asking for anything that she did not do unto me.** Alam ko po iyung treason may view na there can be no treason without war. At binabalik ko sa Punong Mahistrado, eh, wala naming digmaan noong 2014, tinawag mo akong traydor, tinawag mo ang diskarte ko ay treason so ibabalik ko sa iyo. So, ang ibig sabihin sa mind ni Chief Justice, ang treason can be committed even kung walang digmaan.

So Honorable Members of the House, I will leave that to you, kayo po ang hukom dito. Ang sinasabi ko ay pananaw ko, **iyung sinasabi ko na ang Chief Justice ang nag-commit ng acts of disloyalty and acts of treason against the Republic is not a plain opinion. Iyun po ay bati sa... batay sa facts.** Number one, ginamit niya, pinalabas niya sa publiko ang classified document; number two, tinawag niya na island iyung feature na hirap na hirap ang gobyerno naming i-pruweba na rock.

Maraming salamat po.

x x xx

REP. HERNANDEZ. Thank you, Mr. Chairman.

Let me just clarify it, Justice Jardeleza, are you saying that you are accusing the Chief Justice of committing treason? Can you just clarify that?

[JUSTICE] JARDELEZA. Ayaw ko po na maakusahan ni Congressman Marcoleta na ano iyun, ewan, ewan. (*Laughter*).**So, ang straight po na sagot, iyun na po.** Because sa pananaw ko, eh, bakit mo... bakit mo ilantad

> ang classified document? Ano ang pakialam ng hudikatura? O? Alam mo, ang pinag-aawayan ay ang kahulugan ng island. The category of Itu Aba making it an island is a conclusion based on facts. So, kung ang posisiyon ng gobyerno ay that is a rock, iyung tano na magsabi, "Ay, hindi, island yan," **again, if that is not treason, I do not know what is treason.**[3]

The second charge involves my characterization of respondent's actions relevant to my nomination as a "personal slight,"[4] "inhumane" and "not those of a normal person." As evidence, respondent quotes the following portions of my testimony before the House Committee on Justice, to wit:

> REP. G.F. GARCIA. And so, she did not conduct herself as would have been expected of a chief justice, head of a separate branch of government? Would that be a fair statement [?]
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> [JUSTICE] JARDELEZA. I think that is a fair statement, Mr. Chairman.
>
> REP. G.F. GARCIA. And yet as Chief Justice and assumed to be knowledgeable about the law, it would have struck her or, at least, it could have crossed her mind that precisely attacking your integrity on the grounds of your legal strategy on the West Philippine Sea would not hold water if we are to question integrity per se because integrity would now delve on morality, on...what else...well, precisely morality, in this case, this purely involved a professional position or a professional judgment, do you think the Chief Justice could not have foreseen that?
>
> [JUSTICE] JARDELEZA. Mr. Chairman, hindi ko po talaga alam. Ang katotohanan po hanggang sa ngayon...kasi wala...wala po kaming history, wala kaming...sabi ko nga tinuturing naming siya na pamilya ko, na kaibigan, wala akong maisip na away propesyunal or personal. So, **hanggang ngayon hindi ko talaga po maintindihan bakit nagawa niya iyun...nagawa sa akin iyung isang bagay na napakatindi. Napakatindi po iyun, mahirap. So, I am sorry, up to now, I cannot understand why that was done to me.**
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> x x x x
>
> REP. G.F. GARCIA. So, we are left to conclude that the Chief Justice's opposition to your good self was purely out of an...what cannot be comprehended, incomprehensible quirk of her personality?
> [JUSTICE] JARDELEA. Because I cannot understand because I cannot get into her mind, as I cannot understand,

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[3] *Ad Cautelam* Respectful Motion for Inhibition (Motion), pp. 2-5; emphasis and underscoring retained.
[4] Motion, p. 6.

I can only say. Mr. Chairman, talagang, in my view, **what was done to me was inhuman.**

REP. G.F. GARCIA. That no decent humane and human person much less a Chief justice of a country would do?

[JUSTICE] JARDELEZA. Mr. Chairman, that...that...you know, when dealing with a fellow human being, we should afford each other some measure of decency. Kung ayaw po sa akin, kasi alam ko naman may nagsasabi, "Ay, hindi ikaw ang manok ni Chief Justice." Eh, Mr. Chairman, lahat...iyung karamihan ng mga abugado dito, iyung maluklok sa Korte Suprema, siguro iyun ang isa sa mga pinaka-minimithi. Sa kadulu-dulo ng isang career ng isang tao, minsan man lang maka-apply ka. Masabi mo sa mga apo mo, "Aba, nag-apply ako, na-nominate ako."Eh, iyun lang naman ako eh, bakit...and I was...I was minding my own business, I came from the private sector, akala ko tapos na iyung mga anak ko puwede na akong tumulong. So, littled did I know that I will get into all of these. As I said to the UP graduates, **ito po iyung ginawa sa akin were the most difficult two months of my life.** Hindi ko alam kung bakit ginawa but iyung...iyung ordeal na you would go through two months hindi moa lam kung ano mangyayari. Bagkus, Mr. Chairman, one week to go nagpaalam na ako sa Executive Secretary at saka kay CPLC then Ben, sinabi ko naintindihan ninyo ba ang ginawa ko? Kinalaban ko iyung Chief Justice. Kung hindi ako manalo sa Supreme Court, I will not be an effective SolGen. At saka hindi lang iyun, eh, wala na ho, ang term na ginamit ni Justice Brion **it is a ...is a career killer. Ang term na ginamit ko sa UP College of Law, it was a near-death experience** sapagkat mabuti na lang sinuportahan ako ng Supreme Court. Kung hindi po, I will live the rest of my life tagged na tao, abogadong walang integridad.
Integrity is a requirement before you can become a member of the Board of Directors of a publicly-listed company. Under the fit and proper rule of the Central Bank, integrity is a requirement. So, ano po ang mangyayari kung... **kung hindi ako nagdulog sa Supreme Court, ay, talagang wala na ho akong professional life, para na ring na-itsupuwera. So, I can agree po with...with you.**

REP. G.F. GARCIA.In other words, iyung nangyari po sa inyo, sinabi po ninyo those were the worst two months of your life kung saan kunuwestiyon (*question*) ang integridad ninyo on the basis of what was purely a professional legal strategy and belatedly nagdagdag pa ng dalawa na allegations which were totally unsubstantiated. Ibig sabihin po, eh, talagang the Chief Justice was out to discredit you, was out to destroy your reputation, was out to kill you career-wise, is this a normal act of a Chief Justice and would you say that the Chief Justice in this instance committed a great and grave injustice to yourself po?

> MR. JARDELEZA. **<u>I believe po that that is not the act of a normal person</u>**.[5]

The third charge asserts that my negative assessment of respondent's character is the very issue raised in the present petition, and that this negative characterization persists to this day. She cites a portion of my testimony before the Committee on Justice as illustrative:

> It appears that Justice Jardeleza's apparent bias or prejudice against the Chief Justice continues until present. With due respect, this is evident from the following testimony:
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> REP. J.C.Y. BELMONTE. (Continuing)... nag-oath taking po kayo, Sir, as justice, congratulations po and dapat lang talaga; you deserved it. Pero that's an aside, noong nag-oath po kayo, kanino po kayo nag-oath?
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> [JUSTICE] JARDELEZA.Ganito po and kuwento, Mr. Chairman. I think I went to Malacanang almost four-five o'clock na. Noong nandoon na po ako sa Malacanang, I asked Secretary Ochoa, "Puwede mag-oath before President Aquino?" then ang sagot ay "Sige titingnan natin kung ma-schedule, kung maka-schedule pa tayo." So, nag-antay po ako doon. After a while, sabi, 'Baka masikip." Then, one of the aides, one of the political aides of Secretary Ochoa said, "Alam mo, mabuti siguro kung doon ka mag-oath before the CJ para naman anon a, to repair things." Eh talaga pong nag-o-object ako. Sabi ko, "Puwede ba si President? Siya naman ang nagnombra sa akin eh?" Kaya lang I don't know how many minutes passed, hindi... sabi, "Hindi ka pa rin mapagbigyan. The schedule is full."
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> Ang hindi alam nu'ng lahat eh mahirap na iyon masingitan, nag-oath na ako sa notary, I think mga bandang two-o'clock para just in case may mangyari may oath na ako, so may hawak-hawak na akong oath. After a while, wala pa rin, hindi pa rin maano. And then, well, **to my eternal regret pumayag ako.** And why do I say to my eternal regret because, katulad ni Justice Brion, the next morning I think and he is here, I sought out Justice Brion to apologize because there were several people first who said, "Eh mali naman ang ginawa mo. People went out on a limb for you to help you, eh ba't doon ka naman nag-take oath?" So, iyon po ang katotohanan. I had to apologize to Justice Brion why I allowed... I took my oath before the Cj. And again binalikan ko si Secretary Ochoa, 'paki-arrange naman na mag-take oath ako kay Pangulong Aquino." Kaya pag mabisita mo ako, ang picture ko po, I'm taking my oath before President Aquino.
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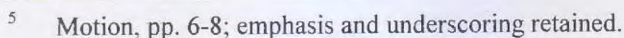
> REP. J.C.Y. BELMONTE. I'm...thank you very much for that, Justice. I'm sorry I had to ask that question.



[5] Motion, pp. 6-8; emphasis and underscoring retained.

> [JUSTICE' JARDELEZA. It's all right but what I'm trying to say is iyong ginawa po sa akin hindi makatao. Hindi po iyon nabura noong ako ay nagte-take oath and she was smiling and everything is okay. **Of course, everything was not okay and up to today everything is not okay.**[6]

B

In the interest of full transparency and to provide a more complete context, I shall also narrate the relevant events which preceded my testimony before the House Committee on Justice:

1. In June 2014, respondent attempted to block my nomination to the Court on the ground that I lacked integrity, as shown by my handling of the West Philippine Sea arbitration case which the Philippines filed before the Permanent Court of Arbitration at The Hague. I was then Solicitor General and led the Philippine legal team that worked on the crafting of the arbitration case. I would later be appointed the Philippine Agent for purposes of the arbitration.

   In public filings made in *Jardeleza v. Sereno*,[7] respondent accused me of committing "treason," being a "traitor," and being disloyal to the country through my alleged "deliberate refusal to promote the remedies available to the Philippines, and deliberately weakening the country's arguments."[8] She also faulted me for allegedly demonstrating "weakness of character" when I was supposedly "not willing to protect the interest" of the Republic, even inferring that I "may have been listening to extraneous factors or may have been promised something", thereby imputing that I may have compromised national interests because of personal agenda.[9]

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6 Motion, p. 9; emphasis and underscoring retained.

7 G.R. No. 213181, August 19, 2014, J. Leonen's dissent, citing Judicial and Bar Council Supplementary Reply, pp. 1-7, pp. 170-176 of the Records.

8 *Id.*

9 *Id.*, more fully, the pertinent portion of the dissent read "She was asked whether the integrity objection would hold considering that there was no proof that the Petitioner obtained money for his actuation in the West Philippine Sea case. She explained her point of view that one's capacity and willingness to uphold the Constitution determines integrity. An objection to integrity does not necessarily require proof of unlawful receipt of money in exchange for a decision or an action. She stressed that one does not have integrity when one is not willing to protect the interest of one's client to the utmost, especially in this case when the client happens to be the Republic. She said that through his actuations, Petitioner has demonstrated weakness of character. She inferred that he may have been listening to extraneous factors or may have been promised something. She also said she had seen many instances where national interests had been compromised because of personal agendas. She cited her experiences as the Director of the Institute of International Legal Studies in the University of the Philippines, when she observed the actuations of certain government officials. She saw how the country's ability to protect Scarborough Shoal was compromised by a foreign affairs official in exchange for a possible United Nations position. She also observed how public officials were willing to see the country lose its defense in the two international arbitration cases brought against it by the companies Fraport and Philippine International Air Terminals Co., Inc., all for something other than duty to the Republic."

On August 19, 2014, the Court ordered my inclusion in the JBC shortlist. President Benigno S. Aquino III appointed me to the Court the following day.

