GUARDING THE GUARDIANS: ADDRESSING THE POST-1987 IMBALANCE OF PRESIDENTIAL POWER AND JUDICIAL REVIEW*

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> *"Judicial review, like most things in life, is double-edged. In our political life, it can cut both ways: it can protect human rights, but it can also prevent social reforms. With its new found strength and its expanded power, the judiciary is no longer the "least dangerous branch of our government".... [I]t may yet evolve to be the most dangerous branch."*
>
> —Dean Pacifico Agabin (1989)[1]

> *"[I]t is relevant to note the gap that exists between the President's paper powers and his real powers. ... Subtle shifts take place in the centers of real power that do not show in the face of the Constitution."*
>
> —Justice Robert Jackson (1952)[2]

> *"The President's greatest and perhaps most desperate check on the judiciary is to ignore it. In a famous fictional account, President Andrew Jackson ordered: 'John Marshall has made his decision, now let him enforce it!' It is said that the judiciary wields neither purse nor sword, and its sole means of enforcing decisions lies in its moral authority. Perhaps we should allow the President to confront a court that has lost it."*
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> —Dean Raul Pangalangan (2011)[3]

INTRODUCTION

I wrote in the *Philippine Law Journal* in 2009, not long after the expansive rulemaking power was launched by Chief Justice Reynato Puno in 2007 before a grateful nation:

> The glare from the halo surrounding these great achievements may well overly dazzle observers and condone their glossing over constitutional nuances given the great public trust the Court presently enjoys. All power is susceptible to corruption and misuse, however. A successor Chief Justice of lesser

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[1] Pacifico Agabin, *The Politics of Judicial Review Over Executive Action: The Supreme Court and Social Change*, 64 PHIL. L.J. 189, 210 (1989).

[2] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

[3] Raul Pangalangan, *Commentary: Arroyo's pleas political, not human rights issue*, PHIL. DAILY INQUIRER, Nov. 18, 2011, at A1, *available at* http://opinion.inquirer.net/17515/arroyo%E2%80%99s-pleas-political-not-human-rights-issue. Having been shared on social media more than 21,000 times based on the *Inquirer* website's count, the column was one of the paper's most widely read op-eds of 2011.

> scholarship and integrity could very well employ the same rulemaking power to preempt judicial review involving certain minorities stigmatized by some sectors or frame an extreme caricature of the right to privacy to protect a political patron as has been attempted in prior legislative and other investigations.[4]

In the mere two years since, the political context of discussions on judicial power has completely reversed. The checks against the Presidency added in the 1987 Constitution to ensure that there would never be another Marcos are currently directed at President Benigno "Noynoy" Aquino III, son of Marcos's political nemeses. Instead of a reviled President Gloria Macapagal-Arroyo contrasted with a beloved Chief Justice Puno, one has a popular President Aquino contrasted with an increasingly distrusted Chief Justice Reynato Corona. The Court has been labeled by some as the "Arroyo Court", with all 15 Justices appointed by President Arroyo at one point.

A young lawyer who grew up in the aftermath of the Edsa Revolution and entered law school shortly after the Edsa II protests that led to President Joseph Estrada's resignation may well lose his moorings given such a cataclysmic change. I wrote my initial reaction to Chief Justice Corona's impeachment, the first of a Philippine jurist:

> Hilario Davide Jr., singlehandedly holding the nation together through sheer integrity, remains my image of a chief justice. I walked to Edsa with the Class of 2001, listened to him speak at my graduation then and, with the greatest of pride, entered his alma mater, the UP College of Law. This image broadened to include Justice Antonio Carpio's stand against a sham people's initiative for Charter change and Chief Justice Reynato Puno's rallying the nation against extrajudicial killings. Thus, the so-called assault on the Supreme Court comes as a visceral blow. Natalie Portman almost whispers, "So this is how liberty dies... with thunderous applause."[5]

This article is a twofold record of my thoughts on judicial review since entering the UP College of Law, thoughts that have evolved since my initial articles. First, this article surveys the scope of judicial power. Filipino lawyers take for granted that this power was intentionally strengthened in our post-martial law constitution, but few acknowledge its actual expansiveness in practice, far beyond even judicial review's traditional case

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[4] Tan, *The New Philippine Separation of Powers*, *supra* note *, at 931.

[5] Oscar Franklin Tan, *Commentary: The 'only boss' at battleground of principle*, PHIL. DAILY INQUIRER, Dec. 19, 2011, *available at* http://opinion.inquirer.net/19379/the-%E2%80%98only-boss%E2%80%99-at-battleground-of-principle.

and controversy restraint.[6] Second, this article surveys the scope of presidential power relative to judicial review. Although there are narrow areas where the President enjoys deference to his actions, constitutional design generally exposes his every action to a judicial labeling of grave abuse of discretion.[7] In surveying presidential power, one must recognize the many key doctrinal developments in the last decade, many spurred by former President Arroyo's controversial acts. These developments have not, as a whole, received the same attention in the academe given to doctrinal developments in the judiciary and I recall Professor Laurence Tribe's admonition that Constitutional Law courses sometimes focus overly on the Supreme Court to the detriment of understanding the Presidency and Congress. One must recall with respect to the political branches, lacking an organized system of jurisprudence to document their thoughts:

> The Constitution was an extraordinary document. But a document is only a document, and what the Constitution 'really' meant – i.e., meant in practice – only practice could disclose.[8]

This article concludes that there is an imbalance to the point that a popular president may find himself stymied by a Supreme Court allegedly using judicial power for partisan ends. The citizenry, particularly the media and the academe who are crucial in communicating constitutional interpretation to them, must keep aware of this imbalance and ensure that the expanded judicial power is deployed in accordance with their wishes instead of hamstringing their popularly elected leaders.

I. AN OVERVIEW OF THE "ARROYO COURT'S" RECENT ACTIONS

The interplay between President Aquino and Chief Justice Corona provides a vivid backdrop for this discussion. The story begins with President Aquino's landslide victory after the May 10, 2010 elections, "a wave of hope and nostalgia that began with an emotional tsunami during the long 8-hour funeral procession of his mother [in 2009]."[9] President Aquino's term began on June 30.[10]

[6] This thought began in Tan, *The New Philippine Separation of Powers, supra* note * Updated discussions from previous articles have been incorporated in this article to present an integrated discussion to the reader.

[7] This thought began in Tan, *The 2004 Canvass, supra* note *

[8] ARTHUR SCHLESINGER, THE IMPERIAL PRESIDENCY 13 (1973).

[9] Shay Cullen, *Aquino election brings hope, nostalgia to Philippines*, NAT'L CATHOLIC REPORTER, Jun. 4, 2010, *at* http://ncronline.org/news/global/aquino-election-brings-hope-nostalgia-philippines. For an in-depth account, *see* CHAY HOFILEÑA & MIRIAM GRACE A. GO, AMBITION DESTINY VICTORY: STORIES FROM A PRESIDENTIAL ELECTION (2011).

[10] CONST. art. VII, § 4.

On May 17, however, then Chief Justice Puno compulsorily retired.[11] Two days after the elections, on May 12, then President Arroyo appointed then Justice Corona as Puno's successor. Corona previously served as Arroyo's chief of staff, spokesman and acting executive secretary. Arroyo, by then, had already appointed a majority of the Court.

The appointment was sharply criticized as an unconstitutional midnight appointment and the highly respected Senior Associate Justice Antonio Carpio and Justice Conchita Carpio-Morales both publicly opined that President Arroyo had no power to appoint Puno's successor.[12] The opinion of Fr. Joaquin Bernas, SJ, was prominently cited:

> [A]ny person who accepted the post of Chief Justice from Ms Arroyo would open himself or herself to impeachment by the next Congress.[13]

Ahead of the May 10 elections, however, the Supreme Court ruled that President Arroyo was entitled to appoint the next chief justice, arguing in a stunning reversal of the tradition against midnight appointments that the provision requiring a Supreme Court vacancy to be filled within 90 days trumped the ban on appointments by the president two months before the elections.[14] (Fr. Bernas has since revised his opinion in line with the Court's decision.) President Aquino publicly refused to recognize Corona's appointment and refused to be sworn in by him, eventually taking his oath before Justice Carpio-Morales, who prominently dissented in *De Castro v. Judicial and Bar Council*.[15]

The Court soon set several stumbling blocks in the path of President Aquino and his campaign crusade against corruption primarily directed against former President Arroyo. The Court struck down

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[11] CONST. art. VIII, § 11.

[12] Tetch Torres & TJ Burgonio, *Arroyo appoints Corona as new chief justice*, PHIL. DAILY INQUIRER, May 12, 2010, *available at* http://newsinfo.inquirer.net/breakingnews/nation/view/20100512-269580/Arroyo-appoints-Corona-as-new-chief-justice.

[13] Norman Bordadora, *Bernas: Arroyo appointment may destroy SC credibility*, PHIL. DAILY INQUIRER, Jan. 23, 2010, *available at* http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20100123-248930/Bernas-Arroyo-appointment-may-destroy-SC-credibility.

[14] De Castro v. Judicial and Bar Council, G.R. No. 191002, 615 SCRA 666, Mar. 17, 2010.

[15] Maila Ager & Tetch Torres, *Conchita Morales is new Ombudsman*, PHIL. DAILY INQUIRER, Jul. 25, 2011, *available at* http://newsinfo.inquirer.net/29653/conchita-morales-is-new-ombudsman.

Aquino's first executive order creating a Philippine Truth Commission to investigate corruption during the Arroyo administration. Of all possible reasons, the decision was anchored on one of the most incredible, most ridiculous possible ground, the human rights doctrine of equal protection:

> The equal protection of the laws clause of the Constitution allows classification. ... A law is not invalid because of simple inequality. The very idea of classification is that of inequality, so that it goes without saying that the mere fact of inequality in no manner determines the matter of constitutionality. All that is required of a valid classification is that it be reasonable, which means that the classification should be based on substantial distinctions which make for real differences, that it must be germane to the purpose of the law; that it must not be limited to existing conditions only; and that it must apply equally to each member of the class. This Court has held that the standard is satisfied if the classification or distinction is based on a reasonable foundation or rational basis and is not palpably arbitrary.
>
> Applying these precepts to this case, Executive Order No. 1 should be struck down as violative of the equal protection clause. The clear mandate of the envisioned truth commission is to investigate and find out the truth "concerning the reported cases of graft and corruption during the previous administration" only. The intent to single out the previous administration is plain, patent and manifest.[16]

The disconnect in *Biraogo* must be apparent to a freshman Constitutional Law student. The decision read like a textbook discussion of the rational basis test but, in a subterfuge in plain sight, applied an exacting strict scrutiny analysis appropriate for a classification based on race or religion. I criticized *Biraogo* as establishing allegedly corrupt government officials as a new suspect class in Philippine jurisprudence and necessarily labeling former President Arroyo a human rights victim:

> "Will you teach your children that Gloria Macapagal-Arroyo is a human rights victim?" ...
>
> The brazen intellectual dishonesty in the Truth Commission decision must shock you. Equal protection, being a human rights doctrine, is strictly applied only when "suspect

[16] Biraogo v. Phil. Truth Comm'n of 2010, G.R. No. 192935, 637 SCRA 78, Dec. 7, 2010.

> classifications" are involved: race, religion and gender. Classic victims of discrimination in law and common sense include the Cordillera tribesman, the Muslim and the working woman. The Court added the overseas Filipino worker to modernize this list.
>
> Outside "suspect classifications," equal protection is applied with far less strictness than in the Truth Commission decision....
>
> The Truth Commission decision misrepresented the equal protection doctrine so suavely it even appeared helpful, advising to add a simple "s" so the order covers all past administrations. The entire nation unfairly ridiculed President Aquino's legal team as lightweights who drafted an order so obviously flawed. The entire nation unwittingly agreed that Arroyo is a human rights victim.[17]

Biraogo, however, was largely, albeit, begrudgingly accepted. The loud outcry was not against the tragic blow dealt to human rights jurisprudence, but President Aquino's allegedly lightweight legal team. Senator Francis "Chiz" Escudero publicly suggested that an "s" be added to change "past administration" to "past administrations" to cure the alleged defect.[18] The unkindest cut of all came from Senator Joker Arroyo, who had served Aquino's own mother:

> Arroyo then noted that President Corazon Aquino had a more high-powered team – notably former Senate President Jovito Salonga, former Sen. Rene Saguisag, former Rep. Teodoro Locsin, Jun Factoran and Dodo Sarmiento.
>
> "All of them were trained in Harvard and we had zero problems with the Supreme Court because we do our homework," Arroyo said.
>
> He said that Cory Aquino's EO 1, which created the Presidential Commission on Good Government, was approved without corrections from the draft of Salonga.[19]

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[17] Oscar Franklin Tan, *Commentary: Gloria M. Arroyo as human rights victim*, PHIL. DAILY INQUIRER, Jan. 16, 2012, *available at* http://opinion.inquirer.net/21191/gloria-m-arroyo-as-human-rights-victim.

[18] Maila Ager, *Aquino told: Add 's' to administration in 'Truth' EO*, PHIL. DAILY INQUIRER, Dec. 9, 2010, *available at* http://globalnation.inquirer.net/news/breakingnews/view/20101209-307966/Aquino-told-Add-s-to-administration-in-Truth-EO.

[19] Gil C. Cabacungan Jr, *Joker tells Aquino's legal team: Don't act rashly*, PHIL. DAILY INQUIRER, Aug. 16, 2010, *available at*

Judicial supremacy thus appeared unshakeable in the public view, unless challenged by an all-Harvard Law team led by a legend such as former Senate President Jovito Salonga, also a holder of a Yale Doctor of Laws degree.

Senator Arroyo criticized President Aquino's legal team for "racking up four cases before the Supreme Court in just 46 days in power,"[20] with each of Aquino's first three executive orders challenged. Aquino's supporters, however, pointed to a lengthening string of controversial decisions involving former President Arroyo allegedly tainted by partisan interests, whose subjects included midnight appointments, the creation of a new congressional district allegedly for Arroyo's son's candidacy, constitutional amendments, virtual martial law, abuse of executive privilege, bypass of the Commission on Appointments and anomalous government contracts.[21]

Perhaps the most outlandish case involved the exoneration of an Arroyo-appointed Justice from plagiarism charges even after several recognized public international law scholars not only wrote the Court about the plagiarism but claimed their articles were cited to support the opposite propositions.[22] The plagiarized decision, sadly, ruled against "comfort women" forced by the Japanese army to provide sexual services during World War II.[23] The Court also disciplined a majority of the University of the Philippines College of Law faculty for its vocal opposition in the matter.[24] Law students across the country ridiculed the Court's definition of plagiarism as necessitating intent and the "Microsoft Word" defense:

> [P]lagiarism is essentially a form of fraud where intent to deceive is inherent. ...

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http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20100816-287029/Joker-tells-Aquinos-legal-team-Dont-act-rashly.

[20] *Id.*

[21] In re Impeachment of Corona, Case No. 002-2011, Verified Complaint for Impeachment, at 18-21 (Dec. 12, 2011).

[22] In re Charges of Plagiarism Against Associate Justice Mariano C. Del Castillo, A.M. No. 10-7-17-SC, 632 SCRA 607, Oct. 15, 2010; Dona Pazzibugan, *Plagiarism: Author files complaint with SC*, PHIL. DAILY INQUIRER, Jul. 31, 2010, available at http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20100731-284134/Author-files-complaint-with-SC.

[23] Vinuya v. Executive Secretary, G.R. No. 162230, 619 SCRA 533, Apr. 28, 2010.

[24] In re Letter of the UP Law Faculty entitled "Restoring Integrity: A Statement by the Faculty of the University of the Philippines College of Law on the Allegations of Plagiarism and Misrepresentation in the Supreme Court", A.M. No. 10-10-4-SC, Oct. 19, 2010. The author enjoyed dark humor from some of the Facebook pages of the professors concerned and Romel Bagares during the entire episode.

> [P]lagiarism presupposes intent and a deliberate, conscious effort to steal another's work and pass it off as one's own.[25]

> [T]he Microsoft word program does not have a function that raises an alarm when original materials are cut up or pruned. The portions that remain simply blend in with the rest of the manuscript, adjusting the footnote number and removing any clue that what should stick together had just been severed.[26]

> Justice Del Castillo failed to attribute to the foreign authors materials that he lifted from their works and used in writing the decision for the Court in the Vinuya case. But, as the Court said, the evidence as found by its Ethics Committee shows that the attribution to these authors appeared in the beginning drafts of the decision. Unfortunately, as testified to by a highly qualified and experienced court-employed researcher, she accidentally deleted the same at the time she was cleaning up the final draft. The Court believed her since, among other reasons, she had no motive for omitting the attribution. The foreign authors concerned, like the dozens of other sources she cited in her research, had high reputations in international law.[27]

The resolution's dispositive portion even provided:

> [T]he Court ... DIRECTS the Clerk of Court to acquire the necessary software for use by the Court that can prevent future lapses in citations and attributions.[28]

Attending a family reunion after *Vinuya,* I found myself at a table of 12-year olds asking him why the Supreme Court had ruled that they could now copy for their school term papers.

