TYRANNOSAURUS TEXT & THE DOCTRINAL SLIP
PP1017 AND THE PROBLEMATICS OF EXECUTIVE LEGISLATION

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Interpretation matters. We are, after all, condemned to it. Interpretation is an indispensable requirement to communication, a necessary step towards understanding; it is the bridge that links communicants. It is also a practice of reading, whether of text, speech, conduct, or object; and a tool, a device that takes different shapes in the hands of readers with diverse histories. Interpretation especially matters when used as a strategy that produces massive public consequences, when it is deployed in the public sphere. This is the case of reasoning employed by judges, either with the use of text or doctrine. Texts are plastic; they can be substantiated through the doctrinal form provided by the interpreting judge. Doctrines, especially borrowed ones, always have to be interpreted by the borrower; and in this process of localization, they are reinscribed and necessarily altered. To this extent, the interpretation of doctrine is an act of translation of a cultural product of a different legal environment.

In this Article, I will discuss the decision of the Supreme Court in *Randolf David v. Gloria Macapagal-Arroyo*,[1] holding that the President acted within her constitutional authority when she issued Presidential Proclamation 1017[2] and General Order No. 5[3] while declaring unconstitutional the acts performed by the authorities pursuant to her proclamation. My interest is at once specific and broad: on the one hand, I will engage in doctrinal discourse by problematizing the fit between the use

[1]G.R. No. 171396, 3 May 2006.
[2]Hereinafter PP1017
[3]Hereinafter GO5

of a particular doctrinal set, the on-its-face and the as-applied challenges to the constitutional validity of statutes, and the kind of constitutional question presented before the Court; on the other, I will critique the Court's use of text as a privileged, if not exclusive, site of interpretation. I am therefore concerned with two types of misfits here—the doctrinal and the interpretive. Moreover, the emphasis is on a critique of methodology and only incidentally on the result; the aim is to promote a dialogue on the tools of decision-making that inform the decision itself.

In the first part of this Article, I argue that the distinction between the on-its-face and the as-applied challenge the Court used in scrutinizing PP1017 and GO5 is founded on the separation of powers principle that in turn relies on a conceptual distinction between rule-making and rule-execution. The institutional play is between the Court, as interpreter of the Constitution, and the Congress, as the body with authority to legislate on matters affecting the guarantees in the Bill of Rights. Because presidential authority is only marginally implicated in the analysis of the need for careful line-drawing of *statutes* and their compliance with constitutional principles—the salient feature of facial analysis—then the application of this kind of scrutiny to a presidential proclamation (an altogether different species of policy) is inappropriate. This is why I think that the Court committed a doctrinal slip.

The second part of the Article builds on the first, with the claim that formalism, specifically textualism or the belief in the autonomy of texts, is the central reason why the Court committed this doctrinal slip. The crux of the Court's analysis in *David* was the separation of PP1017 from the acts committed under its authority. This separation justified the Court's ruling that PP1017 and GO5 were constitutional, at least in part,[4] while the

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[4]("WHEREFORE, the Petitions are partly granted. The Court rules that PP1017 is CONSTITUTIONAL insofar as it constitutes a call by President Gloria Macapagal-Arroyo on the AFP to prevent or suppress lawless violence. However, the provisions of PP1017 commanding the AFP to enforce laws not related to lawless violence, as well as decrees promulgated by the President, are UNCONSTITUTIONAL. In addition, the provision in PP1017 declaring national emergency under Section 17, Article VII of the Constitution is CONSTITUTIONAL, but such declaration does not

derivative acts of the police officers were not. My argument is that the separation was unwarranted considering that in PP1017 the promulgator (legislator) was the President who, unlike the legislature, has the power to enforce her own orders. This argument also brings me to the broader problem over the nature of "texts" and the debate among legal scholars and literary critics over the possibility (or impossibility) of deriving meaning from them.

ONE. THE DOCTRINAL SLIP

The events leading to the *David* petition start with a familiar, if not ironic, history. On the eve of the 20th anniversary of the 1986 People Power Revolution that resulted in the ouster of Ferdinand Marcos for massive electoral fraud, among others, Macapagal-Arroyo issued PP1017 declaring a state of national emergency: "NOW, THEREFORE, I, Gloria Macapagal-Arroyo, President of the Republic of the Philippines and Commander-in-chief of the Armed Forces of the Philippines, by virtue of the powers vested upon me by Section 18, Article 7 of the Philippine Constitution which states that: 'The President...whenever it becomes necessary,...may call out (the) armed forces to prevent or suppress...rebellion...,' and in my capacity as their Commander-in-Chief, do hereby command the Armed Forces of the Philippines, to maintain law and order throughout the Philippines, prevent or suppress all forms of lawless violence as well as any act of insurrection or rebellion and to enforce obedience to all the laws and to all decrees, orders and regulations promulgated by me personally or upon my direction; and as provided in Section 17, Article 12 of the Constitution do hereby declare a State of National Emergency."

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authorize the President to take over privately-owned public utility or business affected with public interest without prior legislation.

"G.O. No.5 is CONSTITUTIONAL since it provides a standard by which the AFP and the PNP should implement PP1017, i.e., whatever is 'necessary and appropriate actions and measures to suppress and prevent acts of lawless violence.' Considering that 'acts of terrorism' have not yet been defined and made punishable by the Legislature, such portion of G.O. No.5 is declared UNCONSTITUTIONAL.")

