OPINIONS OF THE SECRETARY OF JUSTICE

1. *On the scope of the Rep. Act No. 3019, Otherwise known as the Anti-Graft and Corrupt Practices Act.*

OPINION NO. 208 S, 1960

"Considering that the National Economic Council (NEC) is essentially a policy-making body, its actions consisting of recommendations to the President of policies, programs and projects, would the interest of the Chairman and the members of the Council in any business enterprise affected by such actions constitute violations of the provisions [of Section 3(i)] of Republic Act No. 3019?

"Does the offense include interests of relatives of the Chairman and the members of the Council."

Section 3(i) of Republic Act No. 3019, otherwise known as the Anti-Graft and Corrupt Practices Act, penalizes a public officer for

"Directly or indirectly becoming interested, for personal gain, or having a material interest in any transaction or not requiring the approval of a board, panel or group of which he is a member, and which exercises discretion in such approval, even if he votes against the same or does not participate in the action of the board, committee, panel or group.

In respect of actions partaking of the nature of mere formulations of broad economic policies and programs, the penal provision, in my opinion, does not apply. In such cases, the benefit which a private enterprise (in which a member of the NEC may have some direct or indirect interest) might conceivably derive is so remote as to fall within the pale of the prohibition and could not have been within the contemplation of the Congress when it adopted the provision. At least, there is nothing in the law from which to surmise that a contrary design was intended.

On the other hand, where the action of the NEC tends to confer directly and particularly a special advantage or benefit upon a specific business enterprise, as where a designated entity is earmarked for priority in the grant of foreign exchange allocation [Reorganization Plan No. 10, Section 13(m)], there is every reason to insist on the application of the legal ban. The action falls within both the

spirit and the letter of the statute. And it is no excuse that the action is merely recommendatory in character. In the first place, where a member of the NEC has financial interest in the entity to be affected by its recommendation, there is a clear and present conflict between public and private interests, a tempting opportunity to abuse one's official prerogatives for the promotion of private ends. If the recommendation is favorable it is, in point of fact, a substantial and direct step leading to the eventual accrual of an advantage in favor of the business enterprise concerned. In the second place, every recommendation by a composite body, like the NEC, must perforce be discussed, voted upon and approved. Its adoption is literally an "act" within the broad compass of Section 3(i) of the Anti-Graft and Corrupt Practices Law.

Anent the second query, it may be said as a legal proposition that where a statute prohibits out direct and indirect interest without otherwise expanding the import of the phrase, the prohibition should be—and, by precedents, has been—deemed to cover only personal interest, excluding the interest of kins. (See Opinion of the Secretary of Justice, No. 112, series 1947; Edward E. Gillen Co. v. City of Milwaukee, 174 Wis. 362, 183 NW 679; Cason v. City of Lebanon, 153 Ind. 567, 55 NE 768; Lewick v. Glazier, 116 Mich. 493, 74 NW 717.)

Nevertheless, it has also been held that the interest of the wife is the indirect interest of the husband for the reason that under the law prevailing here the fruits of the separate property of the spouses and the income from their work and industry generally become community property, to be shared by them equally upon the dissolution of the marriages or conjugal partnership. (People v. Concepcion, 44 Phil. 126, citing Articles 1315, 1393, 1401, 1407, 1408 and 1412 of the Old Civil Code. See New Civil Code, Articles 142-147, 153-160.) By parity of reasoning and in the light of the usufructuary rights which the law vests in the parents, so must the interest of an unemancipated child be considered as the indirect interest of his parents. (See New Civil Code, Art. 321.)

Nothwithstanding the foregoing, as regards situations where Section 3(i) of Republic Act No. 3019 does not apply, I wish to draw attention to a cognate but less stringent legal provision with which all concerned must comply. This is Section 9 of Reorganization Plan No. 10 which provides that—

"*Wherever* any member attending a meeting of the Council has a personal interest of any kind in the discusion or resolution of any matter, or

any of his business associates, or any of his relatives within the third degree of consanquinity or second degree of affinity has such an interest, this member may not participate in the discussion or resolution of the matter and must retire from the meeting during the deliberation The minutes of the meeting shall note the withdrawal of the member concerned." (Emphasis supplied.)