The Court's lowest point came when it issued a temporary restraining order grounded on the right to travel allowing former President Arroyo and her husband to leave the country, allegedly before charges would be brought against them. The order was odd in that it did the opposite of preserving the status quo and was issued ex parte without allowing the government to respond. Chief Justice Corona was later

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[25] In re Charges of Plagiarism Against Associate Justice Mariano C. Del Castillo, A.M. No. 10-7-17-SC, 632 SCRA 607, 630 Oct. 12, 2011.

[26] *Id* at 628.

[27] In re Charges of Plagiarism Against Associate Justice Mariano C. Del Castillo, A.M. No. 10-7-17-SC, 642 SCRA 11, 45, Feb. 8, 2011.

[28] In re Charges of Plagiarism Against Associate Justice Mariano C. Del Castillo, A.M. No. 10-7-17-SC, 632 SCRA 607, 636-37, Oct. 15, 2011.

accused of abusing his administrative powers to railroad the order.[29] Although many voiced the need to respect the order to maintain the rule of law, Dean Raul Pangalangan opined in the *Inquirer's* front page that the false human rights issue should be pierced and the actual political issue should be recognized:

> It would be the supreme irony to allow GMA (Gloria Macapagal-Arroyo) to invoke our most sacred human rights protections to escape justice. That would be her supreme, final perversion of our democratic institutions. While countless voices have correctly quoted human rights law, our democracy must recognize GMA's pleas as a political, not human rights, issue.
>
> Our Bill of Rights is our democracy's greatest triumph. It is "counter-majoritarian"; it empowers the weakest member of our society to stand against the most powerful members. Wind and sunshine may enter the humblest hovel, but the king must first knock at the door.
>
> The Bill of Rights is applied by the courts with very strict scrutiny in favor of the disadvantaged for whom "those political processes ordinarily to be relied upon to protect minorities" historically do not work: From the Maguindanao massacre victims to millions of starving children who might be fed and clothed with the money from the fertilizer and ZTE scams.
>
> That is why we must pierce legal rhetoric to see what is really at stake.[30]

President Aquino's Secretary of Justice Leila de Lima refused to honor the order and had the Arroyos blocked from boarding planes at the airport. Charges and an arrest warrant were soon brought against Arroyo[31] and impeachment was initiated against Corona in less than a day. One headline story opened:

> Allies in the House of Representatives, seeking to appease an angry President Benigno Aquino III, on Monday swiftly impeached Chief Justice Renato Corona for interfering in the

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[29] In re Impeachment of Corona, Case No. 002-2011, Verified Complaint for Impeachment, art. VII (Dec. 12, 2011).

[30] Pangalangan, *supra* note 3.

[31] Cynthia Balana et al, *Judge OKs continued hospital arrest for Arroyo*, PHIL. DAILY INQUIRER, Dec. 13, 2011, *available at* http://newsinfo.inquirer.net/97883/judge-oks-continued-hospital-arrest-for-arroyo.

> prosecution of former President and now Pampanga Representative Gloria Macapagal-Arroyo.[32]

In attempting to resist the Supreme Court, thus, President Aquino deployed the heavy artillery of impeachment after every other weapon in the arsenal apparently failed. It would later appear that even this firepower brought to bear was insufficient to erase the blot of *De Castro v. Judicial and Bar Council* and *Biraogo v. Philippine Truth Commission* from legal reasoning.

II. THE GREATLY EXPANDED PHILIPPINE POWER OF JUDICIAL REVIEW

A. THE EXPANDED CERTIORARI POWER

The Philippine Supreme Court has repeatedly and consistently asserted:

> The major difference between the judicial power of the Philippine Supreme Court and that of the U.S. Supreme Court is that while the power of judicial review is only *impliedly* granted to the U.S. Supreme Court and is discretionary in nature, that granted to the Philippine Supreme Court and lower courts, *as expressly provided for in the Constitution*, is not just a power but also a *duty*, and it was *given an expanded definition* to include the power to correct any grave abuse of discretion on the part of any government branch or instrumentality. (emphasis in the original)[33]

This excerpt from the landmark cases *Francisco v. House of Representatives* and *Gutierrez v. House of Representatives Committee on Justice* may well be the Philippine Court's *Marbury v. Madison*[34] (or perhaps its *Aaron v.*

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[32] Cynthia D. Balana & Gil C. Cabacungan Jr., *188 solons impeach CJ Corona*, PHIL. DAILY INQUIRER, Dec. 13, 2011, at A1, *available at* http://newsinfo.inquirer.net/109793/188-solons-impeach-cj-corona.

[33] Gutierrez v. House of Representatives Committee on Justice, G.R. No. 193459, 643 SCRA 198, Feb. 15, 2011, *quoting* Francisco v. House of Representatives, G.R. No. 160261, 415 SCRA 44, 130-31, Nov. 10, 2003.

For other recent discussions of judicial power's expanded scope, *see* Bryan Dennis Tiojanco & Leandro Angelo Aguirre, *The Scope, Justifications and Limitations of Extradecisional Judicial Activism and Governance in the Philippines*, 84 PHIL. L.J. 73 (2009) (Awardee, Justice Irene R. Cortes Prize for Best Paper in Constitutional Law (2009)); Johann Carlos Barcena, *Easing the Counter-Majoritarian Difficulty: The Judiciary in a Developing Democracy*, 84 PHIL. L.J. 883 (2010) (Awardee, Justice Irene R. Cortes Prize for Best Paper in Constitutional Law (2010)).

[34] 5 U.S. (1 Cranch) 137 (1803) (generally referred to as the decision that established judicial review in the United States).

Cooper),[35] an *ex cathedra* pronouncement on judicial review made when intervening in an impeachment, that most political of the political branches' powers. *Francisco* outlines the 1987 Constitution's design. First, judicial review has been made explicit and is not a mere product of jurisprudence. Second, it is not limited to determining whether the Constitution has been breached; the Court is further empowered "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" even where a branch of government has acted within its power. Third, judicial review is denominated as a duty, a word that the Court cites emphatically when it is determined to rule on an issue.

It is well established that this outline is intentional constitutional design and the Constitutional Commission intentionally intended to strengthen the Court as a foil against another potential Marcos. What is less clear to our generation of lawyers who inherited this post-EDSA legacy is the extent to which the "expanded certiorari" power has gone beyond the already broad scope it was envisioned to have.

B. HYPERTEXTUALISM AND THE POLITICAL QUESTION'S DEATH

The "expanded certiorari" power allows the Supreme Court to invalidate the act of a co-equal branch that is either invalid under the Constitution or is technically valid but deemed a grave abuse of discretion. It would follow that what is squarely within a branch's discretion must be valid and beyond the Court's scrutiny. This follows from *Marbury* itself; before Chief Justice John Marshall wrote that "It is emphatically the province and duty of the judicial department to say what the law is,"[36] he wrote in a preceding section that:

> [W]here the heads of departments ... merely ... execute the will of the President, or rather to act in cases in which the executive professes a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.[37]

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[35] 358 U.S. 1 (1958).

[36] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803)

[37] *Id.* at 166-67. This thinking is classically articulated in Philippine jurisprudence in *Tanada v. Cuenco,* 103 Phil. 1051, 1067 (1957).

In practice, however, this framework has no relevance to Philippine judicial review.

The political question doctrine determines whether a matter is "only politically examinable" or properly subject to judicial review and this doctrine has been pronounced dead under the 1987 Constitution, particularly with the "expanded certiorari" power thought to drastically restrict if not practically bar this doctrine's application.

Baker v. Carr[38] contains the political question framework's classic formulation:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for questioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[39]

Fr. Joaquin Bernas, S.J. divides *Baker's* formulation into three categories:

> *textual:* where there "is found a textually demonstrable constitutional commitment of the issue to a political department"
>
> *functional:* where there is "a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion"
>
> *prudential:* where there is "the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already

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[38] 369 U.S. 186 (1962).

[39] *Id. at* 217, *quoted in* Francisco v. House of Representatives, G.R. No. 160261, 415 SCRA 44, 151, Nov. 10, 2003; Estrada v. Desierto, G.R. No. 146710, 353 SCRA 452, 490, Mar. 2, 2001.

> made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question"[40]

First, Fr. Bernas has pronounced the prudential question extinct because judicial review is denominated a "duty" by the 1987 Constitution[41] and this has caused the Court to state: "Justices cannot abandon their constitutional duties just because their action may start, if not precipitate, a crisis."[42] This attitude is a conscious shift from Marcos-era invocations of the political doctrine that matches the textual shift embodied in the "expanded certiorari" power.

Second, the textual and the functional questions are ultimately choked off by the 1987 Constitution's sheer length and the present extreme textualist mindset in Philippine constitutional law. The textual question arises when the Constitution's text assigns an issue's resolution to a political branch. The functional question arises when the Constitution provides no rules in its text to govern an issue and leaves its resolution to a political branch with greater institutional competence to resolve it using its discretion.[43] In the face of either question, one readily finds a textual anchor in the torrents of text contained in the 1987 Constitution and argues that the text must be interpreted in an exercise of judicial review.[44]

Integrated Bar of the Philippines v. Zamora[45] exemplifies the extreme textualist approach. President Joseph Estrada's deployment of Marines in shopping malls to augment policemen and enhance their visibility was challenged as unconstitutional. Instead of simply holding that these deployments fell squarely within the President's discretion as Commander-in-Chief, the Court asserted jurisdiction over the matter and found that there was no evidence that the President used his powers over the military arbitrarily, the "expanded certiorari" power's framework. Dean Pacifico

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[40] JOAQUIN BERNAS, S.J., THE 1987 CONSTITUTION OF THE PHILIPPINES: A COMMENTARY 953-54 (2003 ed.).

[41] *Id.* at 959.

[42] Francisco v. House of Representatives, G.R. No. 160261, 415 SCRA 44, 162, Nov. 10, 2003.

[43] Christopher Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 352 (1994).

[44] The Court has on rare occasions still explicitly recognized political questions. "[A]lthough the Constitution reserves to the Supreme Court the power to review the sufficiency of the factual basis of the proclamation or suspension in a proper suit, it is implicit that the Court must allow Congress to exercise its own review powers, which is automatic rather than initiated. ... The constitutional validity of the President's proclamation of martial law or suspension of the writ of *habeas corpus* is first a political question in the hands of Congress before it becomes a justiciable one in the hands of the Court." Fortun v. Macapagal-Arroyo, G.R. No. 190293, Mar. 20, 2012.

[45] G.R. No. 141284, 338 SCRA 81, Aug. 15, 2000.

Agabin jokingly refers to "the power to call out such armed forces to prevent or suppress lawless violence in the central business district,"[46] summing up the textual trap the Court laid for itself when it went further and ruled on whether the "lawless violence, invasion or rebellion" qualifiers to the President's power to declare martial law apply to his deployment of the armed forces. More recently, *Province of North Cotabato v. GRP Peace Panel*[47] ruled that the President had the power to negotiate peace agreements with rebels and did so by textually tying this implied power to the explicit power to the Commander-in-Chief power to "prevent and suppress rebellion and lawless violence."[48] This technical approach is distinguished from a broader approach in *Marcos v. Manglapus*.[49]

IBP v. Zamora's doctrine, birthed by textualist acrobatics, carried far beyond its benign factual milieu to *Lacson v. Perez*[50] and *Sanlakas v. Executive Secretary*,[51] which dealt with the "state of rebellion" declared during the "EDSA III" demonstrations in May 2001 and the takeover by soldiers in July 2003 of the Oakwood Premiere apartments in Makati for use as a base to air grievances against President Arroyo, and eventually to *David v. Macapagal-Arroyo*,[52] which dealt with the "state of national emergency" and alleged virtual declaration of martial law in February 2006, after the discovery of a suspected plot by soldiers who participated in the "Oakwood mutiny" and other elements who sought to unseat President Arroyo. This tortuous but increasingly ominous line of cases eventually discussed the difference between a "state of rebellion" and a "state of national emergency" and how the latter might involve an "awesome power" but the latter did not, and detailed a "sequence of graduated powers." *David* in effect deemed the two terms instances of calling out the armed forces to suppress lawless violence, with different collars, but with a better appreciation of a discussion that began with "the power to call out such armed forces to prevent or suppress lawless violence in the central business district."

The *David* line of cases revolved around the phrase "lawless violence" despite the weighty concepts of Commander-in-Chief and martial law being defined and illustrates how Philippine jurisprudence is developed by anchoring onto snippets of constitutional text. Philippine jurisprudence has produced more curious textual anchors; for example,

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[46] Tan, *The 2004 Canvass*, *supra* note *, at 84.

[47] 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.

[48] *Id.* at 503.

[49] G.R. No. 88211, 177 SCRA 668, Sep. 15, 1989.

[50] G.R. No. 147780, 357 SCRA 756, May 10, 2001.

[51] G.R. 159085, 421 SCRA 656, Feb. 3, 2004.

[52] G.R. 171396, 489 SCRA 161, May 3, 2006.

Duncan Ass'n of Detailman-PTGWO v. Glaxo-Wellcome Philippines, Inc.[53] emphasized a "right of enterprises to reasonable returns on investments, and to expansion and growth"[54] while deciding whether an employer could contractually restrict an employee's right to marry and prohibit marriage to a competitor's employee. It takes only a modicum of creativity to coax a textual anchor out of the 1987 Constitution and when this is achieved, one may readily assert the need to interpret the textual standard and find a "not truly" political question as opposed to a "truly" political question, using *Francisco's* framework.

To cite another freshman syllabus example of hypertextualism at work, *Cayetano v. Monsod*[55] ruled that lawyer Christian Monsod's experience in various banks and non-governmental organizations met the requirement that a Commission on Elections commissioner should have been "engaged in the practice of law for at least ten years."[56] Instead of simply ruling that the appointment lay within the President's discretion as appointing authority, the Court delivered an elaborate dissection of the phrase "practice of law," complete with quotes from magazine articles and strained explanations of how a World Bank lawyer encounters the laws of other countries and a National Movement for Free Elections chair encounters election law issues.[57]

"[O]ld textualism is based on the incorrect view of linguistics and jurisprudence by which the text can be clear without examining its context. Judge Learned Hand was right in saying, 'There is no surer way to misread any document than to read it literally.'"[58] The extreme form of textualism is contrary to the South African approach of reasonableness which does not treat constitutional phrases as absolutes and instead intervenes against government acts only when they are highly unreasonable in their constitution's context. The landmark decision *Soobramoney v. Minister of Health (Kwazulu-Natal)*[59] put to test the constitutional provisions "No one may be refused emergency medical treatment," "Everyone has the right to have access to health care services" and "Everyone has the right to life" when a man in the final stages of severe renal failure challenged a government hospital's refusal to allocate dialysis treatment resources to him. The South African Constitutional Court addressed the issue directly instead of engaging in interpretive textual acrobatics or creating fine factual

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[53] G.R. No. 162994, 438 SCRA 343, Sep. 17, 2004.
[54] CONST. art. XIII, § 3.
[55] Cayetano v. Monsod, G.R. No. 100113, 201 SCRA 210, Sep. 3, 1991.
[56] CONST. art. IX-C, § 1(1).
[57] Tan, *The 2004 Canvass*, *supra* note *, at 88.
[58] AHARON BARAK, THE JUDGE IN A DEMOCRACY 150 (2006).
[59] 1997 (12) BCLR 1696 (CC) (S.Africa).

distinctions. Without diminishing the provisions' mandatory character, the Court recognized that South Africa had scarce health care resources and that the hospital's policy for allocating these was not unreasonable, even if they resulted in the petitioner being denied access to them.

