

DEALING WITH MUTANT JUDICIAL POWER: THE SUPREME COURT AND ITS POLITICAL JURISDICTION*

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INTRODUCTION

Over twenty years ago, the 1987 Constitution textualized a mutant strain of judicial power. Instead of allowing judges to exercise judicial review over policy – political – issues one case at a time, when and as they see fit, as has been done for nearly a century in this jurisdiction,¹ the Constitution tasked them with the “duty... to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.”² By giving electorally unaccountable judges license, written in constitutional ink, to enter the political thicket as a matter of *obligation*, the Constitution, wittingly or not, redefined Philippine constitutional democracy as we know it.³

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¹ As in all matters on constitutionalism, the institution of judicial review is an American colonial legacy which American and Filipino judges exercised as a matter of course [see VICENTE V. MENDOZA, JUDICIAL REVIEW OF CONSTITUTIONAL QUESTIONS: CASES AND MATERIALS (2005) on the history of Philippine judicial review]. In contrast, federal judges in the United States had to initially assert this power which was not uncontested [see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L.REV. 333 (1998)].

² CONST. art. VIII, § 1, ¶ 2 which provides: “Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.” The first clause of this provision, by itself, already departs from the formulation in the 1935 and 1973 Constitutions which assumed the power sub-silencio and textualized only its situs in “one Supreme Court and in such inferior courts as may be established by law.” CONST. art. VIII, § 1, ¶ 1 retains this text.

³ CONST. art. VIII, § 1, ¶ 2 is part of the bundle of amendments wrought by the 1987 Constitution on the judicial branch including the lowering to simple majority of the vote requirement to decide the constitutionality of laws [§ 4(2)]; transferring the power to nominate members of the judiciary to an independent constitutional body (§ 8); assuring the judiciary of fiscal autonomy (§ 3); and granting to the Supreme Court the power to promulgate rules concerning the protection and enforcement of constitutional rights [§ 5(5)]. Commenting on the significance of the lowered vote requirement (in conjunction with § 1, ¶ 2), Dean Pacifico Agabin had opined early on: “The political implications of this provision are loud and clear: the Supreme Court has been strengthened as a check on the executive and legislative powers by requiring a simple majority vote to declare a law unconstitutional. Our experience under martial law has swung the pendulum of judicial power to the other extreme where the Supreme Court can now sit as “superlegislature” and

What is the background and conceptual parameters in *exercising* this power (i.e. taking cognizance or not of a political question)? What is the proper interpretive approach in *applying* it (i.e. granting or denying relief to the petitioner)? How have judges, represented by those who comprise the highest court, wielded this system-altering power both in its *exercise* (i.e., taking cognizance or not of a political question) and *application* (i.e., granting or denying relief to the petitioner)? These are the questions this Article explores and answers. Part I treats in detail the conceptual parameters of the judiciary's special judicial power in light of its historico-legal roots; Part II discusses the optimal interpretive approach in the *application* of this power in the context of the increased structural tension it creates within the Philippine constitutional system; Part III canvasses the Supreme Court's use of its "extraordinary jurisdiction"⁴ as to its exercise and application; and Part IV ends the Article with a short summation.

I. THE HISTORICAL ROOTS AND CONCEPTUAL PARAMETERS FOR THE EXERCISE OF THE SPECIAL POWER

Like most new provisions of the 1987 Constitution, Art. VIII, § 1, par. 2 is a (normative) child of martial law.⁵ Revolted by the Court's inability

"superpresident." If there is such a thing as judicial supremacy, this is it." PACIFICO AGABIN, *The Politics of Judicial Review over Executive Action: The Supreme Court and Social Change*, in UNCONSTITUTIONAL ESSAYS 167, 193-194 (1996).

⁴ Co v. Electoral Tribunal of the House of Representatives, G.R. No. 92191, 199 SCRA 692, 700, Jul. 30, 1991, *citing* Robles v. House of Representatives Electoral Tribunal, G.R. No. 86647, 181 SCRA 780, Feb. 5, 1990.

⁵ In his sponsorship speech of Art. VIII, § 1, ¶ 2, Former Chief Justice Roberto Concepcion, Chairman of the Committee on the Judiciary of the Constitutional Commission, left no doubt of this fact:

The next provision is new in our constitutional law. I will read it first and explain.

Judicial power includes the duty of courts of justice to settle actual controversies involving rights which are legally demandable and enforceable and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part or instrumentality of the government.

Fellow Members of this Commission, this is actually a product of our experience during martial law. As a matter of fact, it has some antecedents in the past, but the role of the judiciary during the deposed regime was marred considerably by the circumstance that in a number of cases against the government, which then had no legal defense at all, the solicitor general set up the defense of political questions and got away with it. As a consequence, certain principles concerning particularly the writ of habeas corpus, that is, the authority of courts to order the release of political detainees, and other matters related to the operation and effect of martial law failed because the government set up the defense of political question. And the Supreme Court said: "Well, since it is political, we have no authority to pass upon it." The Committee on the Judiciary feels that this was not a proper solution of the questions involved. It did not merely request an encroachment upon the rights of the people, but it, in effect, encouraged further violations thereof during the martial law regime.

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[T]he powers of government are generally considered divided into three branches: the Legislative, the Executive and the Judiciary. Each one is supreme within

to check the unabated and extended assault on the rule of law by the Marcos authoritarian regime, the framers of the 1987 Constitution saw to it that the era of a timid judiciary ended with the fall of the authoritarian government.⁶

The doctrinal tool relied on by martial law-era judges to refrain from reviewing politically sensitive issues (and thus close the courts' doors on litigants seeking judicial intervention, either to vindicate personal rights⁷ or assail governmental action⁸) was the colonial doctrine of "political question." Forming part of American public law, this doctrine was imported to the country when the Spanish legal regime gave way to a new corpus of norms occasioned by the country's annexation to the United States at the turn of the last century.⁹

The political question doctrine is an adjudicative tool of restraint. Courts avail of this rule to decline exercising judicial review of politically

its own sphere and independent of the others. Because of that supremacy power to determine whether a given law is valid or not is vested in courts of justice.

Briefly stated, courts of justice determine the limits of power of the agencies and offices of the government as well as those of its officers. In other words, the judiciary is the final arbiter on the question whether or not a branch of government or any of its officials has acted without jurisdiction or in excess of jurisdiction, or so capriciously as to constitute an abuse of discretion amounting to excess of jurisdiction or lack of jurisdiction. This is not only a judicial power but a duty to pass judgment on matters of this nature.