(SGD.) ALEJO MABANAG
Secretary of Justice

2. *On the Authority of Municipal Councils to Change the Names of Public Schools.*

OPINION NO. 205, S. 1960

Respectfully returned, thru the Secretary of Education, to the Director of Public Schools, Manila, the within papers relating to Resolution No. 345 of the Municipal Council of Laoag, Ilocos Norte, changing the name of "Barrio No. 2 Elementary School", in the municipality of Laoag, to "Agripino P. Santos Memorial Community School."

The statutory provision cited and relied upon by the Municipal Council of Laoag, in approving the resolution in question is section 3 of Republic Act No. 2264, which in so far as pertinent provides:

"Municipal Councils of municipalities and regularly organized municipal districts shall have authority:

"(c) To *change* the *names* of *public buildings* and public streets located within the boundaries of the municipality or organized municipal district, not oftener than once every ten years." (Underscoring supplied.)

We do not believe that this provision confers upon municipal councils the authority to change the names of public schools within their respective municipalities. The term "public buildings" and the word "schools" having different meanings or connotation. Thus, a public school may have one or several buildings for the use of its students. There certainly is a clear and well-recognized distinction between the "school" as an educational institution or establishment and the "building" or "buildings" where the instruction of the students takes place

The view expressed above finds support in the fact that since the enactment of Republic Act No. 2264 the legislature has approved many bills changing the names of various schools throughout the country, including barrio schools. (See Republic Acts Nos. 2331, 2576, 2586, 2742, 2773, 2794, 2841 and 2842, among others.) If the intention of Congress in incorporating the above-quoted provision in the Local Autonomy Act was to entrust the matter of changing the names of public schools to the local governments, the said legislative body would not have bothered to consider and approve the aforementioned bills of local application.

The query posed by that office in connection with the aforementioned resolution of the Municipal Council of Laoag, should be, as it is hereby, answered in the negative.

(SGD.) ENRIQUE A. FERNANDEZ
Undersecretary of Justice

3. *On the Seniority Among Judges of the Municipal Court of Manila.*

OPINION NO. 216, S. 1690

Respectfully returned, thru the Executive Judge, to Judge Milagros A. German, Municipal Court, Manila.

This has reference to Judge German's letter bringing to our attention the matter of seniority among judges of the municipal court of Manila, particularly among Judges German, Cansino, and Paredes. It appears that they were all appointed by the President on December 4, 1959, and that Judge German took her oath of office on December 15, 1959, Judge Cansino, on December 16, 1959, and Judge Paredes, on January 23, 1960. However, Judge German's appointment was confirmed by the Commission on Appointments of Congress on April 27, 1960, whereas those of Judge Cansino and Judge Paredes had been confirmed twenty-one days earlier, i.e., on April 6, 1960.

Annexed to the basic communication is a copy of the 1st indorsement dated June 23, 1958, of former Secretary of Justice Jesus G. Barrera, regarding the question of seniority between Justices Edmundo Piccio and Juan L. Lanting of the Court of Appeals. The point therein stressed is that for the purpose at least of determining seniority among "justices of the Supreme Court and of the Court of Appeals," who had been nominated and whose nominations were confirmed on the **same date**, the Judiciary Act (Republic Act No. 296, section 11 and 24) "requires the issuance of commissions to

said justices" after the nominations extended to them by the President are confirmed by the Commission on Appointments. It was thus suggested that the respective commissions of the above-named justices be issued, and that the same order appearing in their nominations and in the confirmation thereof, be maintained to avoid any question as to their precedence."

We believe that the above comments are not controlling in the determination of seniority among the aforementioned municipal judges of Manila.