She declared the bases of her proclamation: a conspiracy between the political opposition with authoritarians of the extreme Left represented by the NDF-CPP-NPA and the extreme Right, represented by military adventurists; the reckless magnification by certain segments of the national media of the claims of these elements; and the clear and present threat to bring down the democratic Philippine State. The detailed accounts of what happened immediately thereafter are widely available and relatively uncontested.[5] Because of the issuance of PP1017 and GO5, petitions were filed by various groups challenging the constitutionality of the presidential orders.

In its decision, the Court held PP1017 "constitutional insofar as it constitutes a call by the President for the AFP to prevent or suppress lawless violence."[6] Except for the phrase "acts of terrorism," GO5 was declared valid as an order issued by the President acting as Commander-in-Chief addressed to subalterns in the AFP to carry out the provisions of PP1017. At the same time, it declared the arrest of petitioners Randy David and Ronald Llamas; the dispersal of the rallies and warrantless arrest of KMU and NAFLU-KMU members; the imposition of standards on media or any prior restraint on the press; and the warrantless search of the *Tribune* offices "not authorized by the Constitution, the law and jurisprudence." There was also a hint of liability: "[o]ther than this declaration of invalidity, this Court cannot impose any civil, criminal or administration sanctions on the individual police officers concerned. They have not been individually identified and given their day in court. The civil complaints or causes of action and/or relevant criminal Informations have not been presented before the Court. Elementary due process bars this Court from making any specific pronouncement of civil, criminal or administrative liabilities."

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[5]For purposes of this Article, the important facts are those that led to the filing of the petitions—most notably the arrest of Randy David and the search on the *Tribune*—and which acts the Court declared unconstitutional.

[6]The Court declared the following "extraneous provisions giving the President express or implied powers" unconstitutional: (1) to issue decrees; (2) to direct the AFP to enforce obedience to all laws even those not related to lawless violence as well as decrees promulgated by the President; and (3) to impose standards on media or any form of prior restraint on the press.

Questioning Foundations. The decision of the Court rests on a division and, therefore, an implied distinction, between the validity of texts standing alone (on-its-face challenge) and the validity of acts that seek their ultimate authority from the text (as-applied challenge). The foundational question, of course, is whether this division applies at all. This question needs to be asked not only because this doctrinal twin of on-its-face and as-applied challenges is not of our own making (it is, as many other doctrines of constitutional law that Philippine courts employ, an import) but, more importantly, because doctrines do not come out of the judicial toolbox ready for use in every apparently similar occasion. Doctrine is a set of practices that arise out of a unique set of facts; it has an origin endemic to a political culture. By character, it is always situated temporally and spatially. Thus, asking why local courts should bother with foreign doctrinal elements is always a legitimate question, not simply as a matter of comparative law, but also as a matter of practicality. This is not a pitch for ethnocentrism, but a highlighting of a post-colonial concern towards a less-than-conscious method of mimicry. How this doctrinal division in the United States is situated politically and historically is thus a relevant source of insight into whether that same separation should have been used by the court in its analysis of PP1017.

The Overbreadth Doctrine.[7] The rule is that a government purpose to control or prevent activities constitutionally subject to regulation may not be achieved by unnecessarily broad means that sweep into and thereby invade the area of protected freedoms.[8] This follows from the principle

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[7]For a Philippine application of the overbreadth and vagueness doctrine, *See* Estrada v. Sandiganbayan, 369 SCRA 394 (2001); Resolution on Motion for Reconsideration, 29 January 2002, Mendoza, *J.*, concurring in the denial of the motion for reconsideration.

[8]NAACP v. Alabama, 357 U.S. 449 (1958). It has been suggested that the doctrine applies in three fundamental circumstances: (1) when "the governmental interest sought to be implemented is too insubstantial or at least insufficient in relation to the inhibitory effect on first amendment freedoms"; (2) when the means employed bear little relation to the asserted governmental interest; and (3) when the means chosen by the legislature do in fact relate to a substantial governmental interest, but that interest could be achieved by a "less drastic means"—that is, a method less invasive of free speech interests. *See* Martin H. Redish, *The Warren Court, the Burger Court and the First Amendment Overbreadth Doctrine*, 78 Nw. U. L. Rev. 1031 [1983]), fn 28.

that the Constitution requires that the conflict between congressional power and individual rights be accommodated by legislation drawn more narrowly to avoid the conflict.[9]

The doctrine of overbreadth is a tool that raises the bar for legislation that affects speech; and when the Court holds a statute overbroad, it in effect declares that such law cannot be enforced until narrowly drawn legislation is enacted. Rather than excise particular invalid applications one by one as they arise, the Court has employed the first amendment overbreadth doctrine to short cut the process by invalidating the statute and putting it up to the legislature for redrafting.[10] The analysis ordinarily compares the statutory line defining burdened and unburdened conduct with the judicial line specifying activities protected and unprotected by the Free Speech Clause; if the statutory line includes conduct which the judicial line protects, the statute is overbroad and becomes eligible for invalidation on that ground.[11]

The doctrine rests on the rationale that the transcendent value to all society of constitutionally protected expression justifies attacks on overly broad statutes without requiring that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.[12] This rationale produces its

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Richard Fallon, Jr. presents an alternative formulation, identifying four ways in which legislatures may fail in their effort to design statutes that are not overbroad: (1) The first involves efforts to regulate, burden, or prohibit speech or expressive activity, identified on the basis of content, in order to further some interest that the state believes to be compelling; (2) The second encompasses statutes that purport to regulate a category of speech based on the belief that the category is constitutionally unprotected; (3) The third embraces statutes that aim to promote state interests unrelated to the content of speech or expressive activity and that infringe speech interests only incidentally; (4) The fourth aims to license or regulate speech in order to protect government interests—such as the interest in an orderly flow of traffic, or in maintaining quiet in residential neighborhoods during the nighttimes—that are not related to the speech's content. *See* Richard Fallon, Jr., *Making Sense of Overbreadth*, 100 Yale L.J. 853, 866 (1991).