This is the background of paragraph 2 of Section 1, *which means that the courts cannot hereafter evade the duty to settle matters of this nature, by claiming that such matters constitute a political question.* I RECORD OF THE CONSTITUTIONAL COMMISSION 434, 435 [hereinafter RECORD], (emphasis supplied).

⁶ The massive human rights violations during the martial law period informed the drafting of the new Constitution leading to the textualization of human rights norms [e.g. CONST. art. II, § 11 ("The State values the dignity of every human person and guarantees full respect for human rights.") and CONST. art. XIII, § 1 ("The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.")] and institutions (e.g. CONST. art. XIII, § 17, creating the Human Rights Commission). The accompanying changes in the operation of the judiciary (see note 3), geared towards broadening its powers and ensuring its independence enhance the Court's institutional role as guardian of rights.

For a historical analysis of Philippine constitutionalism to explicate the theory that the textualization of human dignity values and the expansion of judicial power in the 1987 Constitution are, among others, manifestations of universalism as an embedded ideology in Philippine constitutional ethos, see Diane Desierto, *A Universalist History of the 1987 Constitution (I)*, 10 HISTORIA CONSTITUCIONAL 383 (2009).

⁷ See e.g. *Aquino Jr. v. Enrile*, G.R. No. 35546, 59 SCRA 183, Sep. 17, 1974. The Court dismissed the petitions for the writ of habeas corpus.

⁸ See e.g. *Javellana v. Executive Secretary*, G.R. No. 36142, 50 SCRA 30, Mar. 31, 1973. This ruling held non-justiciable the question of the validity of the effectivity of the 1973 Constitution.

⁹ For a discussion of the theory of "normative imposition" ancillary to colonization see Bongsi Disang Dominic Radipati, *Legal Semiotics and Normative Imposition in an African Context: The Case of the San/Bushmen*, in CONSCIENCE, CONSENSUS, & CROSSROADS IN LAW 261, 262 (1995). See also VERNON PALMER, *MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY* (2001) for an excellent account of colonialism's pattern of creating hybrid or mixed (common law and civil law) systems resulting from the imposition of a new normative system into a colony. In re Shoop, 41 Phil. 213, Nov. 29, 1920, treats in detail the normative intermixture of the Spanish and American legal regimes.

sensitive questions and demur to the decisions of the political branches or the people themselves. Its classic strand is grounded on institutional deference derived from the text, history, and structure of the constitution.¹⁰ This was the strain referred to by the Court when it defined political questions in *Tañada v. Cuenco*¹¹ as those which “under the Constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the Legislature or executive branch of the Government.”¹² Thus, the court’s determination to withhold or exercise power is anchored on interpretation.

The modern strand is driven by prudential considerations unrelated to constitutional text, such as enforcement concerns and other institutional factors.¹³ The Court took these considerations into account in *Aleandrino v. Quezon*¹⁴ in dismissing a petition for mandamus to compel the Senate to reinstate petitioner who was suspended for disorderly conduct.¹⁵

*Baker v. Carr*¹⁶ later combined these strands into a six-part test the US Supreme Court articulated as follows:

[P]rominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy

¹⁰ Rachel Barkow, *The Rise and Fall of the Political Question Doctrine*, in *THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES* 43 (Nada Mourtada-Sabbah & Bruce Cain eds., Lexington Books 2007).

¹¹ *Tañada v. Cuenco*, No. 10520, 103 Phil. 1051, Feb. 28, 1957.

¹² *Id.* at 1066 (emphasis supplied), quoting 16 C.J.S. 413.

¹³ Barkow, *supra* note 10; KATHLEEN SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 30 (14th ed., 2001).

¹⁴ No. 22041, 46 Phil. 83, Sep. 11, 1924.

¹⁵ Responding to the petitioner’s argument that, to skirt enforcement problems, the Court should direct the writ to the “secretary, the sergeant-at-arms, and the disbursing officer” of the Senate, the Court held:

It is intimated rather faintly that...we would be justified in having our mandate run not against the Philippine Senate or against the President of the Philippine Senate and his fellow Senators but against the secretary, the sergeant-at-arms, and the disbursing officer of the Senate. But this begs the question. If we have no authority to control the Philippine Senate, we have no authority to control the actions of subordinate employees acting under the direction of the Senate. The secretary, sergeant-at-arms, and disbursing officer of the Senate are mere agents of the Senate who cannot act independently of the will of that body. *Should the Court do as requested, we might have the spectacle presented of the court ordering the secretary, the sergeant-at-arms, and the disbursing officer of the Philippine Senate to do one thing, and the Philippine Senate ordering them to do another thing. The writ of mandamus should not be granted unless it clearly appears that the person to whom it is directed has the absolute power to execute it.*¹⁵ (*Id.* at 94-95; emphasis supplied).

¹⁶ 369 U.S. 186 (1962).

determination of a kind clearly for non-judicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for questioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.¹⁷

These tests move from purely interpretive (test 1) to a mix of interpretive and prudential (test 2) to purely prudential (tests 3 to 6).¹⁸ The Court has relied on tests 1 and 2 to resolve questions of justiciability.¹⁹

As history attests, this doctrinal tool, whether understood in its classical or modern conception, transmogrified into the much maligned legal cover shielding acts of the martial law government from judicial scrutiny. As observed by a judge in the High Court:

[E]very major challenge to the acts of... Ferdinand E. Marcos under his authoritarian regime[,] the proclamation of martial law, the ratification of a new constitution, the arrest and detention of "enemies of the State" without charges being filed against them, the dissolution of Congress and the exercise by the President of legislative powers, the trial of civilians for civil offenses by military tribunals, the seizure of some of the country's biggest corporations, the taking over or closure of newspaper offices, radio and television stations and other forms of media, the proposals to amend the Constitution, etc. was invariably met by an invocation that the petition involved a political question.²⁰

The Supreme Court proved receptive to these invocations, finding merit in the government's claim, especially on two questions pivotal to the legitimacy of Marcos' one-man rule: the validity of the proclamation of martial law in *Aquino, Jr. v. Enrile*²¹ and the effectivity of the 1973 Constitution in *Javellana v. Executive Secretary*.²² Indeed, in a propaganda material released in 1974, Marcos drained *Javellana* dry of its legitimizing effect:

¹⁷ *Id.* at 217.

¹⁸ See SULLIVAN & GUNTHER, CONSTITUTIONAL LAW, *supra* note 13, at 30.

¹⁹ See *Estrada v. Desierto*, G.R. No. 146710, 353 SCRA 452, Mar. 2, 2001 (Decision).

