Frequently Asked Questions
on the
Anti-Wiretapping Law and Related Issues

Based on the full text of the message to the nation delivered by President Gloria Macapagal Arroyo on 27 June 2005 "to set the record straight" on "the issue of the tape recordings," the President admitted that:

- In 2004, while Congress was still canvassing the votes, she "had conversations with many people, including a Comelec official" as she was "anxious to protect [her] votes;"

- She regretted her telephone call and recognized that making the call was a "lapse in judgment;" and

- Her intent was "not to influence the outcome of the election … [as] the election had already been decided and the votes counted."

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Although she referred to "the issue of the tape recordings," the President did not address the existence of the alleged "Gloria-Garci" tapes, and did not admit that she was a party to any conversation with then Comelec Commissioner Garcillano. While she admitted having spoken to "a Comelec official," she did not mention the official by name or position.

In effect, the President neither confirmed nor denied—

- That she had a conversation with then Comelec Commissioner Garcillano;

- That this conversation was taped and/or wiretapped; and

- That she either authorized or did not authorize the recording/wiretapping.

Assuming, however, that the Comelec official referred to in the President's message is a Comelec commissioner, under the law, Comelec Commissioners are covered by the canons of judicial ethics:

> "The Chairman and members of the Commission [on Elections] shall be subject to the canons of judicial ethics in the discharge of their functions."[i]

Since party-litigants and lawyers are prohibited from engaging in any *ex parte* communication with the judge trying their case, **FLAG** believes the same rule applies to a presidential candidate calling a Comelec Commissioner. **FLAG** believes it is improper for a Chief Executive to call a Comelec Commissioner while Congress is still canvassing the votes, especially where the discussion concerns her votes as a presidential candidate in that election. It is the same as a party approaching a judge while the case is pending, and asking the judge about the outcome of the case. It is not an excuse to say that "the election had already been decided and the votes counted" since the winning candidates for President and Vice-President had not yet been proclaimed by Congress.

Furthermore, under R.A. 6713, *The Code of Conduct of Public Officers and Employees*, the President and other public officers are duty-bound to—

- "Uphold public interest over personal interest;"[ii]

- "Refrain from doing acts contrary to law, good morals, good customs, public policy, public order, public safety and public interest;"[iii]

- "Remain true to the people at all times [and] … act with justness and sincerity;"[iv] and

- "Commit themselves to the democratic way of life and values."[v]

As Justice Irene Cortez explained in her book "*The Philippine Presidency: A Study of Executive Power*,"[vi]

> "Originally, the functions of the Commission [on Elections] were performed by one of the executive departments under the president's control. The Constitution was amended [in 1940] and the independence of the Commission on Elections safeguarded ***in order to eliminate politics from the enforcement and administration of laws having to do with the conduct of elections***."

If a member of the executive department who impinges, interferes or intrudes into the Comelec's independence is accountable to the people for violating the Constitution, the same should apply with greater force when the Chief Executive is the one who impugns the Comelec's independence. To paraphrase the Supreme Court in *Villena v. Secretary*,[vii] the Chief Executive is "… the authority in the Executive Department [and] assumes the corresponding responsibility."

What is the anti-wiretapping law and why was it enacted?

Congress passed the Anti-Wiretapping Law, R.A. 4200, in 1965. The law seeks to punish wiretapping and other related violations of the right to privacy of communication. It also intends to stop the practice by officers of the government of spying on one another—a "most obnoxious instrument of oppression or arbitrary power."[viii] The law also declares inadmissible such illegally obtained recordings in civil, criminal, administrative and legislative hearings or investigations.

Does the Anti-Wiretapping Law prohibit the recording of all communications?

No.

The law prohibits the recording and interception only of private communications. The law does not prohibit the recording of public speeches by members of the audience, or other forms of "public" communication such as press conferences, interviews, and board meetings that are openly recorded. The

law expressly punishes those who secretly record or intercept private conversations and communications. By **private** conversations and communications, the law simply refers to communication between persons privately made:[ix]

> Senator TAÑADA. As I have said, Your Honor, the purpose of this bill is to prevent the tape recording or interception of a communication between one person and another--not between a speaker and a public. Because precisely, the speaker speaks so that the public may know what he has in mind, and there should be no objection to tape recording that speech. But what we want to protect is the communication between private individuals.
>
> Senator DIOKNO. Then, will it be possible to clarify this? Would Your Honor have any objection to clarifying Section 1 as indicating communication or spoken word between private individuals?
>
> Senator TAÑADA. Well, if you believe that that is necessary, although I believe that the very purpose and objective of the bill, as may be seen from the different provisions of the bill, clearly indicate that intention—and that is the tape recording of private conversations or communications between one person and another.
>
> Senator DIOKNO. Privately made.
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> Senator TAÑADA. Yes.