[9]United States v. Robel, 389 U.S. 258 (1967).

[10]Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970).

[11]LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, §12-27 at 1022 (2d Ed. 1988).

[12]Dombrowski v. Pfister, 380 U.S. 479 (1965).

distinctive features: *first,* overbreadth analysis does not question whether the challenger's speech is constitutionally protected, and allows for the nullification of the statute on its face because it might be applied to others not before the Court whose activities are constitutionally protected; *second,* overbreadth is an exception to the usual rules of standing, thereby allowing challengers to a law to raise the rights of third parties.[13] Overbreadth, quite explicitly, displaces as-applied adjudication and licenses the strategic use of facial invalidation because the as-applied method does not adequately protect constitutional rights.[14]

The dynamo of the overbreadth doctrine is the concern for badly drawn statute's "chilling effects" on third parties not courageous enough to bring suit.[15] The Court assumes that an overbroad law's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.[16] The remedy of facial invalidation therefore rests on the doctrine's prophylactic character.[17]

The Void-For-Vagueness Doctrine. The vagueness doctrine is the operational arm of legality, and requires that crimes be legislatively defined in advance and in a meaningfully precise manner—or at least in a manner that isn't meaninglessly indefinite.[18] A statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates

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[13]KATHLEEN SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 1334 (15th ed. Foundation Press 2004) [hereinafter LAW]. Outside of the First Amendment context, the problem of when someone should be able to argue that a statute is "facially invalid" because it reaches constitutionally protected conduct that might be engaged in by parties not before the court, typically is treated as one of "third-party standing" or "jus tertii." The general rule is clear: absent a relationship that makes the actual enjoyment of rights by a third party dependent on a challenger's capacity to assert those rights, one party may not escape the application of a statute on the ground that it would be unconstitutional as applied to someone else. See Fallon, *supra* note 8.

[14]David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. Rev. 1333 (2005).

[15]Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 846 (1970) [hereinafter Overbreadth]; *See* LAW, *supra* note 13 at 1335.

[16]LAW, *supra* note 13 at 1355.

[17]*See* New York v. Ferber, 458 U.S.747, 768-769 (1982).

[18]John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189 (1985).

the first essential requisite of due process.[19] The doctrine of unconstitutional indefiniteness is a judicial instrument for the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms.[20]

An overbreadth challenge should not be confused with one based on vagueness: an unconstitutionally vague statute, like an overbroad one, risks creating a chilling effect upon protected speech and produces rulings of facial invalidity; but a statute can be quite specific, i.e., *not* "vague"—and yet be overbroad (consider a law forbidding "the display of a nude human body on a motion pictures screen"), and a statute can also be vague but not overbroad (consider a law forbidding "all unprotected speech").[21] Nonetheless, whenever an overbroad law covering first amendment activities and formless standards of first amendment privilege are conjoined, the result is an operative, injurious legal reality suffering due process vagueness.[22] Thus, the vices of facially vague statutes—lack of fair warning to actors; lack of adequate standards to guide enforcement agents, fact finders, and reviewing courts—are precisely the defects of overbroad statutes.[23]

The Politics of Doctrine. The emergence of these doctrines, as well as their bite as judicial tools, has inevitably been shaped by the politics of judges. It is no secret that the Warren Court exhibited striking receptiveness to overbreadth challenges that impinged on speech and associational interests.[24] As one familiar with that Court would expect, the doctrines were a perfect and convenient instrument for promoting its progressive judicial philosophy. One distinctive feature of the Warren Court's liberal bent was an aversion to a "balancing" process in the adjudication of first amendment rights.[25] Much of the perceived difficulty

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[19]Connally v. General Construction Co., 269 U.S. 385, 391 (1926).
[20]Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960).
[21]LAW, *supra* note 13 at 1347.
[22]Overbreadth, *supra* note 15 at 873.
[23]*Id.* at 74.
[24]*See* Fallon, Redish *supra* note 8.
[25]Redish, *supra* note 8 at 1042.

with ad hoc balancing was its total absence of guidance, its substantial unpredictability, and a resultant gaping hole in the protective wall of free speech, and protectionists have naturally sought alternatives designed to provide significant guidance and predictability in future cases, while simultaneously leaving as little room as possible for case-by-case manipulability.[26]

The overbreadth doctrine, as re-fashioned by the Warren Court, responded to these concerns in several ways: *First*, a facial challenge allowed the Court to hypothesize violations of fundamental rights.[27] Because the challenge allows standing *jus tertii*, both the petitioner and the Court are afforded much leeway in speculating what kinds of impermissible violations the statute might run into, a situation favorable for progressive policy-making, at least at that time. The overbreadth doctrine was an opportunity to protect and expand the freedoms the Warren Court sought to privilege at an across-the-board level. *Second*, apart from protecting the rights of so-called innocent third parties whose exercise of rights might be chilled by an overbroad statute, the aggressive application of the doctrine created a sort of reverse chill in the sense that it sent a strong message to legislatures that they better engage in speech-protective line-drawing.