For one, Republic Act No. 296 specifically lays down a rule for determining seniority among justices of the Supreme Court and the Court of Appeals, based on the dates of the commissions issued to them after the confirmation of their nominations. This criterion, however, is not expressly prescribed for municipal judges by the Judiciary Act or by the charter of the City of Manila.

For another, Judges German, Cansino and Paredes were extended "ad interim" appointments, having been **appointed** by the President on December 5, 1959, when Congress was not in session. On the other hand, Justices Piccio and Lanting were **nominated** by the President on May 16, 1958, while Congress was in session, and their nominations were confirmed by the Commission on Appointments during the same session. The marked distinction between such appointments made while Congress is in session and the so-called "ad interim" or recess appointments is readily apparent from a perusal of the pertinent constitutional provisions.

Appointments made during legislative sessions are covered by section 10(3), Article VII, of the Constitution which, in so far as relevant, reads:

> "The President shall *nominate* and, with the consent of the Commission on Appointments of the Congress of the Philippines, shall *appoint* the heads of the executive departments and bureaus... and all other officers of the Government whose appointments are not herein otherwise provided for, and those whom he may be authorized by law to appoint;..."

This provision speaks of two distinct acts: "nomination" and "appointment." The first pertains exclusively to, and excercised solely by, the President. The second is accomplished when the nomination made by the President is approved by the Commission on Appointments. (See Sinco, Philippine Political Law, 2nd Rev. Ed., pp. 259-260.) Hence the appointee may be deemed appointed under this provision and may assume office only from the date of the confirmation of the nomination.

On the other hand, "ad interim" appointments are specifically governed by a separate provision of the Constitution, to wit:

> "The President shall have the power *to make appointments* during the recess of the Congress of the Philippines, *but such appointments shall be effective only until disapproved* by the Commission on Appointments or *until the next adjournment* of the Congress of the Philippines." (Art. VII, Section 10, (4); and underscoring ours.)

It is said that this constitutional provision is called for by the exigencies of the public service the continuity of which would be interrupted or its efficiency impaired by leaving an office vacant during the recess of Congress. (Sinco, Phil. Political Law, supra.) For this reason, recess appointments made by the President must be deemed completed and the appointees may immediately enter upon the discharge of their duties. This conclusion is self-evident from the last clause of the above-quoted provision which declares that "such appointments shall be **effective** until disapproved by the Commission on Appointments or until the next adjournment of Congress." In other words, an **ad interim** appointment takes effect from the moment it is made by the President and not upon its confirmation. While it is true that the rejection of nonconfirmation by the Commission of such appointment would result in the separation of the appointee, the appointment is not thereby invalidated or vacated but is merely terminated. Only its term would be affected by whatever action the Commission might take.

In brief, the first constitutional provision quoted above authorizes the President, while the Congress is in session, merely **to nominate** and the nominee is not, in the legal sense, deemed **appointed** until the consent of the Commission on Appointments thereto is obtained; whereas under the second provision, the President has full power **to make appointments** during the recess of Congress.

Courts, in a number of decisions, sustain the above view. Thus, it has been held that the appointee accepting an "ad interim" appointment is entitled, upon his qualification, to the possession of the office. (McCall v. Cull, 72 P. 2nd. 696.) And the legality of the customary practice whereby the interim period between the appointment made by the executive while the legislative body is not in session and its confirmation by the Senate is included as part of the term for which the permanent appointment is made, was upheld by the court in Walsh v. People, 211 P. 646. (See also State v. Bird 163, So. 248.)

Upon these considerations, we do not think the dates of confirmation of the **ad interim** appointments of the municipal judges referred to above is material, much less decisive, in determining seniority

among them. Having been so appointed on the same date, said judges should have precedence in accordance with the respective dates of their assumption of the office of municipal judge.