The Supreme Court, in *Navarro v. Court of Appeals*,[x] distinguished between **private** and **public** communications. In this case, the tape recording captured a heated conversation between a policeman and a reporter which later led to the violent death of the reporter, and which took place at the police station in the presence of several people. The Court held that the conversation was not a private communication, and therefore was admissible in evidence in the homicide case filed against the policeman for the reporter's death, even if the policeman did not authorize the recording.

> "Indeed, Jalbuena's testimony is confirmed by the voice recording he had made. It may be asked whether the tape is admissible in view of R.A. No. 4200, which prohibits wire tapping. The answer is in the affirmative. [quotation from R.A. 4200 omitted] x x x

> "Thus, the law prohibits the overhearing, intercepting, or recording of private communications. Since the exchange between petitioner Navarro and Lingan was not private, its tape recording is not prohibited."[xi]

The law does not prohibit the recording of all private communications, but provides a limited and narrowly drawn exception for law enforcers. The law provides that police and other law enforcement agencies may wiretap private communications but—

> —law enforcers must first secure a court order; and
>
> —only in cases involving crimes against national security under the Revised Penal Code (treason, espionage, rebellion or sedition) and kidnapping. The law further says that in cases involving rebellion, conspiracy and proposal to commit rebellion, inciting to rebellion, sedition, conspiracy to commit sedition, and inciting to sedition, there must be **prior proof** that rebellion or acts of sedition have actually been or are being committed.[xii]

The law does not prohibit the recording of private communications that are authorized by ALL parties. These recordings are admissible in evidence and the person/s who made the recording are not liable.
Thus, a person who attaches an answering machine to his telephone, and records a message inviting callers to leave a message after the tone, would not be covered by the Anti-Wiretapping Law.

The consent or authorization need not be express as long as it is evident from the circumstances. What is essential, however, is that **ALL** the parties to the private conversation expressly or impliedly consent to its being recorded.

If one party to the communication authorizes the recording, but the other party does not, the party who recorded the conversation is liable for prosecution for violating R.A. 4200:

> "'[E]ven a (person) privy to a communication who records his private conversation with another without the knowledge of the latter (will) qualify as a violator' under … R.A. 4200."[xiii].

What offenses are punished by the Anti-Wiretapping Law?

The law punishes the following acts:

- Wiretapping or using any other device or arrangement to secretly overhear, intercept or record a private communication or spoken word, except where the same is done pursuant to a court order and complies with all the conditions imposed by section 3 of R.A. 4200;[xiv]

- Possessing any tape, wire, disc or other record, or copies, of an illegally obtained recording of a private communication, knowing that it was illegally obtained;[xv]

- Replaying an illegally obtained recording for another person, or communicating its contents, or furnishing transcripts of the communication, whether complete or partial.[xvi]

- Acts of peace officers (law enforcement agents) in violation of section 3 of R.A. 4200 on the proper procedure for securing and implementing a court order authorizing the wiretapping of a private communication.[xvii]

The law also makes persons who "wilfully or knowingly aid, permit or cause to be done" the acts described above, equally liable as direct participants to the illegal wiretap or secret recording.[xviii]

What must be proven to sustain a charge of wiretapping or using any other device or arrangement to secretly overhear, intercept or record a private communication?

The prosecution must prove that a wiretap or other device was actually used to secretly overhear, intercept or record a private communication without a court order.

The issue of whether or not the prosecution has the burden of proving that a recording/wiretapped communication was not authorized by all the parties is an open question.