²⁰ *Marcos v. Manglapus*, G.R. No. 88211, 177 SCRA 668, 707, Sep. 15, 1989, (Gutierrez, J., *dissenting*).

²¹ G.R. No. 35546, 59 SCRA 183, Sep. 17, 1974. A repeat of this ruling is arguably precluded by Art. VII, §18, ¶ 2 which provides that "The Supreme Court may review, in an appropriate proceeding filed by any citizen, the sufficiency of the factual basis of the proclamation of martial law or the suspension of the privilege of the writ or the extension thereof, and must promulgate its decision thereon within thirty days from its filing."

²² G.R. No. 36142, 50 SCRA 30, Mar. 31, 1973.

Upon the approval of a new Constitution by the constitutional convention, I organized the barangays or village councils or citizens assemblies, in the barrios.

I directed the new Constitution to be submitted to the barangays, or citizens assemblies, in a formal plebiscite from January 10-15, 1973. The barangays voted almost unanimously to ratify the Constitution, and continue with martial law and the reforms of the New Society.

This action was challenged in a petition filed before our Supreme Court in the cases entitled *Javellana v. Executive Secretary* The issue raised was whether I had the power to call a plebiscite; whether I could proclaim the ratification of the new constitution

The issues in turn raised the question of the legitimacy of the entire government. To meet the insistent suggestion that I proclaim a revolutionary government in the event of an adverse decision, I decided to submit to the jurisdiction of the Supreme Court. . . .

This submission to the Court would also calm fears of every cynic who had misgivings about my intentions or claimed that I was ready to set up a dictatorship. *Certainly, no dictator would submit himself to the judgment of a higher body like the Supreme Court on the question of the constitutionality of validity of his actions.*

Questioned most insistently was General Order No. 1, in which I had directed that I would exercise all the powers of government. I had suspended the sessions of the legislators in view of the manifest opposition of the people to the calling of an interim National Assembly. I created a military commission to try cases committed by persons charged with treason and subversion as well as related crimes.

Inasmuch as I, and all those who counseled me, were convinced of the validity of my position, I decided to submit unconditionally to the jurisdiction of the Supreme Court by appearing through counsel and answering all the issues raised before this highest tribunal of the country.

*The Supreme Court upheld our position and in its decision of March 31, 1973, penned by Chief Justice Roberto Concepcion, ruled in this wise". . . all the aforementioned cases are hereby dismissed. This being the vote of the majority, there is not further judicial obstacle to the new Constitution being considered in force and effect."*²³ (emphasis supplied)

For giving judicial imprimatur to the constitutional moorings of Marcos' martial rule, *Javellana* is unrivalled in doctrinal notoriety, variously described as "[T]he one application of the political question doctrine which more than any other has profoundly altered the Philippine political picture"²⁴ and as "[T]he equivalent to a *Dred Scott*."²⁵

²³ FERDINAND MARCOS, *THE DEMOCRATIC REVOLUTION IN THE PHILIPPINES* 185-86 (1974). Chief Justice Concepcion, who dissented in *Javellana*, is thought to have "resigned in disgust" shortly after its promulgation (AGABIN, *UNCONSTITUTIONAL ESSAYS*, *supra* note 3, at 192).

²⁴ JOAQUIN BERNAS, S.J., *THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY* 284 (1988 ed.).

²⁵ Justice Antonio T. Carpio, Remarks at the Book Launching of "A Test of Courage" [on the Panganiban Court]: A Reminder to Justices (Jan. 22, 2008) excerpts available at http://newsbreak.com.ph/index.php?option=com_content&task=view&Itemid=88889299.

With the restoration of democracy after the fall of the Marcos regime, the framers of the 1987 Constitution homed in on the political question doctrine. As conceived, the second clause of § 1, par. 2 is meant to close the lid on the doctrine's toolbox except for "truly political questions."²⁶ This bifurcation of the previously monolithic "political question doctrine," later led the Court in *Francisco v. House of Representatives*²⁷ to make the following syllogistic move:

[C]hief Justice Conception²⁸ hastened to clarify, however, that Section 1, Article VIII was not intended to do away with "truly political questions." *From this clarification it is gathered that there are two species of political questions: (1) "truly political questions" and (2) those which "are not truly political questions."*

*Truly political questions are thus beyond judicial review, the reason for respect of the doctrine of separation of powers to be maintained. On the other hand, by virtue of Section 1, Article VIII of the Constitution, courts can review questions which are not truly political in nature.*²⁹ (emphasis supplied)

§ 1, par. 2, clause 2 thus adjusted the demarcation line for classifying adjudicative questions to accommodate on the side of justiciable questions, "non-truly political" ones. How is one to draw this new line? *Francisco* continues:

[T]he determination of a truly political question from a [justiciable] political question lies in the answer to the question of whether *there are constitutionally imposed limits on powers or functions conferred upon political bodies*. If there are, then our courts are duty-bound to examine whether the branch or instrumentality of the government properly acted within such limits.³⁰ (emphasis supplied)

²⁶ I RECORD 443.

²⁷ G.R. No. 160261, 415 SCRA 44, Nov. 10, 2003.

²⁸ See note 5.

²⁹ *Francisco*, G.R. No. 160261, 415 SCRA 44, 149, Nov. 10, 2003.

³⁰ *Id.* at 151. Chief Justice Conception articulated a parallel standard in his dissenting opinion in *Jarellana*;

[W]hen the grant of power is qualified, conditional or subject to limitations, the issue on whether or not the prescribed qualifications or conditions have been met, or the limitations respected, is justiciable or non-political, the crux of the problem being one of *legality or validity* of the contested act, not its wisdom. Otherwise, said qualifications, conditions or limitations — particularly those prescribed or imposed by the Constitution — would be set at naught. What is more, the judicial inquiry into such issue and the settlement thereof are the main functions of courts of justice under the Presidential form of government adopted in our 1935 Constitution, and the system of checks and balances, one of its basic predicates. As a consequence, We have neither the authority nor the discretion to decline passing upon said issue, but are *under the ineluctable obligation* — made particularly more exacting and peremptory by our oath, as members of the highest Court of the land, to support and defend the Constitution —