2. On June 29, 2015, a little over a year before the final award on the West Philippine Sea arbitration case was issued,[10] I gave the commencement address at the occasion of the graduation of the University of the Philippines College of Law Class of 2015. In my address, I spoke about the value of hard work and integrity in one's success and shared my harrowing experience in aspiring for a seat in the Court. I recalled then how painful it was to spend a whole lifetime building a reputation worthy of my parents and my family, only for my integrity to be disparaged at the peak of a legal career. I told the graduates that in life, when faced with a shark or a bully, they should stand their ground and push back. Admittedly, I referred to respondent's viciously false accusations as those consistent of a "bully" and a "shark."[11] My address reads, in pertinent part:

x x x x

> *My third story is about my near death experience.*
>
> When I became Solicitor General in 2012, I thought I had reached the pinnacle of my career. Former United States Solicitor General Rex Lee described the position as "probably the creamiest lawyering job in the country." But, as former United States Supreme Court Justice Potter Stewart said, while the Solicitor General's office provides "the best lawyer's jobs," a seat on the Supreme Court may be "the best job in American law." Thus, after two and a half years as Solicitor General, I aspired for a seat in our Supreme Court.
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> And then, Wham! The Chief Justice and the Senior Associate Justice of the Supreme Court objected to my nomination, on grounds that I lack integrity in my handling of the West Philippine Sea arbitration. Wow. It came as a complete surprise; I did not know what hit me. This was the start of the most difficult two months of my life, and that of [my wife], and of my children.
>
> You will read most about what happened in *Jardeleza v. Sereno*. What the case will not tell you, though, is how much pain the vicious untruths thrown my way caused me and my family.
>
> *You spend a whole lifetime building a reputation worthy of your parents.* My father finished law in a school in Iloilo, and he passed the bar on the second try. He

[10] Said final award was issued by the Permanent Court of Arbitration at The Hague on July 12, 2016.

[11] See Tarra Quismundo's "Jardeleza lashes out at 2 SC colleagues", *Philippine Daily Inquirer,* July 1, 2015; "Sereno: It's not helpful to comment on Jardeleza attack", *Philippine Daily Inquirer,* July 3, 2015.

practiced solo until he had to take a government job for its steady income. This was when my siblings and I were entering high school. My mother was a pharmacist and a college teacher who taught piano in the evenings to supplement her income. They both worked very hard and saved. They borrowed to build a house and paid the debt in twenty years. All of one thousand pesos per year. They never owned a car in their lifetime. They only dreamt to send all of us to UP, which they did.

You also spend a whole lifetime building a reputation worthy of your family. [My wife] and I have raised our three children in the same way our own parents reared us: education is the great equalizer, work hard, and the only legacy we can bequeath them is a good name. We come from humble beginnings, and we live a modest life. Name and reputation are most important for us.

Thus, when my integrity was attacked, I knew I had to fight back, if only to clear my name.

I had a most difficult defense because, *first*, as a lawyer, I had to keep the confidences of my client, the Republic of the Philippines. Under our code of ethics, we carry the secrets of the client to the grave. These secrets include litigation strategy and tactics. You do not telegraph these to the adversary. That would be treason. *Second*, I could not even confirm or deny the existence of a leaked memorandum purporting to show the judgment calls being debated in the highest levels of the Executive Department of Government. As you can imagine, there are laws and administrative orders prohibiting public officers charged with the custody of confidential and secret documents from revealing their contents.[12] My accusers violated these laws with impunity. Criminal wrongdoing was piled upon brazen disregard for the safekeeping of state secrets. Laws were broken when persons who had custody of official documents leaked them to persons not members of the legal team, and when the latter recklessly placed them in the public domain. Read again *Jardeleza v. Sereno*. Read carefully between the lines.

Fortunately for me, the Supreme Court decided to allow my name to be placed in nomination, and the President appointed me to the Court.

I was so close to professional death, an inglorious end to a career I worked so hard to nurture. It is an experience I

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[12] See Memorandum Circular No. 78, Promulgating Rules Governing Security of Classified Matter in Government Offices, August 14, 1964. See also Memorandum Circular No. 196, amending MC No. 78, July 19, 1968; Letter of Instruction No. 1420. Prohibiting disclosure to unauthorized persons, the media or general public, top secret, secret, confidential or restricted matters; Executive Order No. 608, Establishing a National Security Clearance System for Government Personnel with Access to Classified Matters and For Other Purposes, March 30, 2007; Republic Act No. 6713, Code of Conduct and Ethical Standards for Public Officials and Employees; Civil Service Commission Resolution No. 1101502, Revised Rules on Administrative Cases in the Civil Service (RRACCS), November 18, 2011.

> would not wish on anybody, not even to those who made those vile accusations against me.
>
> x x x x
>
> "Don't back down from the sharks." "Face down the bullies." These are among the life lessons given by Naval Admiral William H. McRaven to the graduates of the University of Texas, in his commencement address last May 2014. According to Admiral McRaven: "There are a lot of sharks in the world. If you hope to complete the swim, you will have to deal with them." You see, part of basic Navy SEAL training involves swimming in the shark-infested waters off Clemente Island in San Diego. His advice? When a shark circles your position, you must stand your ground. Do not swim away. If it attacks, you must summon all your strength and punch that shark in the snout.
>
> Admiral McCraven, with the bravado of a true Navy SEAL, assumes that the sharks and bullies will swim away when you punch them. I do not know about that. Sharks and bullies can be mindlessly brutal. And relentless. I cannot guarantee that you will triumph over the bullies and the sharks when they circle you. Like I told you, in my case, I almost perished. To this day, I am still searching for answers as to why that had to be done to me and to my family. I still don't have the answers, but I knew then what I had to do. I stood my ground. I pushed back.
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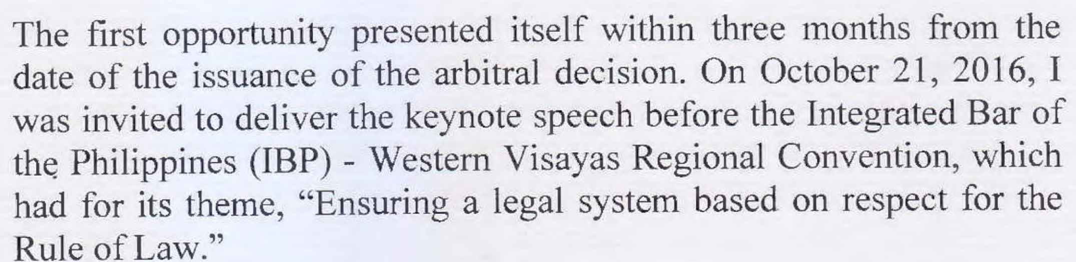
> In life, when faced with a shark or a bully, my advice to you: push back. Use all your might, use your UP Law training. Push back for your parents. For yourself. For your spouse. For your children. For your loved ones. For your class. For your block mates.
>
> Class of 2015, as you push back the bully, as you punch the shark, use all your might and pray that you punched hard enough. It worked for me.
>
> x x x x

3. On July 12, 2016, the Arbitral Tribunal in The Hague promulgated its ruling, which was an astounding decision in favor of the Philippines. With this, I was free at last to talk about the arbitration and, more importantly for me, the treatment of Itu Aba.



The first opportunity presented itself within three months from the date of the issuance of the arbitral decision. On October 21, 2016, I was invited to deliver the keynote speech before the Integrated Bar of the Philippines (IBP) - Western Visayas Regional Convention, which had for its theme, "Ensuring a legal system based on respect for the Rule of Law."

In my remarks, I shared the complete story behind the Itu Aba issue.[13] There, I recounted how the Philippine legal team, composed of lawyers from different offices within the Executive Department, and in coordination with our international legal team, unanimously and purposively embarked on a low-risk strategy involving the question of which features to include in the Philippine submission. Specifically, only features that (in our estimation and based on evidence known or available to us) could, at worst, be declared only as rocks were included in our January 2013 submission to the Arbitral Tribunal. Relatedly, the team made a deliberate decision *not* to include Itu Aba, the largest feature in the Spratly Islands, as it was reputed to have sources of potable water which, arguably, could qualify it as an island, to the detriment of the entire Philippine case.

In brief, the risk posed by including Itu Aba was this: if declared by the arbitral tribunal to be an island, Itu Aba would generate a 200 Nautical Mile (NM) Exclusive Economic Zone (EEZ) that would cover large parts of the Philippine EEZ in the west, including Reed Bank and extending almost up to Palawan. This was a risk none of the members of the Philippine legal team was willing to take.

Towards the end of the year, however, foreign counsel recommended the amendment of the Philippine statement of claim, with the addition of other features, among them, Itu Aba. Considering the gravity and sensitivity of the proposal, we asked counsel to visit Manila to personally discuss the matter with the rest of the Philippine legal team. In a meeting held in Malacanan in January 2014, the advantages and disadvantages of the proposal were discussed. In the end, the team *unanimously* affirmed the low-risk strategy initially agreed upon and decided against amending the Philippine submission to include Itu Aba.

Despite this, foreign counsel *again* proposed, during the preparation of the Philippine Memorial, to include therein fourteen (14) paragraphs *mentioning* Itu Aba. These additional paragraphs would argue that although Itu Aba *is* the largest high-tide feature in the Spratly Islands, it is still incapable of sustaining human habitation or economic life of its own, and thus cannot be held to be an island. After reminding counsel that the matter has already been decided in the January 2014 Manila meeting, I proposed that the recommendation be placed in a formal memorandum[14] addressed to the Secretary of Foreign Affairs and myself, for purposes of elevating

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[13] With the full transcript of the Keynote Address attached hereto as "Annex A."

[14] In this Memorandum, lead counsel for the Republic, Paul Reichler, argued that ignoring the issue of Itu Aba would damage the Philippines's credibility before the Tribunal and undermine the entire case. Executive Secretary Paquito Ochoa Jr, then Chief Presidential Legal Counsel (now Associate Justice of the Court) Alfredo Benjamin Caguioa, and I, for our part, crafted our own memorandum where we argued that the legal and political risks of "mentioning" Itu Aba were no different from the risks of amending the submission to "include" Itu Aba.

the matter to then President Aquino for his decision. After discussion, President Aquino decided to go with the foreign counsel's recommendation and the additional paragraphs mentioning Itu Aba were included in the Memorial.[15]

Respondent would later on use this same confidential Memorandum to block my nomination and impugn my integrity before the JBC. I emphasize that neither respondent nor her informant, Senior Associate Justice Antonio T. Carpio, were part of the Philippine legal team. They did not participate in the discussions that led to the initial adoption of the low-risk strategy, nor in the decision not to amend the Philippine submission. In fact, I did not furnish respondent or Justice Carpio a copy of this confidential Memorandum in view of its highly sensitive content.

4. On December 11, 2017, I appeared and testified before the House Committee on Justice.

II

This part shall cover my survey of the relevant rules on inhibition or disqualification of judges.

First, there is Section 5, Canon 3 of the New Code of Judicial Conduct, cited by respondent, which provides as follows:

> Sec. 5. Judges shall disqualify themselves from participating in any proceedings in which they are unable to decide the matter impartially or in which it may appear to a reasonable observer that they are unable to decide a matter impartially. Such proceedings include, but are not limited to instances where:
>
> a) The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;
>
> b) The judge previously served as a lawyer or was a material witness in the matter in controversy;
>
> c) The judge, or a member of his or her family, has an economic interest in the outcome of the matter in controversy;
>
> d) The judge served as executor, administrator, guardian, trustee or lawyer in the case or matter in controversy, or a former associate of the judge served as counsel during their association, or the judge or lawyer was a material witness therein;
>
> e) The judge's ruling in a lower court is the subject of review;

[15] As fate and the vagaries of litigation would have it, the Arbitral Tribunal itself later on directed the Philippines to make submissions on the status of more than twenty features in the Spratly Islands, including Itu Aba, and made the determination of their status part of the proceeding.

> f) The judge is related by consanguinity or affinity to a party litigant within the sixth civil degree or to counsel within the fourth civil degree; or
>
> g) The judge knows that his or her spouse or child has a financial interest, as heir, legatee, creditor, fiduciary, or otherwise, in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceedings.

A.M. No. 03-05-01-SC, or the Adoption of the New Code of the Philippine Judiciary, was promulgated on May 15, 2004. It was touted as the Philippines' acceptance and implementation of the Bangalore Draft of the Code of Judicial Conduct which was, in turn, intended to be the Universal Declaration of Judicial Standards applicable in all judiciaries of member countries.[16] Somewhat similarly with the New Code of Judicial Conduct, Bangalore Draft Value 2.5 provides:

> 2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:
>
> 2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;
>
> 2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or
>
> 2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy: Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

Rule 137 of the Rules of Court also enumerates grounds for either the disqualification or inhibition of a judge, to wit:

> Sec. 1. *Disqualification of judges.* — No judge or judicial officer shall sit in any case in which he, or his wife or child, is pecuniarily interested as heir, legatee, creditor or otherwise, or in which he is related to either party within the sixth degree of consanguinity or affinity, or to counsel within the fourth degree, computed according to the rules of the civil law, or in which he has been executor, administrator, guardian, trustee or counsel, or in which he has been presided in any inferior court when his ruling or decision is the subject of review, without the written

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[16] The Bangalore Draft was deliberated upon and approved at the Round Table Meeting of Chief Justices by the Judicial Group on Strengthening Judicial Integrity at the Peace Palace, The Hague, on November 25-26, 2002. For further analysis of the history of the Bangalore draft as the precursor of the Philippine New Code of Judicial Conduct, *see* Commentary on the Bangalore Principles of Judicial Conduct, by the United Nations Office on Drugs and Crime, September 2007.