While Senator Lorenzo M. Tañada, during the Senate deliberations on R.A. 4200, expressed the view that the absence of authority by all the parties to the communication was a matter of defense,[xix] jurisprudence now holds that the prosecution has the burden of proving a negative essential element:[xx]

> "Undoubtedly, it is the constitutional presumption of innocence that lays such burden upon the prosecution. The absence of such license and legal authority constitutes an essential ingredient of the offense of illegal possession of firearm, and every ingredient or essential element of an

offense must be shown by the prosecution by proof beyond reasonable doubt.

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"It cannot be denied that the lack or absence of a license is an essential ingredient of the offense of illegal possession of a firearm. The information filed against appellant in Criminal Case No. 3558 of the lower court (now G.R. No. 27681) specifically alleged that he had no 'license or permit to possess' the .45 caliber pistol mentioned therein. Thus it seems clear that it was the prosecution's duty not merely to allege that negative fact but to prove it. This view is supported by similar adjudicated cases. In U.S. vs. Tria, 17 Phil. 303, the accused was charged with 'having criminally inscribed himself as a voter knowing that he had none of the qualifications required to be a voter.' It was there held that the negative fact of lack of qualification to be a voter was an essential element of the crime charged and should be proved by the prosecution. In another case (People vs. Quebral, 68 Phil. 564) where the accused was charged with illegal practice of medicine because he had diagnosed, treated and prescribed for certain diseases suffered by certain patients from whom he received monetary compensation, without having previously obtained the proper certificate of registration from the Board of Medical Examiners, as provided in Section 770 of the Administrative Code, this Court held that if the subject of the negative averment like, for instance, the act of voting without the qualifications provided by law is an essential ingredient of the offense charged, the prosecution has the burden of proving the same, although in view of the difficulty of proving a negative allegation, the prosecution, under such circumstance, need only establish a prima facie case from the best evidence obtainable. In the case before Us, both appellant and the Solicitor General agree that there was not even a prima facie case upon which to hold appellant guilty of the illegal possession of a firearm. …

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"... As this Court summed up the doctrine in People v. Macagaling [G.R. Nos. 109131-33. October 3, 1994]:

> "We cannot see how the rule can be otherwise since it is the inescapable duty of the prosecution to prove all the ingredients of the offense as alleged against the accused in an information, which allegations must perforce include any negative element provided by the law to integrate that offense. We have reiterated quite recently the fundamental mandate that since the prosecution must

> allege all the elements of the offense charged, then it must prove by the requisite quantum of evidence all the elements it has thus alleged."

What must be proven to sustain a charge of possessing a tape, wire, disc or other record, or copies of an illegally obtained recording of a private communication?

R.A. 4200 requires that the accused **knowingly** possesses the illegally obtained recording. The Congressional Record indicates that the word knowingly refers to "knowing that [the recording] was secured by illegal means":[xxi]

> Senator RODRIGO. … In like manner, under this bill, only the persons who actually do the wire tapping or the ones who conspire are the ones penalized. Let us say that a person who does not have any participation in the wire tapping gets hold of the tape and uses it. Will Your Honor agree to an amendment that a person that uses that tape, knowing that it was secured by illegal means, be likewise penalized?
>
> Senator TAŇADA. I was contemplating to introduce an amendment along that line by providing in addition to the amendment already introduced by the committee which makes evidence obtained by wire tapping inadmissible, that it shall be penalized when used knowingly or an evidence obtained by wire tapping should be penalized.

The *Revised Rules on Evidence* define personal knowledge as facts derived from one's own perception.[xxii] To sustain a conviction for "knowingly possessing an illegally obtained recording," it is **FLAG**'s position that the prosecution must prove, beyond a reasonable doubt, (1) that an illegal wiretap actually took place; (2) that the recording in the possession of the accused emanates from that illegal wiretap; and (3) that the accused knew, i.e., had personal knowledge, that the recording was obtained illegally. To hold otherwise would mean that persons could be convicted based on hearsay.[xxiii] **FLAG** believes this would violate the rights of an accused to be presumed innocent, to a fair trial, and other basic rights.

What must be proven to sustain a charge of replaying an illegally obtained recording for another person, or communicating its contents, or furnishing transcripts of the communication, whether complete or partial?

It is **FLAG**'s position that the prosecution must prove that the accused acted with personal knowledge that the recording was illegally obtained. If the crime of possessing an illegally obtained recording requires that the accused knew (i.e., had personal knowledge) that it was illegally obtained, equal protection demands that the crime of replaying or airing the recording should also bear the same requirements. It is **FLAG**'s position, therefore, that the prosecution must prove that the accused had personal knowledge that the recording was illegally obtained when he replayed or aired it.