C. EXPANDED STANDING RULES

Under the "expanded certiorari" power, thus, the Court can review practically any question presented to it. In addition, the question may potentially be brought by any party, the final relaxation of the classic case and controversy constraint on judicial review. The now familiar language of *Kilosbayan v. Guingona*[60] cast this traditional constitutional constraint as a mere "technicality:"

> A party's standing before this Court is a procedural technicality which it may, in the exercise of its discretion, set aside in view of the importance of the issues raised. In the landmark *Emergency Powers Cases*, this Court brushed aside this technicality because "the transcendental importance to the public of these cases demands that they be settled promptly and definitely, brushing aside, if we must, technicalities of procedure."[61]

Guingona was decided by a slim majority and practically reversed the following year in *Kilosbayan v. Morato.*[62] Parenthetically, Court has shied away from this exaggerated formulation. For example, the 2011 decision *Bayan Muna v. Romulo*[63] restated:

> The Court may relax the standing requirements and allow a suit to prosper even where there is no direct injury to the party claiming the right of judicial review.[64]

Chief Justice Puno, in the 2009 decision *Lozano v. Nograles,*[65] presented a more technically accurate articulation:

> The rule on locus standi is not a plain procedural rule but a constitutional requirement derived from Section 1, Article VIII of the Constitution, which mandates courts of justice to settle only "actual controversies involving rights which are

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[60] G.R. No. 113375, 232 SCRA 110, May 5, 1994.
[61] *Id.* at 134.
[62] G.R. No. 118910, 246 SCRA 540, Jul. 17, 1995.
[63] G.R. No. 159618, 641 SCRA 244, Feb. 1, 2011.
[64] *Id.* at 256.
[65] G.R. 187883, 589 SCRA 354, Jun. 16, 2009.

legally demandable and enforceable." As stated in *Kilosbayan, Incorporated v. Guingona, Jr., viz.*:

> x x x [C]ourts are neither free to decide all kinds of cases dumped into their laps nor are they free to open their doors to all parties or entities claiming a grievance. The rationale for this constitutional requirement of locus standi is by no means trifle. It is intended "to assure a vigorous adversary presentation of the case, and, perhaps more importantly to warrant the judiciary's overruling the determination of a coordinate, democratically elected organ of government." It thus goes to the very essence of representative democracies....
>
> A lesser but not insignificant reason for screening the standing of persons who desire to litigate constitutional issues is economic in character. Given the sparseness of our resources, the capacity of courts to render efficient judicial service to our people is severely limited. For courts to indiscriminately open their doors to all types of suits and suitors is for them to unduly overburden their dockets, and ultimately render themselves ineffective dispensers of justice. To be sure, this is an evil that clearly confronts our judiciary today.[66]

Guingona's doctrine featured prominently in several Davide Court decisions such as *IBP v. Zamora* regarding the deployment of marines to augment police, *Bayan v. Zamora*[67] regarding the Visiting Forces Agreement (VFA) with the United States, *Cruz v. Secretary of Environment and Natural Resources*[68] regarding the Indigenous Peoples Rights Act of 1997 and *Lim v. Executive Secretary*[69] regarding the Balikatan military exercises. Parenthetically, it may be better phrasing to admit in such decisions that standing is being analyzed with liberality rather than dismissing standing as a mere technicality and having to deal with questions such as advisory opinions.

The Court has recognized liberality in standing in specific areas. It has reiterated that "when the question is one of public right ... the people are regarded as the real party in interest and the relator at whose instigation the proceedings are instituted need not show that he has any legal or

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[66] *Id.* at 361-62.

[67] G.R. No. 138570, 342 SCRA 449, Oct. 10, 2000.

[68] G.R. No. 135385, 347 SCRA 128, Dec. 6, 2000.

[69] G.R. No. 151445, 380 SCRA 739, Apr. 11, 2002.

special interest in the result, it being sufficient to show that he is a citizen...."[70] Further, the Court has explicitly stated that it treats standing liberally in taxpayers' suits,[71] although some recent decisions do deny taxpayer standing on the ground that there is no direct expenditure questioned. In addition, there are narrow circumstances in which the Constitution explicitly grants standing to any citizen, most prominently when one questions the factual bases for a declaration of martial law or suspension of the writ of habeas corpus.[72]

Legislators are another recognized category:

> To the extent that the powers of Congress are impaired, so is the power of each member thereof, since his office confers a right to participate in the exercise of the powers of that institution.
>
> An act of the Executive which injures the institution of Congress causes a derivative but nonetheless substantial injury, which can be questioned by a member of Congress.[73]

The Court noted in *David*, however, that being a former legislator confers no special standing.[74] Moreover, where the act subject of the petition impairs no prerogative of Congress, legislators may claim no standing to sue.[75]

Oposa v. Factoran,[76] penned by then Justice Hilario Davide, Jr., granted the most extreme liberality in standing by recognizing unborn petitioners:

> Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality

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[70] Tanada v. Tuvera, G.R. No. 63915, 136 SCRA 27, 36, Apr. 24, 1985, *quoted in* Legaspi v. Civil Service Comm'n, G.R. No. 72119, 150 SCRA 530, 536-37, May 29, 1987. The doctrine was prominently reiterated in decisions such as Francisco, 415 SCRA at 136; Chavez v. Pres. Comm'n on Good Gov't, G.R. No. 130716, 299SCRA 744, 759-60, Dec. 9, 1998.

[71] Abaya v. Ebdane, G.R. No. 167919, 515 SCRA 720, 757, Feb. 14, 2007; Constantino v. Cuisia, G.R. No. 106164, 472SCRA 505, 518, Oct. 13, 2005, *citing* Tatad v. Garcia, G.R. No. 114222, 243 SCRA 436, 455, Apr. 6, 1995.

[72] CONST. art. VII, § 18(3).

[73] Sanlakas v. Reyes, G.R. No. 159085, 421 SCRA 656, 665, Feb. 3, 2004, *citing* Phil. Const. Ass'n v. Enriquez, G.R. No. 113105, 235 SCRA 506, Aug. 19, 1994.

[74] David v. Macapagal-Arroyo, G.R. No. 171396, 489 SCRA 160, 223, May 3, 2006.

[75] Pimentel v. Executive Secretary, G.R. No. 164978, 472 SCRA 587, 595, Oct. 13, 2005.

[76] G.R. No. 101083, 224 SCRA 792, Jul. 30, 1993.

> to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the "rhythm and harmony of nature."[77]

The Court codified *Oposa's* extremely liberal approach to standing in environmental claims in its Rules of Procedure in Environmental Cases:

> SEC. 4. Who may file.—Any real party in interest, including the government and juridical entities authorized by law, may file a civil action involving the enforcement or violation of any environmental law.
>
> SEC. 5. Citizen suit.—Any Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws.[78]

Oposa's emphasis on intergenerational responsibility was also reiterated in *Metropolitan Manila Development Authority v. Concerned Citizens of Manila Bay*,[79] which Justice Presbitero Velasco ended with this exhortation:

> So it was that in *Oposa v. Factoran, Jr.* the Court stated that the right to a balanced and healthful ecology need not even be written in the Constitution for it is assumed, like other civil and political rights guaranteed in the Bill of Rights, to exist from the inception of mankind and it is an issue of transcendental importance with intergenerational implications. Even assuming the absence of a categorical legal provision specifically prodding petitioners to clean up the bay, they and the men and women representing them cannot escape their obligation to future generations of Filipinos to keep the waters of the Manila Bay clean and clear as humanly as possible. Anything less would be a betrayal of the trust reposed in them.[80]

MMDA v. Concerned Citizens represents the modern, refined form of an *Oposa* constitutional claim regarding the environment. The claim was anchored on "[r]espondents' constitutional right to life, health, and a

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[77] *Id.* at 802-03.

[78] A.M. No. 09-6-8-SC, Rule 2, Apr. 29, 2010. For a recent overview of Philippine environmental law, see Elizabeth Barrett Ristroph, *The Role of Philippine Courts in Establishing the Environmental Rule of Law*, *at* http://works.bepress.com/elizabeth_ristroph/3 (last visited Apr. 23, 2012).

[79] G.R. No. 171947, 574 SCRA 661, Dec. 18, 2008.

[80] *Id.* at 692.

balanced ecology"[81] but specific statutory as well as international law obligations were also cited as bases to compel the Department of Environment and Natural Resources and other specified agencies to "clean up and rehabilitate Manila Bay and restore its waters to SB classification to make it fit for swimming, skin-diving and other forms of contact recreation."[82] This follows from the note in Justice Florentino Feliciano's *Oposa* concurring opinion that the petitioners should have asserted a more specific legal right. Contrast *MMDA v. Concerned Citizens* with the earlier decision *Henares v. LTFRB,*[83] which cited *Oposa* and featured a claim that the constitutional "right to clean air"[84] compelled the government to require the use of alternative fuel. The Court delivered a stirring opinion recognizing the petitioners' standing, reemphasizing *Oposa* and reading the numerous environmental statistics presented into the anthologies, but ultimately dismissing the petition on the merits and asking the petitioners to cite a specific statutory duty owed or to direct their claims to Congress.[85]

Finally, extending the transcendental importance doctrine and these related rules, *Province of North Cotabato v. GRP Peace Panel*[86] ended its discussion of standing, mootness and other rules by stating that the Court would render a decision on a controversial Memorandum of Agreement on the Ancestral Domain Aspect of the Tripoli Agreement on Peace of 2001 "to formulate controlling principles to guide the bench, the bar, the public and, most especially, the government."[87] Such a rationale arguably borders on judicial legislation, particularly if these principles are dicta enunciated outside the scope of judicial review. Sarcastically, one may accuse the Court of taking the transcendental importance doctrine even further to a doctrine of liberality when it is of a mood to lecture.

Note, finally that the Court on several occasions has asserted a liberal stance on standing but declined a resolution on the merits by invoking an aspect of the case and controversy requirement, such as

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[81] *Id.* at 666.

[82] *Id.* at 667-68.

[83] Henares v. Land Trans. Franchising & Reg. Board, G.R. No. 158290, 505 SCRA 104, Oct. 23, 2006.

[84] *Id.* at 113, 116-18.

[85] Symbolic results are not necessarily meaningless of course. *Brown v. Board of Education,* consider, was widely disregarded by schools in the southern United States in the decade following its promulgation. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 136 (1999).

[86] Province of North Cotabato v. Gov't of the Republic of the Phlippines Peace Panel on Ancestral Domain, G.R. No. 183591, 568 SCRA 402, Oct. 14, 2008.

[87] *Id.* at 462.

mootness, ripeness, or *lis mota*.[88] This was most prominent in the recent ruling of mootness in *Fortun v. Macapagal-Arroyo*,[89] regarding a challenge to a declaration of martial law in Maguindanao following the alleged murder of 57 women and journalists by that province's Ampatuan political clan and alleged subsequent mobilization of thousands of the clan's armed followers. The Court, two years after the petition was brought, declined to rule on the martial law declaration's constitutionality because former President Arroyo lifted it after only eight days. *Fortun* argued:

> The problem in this case is that the President aborted the proclamation of martial law and the suspension of the privilege of the writ of habeas corpus in Maguindanao in just eight days. In a real sense, the proclamation and the suspension never took off. The Congress itself adjourned without touching the matter, it having become moot and academic.
>
> Of course, the Court has in exceptional cases passed upon issues that ordinarily would have been regarded as moot. But the present cases do not present sufficient basis for the exercise of the power of judicial review. The proclamation of martial law and the suspension of the privilege of the writ of habeas corpus in this case, unlike similar Presidential acts in the late 60s and early 70s, appear more like saber-rattling than an actual deployment and arbitrary use of political power.[90]

Justice Carpio heavily criticized the Bickelian dodge, arguing:

> Failing to determine the constitutionality of Proclamation No. 1959 by dismissing the cases on the ground of mootness sets a very dangerous precedent to the leaders of this country that they could easily impose martial law or suspend the writ without any factual or legal basis at all, and before this Court could review such declaration, they would simply lift the same and escape possible judicial rebuke.[91]

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[88] For a discussion of Philippine standing and case and controversy frameworks, *see, generally,* VICENTE V. MENDOZA, JUDICIAL REVIEW OF CONSTITUTIONAL QUESTIONS: CASES AND MATERIALS, chap. 3 (2004). *See also* Francisco v. House of Representatives, G.R. No. 160261, 415 SCRA 44, 160-62, Nov. 10, 2003, *quoting* Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936).

[89] G.R. No. 190293, Mar. 20, 2012.

[90] *Id. Fortun* also ruled that the Court should first allow Congress to review a declaration of martial law's factual bases. "The constitutional validity of the President's proclamation of martial law or suspension of the writ of *habeas corpus* is first a political question in the hands of Congress before it becomes a justiciable one in the hands of the Court." *Id.*

[91] *Id.* (Carpio, J., *dissenting*).

This was also prominent in *Lacson v. Perez*,[92] which declared petitions regarding President Arroyo's declaration of a "state of rebellion" moot and academic (although this application of mootness was reversed in *Sanlakas* and *David v. Macapagal-Arroyo*;[93] the latter ruled on President Arroyo's Proclamation 1017, which was assailed as a virtual declaration of martial law), and *North Cotabato v. GRP Peace Panel* which almost declared petitions assailing a Memorandum of Agreement regarding the Mindanao peace process moot by one vote. In addition to the traditional Bickelian escape devices relating to standing or case and controversy, *Lacson* also cited the Court's lack of original jurisdiction over petitions for declaratory relief, *Lim* and *Francisco v. Fernando*[94] invoked the doctrine that the Court is not a trier of facts (to alleged foreign military operations and jaywalking, respectively),[95] while *Tanada v. Angara*[96] most prominently held that certain constitutional provisions are not meant to be self-executing (and thus enforceable in themselves). This author's previous article detailed a number of these subtle dodges and how these simulate the political question doctrine when it is convenient to present a similar dog with a different collar.[97]

Note, incidentally, that there remain cases where the Court exercises its prerogative to a Bickelian dodge by finding a lack of standing. In 2010, for example, when militant organizations challenged the Human Security Act of 2007, the Court found that they faced neither an actual charge nor a credible threat of prosecution under the law and refused to accept alleged "tagging" and surveillance of these organizations as sufficient to grant standing.[98] More amusingly, Senior Associate Justice Carpio delivered a most powerful deadpan refusal in *Paguia v. Office of the President*,[99] where Alan Paguia was not only denied standing to assail former Chief Justice Davide's appointment as an ambassador for being allegedly beyond the mandatory retirement age for Department of Foreign Affairs employees but reminded his suspension from the practice of law prohibited him from even bringing the suit.[100] *Soriano v. Lista*[101] similarly

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[92] G.R. No. 147810, 357 SCRA 756, May 10, 2001.

[93] David v. Macapagal-Arroyo, G.R. No. 171396, 489 SCRA 160, 223, May 3, 2006.

[94] G.R. No. 166501, 507 SCRA 173, Nov. 16, 2006.

[95] Lim v. Exec. Sec., G.R. No. 151445, 380 SCRA 739, 759-60, Apr. 11, 2002.

[96] G.R. No. 118295, 272 SCRA 18, 54, May 2, 1997. *See* Manila Prince Hotel v. Gov't Service Ins. System, G.R. No. 122156, 267 SCRA 408, 431, Feb. 3, 1997; Oposa v. Factoran, G.R. No. 101083, 224 SCRA 792, 805, Jul. 30, 1993.

[97] Tan, *The 2004 Canvass*, *supra* note *, at 80-97.

98 Southern Hemisphere Engagement Network v. Anti-Terrorism Council, G.R. No. 178552, 632 SCRA 146, 168-72, Oct. 5, 2010.

[99] G.R. No. 176278, 621 SCRA 600, Jun. 25, 2010.

[100] *Id.* at 605-06.

rejected citizen and taxpayer standing for a petitioner questioning the lack of Commission on Appointments confirmation of senior Coast Guard officers. The decision noted the Coast Guard is no longer technically part of the armed forces.[102]

Chief Justice Puno ended *Lozano v. Nograles* with a stinging rebuke that summarizes the transcendental importance doctrine's outer bound:

> [W]hile the Court has taken an increasingly liberal approach to the rule of *locus standi*, evolving from the stringent requirements of "personal injury" to the broader "transcendental importance" doctrine, such liberality is not to be abused. It is not an open invitation for the ignorant and the ignoble to file petitions that prove nothing but their cerebral deficit.
>
> In the final scheme, judicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury. When warranted by the presence of indispensible minimums for judicial review, this Court shall not shun the duty to resolve the constitutional challenge that may confront it.[103]

D. THE 1987 CONSTITUTION'S SHEER LENGTH

In addition to the political question's practical nonexistence and extremely liberal standing rules, the Philippine hypertextualist mindset effectively expands the scop of judicial review when coupled with the sheer length of the 1987 Constitution.[104] This overabundance of text makes it easy to find a textual hook for just about any claim, and has allowed the Court to break new constitutional ground without, unlike the United States Supreme Court, having to first justify the very existence of the right it is enforcing[105] or pinpoint "judicially manageable standards" under *Baker*.

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[101] G.R. No. 153881, 399 SCRA 437, Mar. 24, 2003.

[102] *Id.* at 439-41.

[103] Lozano v. Nograles, G.R. 187883, 589 SCRA 356, 362, Jun. 16, 2009.