In theory, legislatures are as much guardians of free speech rights as are courts.[28] This theory is coerced into practice by the overbreadth doctrine because it places nullification of the statute as a sanction for legislative imprecision. The doctrine is a license for the Court to whip legislatures into following their conception of free speech. The insinuation that the Court, with its use of the doctrine, was acting like a "roving commission" was therefore not entirely untrue. *Third*, as a consequence of the doctrine's ability to haul in hypothetical parties, the Court was eventually able to bypass the "case or controversy" requirement,

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[26] *Ibid.*

[27] As pointed out by Justice Mendoza in *Estrada*, 'The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that the protected speech of others may be deterred and perceived grievances left to fester because of possible inhibitory effects of overly broad statutes." *See* Estrada v. Sandiganbayan, *supra* note 8 at 465.

[28] Overbreadth, *supra* note 15 at 844.

traditionally the doctrinal stronghold of judicial restraint advocates. The use of the doctrine did not sit well with the promotion of Bickel's "passive virtues."[29] Through overbreadth analysis, a court is able to obviate tedious case-by-case adjudication; instead it is empowered to map out large areas of contested constitutional space with the expedient of a single case.

The doctrinal debate was, and still is, part of the larger political debate over the role of the U.S. Supreme Court in enforcing its views on the Constitution and its relationship with both federal and state legislatures. Critics of the Warren Court faulted it for its apparent results-oriented approach and its willingness to depart from settled doctrine as well as create new ones in order to advance its constitutional politics. Process theorists, for example, saw in the Warren Court an inability to promote the ideal of "reasoned elaboration" in decision-making because of its liberal interpretation of the requirements of standing and the "case or controversy" requirements.[30] To them, the doctrines of overbreadth and vagueness were the exemplar of the Warren Court's attitude towards relaxing both jurisdictional and prudential requirements to constitutional adjudication. John Hart Ely, on the other hand, taking his cue from the famous Carolene Products Footnote 4,[31] presents a process-based theory that justifies the decisions of the Warren Court on the ground that they are

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[29]ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH, 111-198 (Yale University Press 1962).

[30]NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (Clarendon Press 1995).

[31]*See* United States v. Carolene Products Co., 304 U.S. 144 (1938). ("There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the 14th.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the 14th Amendment than are most other types of legislation.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities; *whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching juridical inquiry.*") (Citations omitted, italics supplied).

"participation oriented, representation reinforcing." Thus, the role of the Court was to act as a referee in policing the process of representation.[32]

Collapsing the Doctrinal Separation. There are several points to be taken from this discussion that have important bearing on the Supreme Court's analysis of PP1017, and which I think are points of departure from the traditional American doctrinal analysis.

It is quite apparent that both doctrines of overbreadth and vagueness arise out of problems of legislative, *not executive*, line-drawing. The focus is on the need for precision in drafting to avoid conflict with first amendment rights.[33] From a separation of powers standpoint, the doctrines pit the judiciary against the legislature, with the executive department only collaterally involved. The constitutional imperative against laws abridging speech is a restraint on legislative, not executive, action.[34] PP1017, on the other hand, is the President's show all the way; and while she is also held to constitutional standards when issuing proclamations and regulations, those standards stem from her authority not as a legislator, which she is not, but as an executor. This conceptual difference impacts on the kind of analysis the Court should have employed for reasons I will readily make more apparent.

As a structural matter, policies that affect the exercise of speech are for the Congress to expound on: the laws on inciting to sedition, libel, slander, attempted bribery, BP 880,[35] etc. are legislative utterances that

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[32]JOHN HART ELY, DEMOCRACY AND DISTRUST 73-74 (Harvard University Press 1980). ("Many of the Warren Court's most controversial decisions concerned criminal procedure or other questions of what judicial or administrative process is due before serious consequences may be visited upon individuals—process oriented decisions in the most ordinary sense. But a concern with process in a broader sense—with the process by which the laws that govern society are made—animated its other decisions are well.... [There] were certainly interventionist decisions, but the interventionism was fueled not by a desire on the part of the Court to vindicate particular substantive values it had determined were important or fundamental, but rather by a desire to ensure that the political process—which is where such value *are* properly identified, weighted, and accommodated—was open to those of all viewpoints on things approaching an equal basis.").

[33]Overbreadth, *supra* note 15 at 845.

[34]*See* AKHIL REED AMAR, THE BILL OF RIGHTS (Yale University Press 1998).

[35]Batas Pambansa Blg. 880 (Public Assembly Act).

impact on speech rights. Statutory enactments that burden speech take mostly the form of categorizations—you can criticize the government, but not advocate action to bring it down; you can trash talk your neighbors, but you cannot utter false words against them. Anyone who wishes to challenge the extent of legislative line-drawing between permissible and impermissible speech is entitled to seek redress from the courts, their power of judicial review being the power to trump legislative policies in the name of the Constitution.