> consent of all parties in interest, signed by them and entered upon the record.
>
> A judge may, in the exercise of his sound discretion, disqualify himself from sitting in a case, for just or valid reasons other than those mentioned above.[17]

Finally, Rule 8 of A.M. No. 10-4-20-SC, or the Internal Rules of the Supreme Court,[18] also provides the following grounds for inhibition:

> Sec. 1. *Grounds for inhibition.* – A Member of the Court shall inhibit himself or herself from participating in the resolution of the case for any of these and similar reasons:
>
> (a) the Member of the Court was the *ponente* of the decision or participated in the proceedings in the appellate or trial court;
>
> (b) the Member of the Court was counsel, partner or member of law firm that is or was the counsel in the case subject to Section 3(c) of this rule;
>
> (c) the Member of the Court or his or her spouse, parent or child is pecuniarily interested in the case;
>
> (d) the Member of the Court is related to either party in the case within the sixth degree of consanguinity or affinity, or to an attorney or any member of a law firm who is counsel of record in the case within the fourth degree of consanguinity or affinity;
>
> (e) the Member of the Court was executor, administrator, guardian or trustee in the case; and
>
> (f) the Member of the Court was an official or is the spouse of an official or former official of a government agency or private entity that is a party to the case, and the Justice or his or her spouse has reviewed or acted on any matter relating to the case.
>
> A Member of the Court may in the exercise of his or her sound discretion, inhibit himself or herself for a just or valid reason other than any of those mentioned above.
>
> The inhibiting Member must state the precise reason for the inhibition.

In comparison, the applicable United States federal statute on the inhibition of justices and judges, which is broadly governed by Section 455 of the Ethical Standard Act of 1988, provides that:

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[17] Rule 137, in turn, had its origins in Section 8 of Act 190, or the 1901 Code of Civil Procedure. In *People v. Lopez* (G.R. No. L-1243, April 14, 1947), the Court interpreted the determination of the question of a Justice's disqualification and competency under Section 8 of said Act to lie on the Justice's power alone, with the intervention of the Court as merely advisory in nature. Later on, the Supreme Court promulgated the Rules of Court where Rule 126, covering the rule on disqualification of judges, which appears to have merely reproduced Section 8 and Section 608 of the Code of Civil Procedure (*Vargas v. Rilloraza*, G.R. No. L-1612, February 26, 1948; People v. Lopez, G.R. No. L-1243, April 14, 1947).

[18] Published on May 7, 2010 in the *Manila Bulletin;* as amended in the Resolutions dated July 6, 2010, August 3, 2010, January 17, 2012, July 31, 2012, September 18, 2012, March 12, 2013, June 18, 2013 and September 10, 2013.

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3)Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is, to the judge's knowledge, likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

Relatedly, and upon study of the foregoing rules, there seems to me an established dichotomy between grounds calling for mandatory disqualifications and voluntary inhibitions.

Grounds calling for the mandatory disqualification of judges from sitting in, and deciding, cases are those set forth in paragraphs (b) to (g), Section 5, Canon 3 of the New Code of Judicial Conduct, the first paragraph of Section 1, Rule 137 of the Rules of Court, and the first paragraph of Section 1, Rule 8 of the Internal Rules of the Supreme Court. These

provisions similarly provide for objectively verifiable bases upon which to support a judge's disqualification. On the other hand, the second paragraphs of both Section 1, Rule 137 of the Rules of Court and Rule 8 of the Internal Rules similarly provide that a judge may, *in the exercise of his discretion,* inhibit himself or herself for a just or valid reason other than any of those calling for mandatory disqualification. To me, the decision of whether to participate in a case is left to the judge's sound discretion because it acknowledges the possibility of other grounds for inhibition which, by nature, may not be objectively verifiable, as compared to the previous grounds so listed.

While paragraph (a), Section 5, Canon 3 of the New Code of Judicial Conduct can arguably be construed to call for the mandatory disqualification of a judge due to the use of the word "shall," it is my view that a careful (and reconciliatory) reading of this Section would show that it is more akin to the grounds provided under the second paragraph of Section 1, Rule 137 of the Rules of Court and the penultimate paragraph of Section 1, Rule 8 of the Internal Rules. Unlike the prophylactic grounds enumerated in the first paragraphs of the aforementioned sections of the Rules, which include verifiable relations of consanguinity or affinity and pecuniary interests, bias and prejudice do not submit themselves to mathematically precise determination and are therefore included in the grounds that are to be decided based on the challenged judge's discretion.

III

A

The dichotomy between mandatory and voluntary inhibitions, I find, has been validated by jurisprudence, at least insofar as to the manner by which such disqualification or inhibition shall be made. This Court has consistently pronounced that the first paragraphs of Section 1, Rule 137 of the Rules of Court and Section 1, Rule 8 of the Internal Rules of the Supreme Court, by virtue of their objective verifiability, warrant prompt compulsory disqualification, regardless of the will of the judge.[19] However, when the prayer for inhibition is triggered by grounds that are not objectively verifiable, such as bias or prejudice, the Court generally leaves the inhibition discretionary, and submits it to the sole discernment of the judge sought to be inhibited.[20]

Furthermore, I find from my review of Philippine jurisprudence that cases involving the recusal of judges and justices below the level of this

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[19] *Santos v. Lacurom,* A.M. No. RTJ-04-1823 (Resolution), August 28, 2006, 531 PHIL 239-253; *Ong v. Spouses Basco,* G.R. No. 167899, August 6, 2008, 583 PHIL 248-256); *Chin v. Court of Appeals,* G.R. No. 144618, August 15, 2003, 409 SCRA 206, 212.

[20] There have been a few cases wherein the Court has seen fit to intervene effectively reverse the Justice's offer/decision on the question of recusal (See *People v. Ong,* G.R. Nos. 162130-39, May 5, 2006, and *Veterans Federation Party v. COMELEC,* GR Nos. 136781, 136786 and 136795, October 6, 2000).

Court have generally been approached following this methodology: *First*, the Court decides whether the facts trigger the application of mandatory disqualification or discretionary inhibition; *Second*, if the grounds raised on the motion call for mandatory disqualification, the Court involves itself and ensures disqualification of the challenged judge; *If*, however, it finds that the grounds raised are discretionary, the Court leaves the decision of inhibition to the best judgment and careful self-examination of the judge concerned, save for instances where grave abuse of discretion is shown.

Unfortunately, the Court has not laid down a clear litmus test by which a case of *voluntary* recusal by lower court judges and justices should be decided. As it stands, it seems to me that the body of law on discretionary recusal turns on eight (8) identifiable, but not internally consistent, principles: (1) partiality of a judge or justice is not presumed;[21] (2) bare allegations of partiality are not sufficient;[22] (3) clear and convincing extrinsic evidence is required to prove partiality;[23] (4) voluntary inhibition applies only to conduct or statements made from extrajudicial sources, *i.e.*, not in the court proceedings in question;[24] (5) the judge must do a careful

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[21] See *Pimentel v. Salanga*, G.R. No. 27934, September 18, 1967, 21 SCRA 160*; People v. Court of Appeals*, G.R. No. 129120, July 2, 1999, 369 PHIL 150-160*; Saylo v. Rojo*, A.M. No. MTJ-99-1225, April 12, 2000, 386 PHIL 446-452*; Soriano v. Angeles*, G.R. No. 109920, August 31, 2000, 393 PHIL 769-784*; Gohu v. Spouses Gohu*, G.R. No. 128230, October 13, 2000, 397 PHIL 126-136; *Gochan v. Gochan*, G.R. No. 143089, February 27, 2003, 446 PHIL 433-461; *Talag v. Reyes*, A.M. No. RTJ-04-1852, OCA-IPI No. 03-1759-RTJ, June 3, 2004, 474 PHIL 481-491; *Planas v. Reyes*, A.M. No. RTJ-05-1905, OCA-IPI No. 03-1712-RTJ, February 23, 2005, 492 PHIL 288-302*; Republic v. Evangelista*, G.R. No. 156015, August 11, 2005, 504 PHIL 115-125.

[22] See *People v. Kho; Go v. Court of Appeals*, G.R. No. 106087, April 7, 1993, 221 SCRA 397; *Abad v. Belen*, A.M. No. RTJ-92-813, January 30, 1995, 240 SCRA 733; *People v. Tabarno*, GR No. 101338, March 20, 1995, 242 SCRA 456; *People v. Court of Appeals and Pacificador*, GR No. 129120, July 2, 1999,309 SCRA 705; *People v. Court of Appeals*, G.R. No. 129120, July 2, 1999, 369 PHIL 150-160; *Gohu v. Spouses Gohu*, G.R. No. 128230, October 13, 2000, 397 PHIL 126-136*; Pagoda Philippines, Inc. v. Universal Canning, Inc.*, G.R. No. 160966, October 11, 2005, 509 PHIL 339-347*; Spouses Abrajano v. Heirs of Salas, Jr.*, G.R. No. 158895, February 16, 2006, 517 PHIL 663-676*; Kilosbayan Foundation v. Janolo, Jr.*, G.R. No. 180543, July 27, 2010, 640 PHIL 33-61*; Aguinaldo v. Aquino III*, G.R. No. 224302, February 21, 2017.

[23] *Supra* note 20; See also *Aleria v. Velez*, GR No. 127400, November 16, 1998; *Gahol v. Riodique*, GR No. L-40415, June 27, 1975, 65 SCRA 505; *Dimo Realty & Development Inc. v. Dimaculangan*, GR No. 130991, March 11, 2004; *Castillo v. Juan*, G.R. Nos. L-39516-17, January 28, 1975, 159 PHIL 143-149*; Cruz v. Iturralde*, A.M. No. RTJ-03-1775, April 30, 2003, 450 PHIL 77-88; *Dimo Realty and Development Inc. v. Dimaculangan*, G.R. No. 130991, March 11, 2004, 469 PHIL 373-385; *Planas v. Reyes*, A.M. No. RTJ-05-1905, OCA-IPI No. 03-1712-RTJ, February 23, 2005, 492 PHIL 288-302; *Spouses Abrajano v. Heirs of Salas, Jr.*, G.R. No. 158895, February 16, 2006, 517 PHIL 663-676; *Villamor, Jr. v. Manalastas*, G.R. No. 171247, July 22, 2015; *Castro v. Mangrobang*, A.M. No. RTJ-16-2455, Resolution, April 11, 2016.

[24] *Supra* note 20 and 21; *Webb v. People*, GR No. 127262, July 24, 1997, 276 SCRA 243, 253-254, citing *People v. Massarella*, 400 N.E. 2d, 436; *Aleria, Jr. v. Velez*, G.R. No. 127400, November 16, 1998, 359 PHIL 141-150; *People v. Court of Appeals*, G.R. No. 129120, July 2, 1999, 369 PHIL 150-160; *De Vera v. Dames II*, A.M. No. RTJ-99-1455, July 13, 1999, 369 PHIL 470-486; *Seveses v. Court of Appeals*, G.R. No. 102675, October 13, 1999, 375 PHIL 64-74; *Viewmaster Construction Corp. v. Roxas*, G.R. No. 133576, July 13, 2000, 390 PHIL 872-884; *Soriano v. Angeles*, G.R. No. 109920, August 31, 2000, 393 PHIL 769-784; *Estrada v. Desierto*, G.R. Nos. 146710-15, 146738, March 2, 2001, 406 PHIL 1-142; *Gochan v. Gochan*, G.R. No. 143089, February 27, 2003, 446 PHIL 433-461; *Cruz v. Iturralde*, A.M. No. RTJ-03-1775, April 30, 2003, 450 PHIL 77-88; *Chin v. Court of Appeals*, G.R. No. 144618, August 15, 2003, 456 PHIL 440-453; *Spouses Hizon v. Spouses Mangahas*, G.R. No. 152328, March 23, 2004, 469 PHIL 1076-1076; *Tan v. Estoconing*, A.M. Nos. MTJ-04-1554 & MTJ-04-1562, June 29, 2005, 500 PHIL 392-407; *Republic v. Evangelista*, G.R. No. 156015, August 11, 2005, 504 PHIL 115-125; *Republic v. Gingoyon*, G.R. No. 166429, December 19, 2005, 514 PHIL 657-782; *Spouses Dumo v. Espinas*, G.R. No. 141962, January 25, 2006, 515 PHIL 685-701; *Deutsche Bank Manila v. Spouses*

self-examination before deciding;[25] (6) the judge or justice has a duty to decide and to sit;[26] (7) judges and justices must act "like Caesar's wife – above suspicion";[27] and (8) the judge's or justice's decision must affirm the public's faith in the judiciary, for "any act which would give the appearance of impropriety becomes, of itself, reprehensible."[28]

Demonstrably, court decisions on recusal use one or more of these principles to arrive at conclusions that are widely varied and which decidedly turn on the peculiar facts of each case. My review of jurisprudence produced two cases, *Pimentel v. Salanga*[29] and *People v. Ong*,[30] which to me illustrate the stark unpredictability of applications of these eight principles in *theorem* vis-à-vis *praxis*.