Following the same preference to the political question's interpretive strand, the Court, using the standards enunciated in *Tañada v. Cuenco*³¹ and the first two tests in *Baker v. Carr*,³² recently held that the validity of the exercise by Congress of its power under Art. VII, § 11, par. 4³³ of the Constitution to determine whether the President is unable to discharge the powers and duties of his office is a (truly) political question. This arose in *Estrada v. Desierto*,³⁴ decided in 2001, as sub-issue to the main question concerning the validity of the ascension to the presidency of then Vice-President Gloria Arroyo (which the Court held justiciable). The petitioner, whose term as President was to end on June 30, 2004, assailed the validity of the Resolutions³⁵ passed by the Senate and the House of Representatives recognizing Arroyo's presidency a few days after petitioner informed both houses of his *temporary* inability to function as President. The Court ratiocinated:

The question is whether this Court has jurisdiction to review the claim of temporary inability of petitioner Estrada and thereafter revise the decision of both Houses of Congress recognizing respondent Arroyo as president of the Philippines. Following *Tañada v. Cuenco* we hold that this Court cannot exercise its judicial power or this is an issue "in regard to which full discretionary authority has been delegated to the Legislative x x x branch of the government." Or to use the language in *Baker vs. Carr*, there is a "textually demonstrable [commitment of the issue to a coordinate political department] or a lack of judicially discoverable and manageable standards for resolving it."... The question is political in nature and addressed solely to Congress by constitutional fiat. It is a political

to settle it. (*Javellana v. Executive Secretary*, 50 SCRA 30, 87, [Concepcion, J., dissenting]) (italicization in the original; underlining supplied).

Whether as crafted in *Francisco* or in Chief Justice Concepcion's separate opinion in *Javellana*, the "checking" interpretive standards spring from the function of judicial review of maintaining and enforcing the separation of powers among the branches of the government (see Florentino P. Feliciano, *The Application of Law: Some Recurring Aspects of the Process of Judicial Review and Decision Making*, 37 Am. J. Juris. 17, 23 [1992]).

³¹ *Tañada v. Cuenco*, No. 10520, 103 Phil. 1051, 1066, Feb. 28, 1957, *citing* 16 C.J.S. 413; *Geauga Lake Improvement Ass'n. v. Lozier*, 182 N. E. 491; *Sevilla v. Elizalde*, 112 F. 2d 29, referring to political questions as those "that lie outside the scope of the judicial questions, which under the constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government."

³² 369 U.S. 186, 217 (1962).

³³ The provision states: "If the Congress, within ten days after receipt of the last written declaration, or, if not in session, within twelve days after it is required to assemble, determines by a two-thirds vote of both Houses, voting separately, that the President is unable to discharge the powers and duties of his office, the Vice-President shall act as President; otherwise, the President shall continue exercising the powers and duties of his office."

³⁴ *Estrada v. Desierto*, G.R. No. 146710, 353 SCRA 452, Mar. 2, 2001 (Decision).

³⁵ In House Resolution Nos. 175 and 176, dated January 24, 2001 and an unnumbered and undated Senate Resolution, passed by 12 Senators.

issue, which cannot be decided by this Court without transgressing the principle of separation of powers.³⁶ (emphasis supplied)

Because the exercise by the Executive and the Legislature of their discretionary powers is a function of its factual milieu, it is well-nigh impossible to accurately predict all questions lying beyond the Court's jurisdictional reach for being purely political. However, hewing to the Court's bias towards interpretive tests, some areas stand out for the textually broad grant of powers to the political branches and the lack of specific constitutional limitations to their exercise, lending themselves potential sources of questions the Court might find hard to review without indulging in purely policy-making namely: (1) the power of the President to prepare the budget³⁷ and (2) the power of Congress (a) to approve amnesties,³⁸ except for questions relating to voting and (b) to declare war, except for questions relating to voting.³⁹ Further, the Court in *Evardone v. COMELEC*⁴⁰ recognized that loss of confidence as a ground to recall local elective officials is a political question. Lastly, in *Marcos v. Manglapus*,⁴¹ the

³⁶ Estrada, 353 SCRA at 515-16 (internal citations omitted). In denying petitioner's motion for reconsideration, the Court further elaborated:

[T]he recognition of respondent Arroyo as our *de jure* president made by Congress is unquestionably a political judgment. It is significant that House Resolution No. 176 cited as the bases of its judgment such factors as the "people's loss of confidence on the ability of former President Joseph Ejercito Estrada to effectively govern" and the "members of the international community had extended their recognition of Her Excellency, Gloria Macapagal-Arroyo as President of the Republic of the Philippines" and it has a constitutional duty "of fealty to the supreme will of the people x x x." This political judgment may be right or wrong but Congress is answerable only to the people for its judgment. Its wisdom is fit to be debated before the tribunal of the people and not before a court of justice. Needless to state, the doctrine of separation of power constitutes an inseparable bar against this court's interposition of its power of judicial review to review the judgment of Congress rejecting petitioner's claim that he is still the President, albeit on leave and that respondent Arroyo is merely an acting President. [Estrada v. Desierto, G.R. No. 146710, 356 SCRA 108, 141, Apr. 3, 2001 (Resolution)].

³⁷ CONST. art. VII, § 22. The provision states: "The President shall submit to the Congress, within thirty days from the opening of every regular session as the basis of the general appropriations bill, a budget of expenditures and sources of financing, including receipts from existing and proposed revenue measures."

³⁸ CONST. art. VII, § 19, ¶ 2. The provision states: "[The President] shall also have the power to grant amnesty with the concurrence of a majority of all the Members of Congress."

³⁹ CONST. art. VI, § 23(1). The provision states: "The Congress, by a vote of two-thirds of both Houses in joint session assembled, voting separately, shall have the sole power to declare the existence of a state of war."

⁴⁰ G.R. No. 94010, 204 SCRA 464, Dec. 2, 1991 reiterated in *Garcia v. COMELEC*, G.R. No. 111511, 227 SCRA 100, Oct. 5, 1993.

⁴¹ G.R. No. 88211, 177 SCRA 668, 695-96, Sep. 15, 1989. The Court held: "The present Constitution limits resort to the political question doctrine and broadens the scope of judicial inquiry into areas which the Court, under previous constitutions, would have normally left to the political departments to decide. But nonetheless there remain issues beyond the Court's jurisdiction the determination of which is exclusively for the President, for Congress or for the people themselves through a plebiscite or referendum. We cannot, for example, question the President's recognition of a foreign government, no matter how premature or improvident such action may appear. We cannot set aside a presidential pardon though it may appear to us that the beneficiary is totally undeserving of the grant. Nor can we amend the

Court (tentatively) placed three issues “beyond the Court’s jurisdiction”: (1) the President’s power to recognize a foreign government; (2) to grant pardon;⁴² and (3) the people’s right to amend the Constitution. The third category has since been qualified by *Lambino v. COMELEC*⁴³ holding justiciable the question whether the petitioners complied with the requirements under Art. XVII, § 2 of the Constitution on initiatives for its amendment.