The participation of the executive department in this kind of scrutiny is minimal. This is so because the doctrines are motivated by concern not over the President misusing her authority but regarding police officers exercising near-unlimited discretion to interpret the statute they are required merely to implement. The glitch is about the quality of delegated authority. Thus, for example, a court might be concerned about police officers arresting an atheist pamphleteer for violation of Arts. 132 (Interruption of Religious Worship)[36] and 133 (Offending the Religious Feelings)[37] of the Revised Penal Code because the text of the statute seems to give the authorities a wide range of interpretive space in determining whether or not to arrest the pamphleteer whose speech is creating a scene in front of a church.

High-level executive officials, much less the President, are not really in the business of issuing instructions to police officers on how to implement statutes that burden speech. In the case of the President, her constitutional duty is to take care that the laws be properly enforced.[38] The marginal role of the executive department, especially the President, is

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[36] ("The penalty of *prision correccional* in its minimum period shall be imposed upon any public officer or employee who shall prevent or disturb the ceremonies or manifestations of any religion. If the crime shall have been committed with violence or threats, the penalty shall be *prision correccional* in its medium and maximum periods.")

[37]("The penalty of *arresto mayor* in its maximum period to *prision correccional* in its minimum period shall be imposed upon anyone who, in a place devoted to religious worship or during the celebration of any religious ceremony shall performs acts notoriously offensive to the feelings of the faithful.")

[38]CONST. art.VII, sec. 17.

evinced by the fact that overbreadth and vagueness analysis center on the danger of low-level employees—the police on the ground—exercising authority not conferred by the statute. Thus, instead of penalizing individual police officers for abuse in the enforcement of overbroad or indefinite statutes, which is burdensome as it requires case-by-case analysis of instances of malenforcement, the doctrines seek to penalize the drafters of the statute. In the language of law and economics, facial challenges provide an *ex ante* remedy while as-applied challenges merely provide an *ex post* remedy. A successful facial challenge nullifies the entire statute in the name of the rights of countless *potential* victims while a successful as-applied challenge is the vindication of the right of a specific plaintiff and the sanctioning of the previous act of an identifiable culprit.

This series of insights explodes the validity of either overbreadth or vagueness analysis in scrutinizing an executive utterance such as PP1017. As is obvious by now, the doctrines rest on the separability of legislative intention and low-level execution by the police. They are meant to ensure that instructions issued by the legislature to implementing agencies are clear enough; and because the legislature has no ability to enforce, the doctrines require narrow tailoring in order that the ultimate enforcers may not misconstrue. Thus, facial invalidation is a slap on the legislature, while as-applied invalidation is a slap on some arresting officer. In both instances, high-level executive officials are invisible to the reach of the doctrines.

Lost in Doctrinal Translation. What I've shown is that the doctrines of overbreadth and vagueness, as they are applied by American courts, are not suited for the kind of problems presented by PP1017, the most significant of which is the fact that, in this case, all action was confined within the Executive Department, and, significantly, at high levels. The consequence of this is that the standard policy/doctrinal justifications for engaging in traditional facial and as-applied analysis are thrown out of the window.

The mark of distinction is this: in PP1017, there is no division between the promulgator and the implementer, the President being the issuing authority and the commander in chief/chief executive. The

problem with an overbroad or vague statute is not the fact of overbreadth or vagueness per se, but that the legislature does not have direct and operational control over law enforcement officers. What this lack of control entails is not only that the instructions of the legislature may be misconstrued, but also that the misconstruction would go unremedied while, in the meantime, constitutional violations continue to be multiplied by its chilling effects.

Because the legislature does not engage in explaining its utterances in the face of misreading by police officers, the only remedy left is remedial legislation. This, however, presents an institutional problem. Legislation takes a lot of time and this lag between the initial, overbroad/vague legislation and the remedial, narrowly-tailored legislation is most damaging to the exercise of the right of expression. Facial challenges do away with this lag for two reasons: first, a challenger is immediately able to inform the Court of the possible misapplication of the defective statute, which publicizes, and therefore puts on notice (and in some instances chills), the enforcers; second, a successful facial challenge immediately allays the unconstitutional effects of the statute, thus remedying the problem by placing the public and the legislature in a situation prior to the enactment of the defective statute.

This underlying problem is not present in the challenge to PP1017, which is solely the President's act; it is not simply a notice, it is her call to arms. Her calling out of the armed forces and the police to suppress insurrection, lawless violence, rebellion, etc. is a command from an authority with direct and operational control. This situation is entirely distinct from the kind of relation the legislature has with law enforcement authorities and the military. As chief executive and commander in chief, the President has the institutional capability, lacking in the legislature, to control the meaning of her utterance through the manner in which it is enforced. For one, she can configure and re-configure her Proclamations any time she wants; for another, she could issue supplemental orders to clarify and therefore avoid misconstruction and misapplication. Of course, she is most probably aware of her constitutional authority to remove or suspend those who vary her meaning through malenforcement.

This unity of promulgation and execution in the case of PP1017 is a unique instance that renders the doctrinal separation of on-its-face and as-applied challenges wholly inappropriate. What PP1017 presented was an opportunity for the Court to collapse the doctrinal separation in view of this unity. The factual environment surrounding PP1017 is such that the Court could have validly declared, minus the danger of engaging in oxymoron, that the PP1017 was facially null *because* it was unconstitutionally applied, or that it was void on its face, as applied.