Does a person who has, listens to, distributes or replays, a copy of the alleged "Gloria-Garci" recording violate R.A. 4200?

To violate R.A. 4200, there must first be proof that (1) an illegal wiretap actually occurred; (2) that the recording listened to, replayed or distributed emanates from that illegal wiretap; and (3) that the person who listened to, replayed or distributed the recording knew (i.e., had personal knowledge) that the recording was illegally obtained.

In **FLAG**'s view, a third party's claim that the recording was wiretapped is not enough to constitute a violation of R.A. 4200, since that is hearsay.

Can a person be arrested without a warrant for possessing or playing or distributing the alleged "Gloria-Garci" recording?

For a person to be validly arrested without a warrant, that person must be caught in the act of committing or attempting to commit a crime, or when a crime has just been committed and the arresting officer has personal knowledge that that person probably committed that crime.[xxiv]

Applied to R.A. 4200, law enforcement agents can only arrest a person without a warrant if they have **probable cause based on personal knowledge** that the person to be arrested possesses or plays or distributes the recording **knowing that it was illegally obtained**. Thus, even if the police have probable cause to believe that a person possesses the alleged "Gloria-Garci" recordings, it is **FLAG**'s position that they **cannot** arrest that person **unless** they also have

probable cause that that person has **personal knowledge** that the recording in his possession was illegally obtained.

Can the media be prohibited from airing voice recordings that are allegedly illegally obtained?

Freedom of speech, freedom of the press and freedom to assemble and petition the government for redress of grievances are founded on the need to discuss publicly and truthfully any matter of public concern without censorship or punishment. That is why our courts have consistently rejected any prior restraint on the communication of views and free exchange of information on matters of public concern. It is only when a clear and present danger exists that the State has the right to prevent or limit these freedoms:

> "It may be observed at the outset that what is involved in the instant case is a prior and direct restraint on the part of the respondent Judge upon the exercise of speech and of expression by petitioners. The respondent Judge has restrained petitioners from filming and producing the entire proposed motion picture. . . xxx *Because of the preferred character of the constitutional rights of freedom of speech and of expression, a weighty presumption of invalidity vitiates measures of prior restraint upon the exercise of such freedoms*. The invalidity of a measure of prior restraint does not, of course, mean that no subsequent liability may lawfully be imposed upon a person claiming to exercise such constitutional freedoms…xxx There was…no "clear and present danger" of any violation of any right to privacy that private respondent could lawfully assert.**"**[xxv]

The Government's attempts to stop the media from airing the alleged "Gloria-Garci" tapes are a form of **prior restraint**. The Gloria-Garci tapes refer to an alleged conversation between two public officials—the President and a COMELEC commissioner—regarding the national elections, where acts of electoral fraud were supposedly discussed. The conversation between two public officials relates to a matter of public interest and concern. Under the circumstances, **FLAG** believes that it is unlawful for Government to impose any form of prior restraint on the media to prevent them from airing the recordings. As the Supreme Court held in *Ayer Productions Pty. Ltd. v. Capulong*:[xxvi]

> "…The right of privacy or "the right to be let alone," like the right of free expression, is not an absolute right. A limited intrusion into a person's privacy has long been regarded as permissible where that person is a public figure and the information sought to be elicited from him or to be published about him constitute matters of a public character. Succinctly

> put, the right of privacy cannot be invoked to resist publication and dissemination of matters of public interest. The interest sought to be protected by the right of privacy is the right to be free from 'unwarranted publicity, from the wrongful publicizing of the private affairs and activities of an individual which are outside the realm of legitimate public concern.'"

In what kinds of proceedings are illegally obtained recordings of private communications inadmissible?

R.A. 4200 provides that illegally obtained recordings of private communications are inadmissible in civil, criminal, administrative and/or legislative hearings or investigations. Not even the existence of such recordings may be admitted into evidence.

Are illegally obtained voice recordings admissible in impeachment[xxvii] proceedings?

Section 4 of R.A. 4200 expressly declares that illegally obtained recordings are inadmissible "in any judicial, quasi-judicial, legislative or administrative hearing or investigation."