[104] Professor Mark Tushnet uses the illustrations of a "thick" constitution of detailed but uncontroversial provisions and a "thin" constitution of fundamental principles. Consider that such an illustration may be less useful in the Philippines in that the lengthier Constitution contains many pregnant phrases and constitutionalized aspirations and ideals, rendering the "thin" constitution quite bloated. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 9-12 (1999).

[105] Dean Ely lamented the "transparent failure of the dominant mode of 'noninterpretivist' review" in his milieu. JOHN HART ELY, DEMOCRACY AND DISTRUST 41 (1980).

The most prominent examples are all too familiar from a freshman's Constitutional Law syllabus. *Oposa* upheld a constitutional "right to a balanced and healthful ecology" as well as the standing of unborn generations "based on the concept of intergenerational responsibility."[106] *Tecson v. Glaxo Wellcome Philippines, Inc.*[107] recognized a constitutional "right to reasonable returns on investments and to expansion and growth."[108] Other constitutional provisions have been interpreted to authorize the prohibition of monopolies that are against the public interest[109] and a "Filipino First Policy"[110] that allowed a Filipino bidder to match the offer of a foreign company. Indeed, in one early decision regarding the 1987 Constitution's economic provisions, then Justice Artemio Panganiban found basis to emphatically state:

> *Kaya't sa mga kababayan nating kapitalista at may kapangyarihan, nararapat lamang na makiisa tayo sa mga walang palad at mahihirap sa mga araw ng pangangailangan. Huwag na nating ipagdiinan ang kawalan ng tubo, o maging ang panandaliang pagkalugi. At sa mga mangangalakal na ganid at walang puso: hirap na hirap na po ang ating mga kababayan. Makonsiyensya naman kayo!* (emphasis in original)[111]

The shift from what was once highly discretionary into "judicially manageable" was most prominent in *Francisco v. House,* where the Court ruled on the validity of an impeachment complaint against its own Chief Justice, despite the argument that "[i]f the political question doctrine has no force where the Constitution has explicitly committed a power to a coordinate branch and where the need for finality is extreme, then it is surely dead."[112] The Court held:

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[106] Oposa v. Factoran, G.R. No. 101083, 224 SCRA 792, 802-03, Jul. 30, 1993.

[107] Duncan Ass'n of Detailman-PTGWO & Tecson v. Glaxo Wellcome Philippines, Inc., G.R. No. 162994, 438 SCRA 343, Sep. 17, 2004.

[108] *Id.* at 352-53, *quoting* CONST. art. XIII, § 3. The same right was cited in ABAKADA Guro Party List v. Ermita, G.R. No. 168056, 469 SCRA 14, 304, Oct. 18, 2005 (Tinga, J., *dissenting*).

[109] Agan v. Phil. Int'l Air Terminals Co., Inc. (PIATCO), G.R. No. 155001, 402 SCRA 612, May 5, 2003.

[110] Manila Prince Hotel v. Gov't Service Ins. System, G.R. No. 122156, 267 SCRA 408, Feb. 3, 1997.

[111] Tatad v. Sec. of Energy, G.R. No. 124360, 281 SCRA 330, 379, Nov. 5, 1997. (Panganiban, J., *concurring*), *quoted in* Tan, *The 2004 Canvass, supra* note *, at 93. "To our capitalist and influential countrymen, it is but right that you express solidarity with the poor in times of need. Let us not emphasize a lack of profit or temporary losses. To unscrupulous and heartless businessmen: our countrymen are in dire straits. Listen to your consciences!"

[112] Nixon v. United States, 938 F.2d 239, 246 (D.C. Cir. 1991).

> [T]he U.S. Federal Constitution simply provides that "the House of Representatives shall have the sole power of impeachment." ... No limitation whatsoever is given. Thus, the US Supreme Court concluded that there was a textually demonstrable constitutional commitment.... This reasoning does not hold with regard to impeachment power of the Philippine House of Representatives since our Constitution, as earlier enumerated, furnishes several provisions articulating how that "exclusive power" is to be exercised.[113]

Clearly, this assertion of judicial review does not arise purely from the expanded certiorari jurisdiction; it is also grounded on additional text.

The 1987 Constitution's length also makes the context for applying the double standard of judicial review is radically different. This standard demands greater scrutiny when dealing with political and human rights as opposed to social and economic issues and was most recently emphasized by Justice Mendoza.[114] Paul Freund explained it as "set[ting] up a hierarchy of values within the due process clause."[115] It is classically reflected in "Footnote 4":

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution....
>
> 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 Fourteenth Amendment than are most other types of legislation....
>
> Nor do we inquire... whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[116]

This standard is a guideline not a mandatory rule, and note that arguably the greatest United States decision, *Brown v. Board of Education*[117]

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[113] Francisco, 415 SCRA at 175-76

[114] *See* Vicente V. Mendoza, *The Nature and Function of Judicial Review*, 31 J. OF THE INT. BAR OF THE PHIL. 6, 22-23 (2005).

[115] PAUL FREUND, ON UNDERSTANDING THE SUPREME COURT 11 (1950), *quoted in* MENDOZA, *supra* note 88, at 85.

[116] United States v. Carolene Products Co., 304 U.S. 144, 152, n.4 (1938).

[117] 347 U.S. 483 (1954).

on racial segregation, transformed that country's social landscape. Nevertheless, the expanded social and economic provisions in the 1987 Constitution blur the traditional lines. This is most evident in *Oposa* and *Henares* with respect to the "right to a balanced and healthful ecology" and *Manila Prince Hotel* and *Tanada v. Angara* with respect to the Filipino First Policy and certain economic provisions. Are these political and economic issues where policy must be determined by majoritarian process and where "[s]ome play must be allowed for the joints of the machine"[118]? Or are these issues of fundamental constitutional rights subject to exacting scrutiny, taking *Manila Prince Hotel's* statement that "there is nothing so sacrosanct in any economic policy as to draw itself beyond judicial review when the Constitution is involved"[119]? Paradoxically, many issues may be resolved either way, and it is disastrous to lean too closely to either extreme, which is what happened in past decisions where an issue was characterized one-dimensionally.

One notes that provisions not phrased as constitutional rights may fall into this blurring standard as well. For example, when a petition in *Lim v. Executive Secretary* assailed alleged combat operations by American soldiers within the Philippines under the auspices of the VFA, the Solicitor General invoked the President's broad discretion as Commander-in-Chief and in foreign affairs. The Court, however, on the premise that such alleged operations against "Abu Sayyaf bandits"[120] constituted a war, stated that the Constitution's renunciation of "war as an instrument of national policy"[121] restricted the President's discretion in this context. *Hacienda Luisita Inc. v. Presidential Agrarian Reform Council*[122] recognized a right "of farmers and regular farmworkers who are landless, to own directly or collectively the lands they till or, in the case of other farmworkers, to receive a just share of the fruits thereof," given that the Constitution's provisions on agrarian reform used the word "right," and recognized this right as sufficient basis to test the constitutionality of a law that allowed stock distribution instead of actual land to farmers.[123]

Finally, it is a subtle point that the 1987 Constitution is infinitely longer than it actually is, because the Philippines "adopts the generally

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[118] Missouri, Kansas and Tennessee Railroad v. May, 194 U.S. 267, 270 (1904) (Holmes, J.).

[119] Manila Prince Hotel v. Gov't Service Ins. System, G.R. No. 122156, 267 SCRA 408, 447, Feb. 3, 1997.

[120] Lim v. Exec. Sec., G.R. No. 151445, 380 SCRA 739, 773-74, Apr. 11, 2002.

[121] CONST., art. II, § 2.

[122] G.R. No. 171101, Jul. 5, 2011.

[123] G.R. No. 171101, Jul. 5, 2011 (Corona, C.J., *dissenting*). *See also* the dissenting opinion of Chief Justice Corona on the Supreme Court's Resolution on the Motion for Reconsideration in G.R. No. 171101, Nov. 22, 2011.

accepted principles of international law as part of the law of the land."[124] Although this provision does not elevate customary international law to the same tier as constitutional provisions,[125] it does grant the Court the discretion to select which principles to declare as "generally accepted principles of international law" and then apply these with a reverence that brings them to near-constitutional status anyway. In a number of cases, the Court has cited international law principles to reinforce a constitutional right it has identified. For example, *In re Sabio*[126] restated the basis for the Philippine right to privacy from the familiar formulation in the landmark cases *Ople v. Torres*[127] and *Morfe v. Mutuc*:[128]

> The meticulous regard we accord to these zones [of privacy] arises not only from our conviction that the right to privacy is a "constitutional right" and "the right most valued by civilized men," but also from our adherence to the Universal Declaration of Human Rights which mandates that, "no one shall be subjected to arbitrary interference with his privacy" and "everyone has the right to the protection of the law against such interference or attacks."[129]

Taken further, the doctrine of incorporation can and has been used to argue for the existence of new rights, beyond the already extensive constitutional text. Most prominently, a dissent in *Echegaray v. Secretary of Justice,*[130] regarding the first execution under the 1987 Constitution, proposed that the reimposed death penalty violated a newly-emerged norm of international law, notwithstanding that the Constitution explicitly gave Congress the option to restore this.[131] Recall Judge Bork's admonition against "the international homogenization of constitutional law...

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[124] CONST., art. II, § 2.

[125] Philip Morris, Inc. v. Court of Appeals, G.R. No. 91332, 224 SCRA 576, 593 (1993). "Under the doctrine of incorporation ... rules of international law are given a standing equal, not superior, to national legislation." For a recent and interesting commentary on the incorporation clause, *see* Merlin Magallona, *An Essay on the Incorporation Clause of the Constitution as a Juridical Enigma*, 35 J. INT. BAR PHIL. 18 (2010).

[126] In re Habeas Corpus of Camilo L. Sabio, G.R. No. 174340, 504 SCRA 704, 736, Oct. 17, 2006.

[127] G.R. No. 127685, 293 SCRA 141, Jul. 23, 1998.

[128] G.R. No. 20387, 22 SCRA 424, Jan. 31, 1968.

[129] In re Habeas Corpus of Camilo L. Sabio, G.R. No. 174340, 504 SCRA 704, 736, Oct. 17, 2006. Recent decisions have cited international instruments in addition to the constitutional bases in landmark cases. Oscar Franklin Tan, *Articulating the Complete Philippine Right to Privacy in Constitutional and Civil Law: A Tribute to Chief Justice Fernando and Justice Carpio*, 82(4) PHIL. L.J. 78, 133-35 (2008).

[130] G.R. No. 132601, 297 SCRA 754, 793-817, Oct. 12, 1998 (*per curiam dissenting opinion).*

[131] CONST. art. II, § 19(1).

accomplished only if the various national courts are willing to minimize the historical understanding of their own constitutions in favor of what they perceive as an international morality."[132] Although reference to international law norms is explicitly authorized by the Constitution, the suggestion in a Supreme Court decision that an alleged international law norm might trump an explicit constitutional provision shows the allure (or at least its extreme point) of using international law in our modern jurisprudence.

International law norms have been most progressively recognized in human rights contexts. *Government of Hong Kong v. Olalia*[133] declared the UDHR as containing principles of customary international law, stating that: "The modern trend in public international law is the primacy placed on the worth of the individual person and the sanctity of human rights."[134] The ICCPR has been cited on numerous occasions. As a further example, then Justice Puno's separate opinion in *Tecson v. COMELEC*[135] argued that the Convention on the Rights of the Child prohibited discrimination on account of birth or other status, and that this treaty obligation prohibited discrimination of an illegitimate child for purposes of citizenship. The Court's focus on these human rights contexts in international law complements its greater scope for judicial review in constitutional human rights contexts. The most expansive invocation was the first writ of amparo decision, which cited a UDHR formulation "right to life, liberty and security of person"[136] alongside Philippine constitution provisions.

Chief Justice Puno's *Tecson* opinion, parenthetically, illustrates the blurred lines between political and human rights issues in today's constitutional landscape. The Puno opinion framed the issue as one of discrimination against children by virtue of the circumstances of their birth. However, it acknowledged that the true issue was whether popular presidential candidate Fernando Poe, Jr. should be disqualified from the elections for not meeting the citizenship requirement in relation to the circumstances of his birth. The opinion concluded: "Whether respondent

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[132] ROBERT BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 24 (2003). At the extreme point of Judge Bork's criticism, he points out how British Prime Minister Margaret Thatcher and the Prince of Wales were charged in the United States of violating human rights in Northern Ireland and Libya and how the International Court of Justice once, unsuccessfully, ordered the United States Supreme Court to "to take all measures at its disposal" to stay the execution of a German national sentenced to death by an Arizona jury during a murder trial. *Id.* at 27, 34.

[133] G.R. No. 153675, 521 SCRA 470, Apr. 19, 2007.

[134] *Id.* at 481.

[135] Tecson v. Comm'n on Elec., G.R. No. 161434, 424 SCRA 277, 399-401, Mar. 3, 2004.

[136] Sec. of Nat'l Defense v. Manalo, G.R. No. 180906, 568 SCRA 1, Oct. 7, 2008 (text accompanying note 126).

Fernando Poe, Jr. is qualified to run for President involves a constitutional issue but its political tone is no less dominant. ... Given the indecisiveness of the votes of the members of this Court, the better policy approach is to let the people decide...."

E. THE NOW DORMANT RULEMAKING POWER

The rulemaking power shatters the last unbroken link in judicial review's chains.[137] This claimed power to promulgate rules to protect rights, even arguably substantive rules, removes the case and controversy requirement altogether, leaving the Court free to act even without any case before it, as was first and most prominently seen in the National Consultative Summit on Extrajudicial Killing and Enforced Disappearances in 2007. At this summit, then Chief Justice Puno announced:

> [T]he paucity of power of the Judiciary in checking human rights violations was remedied by stretching its rule making prerogative. Article VIII, section 5 (5) empowers the Supreme Court to 'promulgate rules concerning the protection and enforcement of constitutional rights x x x.' ...
>
> In expanding the judicial rule making authority to enhance the protection and enforcement of constitutional rights, our Constitutional Commissioners were endowed with prophetic eyes. For two decades later, we would be bedeviled by extrajudicial killings and forced disappearances that would expose the frailties of our freedom, the inadequacy of our laws if not the inutility of our system of justice. Given these vulnerabilities, the Judiciary, on its part, has decided to unsheath its unused power to enact rules....[138]

With due respect to Chief Justice Puno, it is juvenile to believe that stray surplusage in the 1987 Constitution lay dormant for two decades then suddenly transformed the face of Philippine Constitutional Law at

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[137] Parenthetically, courts of course take more than the case at hand into account. As articulated by Professor Herbert Wechsler, "[T]he principle of the decision must be viable in reference to the applications that are now foreseeable.... Nothing less will satisfy the elements of generality and of neutrality implicit in the concept of a legal judgment as distinguished from the fiat of a court." Herbert Wechsler, *The Nature of Judicial Reasoning, in* LAW AND PHILOSOPHY: A SYMPOSIUM 297-98 (Sidney Hook ed.1964).

[138] Reynato Puno, The View from the Mountaintop, Keynote Address at the National Consultative Summit on Extrajudicial Killing and Enforced Disappearances, Centennial Hall, Manila Hotel, ¶¶ 2-3, at 4-5 (Jul. 16, 2007).

that landmark summit. Curiously, the burly protector does not visibly spring forth from the text of article VIII, section 5(5), or at least not until phrases from it are selectively quoted as they are to students today:

> The Supreme Court shall have the following powers:
>
> ...
>
> (5) Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the integrated bar, and legal assistance to the under-privileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.

Nor was article VIII, section 5(5) cited as containing the rulemaking power in the first 20 years of its life. Its most prominent articulation during this period came in *Echegaray* where then Justice Puno highlighted not quite that section 5(5) created a new power but emphasized that the 1987 Constitution vested the power to promulgate court rules solely in the Supreme Court and it is no longer shared with Congress:

> The rule making power of this Court was expanded. This Court for the first time was given the power to promulgate rules concerning the protection and enforcement of constitutional rights. The Court was also granted for the first time the power to disapprove rules of procedure of special courts and quasi-judicial bodies. But most importantly, the 1987 Constitution took away the power of Congress to repeal, alter, or supplement rules concerning pleading, practice and procedure. In fine, the power to promulgate rules of pleading, practice and procedure is no longer shared by this Court with Congress, more so with the Executive. If the manifest intent of the 1987 Constitution is to strengthen the independence of the judiciary, it is inutile to urge, as public respondents do, that this Court has no jurisdiction to control the process of execution of its decisions, a power conceded to it and which it has exercised since time immemorial.