This brings me to what I think was the important constitutional problem that PP1017 presented—executive legislation. What the President did in PP1017 was not simply to declare a state of facts or a national emergency, but to amend *existing* legislative policies, supplanting them with measures that even the legislature could not have validly enacted: *she* nullified BP880 with an across-the-board "no rally policy," muzzled the press with on-premise surveillance and warnings of revocation of their franchise, and arrested peaceful rallyists.[39] These are acts that *no* President under the present Constitution, and even under a declared state of martial law, could have validly done.[40] The President's assumption of legislative authority already presented a separation of powers problem. This, however, is overshadowed by an even larger constitutional problem: what the President actually did in the one week that PP1017 was operative was to act as a dictator by merging the powers of government in her office. This is why PP1017 was a palpable violation of the Constitution. We are all agreed, citizens and scholars, that our Constitution leaves no space for authoritarianism.

TWO. THE TYRANNY OF TEXT

The central challenge of interpretation concerns the status of text—the weight judges should accord to it—in adjudicating conflicting

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[39]The knee-jerk objection would probably be that the use of the word "she" is problematic considering that it wasn't the President herself (as in "physically") who performed these acts. I shall deal with this objection later, essentially arguing that because the President had constitutional control over the police and the military, their acts were her acts.

[40]CONST. art.VII, sec. 18.

claims of right. It is both a question of value and of methodology. As a question of value, it poses the problem of whether texts possess certain qualities that may be extracted by the judge; as a question of methodology, it raises the correlative issue of how value, intrinsic or not, may be associated with text. Combined, both questions present the problematics of meaning in law.

This concern over meaning may be located in the debate between textualists and intentionalists. Textualists generally find meaning in texts and argue that meaning is possible through parsing;[41] intentionalists, on the other hand, locate meaning in the author and argue that meaning is possible only when text is associated with authorial intent. It is noteworthy that this debate is not solely about methodology but actually goes to the core of legitimate decision-making. U.S. Supreme Court Justice Antonin Scalia frames the debate as a rule of law issue: that it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated; that it is the law that governs, not the intent of the lawgiver; and that men may intend what they will, but it is only the laws that they enact which bind us.[42] What is actually posited is law, and this material may be divorced from the intention of the author/s.

Intentionalists counter that text alone, no matter how long and dense, can never yield meaning, whereas intention, whether assumed, discovered, or revealed, can always alter a meaning that had previously been in place; not because what had been said has been trumped by what was intended, but because one understanding of what was intended has been dislodged by another.[43] The very idea of a clear text (a text written in such

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[41]Walter Sinnott-Armstrong, *Word-Meaning in Legal Interpretation*, 42 San Diego L. Rev. 465 (2005). ("Judicial textualists claim that the common meanings of words in laws should guide interpretations of those laws, whereas judicial intentionalists claim that such interpretations should be guided by the intentions of legislators [or of earlier judges when precedents are interpreted].")

[42]ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, 17 (1997).

[43]Stanley Fish, *There is No Textualist Position*, 42 San Diego L. Rev 629 (2005). ("The instant I try to *construe* the words, the instant that I hear the sounds *as* words, the instant I treat them as language,

a way that it is not likely to be misunderstood), or rather the very idea of the difference between a clear and an unclear text, relies on the presumption that the object of interpretation (what the interpreter is trying to figure out) is the author's intention.[44]

The importance of this discourse on statutory and constitutional interpretation among theorists is that it is founded on the difficulty of locating meaning in a text that is the product of a group effort over a considerable length of time. Statutes, both in the Philippines and the United States, are enacted after a protracted process that involves the filing of bills in both chambers of the legislature, public hearings and debates on the bills, voting by different members with various understandings and intentions, and consolidation of bills through compromises between the Senate and the House.[45] The text of the Constitution undergoes essentially the same process, with the additional complication that it is ratified by a multitude of voters who themselves are diversely motivated. The mass of questions that touch on meaning is endless—is there such a thing as "plain meaning"? Are legislative records relevant? How does one deal with changes introduced by the Bicameral Conference Committee? Does historical context matter? Can groups have a singular intent? Is it possible to assign intent to a ratifying community? Are judges bound by one, and only one, method of interpretation?

Having introduced the interpretive debate between textualists and intentionalists, we must now ask two critical questions: (1) what is the relevance of this debate insofar as executive legislation is concerned? and (2) how does this debate inform our need to adopt a theory of meaning suited for the rule of law concern of attributing to political actors the acts for which they are (or should be) responsible?

I will have put in place some purpose—to give directions, to give orders, to urge haste, to urge outlaw behavior—in the light of which those sounds become words and acquire sense.")

[44]Knapp & Michaels, *Not a Matter of Interpretation*, 42 San Diego L. Rev. 651, 654 (2005).

[45]*See* Tolentino v. Secretary of Finance, 235 SCRA 630 (1994); Resolution on the Motion for Reconsideration, 249 SCRA 628 (1995).

The Solitary Author. Unlike statutes and the Constitution, PP1017 is the work of a single author, the President herself. It doesn't matter who drafted it (whether she herself, the Presidential Legal Counsel, some members of the cabinet, or any other combination thereof) in much the same way that it doesn't matter whether statutes are written by lobbyists or decisions of the Supreme Court are written by law clerks; what matters is the attribution of the text to an identifiable author-*ity*. While it is possible that the text of PP1017 may have been the result of a compromise among the different ideas thrown in by those who participated in its drafting, this kind of settlement among different writers is distinct from compromises engaged in by various participants in the drafting of a statute; what distinguishes the latter from the former is the multiplicity of authoritative actors. The individual members of Congress have constitutional authority to have their ideas considered in the legislative process, while anyone that the President asks to participate in drafting any proclamation or regulation is present not as an authoritative actor, but as a subaltern.