In *Pimentel*, the judge was being inhibited by the litigant by virtue of an earlier extraneous administrative case filed by the litigant against the same sitting judge. There, the Court held that "[i]t ill behooves this Court to tar and feather a judge as biased or prejudiced, *simply because counsel for a party litigant happens to complain against him*." It thereafter laid the following guideposts for voluntary inhibition:

> But when suggestion is made of record that he might be induced to act in favor of one party or with bias or prejudice against a litigant arising out of circumstance reasonably capable of inciting such a state of mind, he

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Chua Yok See, G.R. No. 165606, February 6, 2006, 517 PHIL 212-235; *People v. Ong*, G.R. Nos. 162130-39, May 5, 2006, 523 PHIL 347-359; *Pasricha v. Don Luis Dison Realty, Inc.*, G.R. No. 136409, March 14, 2008, 572 PHIL 52-71; *Reyes v. Paderanga*, A.M. No. RTJ-06-1973, March 14, 2008, 572 PHIL 27-44; *Heirs of Juaban v. Bancale*, G.R. No. 156011, July 3, 2008, 579 PHIL 285-297; *Law Firm of Tungol & Tibayan v. Court of Appeals*, G.R. No. 169298, July 9, 2008, 579 PHIL 717-730; *Ong v. Spouses Basco*, G.R. No. 167899, August 6, 2008, 583 PHIL 248-256; *Dipatuan v. Mangotara*, A.M. No. RTJ-09-2190, April 23, 2010, 633 PHIL 67-79; *Kilosbayan Foundation v. Janolo, Jr.*, G.R. No. 180543, July 27, 2010, 640 PHIL 33-61; *City Government of Butuan v. Consolidated Broadcasting System, Inc.*, G.R. No. 157315, December 1, 2010, 651 PHIL 37-56; *Melendres v. Presidential Anti-Graft Commission*, G.R. No. 163859, August 15, 2012, 692 PHIL 546-565; *Sison-Barias v. Rubia*, A.M. No. RTJ-14-2388, June 10, 2014, 736 PHIL 81-123; *Jimenez, Jr. v. People*, G.R. Nos. 209195, 209215, September 17, 2014; *Umali, Jr. v. Hernandez*, IPI No. 15-35-SB-J, February 23, 2016; *Aranjuez v. Magno*, A.C. No. 10526, July 19, 2017.

[25] *Gacayan v. Pamintuan*, A.M. No. RTJ-99-1483, September 17, 1999, 314 SCRA 682; *Mateo, Jr. v. Villaluz*, G.R. Nos. L-34756-59, March 31, 1973, 151-A PHIL 21-34; *Bautista v. Rebueno*, G.R. No. L-46117, February 22, 1978, 171 PHIL 472-480; *Paderanga v. Azura*, G.R. No. L-69640-45, April 30, 1985, 220 PHIL 644-647; *Intestate Estate of the Late Borromeo v. Borromeo*, G.R. No. L-41171, L-55000, L-62895, L-63818, L-65995, July 23, 1987, 236 PHIL 184-212; *Gutang v. Court of Appeals*, G.R. No. 124760, July 8, 1998, 354 PHIL 77-90; *Garcia v. Burgos*, G.R. No. 124130, June 29, 1998, 353 PHIL 740-775; *Republic v. Gingoyon*, G.R. No. 166429, December 19, 2005, 514 PHIL 657-782; Castro v. Mangrobang, A.M. No. RTJ-16-2455, April 11, 2016.

[26] See *People v. Ong* and *Webb v. People; People v. Kho*, G.R. No. 139381, April 20, 2001, 409 PHIL 326-337; *Chin v. Court of Appeals*, G.R. No. 144618, August 15, 2003, 456 PHIL 440-453; *Pagoda Philippines, Inc. v. Universal Canning, Inc.*, G.R. No. 160966, October 11, 2005, 509 PHIL 339-347.

[27] *People v. Ong, supra* note 19; *Palang v. Zosa*, G.R. No. L-38229, August 30, 1974, 157 PHIL 761-764; *Villapando v. Quitain*, G.R. No. L-41333, L-41738, L-41739, L-41740, L-41741, January 20, 1977, 166 PHIL 26-33; *Bautista v. Rebueno*, G.R. No. L-46117, February 22, 1978, 171 PHIL 472-480; *Rosauro v. Villanueva*, Jr., A.M. No. RTJ-99-1433, June 26, 2000, 389 PHIL 699-707.

[28] *Supra* note 20; *Aguas v. Court of Appeals*, G.R. No. 120107, January 20, 1998, 348 PHIL 417-427; *People v. Ong*, G.R. Nos. 162130-39, May 5, 2006, 523 PHIL 347-359; *Calayag v. Sulpicio Lines, Inc.*, G.R. No. 221864, September 14, 2016.

[29] *Supra* note 21.

[30] *Supra* note 20.

> should conduct a *careful self-examination.* He should exercise his discretion in a way that the people's faith in the courts of justice is not impaired. A salutary norm is that he reflects on the probability that a losing party might nurture at the back of his mind the thought that the judge had unmeritoriously tilted the scales of justice against him.[31]

In the end, the Court in *Pimentel* upheld the judge's refusal to inhibit, thus:

> As applied here, respondent judge has not as yet crossed the line that divides partiality and impartiality. He has not thus far stepped to one side of the fulcrum. No act or conduct of his would show arbitrariness or prejudice. Therefore, we are not to assume what respondent judge, not otherwise legally disqualified, will do in a case before him.

The case of *Ong*, on the other hand, involved the move for the disqualification of Justice Gregory S. Ong, then an associate justice and chairperson of the Fourth Division of the Sandiganbayan, from presiding over the trial and sitting in judgment in ten consolidated cases against former First Lady Imelda R. Marcos. It was alleged, as grounds for his inhibition, that he made, on separate occasions, remarks that were allegedly prejudicial and revealing of his predisposition to dismiss the cases.[32] Justice Ong denied the motion to inhibit him. Upon appeal to the Court, we held that his remark as imputed should have been sufficient ground for Justice Ong to voluntarily inhibit himself, for "judges must be like Caesar's wife – above suspicion." This, despite the pronouncement by the Court in the *same* decision that two important requirements were not met: first, petitioner was unable to adduce clear and convincing evidence as required, and second, the potentially prejudicial remark, apart from being contested, triggered only voluntary inhibition which, pursuant to other cases that preceded and succeeded it, should have been left to the conclusive assessment of the judge concerned.

Although both cases involved *discretionary* inhibition, in *Pimentel,* the Court considered the judge's decision *not* to recuse to be conclusive upon itself. In *Ong,* however, the Court effectively reviewed the decision of the challenged justice not to inhibit from the case, and ultimately reversed it and directed his recusal.

To compare, in American jurisprudence, the issue of recusal is governed by Section 455 of the Ethical Standard Act of 1988, which prescribes that a judge must disqualify himself whenever his impartiality "might reasonably be questioned." In applying Section 455, the U.S. Supreme Court has consistently employed the uniform "test of reasonableness" in examining a judge's actual bias or prejudice or an

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[31] Emphasis supplied.

[32] *Supra* note 20.

appearance thereof, pursuant to the statutory shift[33] from a harder evaluative trigger (judge's opinion) to Section 455's softer question of reasonability (appearance of partiality).[34]

Considering how similar Section 5, Canon 3 of our New Code of Judicial Conduct is to Section 455 of the U.S. Federal Ethical Standard Act of 1988, I find it useful to examine how the United States Supreme Court and lower federal courts have interpreted Section 455.

In 1994, the American Supreme Court in *Liteky et al. v. United States*[35] ruled that Section 455 disqualifications applied exclusively to extrajudicial sources, thus settling divergent interpretations made by federal circuit courts of appeals. In the process, the U.S. Supreme Court explained the origins, meaning and boundaries of the words "bias and prejudice" and "impartiality" as used under Section 455.

Speaking through Associate Justice Antonin Scalia, the Court explained that not all unfavourable disposition towards an individual is properly described in the pejorative terms "bias" or "prejudice" as to merit recusal.[36] Laying down three tests, Justice Scalia wrote that for a conduct or utterance to be of the nature as to give rise to the propriety of inhibition, apart from being extrajudicial, they must be: (1) undeserved, or one that (2) rests upon the knowledge that the subject ought not to possess,[37] or one that is (3) excessive in degree.[38] The U.S. Supreme Court opined that unless an extrajudicial conduct or utterance is any or all of these three characterizations, it is not a bias or prejudice that may be reasonably perceived to warrant the judge's inhibition. Elucidating on the term "extrajudicial source" and the pejorative characterization of the term "personal bias or prejudice," the Court held:

> In our view, the proper (though unexpressed) rationale for Grinnell, and the basis of the modern "extrajudicial source" doctrine, is not the statutory term "personal"-for several reasons. First and foremost, that explanation is simply not the semantic success it pretends tc be. Bias and prejudice seem to us not divided into the "personal" kind, which is offensive, and the official kind, which is perfectly all right. As generally used, these are pejorative terms, describing dispositions that are *never* appropriate. It is common to speak of "personal bias" or "personal prejudice"

[33] After the 1974 amendment.

[34] James Sample, *Supreme Court Recusal from Marbury to the Modern Day,* 26 Geo. J. Legal Ethics 95 (2013); citing Debra Lyn Bassett, *Judicial Disqualification in the Federal Courts,* 87 Iowa L. Rev. 1213, 1225 (2002) at 603.

[35] 510 U.S. 540 (1994).

[36] *Id.* at 550.

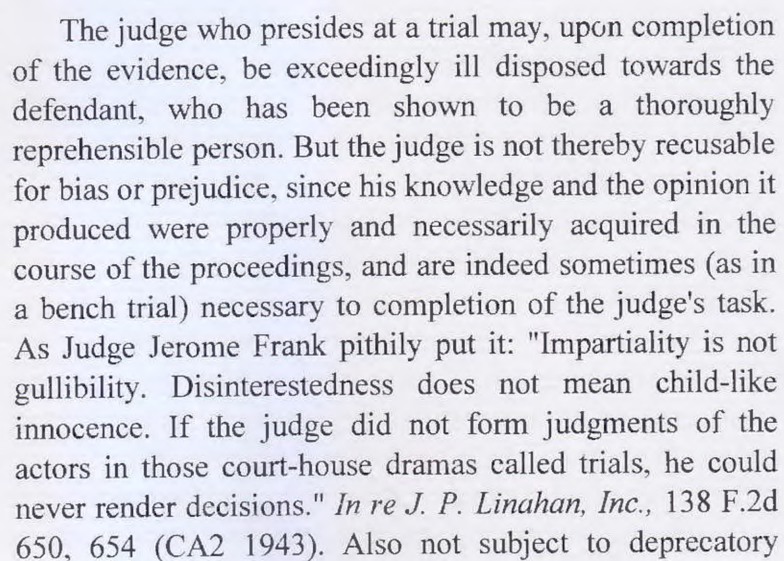
[37] "For example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities."

[38] "For example, a criminal juror who is so inflamed by properly admitted evidence of defendant's prior criminal activities that he will vote guilty regardless of the facts."

without meaning the adjective to do anything except emphasize the idiosyncratic nature of bias and prejudice, and certainly without implying that there is some other "non-personal," benign category of those mental states. In a similar vein, one speaks of an individual's "personal preference," without implying that he could also have a "non-personal preference." Secondly, interpreting the term "personal" to create a complete dichotomy between court-acquired and extrinsically acquired bias produces results so intolerable as to be absurd. Imagine, for example, a lengthy trial in which the presiding judge for the first time learns of an obscure religious sect and acquires a passionate hatred for all its adherents. This would be "official" rather than "personal" bias and would provide no basis for the judge's recusing himself.