Later, in *Purganan,* the last of a series of extradition cases, Justice Carpio cited the rulemaking power to ground a proposal for granting the right to bail to extradites, but cited this in conjunction with the Court's

equity power and "in carefully limited exceptions."[139] As recently as 2010, section 5(5) was asserted by *Baguio Market Vendors Multi-Purpose Cooperative v. Cabato-Cortes*[140] to uphold a judicial rule requiring the payment of court fees against a legislative exemption from such fees. Finally, compare the presently accepted interpretation of the rulemaking power to the scant one-page discussion of article VIII, section 5(5) in the 2003 edition of Fr. Bernas's treatise.[141] Setting the text of section 5(5) aside, as Justice Carpio alluded to, courts have had power to promulgate procedural rules for centuries and many rules of evidence and writs have ancient roots. The *Miranda*[142] rule well entrenched in popular media and cheesy police movies reflects the extent and acceptance of this power.

Arguably, the present "rulemaking power" was a sound bite and shrewd textual anchor that readily satisfied a hypertextualist Philippine bar when Chief Justice Puno needed to justify the unprecedented action he nobly undertook to address extrajudicial killings in the country at a time when government allegedly turned a blind eye or was even accused of perpetrating it. Consider the spectacle of a Chief Justice addressing a crucial national issue long before a case was brought before his court, but the textual hook and unmistakable public adulation for Puno won the day.

Chief Justice Puno primarily deployed the rulemaking power to create the writ of amparo, principally to address extrajudicial killings as documented in the landmark decision *Secretary of National Defense v. Manalo,*[143] which came a year after Puno's summit and enforced "[the right to] to life, liberty and security"[144] The Puno Court also issued rules regarding the writs of habeas data and kalikasan,[145] to protect the rights to informational privacy and to a healthful environment. Finally, the Puno Court also issued a guideline stating a preference for the imposition of fines over imprisonment in libel cases, arguably an exercise of the rulemaking power in the context at the time.

Without diminishing the landmark blow struck by *Manalo* for

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[139] Gov't of the United States of America v. Purganan, G.R. No. 148571, 389 SCRA 623, 729, Sep. 24, 2002 (Carpio, J., *concurring*).

[140] G.R. No. 165922, 613 SCRA 733, Feb. 26, 2010.

[141] BERNAS, *supra* note 40, at 969-70.

[142] *See, generally,* Miranda v. Arizona, 384 U.S. 436 (1966); CONST. art. III, § 12(1).

[143] G.R. No. 180906, 568 SCRA 1, Oct. 7, 2008.

[144] *Id.* at 64.

[145] The Rule on the Writ of Habeas Data, A.M. No. 08-1-16-SC, Jan. 22, 2008; Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC, Apr. 13, 2010; Abigail Sze, *Court News Flash: SC Unveils Landmark Rules of Procedure for Environmental Cases,* Apr. 14, 2010, *at* http://sc.judiciary.gov.ph/news/courtnews%20flash/2010/04/04141001.php.

human rights, that first decision recasting article VIII, section 5(5) reflects all of post-1987 Philippine judicial review's expansive characteristics as discussed thus far. First and most prominently, *Manalo* makes extensive use of international instruments. For example, it cited a right to "freedom from fear"[146] drawn from the UDHR in relation to the right to security. Further, it cited decisions of bodies such as the Inter-American Commission on Human Rights, European Court of Human Rights and the United Nations' Human Rights Committee, in each instance taking the Puno brand of meticulous care to link the reasoning to a Philippine constitutional provision or to a provision of a binding treaty. Just as prominently, the Court cited the development of the writ of amparo in the constitutions of Mexico and other Latin American countries, although noting that these came from a legal tradition different from Philippine judicial review's American moorings. The invocation of such international sources is well-respected in international academia with the Constitutional Court of South Africa, but it readily reflects the infinite nature of textual authority from which the present Court may draw on. Again, this is not necessarily negative as it helps the courts of developing legal systems draw on doctrine from more established systems in cases novel to the former courts' jurisdictions, but the expansion must be recognized.

Second, provisions added in the 1987 Constitution came into play alongside the above international sources, most prominently the prescription that:

> No torture, force, violence, threat, intimidation, or any other means which vitiate the free will shall be used against him. Secret detention places, solitary, incommunicado, or other similar forms of detention are prohibited.[147]

Third, the decision's expansive tone readily matches that of discussions of the expanded certiorari jurisdiction and the transcendental importance doctrine (although standing was not at issue in *Manalo*). Little deference was granted to the executive branch, and the decision invoked decisions from international bodies to support the weight it gave to the victim of alleged abduction and torture, against denials by the executive's agents.

Finally, the most expansive element is not in *Manalo* itself, but in the rules on the writ of amparo and the numerous speeches and discussions that preceded the actual exercise of judicial review. Without repeating these in detail, even before the actual case was filed, the Court

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[146] *Id.* (text accompanying note 124).

[147] CONST. art. III, § 12(2).

held high profile consultations with various sectors and then promulgated rules to enforce a bundle of rights so expansively phrased as the protection of life, liberty and security. It is difficult to imagine circumstances not covered by this judicial formulation yet by the time of *Manalo's* promulgation, no one questioned the Court's authority to formulate rules on so broad a subject and then enforce its own rules via judicial review.

After *Manalo,* several other decisions regarding the writ of amparo followed and were not unexpected given they dealt with persons whose disappearances were widely reported in national media such as Jonas Burgos, son of the late anti-Marcos activist Jose Burgos who was allegedly abducted in broad daylight in 2007,[148] University of the Philippines students Sherlyn Cadapan and Karen Empeño who were allegedly abducted in 2006,[149] Cordillera activist James Balao who was allegedly abducted in 2008,[150] urban poor leader Lourdes Rubrico who was allegedly abducted but released in 2007,[151] Filipino-American activist Melissa Roxas who was abducted but released in 2009[152] and Engr. Mored Tagitis who disappeared in 2007 and was allegedly under surveillance.[153] Further, amparo decisions explicitly declined to rule on substantive issues

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[148] Burgos v. Macapagal-Arroyo, G.R. No. 183711, 621 SCRA 481 Jun. 22, 2010 and 653 SCRA 512, Jul. 5, 2011; *Mother pleas for life of missing son, others*, PHIL. DAILY INQUIRER, Oct. 28, 2009, available at http://globalnation.inquirer.net/cebudailynews/metro/view/20091028-232720/Mother-pleas-for-life-of-missing-son-others.

[149] Boac v. Cadapan, G.R. No. 184461, 649 SCRA 618, May 31, 2011; *Editorial: It's AFP's move*, PHIL. DAILY INQUIRER, Jun. 23, 2011, , available at http://opinion.inquirer.net/6795/it's-afp's-move.

[150] Balao v. Macapagal-Arroyo, G.R. No. 186050, Dec. 13, 2011; Desiree Caluza, *Kin of missing Cordillera activist seek Aquino help*, PHIL. DAILY INQUIRER, Jun. 18, 2011, available at http://newsinfo.inquirer.net/15857/kin-of-missing-cordillera-activist-seek-aquino-help.

[151] Rubrico v. Macapagal-Arroyo, G.R. No. 183871, 613 SCRA 233, Feb. 18, 2010; Leila Salaverria, *Abducted militant seeks SC protection*, PHIL. DAILY INQUIRER, Oct. 31, 2007, available at http://newsinfo.inquirer.net/breakingnews/nation/view/20071031-97817/Abducted_militant_seeks_SC_protection.

[152] Roxas v. Macapagal-Arroyo, G.R. No. 189155, 630 SCRA 211, Sep. 7, 2010; Lira Dalangin-Fernandez, *Missing Fil-Am activist surfaces after 7 days*, PHIL. DAILY INQUIRER, May 25, 2009, available at http://www.inquirer.net/specialreports/education/view.php?db=1&article=20071105-98909.

[153] Razon v. Tagitis, G.R. No. 182498, 606 SCRA 598 Dec. 3, 2009 and 612 SCRA 685, Feb. 16, 2010; Julie Alipala, *Engineer reported missing in Sulu—police*, PHIL. DAILY INQUIRER, Nov. 7, 2007, , available at http://globalnation.inquirer.net/news/breakingnews/view/20090525-207010/Missing-Fil-Am-activist-surfaces-after-7-days.

Another amparo decision is Yano v. Sanchez, G.R. No. 186640, 612 SCRA 347, Feb. 11, 2010.

establishing liability such as command responsibility[154] and the issue of orders such as those ordering the return of a person's belongings.[155] Finally, the Court repeatedly emphasized the writ of amparo's extraordinary nature and declined to apply it to contexts other than extrajudicial killings and related disappearances. Specifically, the Court declined to apply the writ of amparo to a hold departure order against the travel of activist priest Robert Reyes,[156] property disputes,[157] the court sanctioned demolition of a dwelling[158] and confinement in a mental hospital.[159] It is also important to note that the writ of amparo has received legislation sanction and the Anti-Torture Act of 2009 requires writs of amparo or habeas data in relation to torture cases to be resolved expeditiously.[160]

What has been controversial recently is not a new rule but the Court's active approach in *MMDA v. Concerned Citizens*. The decision gave specific instructions to several government agencies in relation to Manila Bay's water quality and reiterated these in a resolution three years later. The Court also formed an advisory committee, headed by Justice Velasco, the decision's author, that reviewed detailed reports from various government agencies. Justice Carpio wrote a vigorous dissent to the 2011 resolution, criticizing these as encroachments on executive power in the guise of the Court controlling the execution of a decision.[161]

The approach of *MMDA v. Concerned Citizens*, however, has arguably been codified in the Rules of Procedure for Environmental Cases. These rules provide for the appointment of a commissioner to monitor compliance with a judgment in an environmental claim and the submission of periodic reports to the court,[162] and provision for broad possible reliefs (except awards of damages) pursuant to a writ of kalikasan.[163] The writ of kalikasan, thus, beyond the writ of amparo demonstrates how broad the present judicial power can be, where the Court can articulate a substantive

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[154] *Generally*, Rubrico v. Macapagal-Arroyo, *supra* note 151.

[155] Roxas v. Macapagal-Arroyo, *supra* note 152.

[156] Reyes v. Gonzalez, G.R. No. 182161, 606 SCRA 580, Dec. 3, 2009.

[157] Castillo v. Cruz, G.R. No. 182165, 605 SCRA 628, Nov. 25, 2009; Salcedo v. Bollozos, A.M. No. RTJ-10-2236, 623 SCRA 27, Jul. 5, 2010; Tapuz v. del Rosario, G.R. No. 182484, 554 SCRA 768, Jun. 17, 2008.

[158] Canlas v. Napico Homeowners Ass'n, G.R. No. 182795, 554 SCRA 208, Jun. 5, 2008.

[159] So v. Tacla, G.R. No. 190108, 633 SCRA 563, Oct. 19, 2010.

[160] Rep. Act. No. 9745, §10 (2009).

[161] Metropolitan Manila Development Authority v. Concerned Citizens of Manila Bay, G.R. No. 171947, Feb. 15, 2011 (Carpio, J., *dissenting*).

[162] A.M. No. 09-6-8-SC, Rule 5, § 4, Apr. 29, 2010.

[163] Rule 7, § 15.

right using rulemaking, further articulate the right using judicial review in cases brought pursuant to the rule the Court formulated, then closely direct government agencies to implement the Court's doctrine. This breadth is not in itself unprecedented as judiciaries in other countries have taken similar expansive approaches if only because no other government body might do so. Such expansive power must be recognized and the potential for abuse must likewise be recognized. For example, a year after *MMDA v. Concerned Citizens* was promulgated, a group claiming to represent small fishermen alleged that government demolition of fishing facilities pursuant to the decision was actually being done to facilitate the construction of an expressway and casino complex and would result in destruction of mangroves and corals and the livelihood of 26,000 persons.[164]

Presented with such expansive power, one notes Harvard Professor Cass Sunstein's proposal to exercise judicial power in narrow, focused incremental steps instead of broad decisions. He wrote:

> Minimalists insist that some constitutional rights are systematically "underenforced" by the judiciary and for excellent reasons. These reasons have to do with the courts' limited fact finding capacities, their weak democratic pedigree, their limited legitimacy, and their frequent ineffectiveness as instigators of social reform.[165]

One concludes that the rulemaking power became dormant after the immensely popular Chief Justice Puno retired. No major new rule has been observed and the interpretation of existing rules promulgated under this power have strictly followed the initial announced intent. Each time the writ of amparo is affirmed, the Court takes care to also affirm its extraordinary nature. One infers that the Court recognizes that the rulemaking power lies close to the edge of its powers (or perhaps slightly beyond) and cannot be exercised absent overwhelming public support. The rulemaking power thus lies dormant but remains available to a Court that feels worthy of wielding it once again.

F. AN ENTRENCHED ACCEPTANCE OF JUDICIAL SUPREMACY

Perhaps the final expansion of judicial power in the Philippines is

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[164] Metropolitan Manila Development Authority v. Concerned Citizens of Manila Bay, G.R. No. 171947, Oct. 6, 2009.

[165] CASS SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 127 (2005).

an unshakeable, entrenched acceptance of judicial supremacy as seen in the Corona impeachment trial, ongoing as of this writing. Picking up from the introduction, the trial's progress implies that impeachment is currently not an accepted mode of correcting or otherwise responding to what appears to be an out-of-bounds Supreme Court decision and, further, that nothing short of a constitutional amendment or a revolution might change a Supreme Court constitutional interpretation.

Judicial review's classic articulation in the Philippines was in the same breath judicial supremacy's classic articulation, and Justice Jose Laurel's words were used to headline the controversial *Biraogo v. Philippine Truth Commission* decision:

> 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.[166]

Without revisiting judicial supremacy's progress since *Angara v. Electoral Commission,* it is sufficient to note that Chief Justice Corona's impeachment was originally sought on doctrinal grounds, most prominently his "midnight appointment" that was widely believed to be unconstitutional and against tradition. However, as the Supreme Court ruled that the appointment was valid, even this powerful ground was nuanced by alleging that it was betrayal of public trust to accept such a dubious appointment, instead of the House of Representatives directly challenging the Court's decision with the various weighty reasons available to it. The impeachment complaint alleged:

> Despite the obviously negative and confidence-shattering impact that a "midnight appointment" by an outgoing President would have on the people's faith in the Supreme Court and the judicial system, Respondent eagerly, shamelessly, and without even a hint of self-restraint and *delicadeza*, accepted his midnight appointment as Chief Justice by then-President Gloria Macapagal-Arroyo.[167]

The complaint assailed several other decisions, from *Biraogo* which used the human rights doctrine of equal protection to strike down a

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[166] Angara v. Electoral Commission, 63 Phil. 139, 158 (1936).

[167] In re Impeachment of Corona, Case No. 002-2011, Verified Complaint for Impeachment, at 14 (Dec. 12, 2011).

Presidential Truth Commission tasked with investigating anomalies in the preceding Arroyo regime to the Court's exoneration of Justice Mariano Castillo who was accused by several noted public international law authors and members of the UP College of Law faculty of plagiarizing the former's articles in a decision. Despite the doctrinal grounds to question such decisions, the complaint instead argued that Corona's votes were biased and cited an investigative report that claimed Corona voted in favor of Arroyo, who appointed him, in 78% of cases involving her.[168] The defense asserted in response to several allegations that (1) a Supreme Court decision had already settled the issue raised and (2) the assailed action was a collegial Supreme Court action of which Corona is only one member.[169] These appeared to have been accepted by the public who were conditioned to thinking of the impeachment trial as a judicial trial where evidence of individual guilt would weigh heaviest.

The House prosecution team soon changed tack even before the trial began, dropping all allegations regarding decisions and focusing on accusing Corona of amassing ill-gotten wealth and waving pictures of luxury condo units allegedly owned by Corona in front of TV cameras. The prosecution later rested having barely discussed any of the allegations regarding Supreme Court decisions.[170]

It appeared that House prosecutors felt it was too difficult to argue judicial doctrine to ordinary voters and the prosecutors and their political allies were unable to effectively do so. One must note that, whatever the reason, the prosecution was unable to question Supreme Court constitutional interpretation even in an impeachment context, despite the popularity of President Aquino at the time.

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[168] *Id.* at 15-21.

[169] In re Impeachment of Corona, Case No. 002-2011, Answer to Verified Complaint for Impeachment (Dec. 21, 2011). For a summary of the prosecution and defense positions, *see* Oscar Franklin Tan, *Talk of the Town: Impeachment trial scorecard*, PHIL. DAILY INQUIRER, at A16, Jan. 15, 2012

[170] Cathy Yamsuan & Cynthia Balana, *Prosecution rests case vs Corona*, PHIL. DAILY INQUIRER, Feb. 29, 2012, available at http://newsinfo.inquirer.net/153265/prosecution-rests-case-vs-corona.