This feature of solitary authorship renders the difficulty that lies beneath the debate between intentionalists and textualists—the concern over multiple authorship—less problematic. For intentionalists, the multiplicity of authorship is a problem that makes locating intention at times difficult, but not necessarily impossible; for textualists, this problem is insurmountable, requiring reliance on what was written rather than on what was intended.

That PP1017 is attributable to a single author does not, however, entirely dissolve the conflict between intent and text, for a single author may still fail to textualize what she intended. And yet, the fact of single authorship substantially reduces the difficulty of discerning intent; whereas a statute's locus of intent is very difficult to locate (to say that it is the intent of the legislature, composed of hundreds of members, that prevails is to attribute a single text to as many of its members and therefore say nothing at all), PP1017's locus of intent can easily be identified—the President herself. In any case, the interpretive issue that should have been determinative of the constitutional argument in *David* is not the difficulty—paradigmatic in statutory construction—of linking text with

intention[46] but of the manipulation of text to suppress an otherwise illicit intention, or the masking with legal text of an intention already bare to public sight.

The Privileging of Text. According to the Court, "[a] plain reading of PP1017 shows that it is not primarily directed to speech or even speech-related conduct. It is actually a call upon the AFP to prevent or suppress lawless violence." In another segment of the decision, it added "there is nothing in PP1017 allowing the police, expressly, or impliedly, to conduct illegal arrest, search or violate the citizen's constitutional rights."

This strategy of legal interpretation, this mode of argumentation, can be described as "intention free textualism."[47] The form of textualism employed by the Court makes several important correlated assumptions: *first,* that texts have inherent meaning; *second,* because texts have inherent meaning, intentions no longer matter; *third,* because texts have inherent meaning, interpretation should be confined to the four corners of the text.

Textualism, as an ideology of reading applied to PP1017, made the Court conclude that there is nothing in its text that allowed the constitutional violations that *actually* occurred (indeed, the Court declared acts carried out in PP1017's name unconstitutional), despite the vulgarity of the contradictory context that surrounded it.

Of course, nothing even remotely close to a command to violate the Constitution will be found in PP1017. To look for something in the text that says "the police may arrest anyone who exercises her freedom of speech, and that they may invade the premises of publications critical to the

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[46]For example, in *Mercado v. Manzano,* [307 SCRA 630 (1999)], the Court construed §40 of the Local Government Code which declares as "disqualified from running for any elective local position:...(d) Those with dual citizenship" as not *really* referring to dual citizenship *per se* but to dual allegiance. The effect, of course, was the judicial deletion of what textualists would call the plain meaning of the text to favor the intention of not even the legislators but of some members of the Constitutional Commission of 1986.

[47]*See* Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation is an Impossibility,* 41 San Diego L. Rev. 967 (2004).

government" is to search for a right of abortion in the Ten Commandments. The Court was looking for something that could never be found in the text of PP1017—a confession from the President.

The tyranny of text is the formalist search for understanding in material marks—texts—that have no presence in the absence of context, of the conditions that make them comprehensible and allow for the emergence of meaning. Meaning itself cannot rise out from the text; interpretation in a vacuum is a false search for meaning. The text, in short, has no independence; it is an entirely derivative entity—something else (an animating intention) must be in place before it can emerge, *as* text—and as a derivative entity it cannot be said to be the source or location of meaning.[48] To conflate text with meaning is to accord it a status that excludes other relevant tools of interpretation that make it possible for decision makers to appreciate the complexity of concrete social reality.

The Triumvirate of Text, Author, Intent. In attempting to demonstrate the tenuous link between text and meaning, Wittgenstein asked, "Can I say 'bububu' and mean 'If it doesn't rain I shall go for a walk?"[49] The answer, an affirmative, is meant to show that words mean what their authors intend them. Similarly, one could very well ask, did the President, in issuing PP1017, utter "bububu" as a command for police and the military to violate the Constitution? Yes.

The Court held: "On the basis of the relevant and uncontested facts narrated earlier, it is also pristine clear that (1) the warrantless arrest of petitioners Randolf S. David and Ronald Llamas; (2) the dispersal of the rallies and warrantless arrest of the KMU and NAFLU-KMU members; (3) the imposition of standards on media or any prior restraint on the press; and (4) the warrantless search of the *Tribune* offices and the whimsical seizures of some articles for publication and other materials, are not authorized by the Constitution, the law and jurisprudence. Not even by the

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[48]Fish, *supra* note 43

[49]LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, P.18.

valid provisions of PP1017 and G.O. No.5." This conclusion is possible only from an intention free textualist position.

The constitutional question is one of attribution—who is responsible for this constitutional violence? The Court points to the police officers, and separates the acts of these policemen from the innocuous language of the President's orders: "Now, may this Court adjudge a law or ordinance unconstitutional on the ground that its implementer committed illegal acts? The answer is no. The criterion by which the validity of the statute or ordinance is to be measured is the essential basis for the exercise of the power, and not a mere incidental result arising from its exertion. This is logical. Just imagine the absurdity of situations when laws (sic) maybe declared unconstitutional just because the officers implementing them have acted arbitrarily. If this were so, judging from the blunders committed by policemen in the cases passed upon by the Court, majority of the provisions of the Revised Penal Code would have been declared unconstitutional a long time ago."