(SGD.) ALEJO MABANAG
Secretary of Justice

4. *On the Power of the Rice and Corn Bill Board (RICOB) to Issue Subpoena and/or Subpoena Duces Tecum.*

OPINION NO. 224, S. 1960

Opinion is requested on "whether or not the Rice and Corn Bill Board (RICOB), created by Republic Act No. 3018, has the power to issue **subpoena** and/or **subpoena duces tecum.**"

The power to issue subpoena is not an inherent power of administrative agencies (Rivera, Law of Public Administration, 1st ed., p. 866). Non-judicial officers who are authorized to issue subpoenas are expressly so empowered by law. (See section 91, Com. Act No. 141 (Director of Lands); Section 1, Com. Act No. 172 (Public Defender of Dept. of Labor); Section 3, Com. Act No. 294, (Board of Mechanical Engineering Examiners); Section 116, Rep. Act No. 367 (Commissioner, Bureau of Industrial Safety); and section 3, Republic Act No. 417 (Board of Dental Examiners), etc.) Republic Act No. 3018, which created the Rice and Corn Board, does not expressly confer upon said body the authority to issue such processes

Section 580 of the Revised Administrative Code provides that when authority to take testimony or evidence is conferred upon an administrative officer or upon any non-judicial person, committee, or other body, such authority shall be understood to comprehend the right to administer oaths, and summon witnesses, and shall include authority to require the production of documents upon a **subpoena duces** tecum or otherwise. But in order that this section may be invoked, it must be shown that the body has "authority to take testimony or evidence" (Francia vs. Pecson, G.R. L-3779, July 25, 1950). Since no such authority has been conferred upon the Rice and Corn Board, we are constrained to hold that said Board does not possess the inquisitorial power to issue **subpoena** and/or **subpoena duces tecum.**

(SGD.) ALEJO MABANAG
Secretary of Justice

5. *On the Exercise of the Power of Eminent Domain by the Municipal Council.*

OPINION NO. 219, S. 1960

Opinion is requested on "whether or not Section 2245 of the Revised Administrative Code, vesting in the municipal council the right of eminent domain has been repealed by paragraph (c) of Section 3 of Republic Act 2264, which vests in the provincial board the exercise of a similar power under certain conditions."

The provisions of law referred to respectively reads as follows:

"SEC. 2245. *Exercise of power of eminent domain.* Subject to the approval of the Department Head, a municipal council shall have the power to exercise the right of eminent domain over property and to authorize the institution of proceedings for the condemnation of the same according to law, for any of the following purposes; the construction or extension of roads, streets, sidewalks, bridges, ferries, levees, wharves, or piers: the construction of public buildings, including schoolhouses, and the making of improvements in connection therewith; the establishment of parks, playgrounds, plazas, market places, artesian wells, or systems for the supply of water and the establishment of cemeteries, crematories, drainage systems, cesspools, or sewage systems."

"SEC. 3. *Additional powers of provincial boards, municipal boards or city councils and municipal and regularly organized municipal district councils.*—Provincial Boards of the respective provinces shall have authority;

* * *

"(e) To exercise upon favorable recommendation by the municipal council of the municipality if the project is within one municipality, and if the project is within two or more municipalities, upon favorable recommendation by the district highway engineer who shall give a previous hearing to the municipal council of the municipalities concerned, the power of eminent domain for the following purposes: The construction or extension of roads, streets, sidewalks, bridges, ferries, levees, wharves, or piers, air fields, the construction of public buildings including schoolhouses and the making of necessary improvements in connection therewith; the establishment of parks, playgrounds, plazas, market places, artesian well, or systems for the supply of water, irrigation canals and dams, and the establishments of nurseries, breeding centers for animals, health centers, hospitals, cemeteries, crematories, drainage systems, cesspools, or sewage systems and abbattoirs."

It is believed that the query should be answered in the negative.

The sections quoted above reffered to distinct and separate subjects; hence, the principle of implied repeal, well known in statutory construction, finds no valid application in this instance. Section 2245