The prosecution discussed only articles 2, 3 and 7 of its complaint. Article 3 involved the recall of the Supreme Court decision favoring labor unions in *Flight Attendants and Stewards Association of the Philippines (FASAP) v. Philippine Airlines* allegedly after Philippine Airlines counsel Estelito Mendoza wrote a letter to the Court and involved no doctrinal issue. G.R. No. 178083, Jul. 23, 2008; In re Letters of Atty. Mendoza, A.M. No. 11-10-1-SC, Oct. 04, 2011. Article 7 accused Corona of highly partisan action in the issuance of a temporary restraining order that would have allowed former President Arroyo and her husband to leave the country and likewise involved no doctrinal issue. Minute Resolution dated Nov. 18, 2011 in Macapagal-Arroyo v. De Lima, G.R. No. 199034 and subsequent Court resolutions.

II. A SURVEY OF THE PRESIDENT'S POWERS

The 1987 Constitution radically expanded judicial power with the explicit expanded certiorari power and this has been implicitly further expanded following Philippine attitude and practice. The presidency, on the other hand, is subject to further additional post-martial law restraints. Through a constitutional design that presumes a noble Court and an ignoble president, this section aims to establish that there is little in terms of explicit power a supposedly noble president can muster against a supposedly ignoble Court. Note that classic discussions on the separation of powers discuss drawing boundaries between the executive and legislative branches and discussions of judicial restraint have been more muted in the Philippines compared to the practical abolition of the political question doctrine and the expansion of judicial power in interpreting constitutional provisions with the exacting scrutiny of a fundamental human rights context.

A. CONTROL, "TAKE CARE" AND GENERAL EXECUTIVE POWERS

The president is vested with the executive power of government and generally exercises this through his control of executive instrumentalities:

> The executive power shall be vested in the President of the Philippines.
>
> The President shall have control of all the executive departments, bureaus, and offices. He shall ensure that the laws be faithfully executed.[171]

The last sentence above is referred to as the "take care" power and articulates the President's "primary function."[172] *Biraogo* summarized:

> As head of the Executive Department, the President is the Chief Executive. He represents the government as a whole and sees to it that all laws are enforced by the officials and

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[171] CONST. art. VII, §§ 1, 17. Note, however, that the President only exercises supervision over local government units. *See* Marcos v. Manglapus, G.R. No. 88211, 177 SCRA 668, 689, Sep. 15, 1989 for an enumeration of executive powers explicit in article VII.

[172] David v. Macapagal-Arroyo, G.R. No. 171396, 489 SCRA 160, 252, May 3, 2006.

> employees of his department. He has control over the executive department, bureaus and offices. This means that he has the authority to assume directly the functions of the executive department, bureau and office, or interfere with the discretion of its officials. Corollary to the power of control, the President also has the duty of supervising the enforcement of laws for the maintenance of general peace and public order. Thus, he is granted administrative power over bureaus and offices under his control to enable him to discharge his duties effectively.[173]

Bermudez v. Executive Secretary[174] describes the President's power of control:

> [T]he President is the head of government whose authority includes the power of control over all "executive departments, bureaus and offices." Control means the authority of an empowered officer to alter or modify, or even nullify or set aside, what a subordinate officer has done in the performance of his duties, as well as to substitute the judgment of the latter, as and when the former deems it to be appropriate. Expressed in another way, the President has the power to assume directly the functions of an executive department, bureau and office. It can accordingly be inferred therefrom that the President can interfere in the exercise of discretion of officials under him or altogether ignore their recommendations. (internal citations omitted)[175]

Rufino v. Endriga[176] stated the power of control is vast and encompasses any government instrumentality not part of the legislative or judicial branches or an independent constitutional body.[177] It ruled that a law prescribing that an instrumentality shall "enjoy autonomy of policy and operation"[178] would be unconstitutional if interpreted to exclude that instrumentality from the President's power of control.

The legitimacy of the President's actions was famously articulated

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[173] G.R. No. 192935, Dec. 7, 2010, *citing* Ople v. Torres, G.R. No. 127685, 293 SCRA 141, Jul. 23, 1998.

[174] G.R. No. 131429, 311 SCRA 733, Aug. 4, 1999.

[175] *Id.* at 741, *citing* Mondano v. Silvosa, 97 Phil. 143 (1955); Echeche v. Court of Appeals, G.R. No. 89865, 198 SCRA 577, Jun. 27, 1991; Pelaez v. Auditor-General, G.R. No. 23825, 15 SCRA 569, Dec. 24, 1965; Lacson-Magallanes Co., Inc. v. Pano, G.R. No. 27811, 21 SCRA 895, Nov. 17, 1967.

[176] G.R. No. 139554, 496 SCRA 13, Jul. 21, 2006.

[177] *Id.* at 62-65.

[178] Pres. Dec. No. 15, § 3 (1972).

by Justice Robert Jackson in the *Steel Seizure Case:*[179]

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at a maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. ...
>
> When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority or in which its distribution is uncertain. ...
>
> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional power minus any constitutional powers of Congress over the matter.[180]

Constitutional text aside, the presidency's broad implicit powers are classically articulated in *Marcos v. Manglapus:*

> [A]lthough the 1987 Constitution imposes limitations on the exercise of specific powers of the President, it maintains intact what is traditionally considered as within the scope of "executive power." Corollarily, the powers of the President cannot be said to be limited only to the specific powers enumerated in the Constitution. In other words, executive power is more than the sum of specific powers so enumerated.
>
> It has been advanced that whatever power inherent in the government that is neither legislative nor judicial has to be executive.[181]

Marcos v. Manglapus articulates the general framework and boundaries for judicial review of presidential action:

> 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

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[179] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Jackson, J., *concurring*).

[180] *Id.* at 637-38.

[181] Marcos v. Manglapus, G.R. No. 88211, 177 SCRA 668, 691-92, Sep. 15, 1989.

> 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 Constitution under the guise of resolving a dispute brought before us because the power is reserved to the people.
>
> There is nothing in the case before us that precludes our determination thereof on the political question doctrine. The deliberations of the Constitutional Commission cited by petitioners show that the framers intended to widen the scope of judicial review but they did not intend courts of justice to settle all actual controversies before them. When 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.[182]

Unfortunately, the preceding section on judicial power has shown that this classic framework is cast aside with ease in later decisions. The *Francisco* line too readily finds "not truly political" questions in impeachment contexts, supposed to be the most political of political exercises. *Province of North Cotabato v. GRP Peace Panel* and certain other decisions may provide basis for judicial review when the Court is of a mood to lecture or even lay down "guidelines" that are arguably judicial legislation.

The President enjoys no special preference in the exercise of his general executive power and power of control over executive agencies. Executive privilege became controversial after alleged abuses by former President Arroyo but is less relevant in this discussion because it is a shield against legislative, not judicial, questioning of cabinet officials. Arthur Schlesinger documents how this evolved to the point that early American presidents ordered documents requested by legislators moved to the White House and dared the investigating legislators to initiate impeachment should they wish to demand the documents. National security might be an area where the President receives deference, given his greater competence "to determine the actual condition of the country"[183] due to the multitude

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[182] *Id.* at 695-96.

[183] David v. Macapagal-Arroyo, G.R. 171396, 489 SCRA 161, 242, May 3, 2006 ("President Arroyo found it necessary to issue PP 1017. Owing to her Office's vast

of military and police intelligence assets at his command and following decisions such as *David, Marcos v. Manglapus,* and *Lim v. Executive Secretary* on the conduct of military exercises with the US military. These decisions, however, emphasize the Court's wide latitude in exercising the expanded certiorari power in this sphere and any Court restraint is purely self-restraint. Further, *Manalo* and succeeding writ of amparo decisions emphasize how executive agents up to generals and the Secretary of Defense are readily subject to the Court's jurisdiction.

The general use of the general executive power to oppose the judiciary lies in refusing to enforce certain decisions or interpretations. A President is always entitled to retort, as Andrew Jackson allegedly did to *Worcester v. Georgia:*[184] "John Marshall has made his decision; now let him enforce it!"[185] Sufficient subtlety, as seen with former President Arroyo, may make it difficult to bring a judicial challenge, cast doubt on a decision's application to a slightly altered set of facts or change tack when a case has with some delay made its way through the court system akin to the "state of rebellion" cases. The President may also influence agencies' decisions and rulemaking.[186]

A President is also entitled to be completely unsubtle, as exemplified by how Secretary De Lima refused to enforce the temporary restraining order that would have allowed former President Arroyo and her husband to leave the country, with the bare pretext of first not officially receiving the order and then claiming that they would not implement the order while the Department of Justice filed for reconsideration.[187] In this case, the President relied purely on testing his popularity against the Supreme Court's. To cite another example, the Supreme Court issued an order to place PHP4.8 billion representing the withholding tax on interest from the zero coupon Poverty Eradication and Alleviation Certificates (or the PEACE bonds) issued by the government in 2001 to be placed in escrow, pending the resolution of a petition by the country's largest banks to uphold that these bonds were not supposed to be subject to this tax under their terms. The Department of Finance did not place the amount in escrow, with Internal Revenue Commissioner Kim Henares arguing that the relevant agencies "did not receive the TRO before they were required

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intelligence network, she is in the best position to determine the actual condition of the country.").

[184] 31 U.S. 515 (1832).

[185] I HORACE GREELEY, THE AMERICAN CONFLICT, A HISTORY OF THE GREAT REBELLION 106 (1864).

[186] Lawrence Lessig, *Readings by our Unitary Executive*, 15 CARDOZO L. REV. 175, 186-89 (1993).

[187] Christine O. Avendaño et al, *Government stops Arroyo flight,* PHIL. DAILY INQUIRER, Nov. 16, 2011, *available at* http://newsinfo.inquirer.net/94427/govt-stops-arroyo-flight.

by law to withhold the tax."[188] These examples possibly prove that the President may well outright defy the Supreme Court on a matter he deems critical and the Court may well lose if public opinion is not on its side and be told, "John Marshall has made his decision, now let him enforce it!" However, it would be difficult and imprudent given residual fears of another Marcos for a President to confront a Supreme Court in this way with any frequency. Employing technicalities or outright defiance is unlikely to enjoy public support in the long term and a popular President would not want to tax his political capital by being accused of doing what former President Arroyo allegedly did with impunity, albeit with more subtlety and semblance of a legal pretext. The judiciary is also, of course, entitled to be equally determined and equally emphatic in rendering a decision against the President.

Supreme Court Administrator Midas Marquez explicitly criticized these awkward moves in the Court's 2012 annual media forum:

> Supreme Court Spokesman and Court Administrator Jose Midas Marquez on Wednesday accused the Aquino government of emboldening the public to defy the courts.
>
> ...
>
> Marquez took note of the Executive Branch's "habit" of invoking technicalities to evade compliance of court orders "even if compliance was still possible."[189]

In addition to the above Supreme Court orders, Marquez cited "the DoJ's defiance of a Manila trial court judge's order for the inspection of the vehicle National Bureau of Investigation Deputy Director Reynaldo Esmeralda was riding in when he was supposedly ambushed on Feb. 21 this year."[190] The alleged defiance of court orders took a strange turn in the much publicized "bikini girls" case, where a Catholic high school brazenly refused to comply with a trial court order to allow several high school girls to attend their graduation after the school disallowed them from attending their school's graduation ceremony after the school administration discovered photos in Facebook allegedly showing the girls

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[188] Ronnel Domingo, *High court's tax order came too late, says DOF,* PHIL. DAILY INQUIRER, Nov. 4, 2011, *available at* http://business.inquirer.net/28521/high-court's-tax-order-came-too-late-says-dof. *See* Jerome Aning & Christine Avendano, *SC issues TRO on BIR move to tax PEACe bonds,* PHIL. DAILY INQUIRER, Oct. 18, 2011, *available at* http://business.inquirer.net/25585/sc-issues-tro-on-bir-move-to-tax-peace-bonds.

[189] Tetch Torres, *Marquez blames Aquino gov't for encouraging people to defy court orders,* PHIL. DAILY INQUIRER, Apr. 18, 2012, *available at* http://newsinfo.inquirer.net/178847/marquez-blames-aquino-gov't-for-encouraging-people-to-defy-court-orders.

[190] *Id.*

in bikinis and in salacious poses. Some pundits put these bikini photos on the same plane as Secretary de Lima's defiance of the Supreme Court order that would have allowed former President Arroyo to leave the country and asked why the two should be treated differently. Arguably, the latter was spurred by the belief that the Supreme Court acted with extreme partiality and political motivations and I wrote that individuals' religious beliefs however strong should not lead to an intellectual impunity that believes itself above the law:

> With what impunity, thus, do teachers claim to know morality better than these parents to the point of defying a court order?
>
> ... The privacy violation here is not the superficial kind involving a nun hacking into a student's account in search of compromising photos. (Facebook friends allegedly sent the photos to STC.) The right to privacy in its deepest sense protects an intimate zone in which a human is free to make fundamental decisions about oneself. ... Perhaps the most fundamental decision in the Facebook age is how one shapes the identity one presents to the world, including one's sexuality. As Dean and Justice Irene Cortes put it: "The stand for privacy need not be taken as hostility against other individuals, against government, or against society. It is but an assertion by the individual of his inviolate personality."
>
> The "bikini girls" are not being punished for a lighthearted teenage moment immortalized on the Internet. They are really being punished for transgressing the unspoken stereotype of the Filipino woman straitjacketed as a Maria Clara who should not bare even her ankles. This stereotype is as outmoded as the idea of educating girls just enough to allow them to pray. Teenage girls worldwide now admire the new stereotype of strong, smart and independent women, from modern characters such as Hermione Granger and Katniss Everdeen to Jane Austen's Elizabeth Bennet. They embrace "Sex and the City's" message of equal footing in relationships. And they believe one is free to revel in one's own beauty for its own sake. As "The Vagina Monologues" put it: "My short skirt, believe it or not, has nothing to do with you."
>
> We must protect the deeper right to privacy from intellectual impunity where schools defy courts and diverge from human rights standards protected by our Constitution. ... We must protect the idea that our national values cannot be imposed but are shaped by an evolving consensus emerging from the exercise of these rights, including by teenage girls.

> Beyond STC, we must curb intellectual impunity in the name of "morality" or "values" in our national decisions. With the same intellectual impunity, some bishops floated the idea of excommunicating President Aquino if he pursues reproductive health legislation and called for People Power against him in a colorful sideshow to the ongoing impeachment trial. With the same intellectual impunity, some vandalized and eventually forced the closure of Mideo Cruz's allegedly blasphemous art exhibit instead of staging their own and allowing the public to judge. With the same intellectual impunity, Comelec blocked a homosexual party from participating in the party-list elections until the Supreme Court noted that its members' alleged immorality was not punished by Philippine law. Justice Mariano del Castillo wrote: "[O]ur democracy precludes using the religious or moral views of one part of the community to exclude from consideration the values of other members of the community."[191]

The President would be well advised to choose a mode of resistance better grounded in Justice Jackson's categories of presidential power and with less potential for massive collateral damage than clumsy outright defiance of the Supreme Court.To cite an American example, parenthetically, the American Social Security Administration blatantly disregarded late 1970s appellate court rulings that would have made it more difficult for the agency to reduce the number of its beneficiaries, to the point that the US Ninth Circuit promulgated a statewide injunction and Congress considered legislation to put an end to the conflict.[192] A Philippine parallel might be *Lapinid v. Civil Service Commission,*[193] whose barbaric yawp against an independent constitutional body read:

> We note with stern disapproval that the Civil Service Commission has once again directed the appointment of its own choice in the case at bar. We must therefore make the following injunctions which the Commission must note well and follow strictly.
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> ...Up to this point, the Court has leniently regarded the attitude of the public respondent on this matter as imputable to a lack of comprehension and not to intentional intransigence. But we are no longer disposed to indulge that fiction. Henceforth,

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[191] Oscar Franklin Tan, *Commentary: Intellectual impunity vs the right to bikini photo*, PHIL. DAILY INQUIRER, Apr. 2, 2012, *available at* http://opinion.inquirer.net/26129/intellectual-impunity-vs-the-right-to-bikini-photos. The essay was one of the most widely read *Inquirer* op-eds in 2012 as of its publication.

[192] Samuel Estreicher & Richard Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681-82 (1989).

[193] G.R. No. 96298, 197 SCRA 106, May 14, 1991.

> departure from the mandate of Luego by the Civil Service Commission after the date of the promulgation of this decision shall be considered contempt of this Court...
>
> ...
>
> The Commission on Civil Service has been duly warned. Henceforth, it disobeys at its peril.