The reason why laws, in general, may not be declared unconstitutional on the basis of an implementer's misdeed is that the legislature cannot be faulted for the blunders of law enforcement agencies. Obviously, you cannot declare Art. 293 (Robbery) of the Revised Penal Code unconstitutional if policemen turn out to be robbers themselves. I sincerely doubt whether a successful constitutional challenge to the Anti-Rape Statute may be made with the argument that the accused was arrested without warrant and without probable cause for a warrantless arrest. Even in those instances where a *bona fide* implementation of a statute results in a disparity between the intention of the legislature and the meaning imputed by law enforcement agencies, the result will not be a nullification of the statute. Thus, a prosecution under the Revised Securities Act may fail because the prosecutors honestly believed that its provisions made illegal the sale of a certain block of shares when in fact it does not, but it has no bearing on the constitutionality of the statute. In such a case, the role of the court is to declare that the meaning intended by the legislature prevails over the construction of the executive. It is only fair that the error of the

latter should not be attributed to the former. But this is the extent to which this logic may carry us.

The matter is entirely different when the question of meaning is confined in a single high office of the government. Here we are no longer dealing with the possibility of cross-purposes between constitutionally independent promulgators and executors, either of which cannot command the other to follow. The structure of our constitutional government limits the power of the legislature to compel the executive department to follow its intended meaning. However, in the case of PP1017, the President, as commander in chief and chief executive, had full control of her own text, that is, she had the constitutional authority to author—enforce—what she had intended and carry out, as she did, her purpose.

From another perspective, it could be said that the search for legislative meaning is complicated by the Congress's lack of constitutional authority to implement its own orders. This means that the meaning of congressional utterance is divorced from executive action, with the understandable, if not logical, result that the (executive) implementation of a statute cannot be a source of legislative meaning. This search for meaning is drastically altered in the case of a presidential edict such as PP1017—the problem of conflicts among what was promulgated, what was intended, and what was enforced is dissolved because the author's intention can be gleaned from her actions. This insight solves the problem of attribution.

The Face of PP1017. Between Saruman and the Fighting Uruk-Hai, readers of *The Lord of the Rings* would probably attribute to the White Wizard blame for the scouring of the Shire. After all, he effected the order to destroy to creatures that were under his control. This relation of master and slave is instructive because it provides the doctrinal analogue that resolves the problem of attribution I earlier adverted to and clarifies the question of legal meaning central to the language of PP1017.

The text of PP1017 is not simply its numerous *whereas* clauses that sought to justify the proclamation; neither is it the operative clause declarative of the national emergency—it is the acts of the police in

arresting Prof. David and other rallyists whose aim was to express their outrage at how their country was being managed; it is the invasion of the *Tribune* by the police without proper process; it is the public threat of the National Telecommunications Commission to go after "irresponsible" media outfits; it is Mike Defensor proclaiming warrantless arrests to be ok. The face of PP1017 assumes meaning only through the deeds that give it flesh. It is the unity of the text and action that infuses meaning into PP1017. Without these signifying acts, PP1017 assumes no properties from which meaning may emerge.

To locate ultimate responsibility in the police is to blame the slave for the commands of the master. The President has constitutional control over them; she can commandeer their acts and impose her will upon them—she can author their deeds. PP1017 is her speech, and GO5 her marching orders. Together, they are her voice of command to the police who have no choice but to obey, for they are but instruments. It is no metaphor to say that what the President intended PP1017 to mean is what her inferiors simply acted out. The police are subalterns who cannot speak—they are mere conduits, instruments of action that effected the President's desire. They are her Fighting Uruk-Hai.

For the Court to limit responsibility for the constitutional violence it acknowledged is to privilege the text over the facticity of action and hold them separate and unrelated. But they are not. The police have relative institutional independence when they are implementing the commands of the legislature; they do not when they are implementing the command of the President; in fact, they are institutionally dependent on her. They have wider interpretive space when they are implementing the law than when they are following orders connected through a chain of command.

It also makes no sense to argue that the President cannot control *everything* the police do. Surely, she cannot control the minutiae of acts her subalterns could perform. Saruman, after all, didn't bother whether his minions used swords or arrows. But what matters is the proof of the pudding. If the instances of constitutional violence the Court enumerated were few and far between, unpublicized and uncontroversial, then

attribution may be turned away from her and towards rogue elements of the police. She may well argue that these things were neither visible to her radar or nor deserving of her personal attention. But no claim to sanity could be made by anyone who argues that the actions of the police related to PP1017 were any of these things. Even those who might doubt that the President was responsible by commission (that she virtually, if not actually, ordered these constitutional violations) cannot be as skeptical that she was responsible by omission.

As the person responsible for issuing PP1017 and GO5, and as chief executive, she had both the constitutional duty and the authority to control her meaning through the acts of her subalterns. The essence of presidential authority is the ability to manipulate the symbols that those under her communicate. If public accountability means anything, it is that the President has to assume responsibility for the kinds of meaning that emerge not only from the *text* of her speech and conduct but also for her subalterns'.

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