Impeachment proceedings are, in the words of Justice Puno in his Separate Opinion in *Francisco v. House of Representatives,*[xxviii] "*sui generis*" and possess both political and non-political aspects. In this case (a petition seeking to prevent the House of Representatives from transmitting to the Senate the Articles of Impeachment against Chief Justice Hilario Davide for improper use of the Judiciary Development Fund), Justice Puno, after tracing the origin and nature of impeachment in England and the United States, commented on the nature of impeachment in the Philippines, thus:

> "The historiography of our impeachment provisions will show that they were liberally lifted from the U.S. Constitution. Following an originalist interpretation, there is much to commend to the thought that ***they are political in nature and character. The political character of impeachment hardly changed in our 1935, 1973 and 1987 Constitutions***. … All these provisions ***confirm the inherent nature of impeachment as political***.
>
> "Be that as it may, ***the purity of the political nature of impeachment has been lost***. …

> "I therefore respectfully submit that there is now a ***commixture of political and judicial components*** in our reengineered concept of impeachment. It is for this reason and more that impeachment proceedings are classified as ***sui generis***. … "[xxix]

Impeachment, being in a class of its own, is therefore neither a judicial, nor quasi-judicial, nor legislative nor administrative proceeding. Hence, there appears to be no legal bar to the admissibility of wiretapped recordings in impeachment proceedings.

Since the law does not prohibit the use of illegally obtained recordings in impeachment proceedings, following the canon of statutory construction *expressio unius est exclusio alterius* (that which is expressly mentioned implies the exclusion of all others, or, in simple terms, that which is not expressly prohibited by law is allowed), it follows that these recordings may be used in impeachment proceedings if Congress, sitting as the impeachment court, allows it under its rules.[xxx]

Assuming that a voice recording is admissible in evidence under R.A. 4200, how is it duly authenticated in civil, criminal and administrative cases?

The Supreme Court requires that ---

> "A voice recording is authenticated by the testimony of a witness (1) that he personally recorded the conversation; (2) that the tape played in court was the one he recorded; and (3) that the voices on the tape are those of the persons such are claimed to belong."[xxxi]

This ruling is consistent with Rule 11, Section 1 of the *Rules on Electronic Evidence*, which provides that "audio, photographic and video evidence of events, acts or transactions shall be admissible provided it shall be shown, presented or displayed to the court and shall be identified, explained or authenticated by the person who made the recording or by some other person competent to testify on the accuracy thereof."[xxxii]

What are the penalties for violating the Anti-Wire Tapping Law?

The direct participants to the wiretapping, and any one who aids, permits or causes the violation are, upon conviction, punished by imprisonment of not less than six months nor more than six years. If the offender is a public official at the time of the offense, he shall suffer the accessory penalty of perpetual absolute disqualification from public office. If the offender is a foreigner, he shall be subject to deportation.[xxxiii]

Quezon City, Philippines, 29 June 2005.