B. THE COMMANDER-IN-CHIEF POWER

It is appropriate to begin a discussion of the President's specific, explicit powers with the Commander-in-Chief power, one described by Schlesinger as "of prime importance. The Founders were determined to deny the American President what Blackstone had assigned to the British King – 'the sole prerogative of making war and peace.'"[194] The 1987 Constitution provides:

> The President shall be the Commander-in-Chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion. In case of invasion or rebellion, when the public safety requires it, he may, for a period not exceeding sixty days, suspend the privilege of the writ of habeas corpus or place the Philippines or any part thereof under martial law.[195]

This presidential role emphasizes why executive power is concentrated in one person when decisive, immediate action is called for and the classic example of a political question where *Baker's* "unusual need for questioning adherence to a political decision already made" is required is in the middle of a shooting war. In summary, however, the President enjoys little additional preference against judicial review in wielding the Commander-in-Chief power outside an actual war. The power was granted great deference in decisions during former President Arroyo's term, but only in the narrow confines of the "most benign" "calling out" power.

This is not difficult to understand given that much of the 1987 Constitution's restraints on the president were motivated by fear of martial law and a Commander-in-Chief turned dictator. The rest of the Constitution's article VII, Section 18 imposes multiple safeguards against a declaration of martial law or a suspension of the writ of habeas corpus,

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[194] SCHLESINGER, *supra* note 8, at 3, *quoting* WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 56-57 (1908).

[195] CONST. art. VII, § 18.

including both judicial and congressional review, and these powers are unlikely to be exercised except in a genuinely dire emergency. Or rather, based as past allegations against former President Arroyo, a president might attempt to evade these restrictions by giving actions akin to martial law other names.[196]

Note, however, that when former President Arroyo declared martial law in Maguindanao following the so-called Ampatuan massacre of 57 women and journalists by the Ampatuan political clan and subsequent alleged mobilization of thousands of their armed followers, the Court despite the multiple safeguards against martial law declined to rule on the matter for two years, after which it dismissed the case for mootness. The Court reasoned that she lifted martial law after only eight days and Congress likewise did not act further on the matter.[197] In this decision, Justice Carpio vigorously dissented to emphasize, first, that standing is granted to "any citizen" to question a declaration of martial law and this grant of standing should not be restricted in interpretation. Second, Justice Carpio argued that the power to declare martial law is restricted by the Revised Penal Code definition of rebellion, which requires that the armed uprising or violence contemplated have a political complexion such as the intent to remove a potion of Philippine territory from the government's jurisdiction. He argued that a declaration of martial law was unconstitutional where the alleged armed mobilization was by known political allies of then President Arroyo. He reiterated a low bar, however, for reviewing the propriety of martial law and proposed the low bar of probable cause. Third, Justice Carpio vigorously argued that the Court's power of review was independent of Congress' and the Court could act without waiting for Congressional inaction.[198]

The present framework for the Commander-in-Chief powers was articulated in *Sanlakas v. Reyes*[199] and reiterated in *David v. Macapagal-Arroyo:*

> [Section 18] grants the President, as Commander-in-Chief, a "sequence" of "graduated power[s]." From the most to the least benign, these are: the calling out power, the power to suspend the privilege of the writ of habeas corpus, and the power to declare martial law. In the exercise of the latter two powers, the Constitution requires the concurrence of two conditions, namely, an actual invasion or rebellion, and that public safety requires the exercise of such power. However, as

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[196] David v. Macapagal-Arroyo, G.R. No. 171396, 489 SCRA 160, May 3, 2006 and preceding cases.

[197] Fortun v. Macapagal-Arroyo, G.R. No. 190293, Mar. 20, 2012.

[198] *Id.* (Carpio, J., *dissenting*).

[199] G.R. No. 159085, 421 SCRA 656, Feb. 3, 2004.

> we observed in *Integrated Bar of the Philippines v. Zamora*, "[t]hese conditions are not required in the exercise of the calling out power. The only criterion is that 'whenever it becomes necessary,' the President may call the armed forces 'to prevent or suppress lawless violence, invasion or rebellion.'"[200]

The framework of graduated powers gives great deference to the President with respect to the "most benign" power, the "calling out" power or the deployment of the military, from the deployment of Marines in shopping malls in *IBP v. Zamora* to military responses to a "state of rebellion" in *Sanlakas*. This has been borne out in the American experience, which moved from wars declared with Congressional authorization to the President's unilateral deployment of troops in various exercises, police actions and peacekeeping missions with the term war rarely mentioned. This change also conforms to modern military reality from formal battlefields to abstract battle lines crossed by terrorists, insurgents, guerillas and commandos. Of course, the power to position troops itself is broader than it seems. In 1846, for example, US President James Polk deployed American troops in disputed territory and were predictably attacked by Mexican troops. Whatever Congress' power over war on paper, "Polk then stampeded Congress into a recognition of a state of war."[201]

The Supreme Court recently and explicitly upheld the breadth of presidential power outside a martial law or suspension of writ context in *Province of North Cotabato v. GRP Peace Panel*:

> [T]he President's power to conduct peace negotiations is implicitly included in her powers as Chief Executive and Commander-in-Chief. As Chief Executive, the President has the general responsibility to promote public peace, and as Commander-in-Chief, she has the more specific duty to prevent and suppress rebellion and lawless violence.[202]

Further, *Sanlakas* held that the Commander-in-Chief power may be exercised broadly when coupled with the executive power:

> Section 18, Article VII does not expressly prohibit the President from declaring a state of rebellion. Note that the Constitution vests the President not only with *Commander-in-Chief* powers but, first and foremost, with *Executive* powers.

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[200] David v. Macapagal-Arroyo, 489 SCRA at 242.

[201] SCHLESINGER, *supra* note 8, at 41.

[202] 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, 502, Oct. 14, 2008.

> ...
> Lincoln believed the President's power broad and that of Congress explicit and restricted, and sought some source of executive power not failed by misuse or wrecked by sabotage. He seized upon the President's designation by the Constitution as Commander-in-Chief, coupled it to the executive power provision — and joined them as "the war power" which authorized him to do many things beyond the competence of Congress.
> ...
> The lesson to be learned from the U.S. constitutional history is that the Commander-in-Chief powers are broad enough as it is and become more so when taken together with the provision on executive power and the presidential oath of office.
> ...
> Thus, the President's authority to declare a state of rebellion springs in the main from her powers as chief executive and, at the same time, draws strength from her Commander-in-Chief powers.[203]

David added that "the primary function of the President is to enforce the law.... ... In the exercise of such function, the President, if needed, may employ the powers attached to his office as the Commander-in-Chief...."[204] One notes that previous decisions have recognized great deference in reviewing the factual bases for the exercise Commander-in-Chief powers and even Justice Carpio's dissent in *Fortun* regarding an actual declaration of martial law proposed the low bar of probable cause for a review of such a declaration. In the United States, the Commander-in-Chief power has been stretched to argue for an inherent discretion to interrogate enemy combatants, practically arguing to justify torture in certain circumstances.[205]

The deference to the "calling out" power is deceptive, however, in that it exists only within a very narrow sphere bounded by a large number of restrictions. The President may deploy the armed forces to suppress a rebellion but past the point when persons can legitimately be treated as combatants, he will be bound by restrictions against unreasonable search and the rights of the accused. *Sanlakas* precisely emphasized that the declaration of a "state of rebellion" was tolerable only in that the Court found that it had no legal significance and "the mere declaration of a state

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[203] Sanlakas v. Reyes, G.R. No. 159085, 421 SCRA 656, 669-77, Feb. 3, 2004.

[204] David v. Macapagal-Arroyo, G.R. No. 171396, 489 SCRA 160, 245, May 3, 2006.

[205] SUNSTEIN, *supra* note 165, at 155.

of rebellion cannot diminish or violate constitutionally protected rights."[206] *Sanlakas* added that "a person may be subjected to a warrantless arrest for the crime of rebellion whether or not the President has declared a state of rebellion, so long as the requisites for a valid warrantless arrest are present."[207] *David* stated that although the President has broad power to declare a "state of national emergency" and act to address such an emergency, he may not exercise emergency powers such as the takeover of private property absent congressional authorization.[208]

Finally, the deference results in part from unelected Justices' natural hesitation to countermand military matters but such deference has always been accompanied by a reiteration that the Court may invalidate a "calling out" if it is established to be a grave abuse of discretion. The bar has been set explicitly high, however:

> As to how the Court may inquire into the President's exercise of power, *Lansang* adopted the test that "judicial inquiry can go no further than to satisfy the Court not that the President's decision is correct," but that "the President did not act arbitrarily." Thus, the standard laid down is not correctness, but arbitrariness. In *Integrated Bar of the Philippines*, this Court further ruled that "it is incumbent upon the petitioner to show that the President's decision is totally bereft of factual basis" and that if he fails, by way of proof, to support his assertion, then "this Court cannot undertake an independent investigation beyond the pleadings."
>
> Petitioners failed to show that President Arroyo's exercise of the calling-out power, by issuing PP 1017, is totally bereft of factual basis. A reading of the Solicitor General's Consolidated Comment and Memorandum shows a detailed narration of the events leading to the issuance of PP 1017, with supporting reports forming part of the records. Mentioned are the escape of the Magdalo Group, their audacious threat of the Magdalo D-Day, the defections in the military, particularly in the Philippine Marines, and the reproving statements from the communist leaders. There was also the Minutes of the Intelligence Report and Security Group of the Philippine Army showing the growing alliance between the NPA and the

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[206] Sanlakas v. Reyes, G.R. No. 159085, 421 SCRA 656, 677, Feb. 3, 2004, *citing* Lacson v. Perez, G.R. No. 147780, 357 SCRA 757, 776, May 10, 2001 (Kapunan, J., *dissenting*).

[207] *Id.* at 678.

[208] David v. Macapagal-Arroyo, G.R. No. 171396, 489 SCRA 160, 250-57, May 3, 2006.

> military. Petitioners presented nothing to refute such events. Thus, absent any contrary allegations, the Court is convinced that the President was justified in issuing PP 1017 calling for military aid.
>
> Indeed, judging the seriousness of the incidents, President Arroyo was not expected to simply fold her arms and do nothing to prevent or suppress what she believed was lawless violence, invasion or rebellion. However, the exercise of such power or duty must not stifle liberty.[209]

The problem for a popular president, however, is that the Commander-in-Chief power offers little outside the purely military sphere for his execution of programs. He may not, for example, have an allegedly corrupt former official court-martialed instead of prosecuted.

C. EMERGENCY POWERS

When *David* discussed how the Commander-in-Chief power may be wielded broadly in conjunction with the general executive power, the power of control and the "take care" power, it also mentioned emergency powers in relation to the following constitutional provisions:

> In times of national emergency, when the public interest so requires, the State may, during the emergency and under reasonable terms prescribed by it, temporarily take over or direct the operation of any privately-owned public utility or business affected with public interest.[210]
>
> In times of war or other national emergency, the Congress may, by law, authorize the President, for a limited period and subject to such restrictions as it may prescribe, to exercise powers necessary and proper to carry out a declared national policy. Unless sooner withdrawn by resolution of the Congress, such powers shall cease upon the next adjournment thereof.[211]

David affirmed that the President may declare a "state of national emergency" and bring all of his powers to bear on such an emergency, including the Commander-in-Chief powers. It described emergencies as

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[209] *Id.* at 228-29.

[210] CONST. art. XII, § 17.

[211] CONST. art. VI, § 23(2).

encompassing "a wide range of situations"[212] in three broad categories: economic, natural disaster and national security. Thus, for example, the President could declare an economic emergency with some reasonable factual basis and deploy troops to help build buildings, bridges and roads in remote areas.

David, however, clarified that these powers are not the emergency powers contemplated in the Constitution but are part of the President's implied executive powers or another explicit power. Additional emergency powers may only be authorized by Congress, under the following framework:

> (1) There must be a war or other emergency.
>
> (2) The delegation must be for a limited period only.
>
> (3) The delegation must be subject to such restrictions as the Congress may prescribe.
>
> (4) The emergency powers must be exercised to carry out a national policy declared by Congress.[213]

One recalls Justice Jackson's three graduations of presidential power, as well as his admonition that:

> [The forefathers] knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.[214]

Absent Congressional authorization, the President falls back on his general executive power and Justice Jackson's twilight zone,[215] and enjoys no particular preference against judicial review.

D. FOREIGN AFFAIRS AND EXECUTIVE AGREEMENTS

More than the "calling out" gradation of the Commander-in-Chief

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[212] David v. Macapagal-Arroyo, G.R. No. 171396, 489 SCRA 160, 253-254, May 3, 2006.

[213] *Id.* at 251, *citing* ISAGANI CRUZ, PHILIPPINE POLITICAL LAW 94 (1998).

[214] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650(1952) (Jackson, J., *concurring*).

[215] SCHLESINGER, *supra* note 8, at 146.

power, the President traditionally enjoys some of the greatest judicial deference in foreign affairs, classically described as "the very delicate, plenary and exclusive power of the President as the sole organ... in the field of international relations,"[216] a field where the separation of powers finds far less application.[217] Schlesinger noted that:

> Congress could not easily stay abreast of the details of relations with foreign states. It rarely acted as a unified body. It could not conduct negotiations. It could not be relied on to preserve secrecy about matters where secrecy was indispensable. Moreover, international law itself, by requiring in every nation a single point of responsible authority, confirmed presidential primacy in foreign relations.[218]

Perhaps this deference is best reflected in this power's lack of an explicit grant and left implied in the Constitution's structure, with only restrictions on the power made explicit:

> No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.[219]

> The President may contract or guarantee foreign loans on behalf of the Republic of the Philippines with the prior concurrence of the Monetary Board, and subject to such limitations as may be provided by law.[220]

The lack of "judicially manageable standards" in foreign affairs was highlighted in *Arroyo v. De Venecia*:[221]

> [W]hile Art. VIII, §1 has broadened the scope of judicial inquiry... it has not altogether done away with political questions such as those which arise in the field of foreign relations.[222]

In the political question's jargon, foreign affairs is a key example of a functional question,[223] or at least an example where hypertextualism is challenged by a rare dearth of text. Functionally, the President's primacy in

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[216] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).
[217] *Id.* at 316.
[218] SCHLESINGER, *supra* note 8, at 13-14.
[219] CONST. art. VII, § 21.
[220] CONST. art. VII, § 20.
[221] G.R. No. 127255, 277 SCRA 268, Aug. 14, 1997.
[222] *Id.* at 289-90.
[223] BERNAS, *supra* note 40, at 955-56.

foreign affairs is readily understood as a state needs to speak with one clear, definitive voice to others. *Marcos v. Manglapus'* classic discussion cites an example:

> [T]here remain issues beyond the Court's jurisdiction... We cannot, for example, question the President's recognition of a foreign government....[224]

An established line of cases has also affirmed the judiciary's acceptance of determinations by the executive that an international organization enjoys certain immunities,[225] although this is subject to exceptions discussed below.

The traditional deference to the President in foreign affairs has doctrinally spilled over into the modern diplomatic development of executive agreements over treaties. Executive agreements, entered into with other states solely by the executive pursuant to its foreign affairs power, cover a broad array of subjects and are distinguished from treaties in practice almost solely by these agreements' not being submitted to the Senate for ratification. In the United States, these became "an instrument of major foreign policy" when an exchange of notes with Great Britain limited naval forces in the Great Lakes, shortly after war with Great Britain ended. The US Senate did not ratify the executive agreement although it endorsed it with a two-thirds vote.[226] The 2011 decision *Bayan Muna v. Romulo* summarized the present doctrine:

> The categorization of subject matters that may be covered by international agreements mentioned in *Eastern Sea Trading* is not cast in stone. ... [F]orm takes a back seat when it comes to effectiveness and binding effect of the enforcement of a treaty or an executive agreement, as the parties in either international agreement each labor under the *pacta sunt servanda* principle.
>
> As may be noted, almost half a century has elapsed since the Court rendered its decision in *Eastern Sea Trading*. Since then,

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[224] Marcos v. Manglapus, G.R. No. 88211, 177 SCRA 668, 696, Sep. 15, 1989.

[225] Int'l Catholic Migration Comm'n v. Calleja, G.R. No. 85750, 190 SCRA, 130, Sep. 28, 1990; Holy See v. Rosario, G.R. No. 101949, 238 SCRA 524, Dec. 1, 1994; Lasco v. U.N. Revolving Fund for Natural Resources Exploration, G.R. No. 109095, 241 SCRA 681, Feb. 23, 1995; Callado v. Int'l Rice Research Institute, G.R. No. 106483, 241 SCRA 681, May 22, 1995; Dep't of Foreign Affairs v. Nat'l Labor Relations Comm'n, G.R. No. 113191, 262 SCRA 38, Sep. 18, 1996. *See* Lacierda v. Platon, G.R. No. 157141, 468 SCRA 650, Aug. 31, 2005 (resolution of claim allegedly against persons in their individual capacities and not against an international organization employing them).

[226] SCHLESINGER, *supra* note 8, at 86-87.