It is a truism that legal standards are notoriously malleable in the hands of judges and one judge’s political question could very well be a paradigmatic justiciable question to another.⁴⁴ However, the constitutional text’s framing of courts’ special power along obligatory lines effectively constricts judges’ options in *exercising* their special power. This is evident in the voting of some members of the Court in *Francisco* who invoked the obligatory tone of the second clause of § 1, par. 2 to resist the argument that it is the better side of prudence for the Court to refrain from exercising its special power to decide the question presented (*i.e.*, the constitutionality of the House of Representatives’ internal rules used in impeaching then Chief Justice Hilario G. Davide) *at that time* and instead allow resolution of the issue in non-judicial fora.⁴⁵

Constitution under the guise of resolving a dispute brought before us because the power is reserved to the people.” (emphasis supplied).

⁴² Significantly, the question of the validity of the pardon extended by President Arroyo to former President Estrada on the latter’s conviction for Plunder, a highly divisive and controversial move, was never brought to the courts.

⁴³ G.R. No. 174153, 505 SCRA 160, Oct. 25, 2006.

⁴⁴ See *e.g.* *Santiago v. Guingona, Jr.*, G.R. No. 134577, 298 SCRA 756, Nov. 18, 1998 (holding that the question whether the internal organization of the Senate is justiciable with three Justices dissenting); *Bengzon, Jr. v. Senate Blue Ribbon Committee*, G.R. No. 89914, 203 SCRA 767, Nov. 20, 1991 (holding that the conduct by the Senate of its power to investigate is a justiciable question with one Justice dissenting).

⁴⁵ *E.g.*, Angelina Sandoval-Gutierrez and Renato Corona, *JJ.*, concurring. Justice Sandoval-Gutierrez wrote:

Confronted with an issue involving constitutional infringement, should this Court shackle its hands under the principle of judicial self-restraint? The polarized opinions of the amici curiae is that by asserting its power of judicial review, this Court can maintain the supremacy of the Constitution but at the same time invites a disastrous confrontation with the House of Representatives. A question repeated almost to satiety is - what if the House holds its ground and refuses to respect the Decision of this Court? It is argued that there will be a Constitutional crisis. Nonetheless, despite such impending scenario, I believe this Court should do its duty mandated by the Constitution, seeing to it that it acts within the bounds of its authority.

The 1987 Constitution speaks of judicial prerogative not only in terms of power but also of duty. As the last guardian of the Constitution, the Court’s duty is to uphold and defend it at all times and for all persons. It is a duty this Court cannot abdicate. It is a mandatory and inescapable obligation - made particularly more exacting and peremptory by the oath of each member of this Court. Judicial reluctance on the face of a clear constitutional transgression may bring about the death of the

II. APPLYING MUTANT JUDICIAL POWER IN A CONSTITUTIONAL DEMOCRACY: THE IMPERATIVE INTERPRETIVE APPROACH

Implicit in the design of the constitutional system prevailing in this jurisdiction are basic constructs of popular sovereignty, representative democracy, separation of powers, and checks and balances informing its operation.⁴⁶ Popular sovereignty (that ultimate political power resides in the people) and representative democracy (that the people periodically select their political agents) underscore the contractarian, democratic and majoritarian grounding of the system.⁴⁷ On the other hand, separation of powers (that governmental powers are diffused in three branches supreme within each own sphere) and checks and balances (that, within limits, each branch intervenes in the affairs of the other) obviate tyranny and temper institutional abuse. Judicial review, which the second clause of Art. VIII, §1, par. 2 amplifies, tests the outer limits of these principles by empowering electorally unaccountable judges, in interpreting and applying the Constitution, to privilege its text above all else, even to the extent of annulling the acts of the democratically accountable branches thus, impliedly, of the people. Thus, it is no accident that the seminal Philippine

rule of law in this country. (Francisco, 415 SCRA 44, 256; emphasis supplied, internal citations omitted)

Echoing this interpretation, Justice Corona opined:

A side issue that has arisen with respect to this duty to resolve constitutional issues is the propriety of assuming jurisdiction because "one of our own is involved." Some quarters have opined that this Court ought to exercise judicial restraint for a host of reasons, delicadeza included. According to them, since the Court's own Chief Justice is involved, the Associate Justices should inhibit themselves to avoid any questions regarding their impartiality and neutrality.

I disagree. The Court should not evade its duty to decide the pending petitions because of its sworn responsibility as the guardian of the Constitution. To refuse cognizance of the present petitions merely because they indirectly concern the Chief Justice of this Court is to skirt the duty of dispensing fair and impartial justice. Furthermore, refusing to assume jurisdiction under these circumstances will run afoul of the great traditions of our democratic way of life and the very reason why this Court exists in the first place.

....

Thus, vexing or not, as long as the issues involved are constitutional, the Court must resolve them for it to remain faithful to its role as the staunch champion and vanguard of the Constitution. . . . *We have the legal and moral obligation to resolve these constitutional issues, regardless of who is involved. As pointed out by the eminent constitutionalist, Joaquin Bernas, S.J., jurisdiction is not mere power; it is a duty which, though vexatious, may not be renounced.* (Id. at 278-280) (emphasis supplied).

⁴⁶ See Jack Wade Nowlin, *The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis*, 89 KY. L. J. 387 (2001).

⁴⁷ These principles are textualized in Art. II, § 2 of the 1987 Constitution which provides: "The Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them."

case on judicial review took pains to articulate the *justification* for the power, soothing countermajoritarian and judicial supremacy concerns.⁴⁸

With the constitutional textualization of the second clause of Art. VIII, §1, par. 2 mandating judges to enter the political thicket when given the chance (but not all of its nooks and crannies), the Constitution itself has made the calculated risk of further blurring the lines between adjudicating and policy-making, thus exacerbating judicial review's dark side.⁴⁹ To cushion its effect, the framers embedded a mechanism in the power granted to temper its *application* – that the courts enter the political thicket for the narrow purpose of determining “whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction.”

The standard of “grave abuse of discretion” is of remedial law origin⁵⁰ and has acquired well-known parameters in that field distillable to two alternative propositions: (1) it connotes *arbitrary* conduct or (2) conduct that is *more than mere error*. The scope of review is narrow to correct only jurisdictional errors. The Court fashioned a parallel standard in constitutional law to inquire into the sufficiency of the factual bases for the suspension of the writ of *habeas corpus*, when pressure to allow minimal judicial intrusion into Marcos' national security decisions mounted.