It seems to us that the origin of the "extrajudicial source" doctrine, and the key to understanding its flexible scope (or the so-called "exceptions" to it), is simply the pejorative connotation of the words "bias or prejudice." Not *all* unfavorable disposition towards an individual (or his case) is properly described by those terms. One would not say, for example, that world opinion is biased or prejudiced against Adolf Hitler. The words connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate,* either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts). The "extrajudicial source" doctrine is one application of this pejorativeness requirement to the terms "bias" and "prejudice" as they are used in §§ 144 and 455(b)(1) with specific reference to the work of judges.

The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task. As Judge Jerome Frank pithily put it: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." *In re J. P. Linahan, Inc.,* 138 F.2d 650, 654 (CA2 1943). Also not subject to deprecatory



> characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.[39]

Stated differently, *Liteky* drew the narrowly sharp distinction in extrajudicial sources, discriminating against those extrajudicial sources that do not necessarily trigger a question of recusal, and those extrajudicial sources that are wholly pejorative or "*wrongful* or *inappropriate*" as to become a valid impetus for disqualification.

In 2000, in *Microsoft v. United States,*[40] Chief Justice William H. Rehnquist would interpret the words "in which his (judge's) impartially might reasonably be questioned," as used by Section 455, to refer to the "perspective of a reasonable observer who is informed of all the surrounding facts and circumstances."[41]

Justice Scalia, in his Memorandum explaining his non-recusal in the 2004 case of *Cheney v. United States, District Court for the District of Columbia,*[42] would add that "the decision whether a judge's impartiality can reasonably be questioned is to be made in light of the facts as they existed, and not as they were surmised or reported."

The Ninth Circuit Court of Appeals, in *United States v Holland,*[43] explained the concept of the reasonable third-party observer in the following wise:

> First, under section 455(a), the judge must apply the "objective" standard articulated in Liljeberg, 486 U.S. at 860, 108 S.Ct. 2194. That standard requires recusal if a reasonable third-party observer would perceive that there is

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[39] *Supra* note 34, pp.549-551. See also Shawn P. Flaherty, *Liteky v. United States*: The Entrenchment of an Extrajudicial Source Factor in the Recusal of federal Judges under 28 U.S.C. 455 (a), 15 N. III. U. L. Rev. 411 (1995); Jeremy S. Brumbelow, *Liteky v. United States*: The Extrajudicial Source Doctrine and Its Implications for Judicial Disqualification, 48 Ark. L. Rev. 1059 (1995).

[40] Nos. 00—139 and 00—261. Decided September 26, 2000; In this case, Justice William Rehnquist's inhibition was being sought by virtue of the fact that Microsoft retained the services of the law firm for which Justice Rehnquist's son was a partner. In refusing to inhibit himself despite imputations of actual and apparent bias, Rehnquist opined that for a reasonable observation to be one that determines his recusal, such observation must be informed of all the facts and circumstances of the imputed bias, otherwise, such misappreciation of the facts cannot hold sway. Rehnquist additionally noted the negative impact of the unnecessary disqualification of even one irreplaceable Justice may have on the Supreme Court.

[41] *Id.*

[42] No. 03–475. Decided March 18, 2004; Justice Scalia was being asked to inhibit by virtue of one duck hunting trip during which he rode the same government aircraft with then Vice Present Richard Cheney, Scalia rejected the suggestion of recusal by pounding on the misperception of the public through the pervasive inaccuracies of facts as told by the media, echoing Rehnquist in saying that a "blast of largely inaccurate and uninformed opinion cannot determine the recusal question". He cautioned against the danger of erroneously considering just any perception of bias, even an unapprised one, as reasonable perception of bias that calls for recusal.

[43] 519 F.3d 909,914 (2007).

> a "significant risk" that the judge will be influenced by the threat and resolve the case on a basis other than the merits. **The reasonable third-party observer is not a "partly informed man-in-the-street," but rather someone who "understand[s] all the relevant facts" and has examined the record and law.** LoCascio v. United States, 473 F.3d 493, 496 (2d Cir.2007); see also Clemens, 428 F.3d at 1178 ("The reasonable person in this context means a well-informed, thoughtful observer, as opposed to a hypersensitive or unduly suspicious person." (internal quotation marks and citation omitted)); but see In re Nettles, 394 F.3d 1001, 1002 (7th Cir.2005) ("We must bear in mind that these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be." (internal quotation marks and citation omitted)). The "objective" standard is a check to avoid even the "appearance of partiality," Liljeberg, 486 U.S. at 860, 108 S.Ct. 2194, and ensure that the judge's decision is reasonable to an informed observer.[44]

B

Beyond the specific prescriptions of statutes or court rules regulating the disqualification or recusal of judges for cause, which I have covered above, there lies the overarching due process guarantee of the Constitution. This guarantee has given rise to, among others, the stricture that due process of law requires a hearing before an impartial and disinterested tribunal, and that every litigant is entitled to nothing less than the cold neutrality of an impartial judge.[45]

As the Court has recognized in *Mateo Jr. v. Villaluz*,[46] there may be, in addition to the causes for disqualification identified by Section 1, Rule 137 of the Rules of Court, *other* causes that could conceivably erode the trait of objectivity, as to call for inhibition as a matter of constitutional law.[47] These causes, however, would be rare, and the specific issue in each case would be whether the acts of the judge complained of would negate the degree of objectivity required by the Constitution.[48] Thus, the rule would be that where a claim for the disqualification of a judge can be resolved under the narrower grounds provided for in the Rules of Court, the Court will not lightly tread on constitutional grounds. Plainly, not all grounds for disqualification or recusal implicate the great due process clause of the Constitution.

In *Mateo, Jr.*, the Court held that a trial judge before whom a witness executed an extrajudicial statement, which the witness later recanted for

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[44] *Id.* Emphasis supplied. See Joey Kavanagh, "Judicial Impartiality in Recent Civil Rights Victories: An Analysis of the Disqualification of Judge Shira Scheindlin in *Floyd v. New York City*," American University Journal of Gender Social Policy and Law 23, No. 1 (2014): 197-229.

[45] *Gutierrez v. Santos*, L-15824, May 30, 1961, 2 SCRA 249.

[46] G.R. Nos. L-34756-59, March 31, 1973, 50 SCRA 18.

[47] *Id.* at 24.

[48] *Id.* at 28.

having been made under duress, cannot be expected to rule fairly on the question on whether the witness executed his statement freely, for indeed to admit that there was government intimidation would be hardly flattering to the judge.

I read the same judicial attitude of severely limiting the applicability of the due process clause to the matter of judicial disqualification to obtain in the United States. The leading case is *Caperton v. A. T. Massey Coal Co.*[49] where the U.S. Supreme Court reiterated that a fair trial in a fair tribunal is a basic requirement of due process. It recognized, however, that most matters relating to judicial disqualification do not rise to a constitutional level. Consequently, the U.S. Supreme Court has limited the application of the due process clause, with respect to judicial disqualification, to only two instances.

The first involves judges with a financial interest in the outcome of the case, although the interest was less than what would have been considered personal or direct at common law. In *Tumey v. Ohio*,[50] involving the case of a village mayor with authority to sit as judge to try those accused of violating a liquor ban and receive a salary supplement each time he convicts and levies a fine on an offender (and none in cases of acquittal), the U.S. Supreme Court held this procedure to violate the due process clause.

The second instance involved cases where a judge was challenged because of a conflict arising from his participation in an earlier proceeding. In *In re Murchison*,[51] a judge examined witnesses to determine whether criminal charges would be brought against them. Both witnesses appeared before the judge. The first witness answered questions, which the judge found untruthful and consequently charged him with perjury. The second witness, who declined to answer, was charged by the judge with contempt. The same judge thereafter proceeded to try and convict both witnesses. The Court set aside their convictions on grounds of conflict of interest, stating that "no man can be a judge in his own case," and "no man is permitted to try cases where he has an interest in the outcome."[52]

There stood jurisprudence until 2009 when the U.S. Supreme Court crafted a *third* instance, though one (it was quick to caution) available only under "extraordinarily extreme facts." In *Caperton*,[53] a West Virginia jury found respondent coal company guilty of fraud and awarded petitioner $50Million in damages. West Virginia then held judicial elections. Knowing that the State Supreme Court of Appeals would be considering the appeal, respondent's chairman supported Benjamin, against the incumbent justice seeking reelection, with $3Million in contributions, an amount exceeding the

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[49] 556 U.S. 886 (2009).
[50] 273 U.S. 510 (1927).
[51] 349 U.S. 133 (1955).
[52] *Id.* at 136.
[53] 556 U.S. 886 (2009).

total spent by all other supporters. Benjamin would go on to win the election by fewer than 50,000 votes. When petitioner moved to disqualify now-Justice Benjamin under the due process clause and the State's Code of Judicial Conduct, the latter refused to recuse himself and still participated in making judgment on the appeal. The U.S. Supreme Court ultimately vacated the judgment of the State Supreme Court of Appeals and held that Justice Benjamin's participation in the case violated the due process clause of the Constitution: "Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own case." It went on to hold that respondent chairman's significant and disproportionate influence offers a possible temptation to the average judge to lead him not to hold the balance nice, clear and true, and that "[o]n these extreme facts, the probability of actual bias rises to an unconstitutional level."[54]

IV

While the Internal Rules of the Supreme Court enumerate grounds for inhibition, it does not specify *how* the Court should treat a Member's inhibition beyond stating that the inhibiting member must state, typically in abbreviated language, the precise reason for the inhibition. The *practice* of the Court in this respect, on the other hand, is mixed as it is instructive. This part shall deal with the practice of the Court with respect to the recusal of its own members.

In *Estrada v. Desierto*,[55] then Associate Justice Artemio Panganiban offered to inhibit himself (despite absence of proof of any of the grounds for inhibition) so as not to give any person excuse to cast doubt on the integrity of the proceeding. The Court accepted the inhibition. Justice Panganiban then wrote an extended opinion on the subject, discussing at length the distinction between mandatory and voluntary inhibition.

In contrast, in *Veterans Federation Party v. Comelec*,[56] the Court denied (then already Chief) Justice Panganiban's offer to inhibit on grounds that he had been general counsel of one of the respondents. The Court considered, among others, the fact that the case involved important constitutional questions which should, as much as possible, be decided by a complete Court.[57]

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[54] See sharp dissent from Chief Justice Roberts, joined by Justices Scalia, Thomas and Alito, criticizing the "probability of bias" analysis used by the Court. "Until today, we have recognized exactly two situations in which the Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, land when the judge is trying a defendant for certain criminal contempts. Vaguer notions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedents. Those issues were instead addressed by legislation or court rules." See also Lynne H. Rambo, High Court Pretense, Lower Court Candor: Judicial Impartiality after *Caperton v. Massey Coal Co.*, 13 Cardozo Pub. L. Pol'y & Ethics J. 441 (2015); Raymond J. McKoski, Judicial Disqualification after Caperton v. A.T. Massey Coal Company: What's Due Process Got to Do With It, 63 Baylor L. Rev. 368 (2011).

[55] G.R. No. L-146710-15; G.R. No. 146738, March 2, 2001.

[56] *Supra* note 20.

[57] Chief Justice Panganiban would go on to write the opinion for the Court in this case.

In *Commission of Internal Revenue v. Court of Appeals*,[58] Justice Santiago M. Kapunan denied by way of a resolution a motion for his inhibition. The Court *En Banc* upheld Justice Kapunan's decision, declaring thus:

> On the motion to disqualify Justice Kapunan from participating in this case, the Court took note of the old doctrine that when a Justice of the Court of Appeals or the Supreme Court is challenged, "the magistrate sits with the court and the question is decided by it as a body."It will be observed, however, that the basis of the challenge there was that the Justice had previously acted as the fiscal in an earlier proceeding in the case, a ground for *compulsory* inhibition, and that the matter was dealt with under Article 8 of the Code of Civil Procedure the provisions of which differ from those under the first paragraph of Rule 137 of the Rules of Court.
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> In the present case, the so-called grounds relied upon for the disqualification of Justice Kapunan, i.e., his having served under Atty. Estelito Mendoza when the latter was the Solicitor General, and their having had business relations in connection with the operation of a small restaurant, even if true, could not constitute compulsory grounds for Justice Kapunan's recusation. It is for him alone, therefore, to determine his qualification.[59]

I have compared the above Philippine experience with the practice in the U.S. Supreme Court, which does not have formal rules governing recusal by its Members. In the US, individual Members of the Court have expressed their views on recusal as contained in extended Memoranda explaining their non–recusal in specific cases. Chief Justice John G. Roberts, Jr. has also expressed this view on recusal at the level of the Supreme Court.