JOSE MANUEL I. DIOKNO
Chair

[i] Sec. 6, Chapter 2, Subtitle C, Title II-Other Bodies, Book V, Executive Order No. 292, *The Administrative Code of 1987*, as amended; Sec. 58, Article VII, *The Omnibus Election Code of the Philippines as Amended*.
[ii] Section 2.
[iii] Section 4(c).
[iv] Section 4(c).
[v] Section 4(g).
[vi] University of the Philippines Law Center, 1966, p. 100 (emphasis supplied).
[vii] 67 Phil. 451 (1939).
[viii] Explanatory Note, Senate Bill No. 9 introduced by Senator Lorenzo M. Tañada, 5 January 1962; *see also* Congressional Record, Vol. III, No. 31, 10 March 1964, p. 573.
[ix] Congressional Record, Vol. III, No. 33, 12 March 1964, p. 626.
[x] G.R. No. 121087, 26 August 1999.
[xi] *Navarro v. Court of Appeals*, G.R. No. 121087, 26 August 1999.
[xii] Only law enforcement agents may apply for a court order to conduct a wiretap or similar form of secretly overhearing and recording private communications, but the court may only issue such an order in cases involving--
A. The following felonies penalized under the Revised Penal Code:
1. Treason;
2. Espionage;
3. Provoking war and disloyalty in case of war;
4. Piracy and mutiny in the high seas;
5. Rebellion, inciting to rebellion, conspiracy and proposal to commit rebellion;
6. Sedition, inciting to sedition, conspiracy and proposal to commit sedition; and
7. Kidnapping; and
B. Violations of Commonwealth Act No. 616, punishing espionage and other offenses against national security.
The Anti-Wiretapping Law also requires that a court order shall only be issued upon written application and the examination under oath or affirmation of the applicant and his witnesses, and a showing that (a) there are reasonable grounds to believe that any of the crimes enumerated above has been, is being or is about to be committed; (b) that in cases involving rebellion, conspiracy and proposal to commit rebellion, sedition, conspiracy to commit sedition, and inciting to sedition, there must be prior proof that a rebellion or acts of sedition as the case may be, have actually been or are being committed; (c) that there are reasonable grounds to believe that evidence will be obtained essential to the conviction of any person for, or to the solution of, or to the prevention of any of such crimes; and (d) that there are no other means readily available for obtaining such evidence. [RA 4200, sec. 1, 1st and 2nd paragraphs] The law, therefore, provides for a very narrow exception for law enforcement agents to obtain court orders to conduct wiretapping or related acts.
[xiii] *Ramirez v. Court of Appeals*, 248 SCRA 590, 596 (1995).
[xiv] Section 1, R.A. 4200.
[xv] 2nd paragraph, Section 1, R.A. 4200.
[xvi] 2nd paragraph, Section 1, R.A. 4200.
[xvii] Section 2, R.A. 4200.
[xviii] Section 2, R.A. 4200.
[xix] Congressional Record, Vol. III, No. 31, 10 March 1964, p. 586:

Senator GANZON. … For some more clarificatory questions. On page 1, line 2, do I understand from the gentleman from Quezon that the authority may be oral or written?
Senator TAÑADA. Well, it could be.
Senator GANZON. It could be. Now, who will prove that there is no such authority oral or written?
Senator TAÑADA. No, it is the defense already of the accused.
Senator GANZON. Now, the defense will prove that he is authorized. But need not the prosecution prove at the first stage of the prosecution that as a matter of fact no such authority has been given?
Senator TAÑADA. It is just like prosecuting one for possession of opium without license. The prosecution does not have to prove license.
Senator GANZON. I am just trying to clarify.
Senator TAÑADA. In my opinion, it is the defense that must prove that he is authorized. It is very hard to establish neglect.

[xx] *People v. Solayao*, G.R. No. 119220, 20 September 1996 (footnotes omitted); *see also People v. Macagaling*, G.R. Nos. 109131-33, 3 October 1994.

[xxi] Congressional Record, Vol. III, No. 31, 10 March 1964, p. 577.

[xxii] Section 36, Rule 130, *Revised Rules on Evidence*.

[xxiii] A declaration related by a person other than the declarant himself.

[xxiv] Rule 113, Section 5 (a) and (b), *Revised Rules of Court*.

[xxv] *AYER Productions Pty. Ltd.* v. *Capulong*, G.R. No. L-82380, 29 April 1988 (footnotes omitted).

[xxvi] G.R. No. L-82380, 29 April 1988 (footnotes omitted).

[xxvii] Section 2, Article XI of the 1987 Constitution lists the grounds upon which the President, the Vice-President, Members of the Supreme Court, Members of the Constitutional Commissions, and the Ombudsman, may be validly impeached: culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust.

[xxviii] G.R. No. 160261, 10 November 2003.

[xxix] Emphasis supplied.

[xxx] Articles VI, paragraph 2 of the *Rules of Procedure on Impeachment Trials in the Senate of the Philippines*, used during the impeachment of then President Joseph E. Estrada, grants the Senate President or the Chief Justice the power to "rule on all questions of evidence, including … admissibility." The same article further states that the *Rules of Court* "shall apply insofar as they are applicable;" and the *Rules of Evidence* and procedure "shall be **liberally construed**." [*emphasis supplied*].

[xxxi] *Navarro v. Court of Appeals*, G.R. No. 121087, 26 August 1999.

[xxxii] A.M. No. 01-7-01-SC, which took effect on 1 August 2001.

[xxxiii] Section 2, R.A. 4200.