⁴⁸ The following disquisition of Justice Jose P. Laurel in *Angara v. Electoral Commission*, No. 45081, 63 Phil. 139, 158, Jul. 15, 1936, has long become part of this jurisdiction's constitutional law lore:

The Constitution is a definition of the powers of government. Who is to determine the nature, scope and extent of such powers? The Constitution itself has provided for the instrumentality of the judiciary as the rational way. And *when the judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments; it does not in reality nullify or invalidate an act of the legislature, but only asserts the solemn and sacred obligation assigned to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which that instrument secures and guarantees to them. This is in truth all that is involved in what is termed “judicial supremacy” which properly is the power of judicial review under the Constitution.* (emphasis supplied)

This is a step removed from *Marbury* which had to *establish* the institution of judicial review itself.

⁴⁹ Thus, in effect, the second clause of Art. III, §1, par. 2 exacerbates the “countermajoritarian difficulty” inherent in judicial review paradigmatically encapsulized thus:

The root difficulty is that judicial review is a counter-majoritarian force in our system [w]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens.... It is the reason the charge can be made that judicial review is undemocratic. [ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (1962)].

⁵⁰ Applicable to special actions for the writs of certiorari, prohibition and mandamus under Rule 65 of the 1997 Rules of Civil Procedure.

Grounding its analysis on separation of powers framework, the Court presented the contours of this power in *Lansang v. Garcia*.⁵¹

Article VII of the Constitution vests in the Executive the power to suspend the privilege of the writ of habeas corpus under specified conditions. Pursuant to the principle of separation of powers underlying our system of government, the Executive is supreme within his own sphere. However, the separation of powers, under the Constitution, is not absolute. What is more, it goes hand in hand with the system of checks and balances, under which the Executive is supreme, as regards the suspension of the privilege, but only if and when he acts within the sphere allotted to him by the Basic Law, and the authority to determine whether or not he has so acted is vested in the Judicial Department, which, in this respect, is, in turn, constitutionally supreme.

In the exercise of such authority, the function of the Court is merely to check — not to supplant — the Executive, or to *ascertain merely whether he had gone beyond the constitutional limits of his jurisdiction*, not to exercise the power vested in him or to determine the wisdom of his act.⁵² (emphasis supplied)

That the standard embedded in Art. VIII, §1, par. 2 mirrors *Lansang* was not lost on the Court. In *Marcos v. Manglapus*, the Court observed that Art. VIII, §1, par. 2 “appears” to constitutionalize *Lansang*:

[W]hen political questions are involved, the Constitution limits the determination to whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the official whose action is being questioned. If grave abuse is not established, the Court will not substitute its judgment for that of the official concerned and decide a matter which by its nature or by law is for the latter alone to decide. *In this light, it would appear clear that the second paragraph of Article VIII, Section 1 of the Constitution, defining “judicial power,” which specifically empowers the courts to determine whether or not there has been a grave abuse of discretion on the part of any branch or instrumentality of the government, incorporates in the fundamental law the ruling in Lansang v. Garcia*⁵³ . . . (emphasis supplied)

If, in reviewing acts of “any tribunal . . . exercising judicial . . . functions” in petitions for *certiorari*,⁵⁴ the Court does not overturn rulings of

⁵¹ G.R. No. 33964, 42 SCRA 448, Dec. 11, 1971.

⁵² *Id.* at 479-80.

⁵³ *Marcos*, 177 SCRA at 696.

⁵⁴ Rule 65, § 1 of the 1997 Rules of Civil Procedure provides:

When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of

judges, who are under its supervision and control, for mere errors of judgment or for non-arbitrary conduct, there is more reason to let lie undisturbed the non-jurisdictional errors committed by “any branch or instrumentality of the Government,” done in the exercise of their discretionary powers. The officials in these branches are neither under the control nor supervision of the Court. As Justice Irene R. Cortes had opined:

The [“grave abuse of discretion”] test . . . *should apply with greater cogency to the executive and legislative branches of government. As to [them], the exercise of the power and duty of judicial review would call for a higher degree of self restraint and circumspection.* Should no grave abuse of discretion amounting to lack or excess of jurisdiction taint the challenged acts of the executive or the legislature the courts must necessarily uphold them. For the expanded constitutional power of judicial review cannot be read to place in the judicial branch of government the prerogative to substitute its judgment for that of the branch of government in which the discretion has been reposed.⁵⁵ (emphasis supplied)

Indeed, every time judges loosely construe the “grave abuse of discretion” standard in *applying* the second clause of § 1, par. 2, they defeat the purpose for which this stringent doctrinal standard was embedded in the power granted, giving fresh outlet for protests of “judicial overreaching” to surface, undermining, however infinitesimally, the legitimacy of the impugned judicial act.⁵⁶

III. THE SUPREME COURT’S *EXERCISE AND APPLICATION* OF ITS SPECIAL POWER

Except for two instances (on the validity of the legislature’s recognition of Arroyo as President in 2001 in *Estrada* and the recall of a local government official for loss of confidence in *Evardone*), the Court found all questions alleged to be political as justiciable. As noted, the Court’s robust

discretion amounting to lack or excess of jurisdiction, and there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require.

⁵⁵ Irene Cortes, *The Supreme Court and the Political Departments*, 67 PHIL. L.J. 293, 307 (1993).

⁵⁶ In the field of constitutional interpretation, jurists have advocated a double standard to review questions involving personal rights and economic policy as interpretive tool to ease structural tensions occasioned by the exercise of judicial review. See e.g. Vicente V. Mendoza, *The Nature and Function of Judicial Review*, 31 IBP JOURNAL 6 (2005).

exercise of its special power appears to be grounded on its framing as a “duty.” Although there is nothing novel in casting the classic conception of the judicial function along mandatory lines, *i.e.*, that it “includes the *duty* of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable”⁵⁷ as the first clause of Art. VIII, § 1, par. 2 frames it, injecting this obligatory element to the special power in the second clause of § 1, par. 2 “to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government” is not only new but also conceptually transformative. By mandating judges to immediately launch into an interpretive analysis of a question’s justiciability, § 1, par. 2 effectively denies judges the use of a bundle of useful non-interpretive, *i.e.* prudential, grounds to decline exercising judicial review even if the factual circumstances call for their use, such as when a suit presents a frontal clash between two branches.