Prior to the 1974 amendment to Section 455, *Laird v. Tatum*[60] was the guiding decision on the question of recusal. The case involved a group of anti-war activists who brought a challenge to the constitutionality of the U.S. Army's domestic surveillance program, then perceived as the Nixon administration's attempt at monitoring the activities of American dissidents. Then Associate Justice Rehnquist was being disqualified due to his leadership position as an Assistant Attorney General in the Justice Department's office of Legal Counsel to the White House at the time the surveillance program was instituted.[61] Breaking the U.S. Supreme Court's

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[58] G.R. No. 119322, February 6, 1997.

[59] *Id.*

[60] *Memorandum of Mr. Justice Rehnquist,* October 10, 1972, 409 U.S. 824-25.

[61] Jeffrey W. Stempel, *Rehnquist, Recusal and Reform,* 53 Brook.L.Rev., 589, 602 (1987).

perceived ritual of silence to explain his non-recusal,[62] Justice Rehnquist denied the motion to recuse based in part on a reading of the governing disqualification statute,[63] as well as on his consistent observations that "a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified."[64] He explained:

> I think that the policy in favor of the "equal duty" concept is even stronger in the case of a Justice of the Supreme Court of the United States. There is no way of substituting Justices on this Court as on judge may be substituted for another in the district courts. There is no higher court of appeal which may review an equally divided decision of this Court and thereby establish the law for our jurisdiction.
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> While it can seldom be predicted with confidence at the time that a Justice addresses himself to the issue of disqualification whether or not the Court in a particular case will be closely divided, the disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an equally divided Court. The consequence attending such a result is, of course, that the principle of law presented by the case is left unsettled. The undesirability of such a disposition is obviously not a reason for refusing to disqualify oneself where in fact one deems himself disqualified, but I believe it is a reason for not "bending over backwards" in order to deem one's self disqualified.[65]

In 2000, (at the time, already Chief) Justice Rehnquist was again asked to inhibit from participating, this time in the case of *Microsoft v. United States*[66] on the ground that Microsoft had retained the services of the law firm for which Chief Justice Rehnquist's son was a partner. In a Memorandum explaining his non-recusal, Chief Justice Renhquist said:

> Finally, it is important to note the negative impact that the unnecessary disqualification of even one Justice may have upon our Court. Here—unlike the situation in a District Court or a Court of Appeals—there is no way to replace a recused Justice. Not only is the Court deprived of the participation of one of its nine members, but the even

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[62] Robert Nagel, *Partiality and Disclosure in the Supreme Court Opinions,* 7 Nw.J.L. & Soc. Pol'y.116 (2012).

[63] *Supra* note 34; Before its amendment two years after *Laird,* the disqualification statute required only that a justice disqualify himself when "he has a substantial interest, has been of counsel, is or has been a material witness, or is so related ... as to render it improper, in his opinion, for him to sit. . ."

[64] *Supra* note 60; citing *Edwards v. United States,* 334 F.2d 360, 362 (CA5 1964); *Tynan v. United States,* 126 U.S.App.D.C. 206, 376 F.2d. 761(1967); *In re Union Leader Corporation,* 292 F.2d 381 (CA1 1961'); iWolfson v. Palmieri 396 F.2d 121 (CA2 1968); *Simmons v. United States,* 302 F 2d. 71 (CA3 1962); *United States v. Hoffa,* 382 F.2d 856 (CA6 1967); *Tucker v. Tucker,* 186 F.2d 79 (CA7 1950); *Walker v. Bishop,* 408 2d 1378 (CA 1969).

[65] *Id.*

[66] *Supra* note 41.

> number of those remaining creates a risk of affirmance of a lower court decision by an equally divided court.

In 2004, Justice Scalia refused to inhibit from the case of *Cheney v. United States District Court for District of Columbia.*[67] One of the parties to the case sought to inhibit Justice Scalia because he previously rode on the same government aircraft and joined a duck hunting trip with Vice President Richard Cheney, a respondent to the case. In his Memorandum explaining his non-recusal, Justice Scalia said:

> Let me respond, at the outset, to Sierra Club's suggestion that I should "resolve any doubts in favor of recusal." Motion to Recuse 8. That might be sound advice if I were sitting on a Court of Appeals. But see In re Aguinda, 241 F. 3d 194, 201 (CA2 2000). There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: The court proceeds with eight justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case. x x x Moreover, granting the motion is (insofar as the outcome of the particular case is concerned) effectively the same as casting a vote against the petitioner. The petitioner needs five votes to overturn the judgment below, and it makes no difference whether the needed fifth vote is missing because it has been cast for the other side, or because it has not been cast at all.[68]

In more recent high-profile cases, issues of non-recusal were settled with the challenged Justices refusing to recuse without an extended explanation for such choice. This silent non-recusal is perhaps best illustrated by the denial of the motions to disqualify Justices Clarence Thomas and Elena Kagan from participating in the cases posing legal challenges to the constitutionality of the Patient Protection and Affordable Care Act (PPACA) of 2010[69] of then President Barrack Obama. Justice Thomas's impartiality was questioned by virtue of the fact that his wife, Virginia Thomas, was actively engaged with a conservative policy group that challenged the constitutionality of the Obama health care law,[70] and herself a highly visible voice in a nationwide campaign against the Obama administration and its health-care reform law.[71] Justice Kagan, for her part, was sought to be disqualified from participating in the case on the ground

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67 *Supra* note 42.

68 *Id.* See also Monroe H. Freedman, Duck-Blind Justice: Justice Scalia's Memorandum in the Cheney Case, 18 Geo. J. Legal Ethics 229 (2004); David Feldman, Duck Hunting, Deliberating, and Disqualification: *Cheney v. U.S. District Court* and the Flaws of 28 U.S.C. Sec 455(A), 15 B.U. Pub. Int. L.J. 319 (2006); Luke Mcfarland, Is Anyone Listening –The Duty to Sit Still Matters Because the Justices Say it Does, 24 Geo. J. Legal Ethics 677 (2011).

69 *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health &Human Servs.*, 648 F.3d 1235, 1241 (llth Cir. 2011), cert. granted sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 603(2011), cert. granted, 132 S. Ct. 604 (2011), and cert. granted in part, 132 S. Ct. 604 (2011).

70 Carrie Johnson, *Health Care Rulings Reignite Judicial Bias Debate,* NPR, December 16, 2010.

71 Jeffrey Toobin, *Partners; Will Clarence and Virginia Thomas Succeed in Killing Obama's Health-Care Plan?*The New Yorker, August 29, 2011, at p.40.

that she was Solicitor General when the Obama administration was building the defense for the health care law's legality.[72] In the end, both Justices Thomas and Kagan refused to recuse from the case, and neither issued a written official explanation for the same.

It is generally held that the Thomas and Kagan non-recusals led Chief Justice Roberts to discuss the American Supreme Court practice on recusals in his 2011 Year-End Report:

> Congress has directed that federal judicial officers must disqualify themselves from hearing cases in specified circumstances. As in the case of financial reporting and gift requirements, the limits of Congress's power to require recusal have never been tested. **The Justices follow the same general principles respecting recusal as other federal judges, but the application of those principles can differ due to the nnique circumstances of the Supreme Court.** The governing statute, which is set out in Title 28, Section 455, of the United States Code, states, as a general principle, that a judge shall recuse in any case in which the judge's impartiality might reasonably be questioned. That objective standard focuses the recusal inquiry on the perspective of a reasonable person who is knowledgeable about the legal process and familiar with the relevant facts. Section 455 also identifies a number of more specific circumstances when a judge must recuse. All of the federal courts follow essentially the same process in resolving recusal questions. In the lower courts, individual judges decide for themselves whether recusal is warranted, sometimes in response to a formal written motion from a party, and sometimes at the judge's own initiative. In applying the Section 455 standard, the judge may consult precedent, consider treatises and scholarly publications, and seek advice from other sources, including judicial colleagues and the Judicial Conference's Committee on Codes of Conduct. A trial judge's decision not to recuse is reviewable by a court of appeals, and a court of appeals judge's decision not to recuse is reviewable by the Supreme Court. **A court normally does not sit in judgment of one of its own members' recusal decision in the course of deciding a case. The process within the Supreme Court is similar. Like lower court judges, the individual Justices decide for themselves whether recusal is warranted under Section 455. They may consider recusal in response to a request from a party in a pending case, or on their own initiative. They may also examine precedent and scholarly publications, seek**

[72] Robert Barnes, *Recusals Could Force Newest Justice to Miss Many Cases,* Washington Post, October 4, 2010 at A15; further stating "Elena Kagan begins hearing cases as the Supreme Court's 112th Justice Monday morning. But anyone who wants to see her in action needs to be sharp. x x x Her chair will be empty when the Court returns next Tuesday and she'll put in a half-day the next day. Kagan's old job as solicitor general – the "tenth justice" – is initially making it hard to do her new job as the ninth justice."; See Suzanne Levy, Your Honor, Please Explain: Why Congress Can, and Should, Require Justices to Publish Reasons for Their Recusal Decisions, 16 U. Pa. J. Const. L. 1161 (2014).

> **advice from the Court's Legal Office, consult colleagues, and even seek counsel from the Committee on Codes of Conduct. There is only one major difference in the recusal process: There is no higher court to review a Justice's decision not to recuse in a particular case. This is a consequence of the Constitution's command that there be only "one supreme Court."** The Justices serve on the Nation's court of last resort. As in the case of the lower courts, the Supreme Court does not sit in judgment of one of its own Members' decision whether to recuse in the course of deciding a case. Indeed, if the Supreme Court reviewed those decisions, it would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate. Although a Justice's process for considering recusal is similar to that of the lower court judges, the Justice must consider an important factor that is not present in the lower courts. **Lower court judges can freely substitute for one another. If an appeals court or district court judge withdraws from a case, there is another federal judge who can serve in that recused judge's place. But the Supreme Court consists of nine Members who always sit together, and if a Justice withdraws from a case, the Court must sit without its full membership.** A Justice accordingly cannot withdraw from a case as a matter of convenience or simply to avoid controversy. Rather, each Justice has an obligation to the Court to be sure of the need to recuse before deciding to withdraw from a case.[73]

This acknowledgment of a heightened, if not heavier, sense of responsibility when it comes to recusals within its ranks echoes the sentiment earlier articulated by the Court in its 1993 *Statement of Recusal Policy* regarding cases when a covered relative-lawyer "has participated in the case at an earlier stage of the litigation," or when [he] is "a partner in a firm appearing before [the Court.]" There, the U.S. Supreme Court, in carefully delineating the specific instances wherein recusal by its members on the above grounds would be warranted, explained:

> Even one unnecessary recusal impairs the functioning of the Court. x x x In this Court, where the absence of one Justice cannot be made up by another, needless recusal deprives litigants of the nine Justices to which they are entitled, produces the possibility of an even division on the merits of the case, and has a distorting effect upon the certiorari process, requiring the petitioner to obtain (under our current practice) four votes out of eight instead of four votes out of nine. x x x

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[73] Published on December 31, 2011; James Sample, *Supreme Court Recusal from Marbury to the Modern Day*, 26 Geo. J. Legal Ethics 95 (2013).

Conclusion

In wrestling with the present issue of recusal, I have taken to heart the process suggested by Chief Justice Roberts and exerted my utmost to identify and explain the legal reasoning behind my decision on this very divisive issue.[74] Marrying the best insights from our laws and experience and those from our American counterparts, I have resolved to participate in this case.

First, I resolved to sit in this case by tilting the balance in favor of giving full weight to the value of a judge's duty to sit and decide a case. I am convinced that the grave importance of this case, its far-reaching doctrinal value and its permanent implications to the Court as an institution and an equal branch of Government call for no less than a decision made by a full court. Consistent with *Veterans Federation Party*, a decision handed down by any less than that would, in my view, only fall short of affirming the public's faith in our country's administration of justice.[75]

Second, and after careful reflection, I have come to the view that questions of inhibition should, as a principle, be solely addressed to, and answered by, the good judgment and conscience of the individual Justice/s concerned. To permit otherwise would only contribute to the arguably attractive temptation of "strategizing recusals."[76] As in this case, respondent should not be allowed to affect (or worse, impair) the ability of the Court to decide significant legal issues with its full membership through the simple expedient of fashioning a colorable ground for inhibition on the part of one (or some) of its members.

Third, on analysis, my acts complained of, under all the circumstances, do not negate the degree of objectivity required of me by the due process clause of the Constitution as to disqualify me. Far from it, I am convinced that respondent's factual bases, when measured against the three tests in *Liteky*, all fail to prove my alleged bias and prejudice against her. My conduct and utterances of which she complains were not undeserved, as they were not done or said by me to merely vex her reputation. They were all founded on fact. They were also only done and said in self-defense, as measures to restore whatever I could salvage or restore of my name, in the face of respondent's unprovoked assaults on my integrity. This is the reason why I have endeavored to include in this Resolution a full narration of the facts that led to her attacks on me, and my acts and words done subsequent

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[74] As Lincoln Caplan, in "The Tenth Justice" (1987) posited, since the meaning of the Constitution is neither fixed nor self-explanatory, it has been vital that legal reasoning be marked by its own integrity.

[75] *Supra* note 20.

[76] U.S. Supreme Court Statement of Recusal Policy. See *also Jurado & Co. v. Hongkong and Shanghai Banking Corporation* (G.R. No. L-1061, October 10, 1902) where the Court rejected a construction which would allow questions of inhibitions of its members to be decided by it, to the exclusion of the challenged member/s, as it would "put it in the power of a party to stop all proceedings in the cause by challenging [a sufficient number] of the justices."

to the issuance by the Arbitral Tribunal in The Hague of its ruling, which release allowed me to air my full side.

Specifically, my act of calling her "treasonous" was merely in reference to the lexical equivalent of the label she herself used to pertain to me and my actions. In fact, I find that the use of said term was not undeserved as it was merely semantically descriptive, and was merited, even necessary, in the instance that I employed it. As I earlier recounted, respondent recklessly placed into the public domain sensitive issues of legal strategy[77] and characterized Itu Aba in her public filings as an island,[78] contrary to national interest, in general, and the Republic's official submission before the UNCLOS arbitral tribunal, in particular. My use of the word "inhumane" to depict her manner and means of objecting to my nomination was also not undeserved, as it was, in fact, how I personally perceived such an affront. Such perception is personal, the effect of which is not measured by the doer of the act, but by its receiver. Furthermore, the suggestion that my characterizations of respondent persists to this day cannot be conceived as undeserved, for it is wholly an opinion, based on facts, one which she and maybe those sympathetic to her are completely free to disagree with.

My conduct and utterances were also not based on evidence or information illegally received, as all the facts upon which I anchored my actions were culled from my personal experience and knowledge. All the bases for my actions, whether it be the "treasonous' description attributed to her, or the "inhumane" depiction of her actions, or the negative characterization of herself, are borne of my personal knowledge, and not obtained through other means. Finally, I do not believe my conduct or utterances were excessive, as they were not made with blind fury, but only with righteous indignation and merely as a means to the vindication of a right.

Finally, and maybe most importantly, my actions and words complained of are wholly extraneous and immaterial to the facts and issues raised in this Quo Warranto petition which specifically relates to respondent's alleged deficient submissions of her Statement of Assets, Liabilities and Net Worth (SALN). That I cannot be impartial and decide this case on the merits based on the facts and evidence on record cannot be presumed simply on account of my unpleasant "history" with respondent.

This Resolution is intended to serve as a record upon which all well-informed and reasonable observers who care to know the facts can make their own judgment on whether my acts and words rise to the level of a disqualifying bias or prejudice. To borrow from Chief Justice Rehnquist, I imagine that other reasonable observers may arrive at a legal conclusion

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[77] *Supra* note 7, in the Judicial and Bar Council Supplementary Reply, pp. 14-17, pp. 183-186 of the Records.

[78] *Id.* at 17-18, 186-187 of the Records.

contrary to mine, and that there may be sound arguments[79] that plausibly lean towards my recusal. Perhaps if I were preoccupied with avoiding controversy and would like to act in favor of simple convenience,[80] I may as well recuse. My conscience, aided by my self-examination and analysis of the pertinent laws and the facts of the present case, nevertheless impels me otherwise.

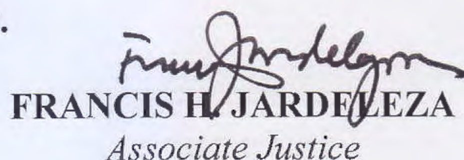
Every judgment of conscience has been said to be obligatory, in that "he who acts against his conscience always sins."[81] Judgment on the soundness of my decision will ultimately be for the public to decide. I am nevertheless comforted by the fact that I have resolved this matter with as much transparency and judiciousness as my conscience dictates and now leave people to decide in accordance with their own conscience, as "every man should leave me to mine."[82]

In my Commencement Address to the U.P. College of Law in 2014, I described the two months that started with respondent's attack on my integrity, the JBC's rejection of my nomination, my decision to take on a sitting Chief Justice in *Jardeleza v Sereno*, the Court's last-minute decision to allow my nomination, and finally my appointment by President Aquino, as the most painful and difficult time of my life, as well as of my wife and children. My family and I had to live those two terrible months with the label "traitor" tarred and feathered on my being. In my address, I described our painful experience as one "I would not wish on anybody, not even to those who made these vile accusations against me."

Today, four years later, respondent and her family have had to face up to more months of attacks on her integrity. Perhaps, because my family and I have endured such a harrowing experience, I fervently hope that reasonably informed persons would believe that I would be among the last to taint another human being's name out of sheer spite.

WHEREFORE, the foregoing premises considered, the *Ad Cautelam* Respectful Motion for Inhibition of Hon. Associate Justice Francis H. Jardeleza filed by Respondent Maria Lourdes P.A. Sereno is hereby **DENIED**.

SO ORDERED.



FRANCIS H. JARDELEZA
Associate Justice

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[79] See *Gutang v. Court Appeals,* G.R. No. 124760, July 8, 1998; *Orola v. Alovera,* GR No. 111074, July 14, 2000; *Luque v. Kayanan,* G.R. No. L-26826, August 29, 1969.

[80] *Supra* note 74.

[81] Saint Thómas Aquinas, III Quodlibet, p. 27.

[82] St. Thomas More's Letter to His Daughter Margaret, 17 April 1534. *St. Thomas More: Selected Letters*, Ed. Elizabeth Rogers, Yale University Press, 1961, Letter #54, pp. 215-223. Taken from https://www.thomasmorestudies.org/docs/More%20to%20Margaret%2017%20Apr%201534.pdf, last accessed May 9, 2018.

"INTEGRITY, ITU ABA, AND THE RULE OF LAW IN THE WEST PHILIPPINE SEA ARBITRATION"

A Keynote Speech
By
Supreme Court Associate Justice Francis H. Jardeleza[1]
IBP Western Visayas Regional Convention
Theme: "Ensuring a legal system based on respect for the rule of law"
October 21, 2016, Iloilo City

Ladies and Gentlemen of the IBP Western Visayas Region, thank you for inviting me to be your keynote speaker. It warms my heart to speak before friends in Iloilo, the place where I was born and raised. Here was where I spent my formative years and where I made life-long friends. I am very grateful for your kind invitation to be with you today.

Your EVP and Governor for Western Visayas, Atty. Ade, asked me to share my insights on your convention theme, "Ensuring a legal system based on respect for the rule of law." As lawyers, we are all sworn to act in ways designed to advance respect for the Rule of Law. Each of you, I am sure, may have your own personal experiences as to how, in your own small ways, you were able to contribute to the ideal of a legal system based on the Rule of Law. Every experience will carry with it its own lessons, each one as important as those of the person sitting next to you. It is, I believe, in the sharing of, and learning from, these experiences that we help move our profession just that bit nearer to our common aspiration, that of a legal system based on respect for the rule of law.

Today, I would like to share with you a personal story about integrity and keeping faith with the rule of law.

As you know, when I aspired for a seat in the Supreme Court, my application was blocked by the Chief Justice and Senior Associate Justice of the Supreme Court, on the ground that I lacked integrity, specifically in relation to my handling of the Republic's West Philippine Sea arbitration against China.

What was this integrity issue all about? Essentially, the Chief Justice and Senior Associate Justice disagreed with a decision on legal strategy that I made in the case we filed against China. I actually have a whole lecture to explain what the Philippines' case against China was about. Since we do not have the time for it now, I will just try to give you the basics.

In the arbitration case we filed against China, we had four principal submissions or what we know as causes of action under our Rules on Civil

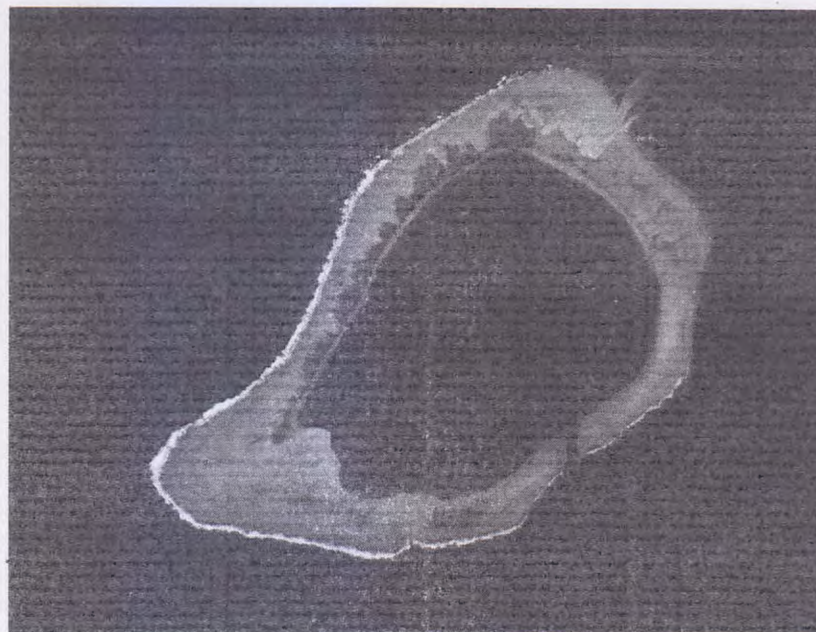
[1] Former Solicitor General (2012-2014) and Agent for the Republic of the Philippines.

Procedure. One of the submissions related to the **status** of certain features in the West Philippine Sea.

Under the United Nations Convention on the Law of the Seas (or UNCLOS), there are three kinds of land features: an island, a rock, or a low tide elevation. An **island** is defined under the UNCLOS as a naturally-formed area of land, surrounded by water, and is above water at high tide. A good example would be Luzon Island.

(Figure 1)

At the other extreme is the feature called a **low tide elevation**. It is, by definition, not visible at high tide. It includes submerged reefs. A good example would be Subi Reef before China introduced improvements to convert it into an artificial island. (See fig. 2).



(Figure 2)

In between these two categories are features called **rocks**. They are reefs mainly below water, but have rocky promontories that protrude at high tide. What distinguishes them from islands is that they "cannot sustain human habitation or economic life of its own." A good example would be Scarborough Shoal (See fig. 3).

(Figure 3)

Why is it important to ascertain the status of a feature? It is important because, in simple terms, status determines right to the adjacent sea. An island would, for example, be entitled to a 12 NM territorial sea and a 200 NM exclusive economic zone. A rock, on the other hand, would be entitled to a 12 NM territorial sea. A low tide elevation would not be entitled to anything.

Now, there are more than six hundred features in the West Philippine Sea. Given the challenges posed by the above definitions, our submission was part of what I call a *low-risk strategy*, purposely designed to protect our interests in (1) Scarborough Shoal, a traditional fishing ground for Filipino fishermen, and (2) Reed Bank, a potentially oil and gas rich area beyond Palawan. Our submissions were limited to eight[2] features, occupied either by us or by China. These features, we submitted, were either low-tide elevations (like Subi Reef) entitled to nothing, or at most, rocks (like Scarborough Shoal) entitled to no more than a 12 NM territorial sea.

I called it a low-risk strategy because it presented what the team thought was an "acceptable" worst case scenario, that is, any or all of the features we included in the suit would be declared rocks entitled to a 12 NM territorial sea. Otherwise stated, we were confident that none of the features we identified would conceivably be declared an island (as defined under UNCLOS) capable of generating a 200 NM EEZ. More importantly, none of the features we identified would be capable of generating a 200 NM to

2 Later expanded to include Ayungin Shoal.

overlap with *our* EEZ and put Reed Bank at risk. This was how matters stood as of January 23, 2013, the date we filed our submission.