This dilemma came to the fore in *Francisco* which presented for review the question whether the House of Representatives’ internal rules used in impeaching then Chief Justice Hilario G. Davide, Jr. were unconstitutional. On the one hand, the case beckoned the members of the Court to tackle complex interpretive challenges but, on the other hand, overflowed with prudential considerations counseling judicial restraint. Awaiting interpretation were textual commitments of the impeachment power to the House of Representatives⁵⁸ and the Senate,⁵⁹ and a limitation on the exercise of that power⁶⁰ as interpreted by the House of Representatives in its internal rules on the initiation of impeachment complaints.⁶¹ Counseling restraint were simultaneous efforts to resolve the conflict in non-judicial fora, obvious enforcement problems, and the controversial nature of the case. The separate opinion of Justice Artemio Panganiban captures how these two strands play out in the mind of a judge, grappling to solve the question presented in light of the obligatory thrust of the second clause of Art. VIII, § 1, par. 2:

⁵⁷ See *Lopez v. Roxas*, G.R. No. 25716, 17 SCRA 756, 761, Jul. 28, 1966.

⁵⁸ CONST. art. XI, § 3(1) which provides: “The House of Representatives shall have the *exclusive* power to initiate all cases of impeachment.” (emphasis supplied)

⁵⁹ CONST. art. XI, § 3(6) which provides: “The Senate shall have the *sole* power to try and decide all cases of impeachment.” (emphasis supplied).

⁶⁰ CONST. art. XI, § 3(5) which provides: “No impeachment proceedings shall be initiated against the same official more than once within a period of one year.” (emphasis supplied)

⁶¹ Rule V, §§ 16-17, Rules of Procedure in Impeachment Proceedings.

[U]nlike the 1973 and the 1935 Constitutions, the 1987 Constitution— in Article VIII, Section 1 thereof — imposes upon the Supreme Court the duty to strike down the acts of "any branch or instrumentality of the government" whenever these are performed "with grave abuse of discretion amounting to lack or excess of jurisdiction."

.....
[B]y imposing upon our judges a duty to intervene and to settle issues of grave abuse of discretion, our Constitution has thereby mandated them to be activists. A duty cannot be evaded. The Supreme Court must uphold the Constitution at all times. Otherwise, it will be guilty of dereliction, of abandonment, of its solemn duty. Otherwise, it will repeat the judicial cop-outs that our 1987 Constitution abhors.

.....
 I must admit that I was initially tempted to adopt the view of Amici Jovito R. Salonga and Raul C. Pangalangan. They maintain that although the Court had jurisdiction over the subject matter and although the second Impeachment Complaint was unconstitutional, the Court should nonetheless "use its power with care and only as a last resort" and allow the House to correct its constitutional errors; or, failing in that, give the Senate the opportunity to invalidate the second Complaint.

This Salonga-Pangalangan thesis, which is being espoused by some of my colleagues in their Separate Opinions, has some advantages. While it preserves the availability of judicial review as a "last resort" to prevent or cure constitutional abuse, it observes, at the same time, interdepartmental courtesy by allowing the seamless exercise of the congressional power of impeachment. . . .

Furthermore, the proponents of this deferential position add that the Senate may eventually rule that the second Impeachment Complaint is unconstitutional, and that the matter may thus be settled definitively. Indeed, the parties may be satisfied with the judgment of the Senate and, thus, obviate the need for this Court to rule on the matter. In this way, the latter would not need to grapple with the conflict of interest problem I have referred to earlier.

With due respect, I believe that this stance of "passing the buck" — even if made under the guise of deference to a coequal department — is not consistent with the activist duty imposed by the Constitution upon this Court.⁶²

⁶² *Francisco v. House of Representatives*, G.R. No. 160261, 415 SCRA 44, 233-34, 240, Nov. 10, 2003 (emphasis supplied).

In the end, the Court voted 11-3⁶³ to take cognizance of the question (and grant relief to the petitioners by striking down the assailed internal rules of the House).⁶⁴ That only three members of the Court voted to defer review for prudential considerations is a measure of the institution's interpretation of the "obligatory nature" of its special power. Thus, among other things, *Francisco* is a testament to the Court's resolute stance to effectuate the mandatory element of Art. VIII, § 1, par. 2, clause 2.

Consistent with the rigor with which the Court has exercised its special power, the line it drew in *Manglapus* classifying questions on "the people's right to amend the Constitution" as "beyond the Court's jurisdiction" proved temporary, soon erased by the ruling in *Lambino v. COMELEC*.⁶⁵ Although the members of the Court were almost evenly divided in their interpretation of the relevant constitutional text, Art. XVII, § 2,⁶⁶ all Justices except one⁶⁷ found the question on the validity of the petitioners' initiative to amend the Constitution justiciable, holding that Art. XVII, § 2 contains specific limitations to its exercise. With the issues in *Lambino* and *Francisco*, a number of other questions have been added to the pool of "non-truly political" issues.⁶⁸ These relate to:

⁶³ Chief Justice Hilario G. Davide took no part.

⁶⁴ Chief Justice Reynato S. Puno and Associate Justices Josue N. Bellosillo and Consuelo Ynares-Santiago voted to defer review. At the opposite end of the spectrum, Justices Angelina Sandoval-Gutierrez, and Renato Corona shared Justice Panganiban's view that the argument for judicial restraint cannot prevail over their "duty" under Art. VIII, § 1, par. 2 to undertake judicial review (*see note 45*).

⁶⁵ G.R. No. 174153, 505 SCRA 160, Oct. 25, 2006.

⁶⁶ The provision states:

Amendments to this Constitution may likewise be directly proposed by the people through initiative upon a petition of at least twelve per centum of the total number of registered voters, of which every legislative district must be represented by at least three per centum of the registered voters therein. No amendment under this section shall be authorized within five years following the ratification of this Constitution nor oftener than once every five years thereafter.

⁶⁷ Justice Leonardo A. Quisumbing.

⁶⁸ In *Province of North Cotabato v. Gov't of the Republic of the Philippines Peace Panel on Ancestral Domain*, G.R. No. 183591, 568 SCRA 402, Oct. 14, 2008 (reviewing the power of the President to "pursue the peace process with muslim insurgents"), the question whether "the inclusion/exclusion of the Province of North Cotabato, Cities of Zamboanga, Iligan and Isabela, and the Municipality of Linamon, Lanao del Norte in/from the areas covered by the Bangsamoro Homeland is... justiciable" was argued during the oral arguments. However, in its decision [striking down the Memorandum of Agreement on the Ancestral Domain (MOA-AD) between the government and the Moro Islamic Liberation Front (MILF) for being contrary to law and unconstitutional], the Court no longer passed upon this issue and limited itself to the threshold issues of ripeness, mootness, and *locus standi*.