Towards the end of 2013, however, and a few months before the Philippine Memorial was due, our foreign counsel Paul Reichler from Foley Hoag recommended[3] that we amend our submissions to include Ayungin Shoal, Pagasa plus four other Philippine-occupied features, and Itu Aba, a feature located just outside our EEZ and occupied by Taiwan. These additional features, we would argue, are either low tide elevations or rocks not capable of sustaining human habitation or economic life on its own.

Although our foreign lawyers conceded that there was a risk that the tribunal would conclude that Itu Aba was significant enough a feature to warrant an entitlement of up to 200 NM EEZ, they argued that as a practical matter, the Philippines would not be worse off because competing claims would still remain. That is, even if Itu Aba was declared an island, Philippine-occupied Pagasa, which is only slightly smaller, would, by parity of reasoning, likely also be declared an island itself entitled to a 200 NM EEZ which would overlap with the EEZ to be generated by Itu Aba.[4]

Considering the gravity of the proposal, we asked Mr. Reichler and his team to visit Manila in January 2014 to discuss the matter further. The Philippine legal team, which I headed and reported directly to then Executive Secretary Paquito Ochoa, readily agreed to amend our claim to include Ayungin Shoal, which we asserted to be a low-tide elevation. At that time, China was already increasing its interference with Philippine resupply missions to our military personnel in the area. Amending our claim to include Ayungin did not add any risk to our original low-risk strategy as the projected worst case would only be, similar to our earlier claims, that it would be declared a rock entitled to no more than a 12NM territorial sea.

Amending to include Itu Aba was, however, an entirely different matter.

The members of the Philippine team (composed of then Chief Presidential Legal Counsel, now Supreme Court Associate Justice, Benjamin Caguioa, then Undersecretary for Special Concerns Mike Musngi, then Foreign Affairs Secretary Albert del Rosario, then Cabinet Secretary Rene Almendras, myself, and lawyers from the OSG, DOJ and DOE) were *unanimous* in deciding against amending our submissions to include Itu Aba and the four other features occupied by the Philippines. We explained to Mr. Reichler that doing so would deviate from the low-risk strategy that permeated the filing of the arbitration, and that the risk posed by the inclusion of Itu Aba was not acceptable.

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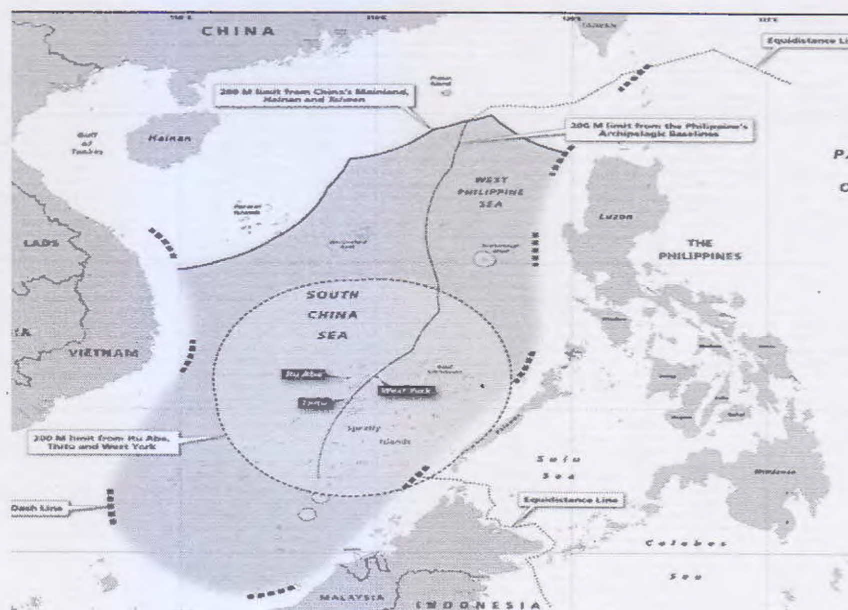
[3] Memorandum dated November 26, 2013.

[4] According to Reichler, *et al.*, in such case, the respective entitlements of Itu Aba and Pagasa would overlap "in such a fashion that a putative median line delimiting the boundary between them would cut off the reach of Itu Aba well short of Reed Bank." (Memorandum dated November 26, 2013, p. 3.)

Why? Here are photos of Itu Aba (See fig. 4).

(Figure 4)

At approximately .43 square miles, it is the largest feature in the Spratly Islands and has been occupied by Taiwan since 1946. It reportedly has two wells, garrisoned by military and coast guard personnel, and is partially covered by scrub grass and trees. A military supply ship services the feature twice a year, and a civilian merchant brings general goods every 20 days. Our case being one of first impression, we did not know how the tribunal would rule on the status of Itu Aba. Unlike the case of Scarborough Shoal, none of the members of the Philippine legal team were willing to risk the chances of Itu Aba possibly being declared an island and end up with a worst case scenario like this (See fig. 5).



(Figure 5)

If Itu Aba was declared an island, it would be capable of generating a 200NM EEZ that would cover large parts of our EEZ, including Reed Bank and extending almost up to Palawan. We thus politely informed our foreign counsel, who accepted our judgment call as client.

Towards the end of March 2014, Undersecretary Musngi and I, together with our staffs, and lawyers from the DFA, went to Washington, D.C. to supervise the preparation of the Memorial which was due for filing at the end of the month. It was then that Reichler and his team proposed to include 14 paragraphs into the Memorial which would *mention* that Itu Aba, even as it is largest high tide feature in the Spratly Islands, is incapable of sustaining human habitation or economic life of its own.

Undersecretary Musngi and I immediately reminded Mr. Reichler and his team about the Manila decision *not* to amend our submissions. We argued that the additional paragraphs would bring about the same legal and political risks that prompted the decision not to amend in the first place. Since the DFA lawyers supported the inclusion of the 14 paragraphs, I proposed that Reichler, *et al.* put their recommendation in a memorandum addressed to me and Secretary del Rosario so that we can take the matter up with President Aquino for his decision.

Paul Reichler released their memo[5] over that weekend in time for my arrival in Manila with Undersecretary Musngi and the rest of the Philippine delegation. There, they asserted that ignoring the issue of Itu Aba, the largest and most significant feature in the Spratly Islands, would not only damage the Philippines' credibility before the Tribunal but also undermine the entire case.

[5] Dated March 19, 2014.

Secretary Ochoa, CPLC Caguioa, and I thereafter submitted our own memo[6] to President Aquino where we argued *against* the inclusion of the additional 14 paragraphs and submitted that if the Tribunal is so minded, it would, on its own, instruct us to include (whether in the oral arguments or in further written submissions) consideration of the status of Itu Aba in the arbitration. That same day, the three of us were summoned by President Aquino to discuss the conflicting positions. After discussion, President Aquino decided to defer to the advice of our foreign counsel. The matter thus decided, I forthwith communicated the President's instructions to our lawyers. Our Memorial was filed on March 30, 2014, including the 14 paragraphs mentioning Itu Aba.

Little did I realize that my actions concerning the mention of Itu Aba in the Memorial would later be used to impugn my integrity and block my nomination to the Court. The charge against me centered on a memorandum relating to a judgment call made at the highest level of government. A copy of the confidential Foley Hoag memo was leaked to the Chief Justice and to the Senior Associate Justice (both of whom, by the way, had nothing to do with, and were not accountable for, the conduct of the arbitration) who thereafter used the same Memo against me.

At the time my nomination was being blocked, however, the arbitration case was still pending. While I knew the truth, I could not, as a professional, disclose intimate case details and matters of strategy as part of my defense. In the one-sided proceedings before the JBC, I was painted, by individuals who were not part of our arbitration team, as being disloyal to our country, and thereby lacking the integrity to be a member of the Supreme Court.

You spend a whole lifetime building a reputation worthy of your parents and of your family. When my integrity was attacked, I knew I had to fight back, if only to clear my name. But, at that time, as agent of the Republic of the Philippines to the arbitration, I had a duty to keep the confidences of my client. I was sworn to keep sensitive secrets about our litigation strategy and tactics affecting the arbitration. One does not telegraph them to the opponent. Considering its sensitive nature, I could neither deny or confirm the existence of the leaked Foley Hoag memorandum, much less discuss its content. To do so will reveal the reasons for the positions taken by the government, to the possible prejudice of our success in the arbitration. Thus, at that time, I was constrained to put up a defense purely on due process grounds and hope that the rule of law would prevail.

Of course, I was not alone in the handling of the country's arbitration case against China. The Philippine team was composed of many Filipino patriots, who labored long and hard on the West Philippine Sea arbitration.

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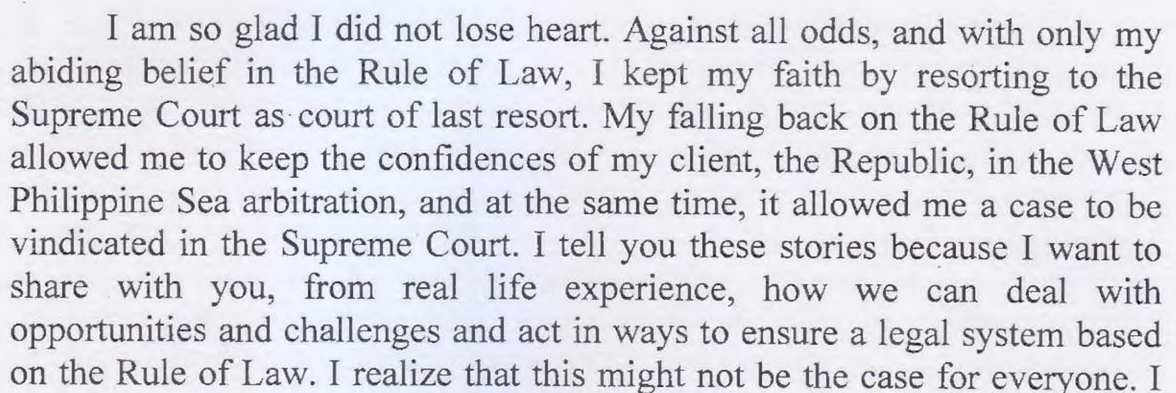
[6] Dated March 24, 2014.

Many of us were lawyers, who believed that the Rule of Law applies to, and protects all of us under international law. Each of us acted according to the best of our abilities and our conscience. In refusing to include Itu Aba in our claim, did we in fact do the right thing? For my part, I can assure you that I acted only with the best of intentions. Did I act with integrity? I would like to believe so, even if in the end the President chose to go another way.

As fate and the vagaries of litigation would have it, it was the Arbitral Tribunal itself that directed the Philippines to make submissions on the status of more than 20 features in the Spratly Islands, including ltu Aba, and to make the determination of their status part of the proceeding. The rest, as they say, is history. On this specific point, the arbitral tribunal unanimously decided that Itu Aba, like Pagasa, was a rock that does not generate an entitlement beyond a 12 NM territorial sea. Thus, the Reed Bank is securely within our EEZ.

This astounding win for the Philippines, and for President Aquino, merits a story by itself about the role of the Rule of Law under international law. The promulgation of the decision also allowed me to talk, publicly and for the first time, about the integrity issue raised against me in the JBC during my nomination to the Supreme Court. I have chosen to break my silence about this issue in my home town, before you, because it is here in Iloilo where the foundations of the integrity I have tried to embrace under a life in the law were first nurtured. I will be dishonest if I say that we knew that we will win, or that the result would be a win as big as this. We did not. The team had many agreements and a few disagreements. But we all worked as a band of patriots, under the leadership of President Aquino, blessed to play a role in the making of history. Along the way, I was just unfortunate that my integrity was questioned.

The meaning of the Rule of Law became so personal to me in a way I never imagined. I was so close to professional death, an inglorious end to a career I worked so hard to nurture. It is an experience I would not wish on anybody. Fortunately for me, however, the Rule of Law prevailed. The Supreme Court decided to allow my name to be placed in nomination, and President Benigno S. Aquino III appointed me to the Court.



I am so glad I did not lose heart. Against all odds, and with only my abiding belief in the Rule of Law, I kept my faith by resorting to the Supreme Court as court of last resort. My falling back on the Rule of Law allowed me to keep the confidences of my client, the Republic, in the West Philippine Sea arbitration, and at the same time, it allowed me a case to be vindicated in the Supreme Court. I tell you these stories because I want to share with you, from real life experience, how we can deal with opportunities and challenges and act in ways to ensure a legal system based on the Rule of Law. I realize that this might not be the case for everyone. I

hope though that by sharing with you my story you would be encouraged to continue keeping your faith in the Rule of Law.

Thank you all very much for your time.