On the other hand, *Oposa v. Factoran*, G.R. No. 101083, 224 SCRA 792, 809, Jul. 30, 1993, raised the issue whether the government's issuance of permits to logging concessionaires violated the plaintiffs' right to a balanced and healthful ecology is justiciable. The lower court had held in the negative but on appeal by the plaintiffs through special civil action for *certiorari* under Rule 65, the Court reversed, ruling that "[p]olicy formulation or determination by the executive and legislative branches of Government is not squarely put in issue."

- (1) *The President's "residual power to protect the general welfare of the people,"* reviewed in resolving a petition by the exiled President Marcos to return to the country. Although the voting on the merits *i.e.* whether President Aquino acted within her powers in refusing to allow Marcos' return, was razor thin (8-7 dismissing the petition), the Court unanimously rejected the government's argument that the question was political, with Justices Hugo Gutierrez and Ambrosio Padilla addressing the matter in their dissents;⁶⁹
- (2) *The apportionment of seats in the Commission on Appointments (COA),* reviewed in resolving a petition challenging the removal of Representative Raul Daza from the COA;⁷⁰
- (3) *The reorganization of the membership of the House of Representatives Electoral Tribunal (HRET),* reviewed in resolving a petition to, among others, annul the removal of Representative Juanito G. Camasura, Jr. from the HRET; Justices Abraham Sarmiento and Teodoro Padilla filed dissenting opinions on the justiciability issue;⁷¹
- (4) *The President's power to grant clemencies in administrative cases,* reviewed in a petition assailing the clemency extended to a governor who had been found administratively liable;⁷²
- (5) *The power of the Senate to ratify treaties,* reviewed in resolving a petition to annul the Senate's concurrence to the Agreement Establishing the World Trade Organization;⁷³
- (6) *The selection by the Senate of its officers,* reviewed in resolving a petition contesting the election of Senator Teofisto Guingona, Jr. as minority leader. Justice Vicente V. Mendoza, joined by Justices Santiago Kapunan and Fidel Purisima, filed a dissenting opinion holding the question political;⁷⁴ and

⁶⁹ Marcos v. Manglapus, G.R. No. 88211, 177 SCRA 668, Sep. 15, 1989.

⁷⁰ Daza v. Singson, G.R. No. 86344, 180 SCRA 496, Dec. 21, 1989.

⁷¹ Bondoc v. Pineda, G.R. No. 97710, 201 SCRA 792, Sep. 26, 1991.

⁷² Llamas v. Executive Secretary, G.R. No. 99031, 202 SCRA 844, Oct. 15, 1991.

⁷³ Tanada v. Angara, G.R. No. 118295, 272 SCRA 18, May 2, 1997.

⁷⁴ Santiago v. Guingona, Jr., G.R. No. 134577, 298 SCRA 756, Nov. 18, 1998.

- (7) *The President's power to call-out "such armed forces to prevent or suppress lawless violence,"* reviewed in resolving a petition questioning the order of then President Joseph Estrada to deploy members of the armed forces to conduct with the member of the Philippine National Police "visibility patrols" to help maintain peace and order in Metro Manila.⁷⁵

The Court's unfailing *exercise* of its special power notwithstanding, one must take caution in concluding that we are living in the age of a politically hyperactive Supreme Court. The political question doctrine is but one of the tools in the Court's doctrinal arsenal to demur exercising judicial review. By its recent ruling in *Lozano v. Nograles*,⁷⁶ the Court has signaled its readiness to employ the elements of the case and controversy requirement⁷⁷ to proxy for the political question doctrine. The petition in that case, filed by citizens in their capacity as such and as tax payers, sought a review of a Resolution passed in the House of Representatives calling for the convening of Congress as constituent assembly to amend the Constitution. Without reaching the merits, the Court dismissed the petition, not for raising a political question, but for prematurity and petitioners' lack of *locus standi*.⁷⁸

Further, the consistency with which the Court took cognizance of questions involving the exercise of discretionary power by the other branches and the people is offset by the rarity with which the Court has *applied* its special power to override the assailed act or rule. In the cases surveyed, the Court found occasion to overrule the decision of the other branches for having acted "with grave abuse of discretion amounting to lack or excess of jurisdiction" only in *Bondoc* and *Francisco*.⁷⁹ Philippine

⁷⁵ Integrated Bar of the Philippines v. Zamora, G.R. No. 141284, 338 SCRA 81, Aug. 15, 2000.

⁷⁶ G.R. No. 187883, June 16, 2009 (Resolution).

⁷⁷ As recently reiterated by the Court, the elements of the "case and controversy" requirements are: 1) an actual case or controversy calling for the exercise of judicial power; (2) the person challenging the act must have "standing" to challenge; he must have a personal and substantial interest in the case such that he has sustained or will sustain, direct injury as a result of its enforcement; (3) the question of constitutionality must be raised at the earliest possible opportunity; and (4) the issue of constitutionality must be the very *lis mota* of the case (*Francisco*, 415 SCRA 44, 133).

⁷⁸ The question whether the Court's broadened power justifies liberalizing the *locus standi* requirements lies beyond the scope of this Article. For the present purposes, it suffices to state that within limits, prudential considerations play a large part in the Court's (strict or liberal) observance of this requirement.

⁷⁹ *Bondoc*, 201 SCRA 792 and *Francisco*, 415 SCRA 44. The Court's ruling in *Garcia v. Board of Investment*, G.R. No. 92024, 191 SCRA 288, Nov. 9, 1990 (reversing the ruling of an administrative body on the location and operation of a foreign funded business venture) although eliciting ample criticisms for judicial overreaching, was issued by the Court in the exercise of its appellate review power over rulings of administrative bodies exercising quasi-judicial functions. The matter was brought to the Court through a special civil action for certiorari under Rule 65 and much of the criticism centered on the perception that the Court loosely applied the "grave abuse of discretion" standard in the remedial law sense.

constitutional democracy appears none too worse for the wear for these pronouncements.

IV. CONCLUSION

The second clause of Art. VIII, § 1, par. 2 transformed judicial power by constitutionalizing obligatory judicial access to the discretionary domains of the political branches and acts of sovereignty of the Filipino people. Thus far, the Supreme Court, in using this power, has been sparing in its *application* but unfailing in its *exercise*. The narrowness of its scope and political sensitivity of its use counsel rigorous observance of its embedded interpretive tool. It is no exaggeration to say that the disciplined use of this special power contributes in no small way to the stable functioning of Philippine constitutional democracy.

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