> the conduct of foreign affairs has become more complex and the domain of international law wider, as to include such subjects as human rights, the environment, and the sea. In fact, in the US alone, the executive agreements executed by its President from 1980 to 2000 covered subjects such as defense, trade, scientific cooperation, aviation, atomic energy, environmental cooperation, peace corps, arms limitation, and nuclear safety, among others. Surely, the enumeration in *Eastern Sea Trading* cannot circumscribe the option of each state on the matter of which the international agreement format would be convenient to serve its best interest.[227]

Bayan Muna v. Romulo practically deemed antiquated the statement in *Commissioner of Customs v. Eastern Sea Trading*:[228]

> International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. But international agreements embodying *adjustments of detail* carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements.[229]

Bayan Muna v. Romulo is a strong precedent in the executive's favor in that the Court upheld the executive agreement despite the available reasons to do otherwise. The agreement in question was a bilateral "non-surrender" agreement, executed with the United States in 2003 through an exchange of diplomatic notes, where each country agreed not to surrender a national of the other to an international tribunal. The Philippines signed the Rome Statue establishing the International Criminal Court in 2000, although it only acceded to the treaty in 2011 after the decision,[230] and the United States entered into these bilateral agreements with various countries in an attempt to protect its nationals from harassment in such international tribunals. The *Bayan Muna* petitioners argued that the non-surrender agreement contravened the Rome Statute, although the Court ruled that it complemented the latter, the International Criminal Court's jurisdiction

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[227] Bayan Muna v. Romula, G.R. No. 159618, 641 SCRA 244, 260-62, Feb. 1, 2011.

[228] 3 SCRA 351 (1961). Parenthetically, *Eastern Sea Trading* made its point by noting that the "Parity Rights" with the United States was previously an executive agreement not concurred in by the US Senate, before these were appended to the Philippine Constitution in an ordinance.

[229] *Id.* at 356.

[230] *Philippines ratifies the Rome Statute of the International Criminal Court*, UN NEWS CENTRE, Aug. 30, 2011, *at* http://www.un.org/apps/news/story.asp?NewsID=39416.

intended to complement domestic courts'. The petitioners also argued that the agreement contravened the Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity, which permits the Philippines to surrender persons to an international tribunal already investigating or prosecuting the crime they are accused of in lieu of a domestic investigation.[231] In a vigorous dissent, Justice Carpio emphasized that the Act on Crimes against International Humanitarian Law stated a policy that a state is has a duty to exercise criminal jurisdiction over international crimes and the agreement should thus be ratified before effectively amending a law.

One thus concludes that if the present jurisprudential trajectory is followed, an executive agreement would conceivably only be struck down if it too blatantly conflicted with a law or treaty. This was in fact the case in *Adolfo v. Court of First Instance of Zambales,*[232] where the 1947 Military Bases Agreement provided that the Philippines would exercise jurisdiction over members of the United States armed forces but custody would be entrusted to the commanding officer of the nearest American base. However, an exchange of notes in 1965 extended this to a "civilian component." Justice Fernando wrote that the Bases Agreement, being a ratified treaty, would have to be respected but declared the case moot following the American civilian in question's voluntary waiver of an American commander's custody. *Adolfo* was in fact cited in *Bayan Muna v. Romulo.*

Bayan v. Zamora[233] upheld the Visiting Forces Agreement, although it was ratified by the Senate by then. *Lim v. Executive Secretary* declined to examine whether American troops were engaged in offensive exercises in the Philippines without further proof, raising that the Supreme Court is not a trier of facts.

Finally, despite the deference granted in a foreign affairs context, one must remain aware that the expanded certiorari power may strike down what is deemed grave abuse of discretion. *Bayan Muna* reiterated:

> [B]earing in mind what the Court said in *Tañada v. Angara*, "that it will not shirk, digress from or abandon its sacred duty and authority to uphold the Constitution in matters that involve grave abuse of discretion brought before it in appropriate cases, committed by any officer, agency, instrumentality or department of the government," we cannot but resolve head on

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[231] Rep. Act No. 9851, §17 (2009).

[232] G.R. 30650, 34 SCRA 166, Jul. 31, 1970.

[233] G.R. 138587, 342 SCRA 449, Oct. 10, 2000.

> the issues raised before us. Indeed, where an action of any branch of government is seriously alleged to have infringed the Constitution or is done with grave abuse of discretion, it becomes not only the right but in fact the duty of the judiciary to settle it. As in this petition, issues are precisely raised putting to the fore the propriety of the Agreement pending the ratification of the Rome Statute.'[234]

Tañada v. Angara prominently addressed whether the Senate could validly concur in the agreement establishing the World Trade Organization and refused to consider this a political question despite the clear textual commitment of treaties to the Senate. This was because of nationalist constitutional provisions that may have stated policies contrary to the WTO's. In a foreign affairs context, a hypertextualist may draw on far more verbiage by considering treaties or declaring international custom. For example, dictum in *Liang v. People,*[235] which rejected an extension of diplomatic immunity of a Chinese Asian Development Bank economist to a slander charge, stated:

> The DFA's determination that a certain person is covered by immunity is only preliminary which has no binding effect in courts.[236]

The holding was anchored on the Vienna Convention on Diplomatic Relations, under which immunity does not extend beyond official functions.[237] *Liang* is contrasted with *Minucher v. Court of Appeals,*[238] which recognized that a US Drug Enforcement Agency agent conducting surveillance on alleged international drug traffickers in the Philippines and testifying in a criminal case against one was acting within his official functions and enjoyed diplomatic immunity. *Liang* is not the only exception to the general deference to an executive recognition of diplomatic immunity. *German Agency for Technical Cooperation v. Court of Appeals*[239] rejected a finding of diplomatic immunity made by the Solicitor General and not the Department of Foreign Affairs, although the Court noted the website of the "agency" concerned described it as "a company under private law" and the matter was a labor case involving allegedly illegally dismissed Filipinos. The reasoning behind these precedents may readily be

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[234] Bayan Muna v. Romulo, G.R. No. 159618, 641 SCRA 244, 256, Feb. 1, 2011, *quoting* Tañada v. Angara, G.R. No. 118295, 272 SCRA 18, 48-49, May 2, 1997.

[235] G.R. No. 125865, 355 SCRA 125, Mar. 26, 2001 (Resolution on Motion for Reconsideration).

[236] Liang v. People, G.R. No. 125865, 323 SCRA 692, 695, Jan. 28, 2000.

[237] Liang, 355 SCRA at 133.

[238] G.R. No. 142396, 397 SCRA 244, Feb. 11, 2003.

[239] G.R. No. 152318, 585 SCRA 160, Apr. 16, 2009.

used against the President in weightier matters beyond individual foreigners.

E. APPOINTMENTS

The Constitution provides:

> The President shall nominate and, with the consent of the Commission on Appointments, appoint the heads of the executive departments, ambassadors, other public ministers and consuls, or officers of the armed forces from the rank of colonel or naval captain, and other officers whose appointments are vested in him in this Constitution. He shall also appoint all other officers of the Government whose appointments are not otherwise provided for by law, and those whom he may be authorized by law to appoint. The Congress may, by law, vest the appointment of other officers lower in rank in the President alone, in the courts, or in the heads of departments, agencies, commissions, or boards.[240]

This provision is understood to refer to four categories:

> *First*, the heads of the executive departments; ambassadors; other public ministers and consuls; officers of the Armed Forces of the Philippines, from the rank of colonel or naval captain; and other officers whose appointments are vested in the President in this Constitution;
>
> *Second*, all other officers of the government whose appointments are not otherwise provided for by law;
>
> *Third*, those whom the President may be authorized by law to appoint; and
>
> *Fourth*, officers lower in rank whose appointments the Congress may by law vest in the President alone.[241]

Bermudez v. Executive Secretary describes the President's general power to appoint the executive branch's officers in broad terms:

> When the Constitution or the law clothes the President with the power to appoint a subordinate officer, such conferment must be understood as necessarily carrying with it an ample discretion of whom to appoint. ...

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[240] CONST. art. VII, § 16.

[241] Abas Kida v. Senate, G.R. No. 196271, Oct. 18, 2011, *citing* Sarmiento v. Mison, G.R. No. 79974, 156 SCRA 549, Dec. 17, 1987.

> [T]he phrase "upon recommendation of the Secretary" ... should be interpreted, as it is normally so understood, to be a mere advise, exhortation or indorsement, which is essentially persuasive in character and not binding or obligatory upon the party to whom it is made. ... The President, being the head of the Executive Department, could very well disregard or do away with the action of the departments, bureaus or offices even in the exercise of discretionary authority, and in so opting, he cannot be said as having acted beyond the scope of his authority.[242]

Beyond the executive branch, *Pimentel v. Executive Secretary* described:

> The power to appoint is essentially executive in nature, and the legislature may not interfere with the exercise of this executive power except in those instances when the Constitution expressly allows it to interfere. Limitations on the executive power to appoint are construed strictly against the legislature. The scope of the legislature's interference in the executive's power to appoint is limited to the power to prescribe the qualifications to an appointive office.[243]

Rufino v. Endriga added:

> Usurpation of this fundamentally Executive power by the Legislative and Judicial branches violates the system of separation of powers that inheres in our democratic republican government.[244]

Rufino found that the Cultural Center of the Philippines was part of the executive branch, not being legislative or judicial, and struck down provisions of a law that allowed the center's board of trustees to appoint a new trustee in case of a vacancy as unconstitutional and against the President's power to appoint.[245] Contrast *Rufino* with *Liban v. Gordon's*[246] different outcome because it found that the entity in question, the Philippine National Red Cross, was not a government entity.

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[242] G.R. No. 131429, 311 SCRA 733, 740-41, Aug. 4, 1999.

[243] Pimentel v. Executive Secretary, G.R. No. 164978, 472 SCRA 587, 593, Oct. 13, 2005, *citing* Sarmiento v. Mison, G.R. No. 79974, 156 SCRA 549, Dec. 17, 1987; Manalang v. Quitoriano, 94 Phil. 903 (1954); Flores v. Drilon, G.R. No. 104732, 223 SCRA 568, Jun. 22, 1993. The decision noted that the Commission on Appointments is distinct from Congress and its powers are executive in nature even though it is composed of legislators.

[244] G.R. No. 139554, 496 SCRA 13, 50, Jul. 21, 2006, *citing* Santos v. Macaraig, G.R. No. 94070, 208 SCRA 74, Apr. 10, 1992.

[245] Rufino v. Endriga, 496 SCRA at 60-62.

[246] G.R. No. 175352, 593 SCRA 68, Jul. 15, 2009.

Following *Cayetano v. Monsod,* the President has enjoyed deference in choice of appointments, with requirements for positions interpreted in his favor in cases of doubt. There, the Court ruled that lawyer Christian Monsod's experience in various banks and non-governmental organizations met the requirement that a Commission on Elections commissioner should have been "engaged in the practice of law for at least ten years"[247] and delivered an elaborate dissection of this phrase complete with quotes from magazine articles and strained explanations of how a World Bank lawyer encounters the laws of other countries and a National Movement for Free Elections chair encounters election law issues.[248]

Pimentel v. Executive Secretary, with similar deference, upheld how former President Arroyo appointed several cabinet secretaries in an acting capacity while Congress was in session then immediately reappointed them in an ad interim capacity immediately upon Congress' recess.[249] This substantially delayed the need for the appointees' confirmation because acting secretaries need not be confirmed by the Commission on Appointments. The decision also rejected the proposition that only an undersecretary may be appointed an acting secretary.[250] Another recent decision upheld a law that allowed the President to appoint officers-in-charge for certain Autonomous Region of Muslim Mindanao offices until an upcoming election, in the context of election synchronization.[251]

More recently, in *Paguia v. Office of the President,* Alan Paguia was not only denied standing to assail former Chief Justice Davide's appointment as an ambassador for being allegedly beyond the mandatory retirement age for Department of Foreign Affairs employees but reminded his suspension from the practice of law prohibited him from even bringing the suit.[252] *Soriano v. Lista* similarly rejected citizen and taxpayer standing for a petitioner questioning the lack of Commission on Appointments confirmation of senior Coast Guard officers. The decision noted the Coast Guard is no longer technically part of the armed forces,[253] and a previous decision ruled similarly regarding the Philippine National Police and its senior officers.[254]

The power to appoint is obviously important in relation to the

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[247] CONST. art. IX-C, § 1(1).

[248] Tan, *The 2004 Camrass, supra* note *, at 88.

[249] Pimentel v. Executive Secretary, G.R. No. 164978, 472 SCRA 587, 600, Oct. 13, 2005.

[250] *Id.* at 598-99.

[251] Abas Kida v. Senate, G.R. No. 196271, Oct. 18, 2011.

[252] Paguia v. Office of the President, G.R. No. 176278, 621 SCRA 600, 605-06, Jun. 25, 2010.

[253] G.R. No. 153881, 399 SCRA 437, 439-40, Mar. 24, 2003.

[254] *See* Manalo v. Sistoza, G.R. No. 107369, 371 SCRA 165, Aug. 11, 1999.

judiciary in that the President appoints Supreme Court Justices and other judges, although the impact of such appointments are not immediately felt. In President Aquino's case, he may feel stymied by ten years' worth of judicial appointments made by his predecessor.

Otherwise, the deference accorded to the President's power to appoint, however, is not particularly helpful to a popular president facing an adverse Court in that the deference does not extend to judicial review of the appointees' acts. The Court may also opt to find grave abuse of discretion when interpreting an appointee's qualifications if there is an available textual hook in the relevant constitutional or statutory provision.

F. PARDON

The Constitution provides:

> Except in cases of impeachment, or as otherwise provided in this Constitution, the President may grant reprieves, commutations, and pardons, and remit fines and forfeitures, after conviction by final judgment.[255]

The nature of a pardon has been described as follows:

> In *Monsanto v. Factoran*, we have firmly established the general rule that while a pardon has generally been regarded as blotting out the existence of guilt so that in the eyes of the law the offender is as innocent as though he never committed the offense, it does not operate for all purposes. The very essence of a pardon is forgiveness or remission of guilt and not forgetfulness. It does not erase the fact of the commission of the crime and the conviction thereof. Pardon frees the individual from all the penalties and legal disabilities and restores to him all his civil rights. Unless expressly grounded on the person's innocence, it cannot bring back lost reputation for honesty, integrity and fair dealing.[256]

The President's power to pardon is understood to be one of utmost discretion and *Marcos v. Manglapus*' classic discussion noted:

> [T]here remain issues beyond the Court's jurisdiction... We cannot set aside a presidential pardon....[257]

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[255] CONST. art. VII, § 19.

[256] Garcia v. Chairman of Comm'n on Audit, G.R. No. 75025, 226 SCRA 356, Sep. 14, 1993, *citing* Monsanto v. Factoran, G.R. No. 78239, 170 SCRA 190, Feb. 9, 1989.

[257] Marcos v. Manglapus, G.R. No. 88211, 177 SCRA 668, 696, Sep. 15, 1989.

The power is also understood to be broad and *Llamas v. Orbos*[258] upheld a pardon in an administrative case as the Constitution's qualification only excluded impeachment cases.[259] A pardon may be accompanied by conditions or reinstatement to an administrative position.[260] The main restriction is the requirement that a pardon be granted only after a conviction by final judgment. *People v. Salle*[261] categorically declared:

> We now declare that the "conviction by final judgment" limitation under Section 19, Article VII of the present Constitution prohibits the grant of pardon, whether full or conditional, to an accused during the pendency of his appeal from his conviction by the trial court. ... [A]gencies or instrumentalities of the Government concerned must require proof from the accused that he has not appealed from his conviction or that he has withdrawn his appeal. ... The acceptance of the pardon shall not operate as an abandonment or waiver of the appeal, and the release of an accused by virtue of a pardon, commutation of sentence, or parole before the withdrawal of an appeal shall render those responsible therefor administratively liable. Accordingly, those in custody of the accused must not solely rely on the pardon as a basis for the release of the accused from confinement.[262]

The dearth of jurisprudence on the power to pardon appears to affirm its breadth and highly discretionary nature. When former President Arroyo pardoned former President Joseph Estrada following his conviction for plunder,[263] debates revolved purely around its wisdom, not its validity. As always, however, the Court may find grave abuse of discretion. For example, it may decide that a pardon or stated reasons for a pardon contradicts a stated constitutional policy, akin to how certain provisions were invoked in *Tanada v. Angara* in an attempt to block a ratified treaty.

The problem, again, for a popular president is that the power to pardon is extremely narrow. A pardon's main use in opposing the judiciary is to signal severe disagreement with the interpretation of a law or even the

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[258] G.R. No. 99031, 202 SCRA 844, Oct. 15, 1991.

[259] *Id.* at 857.

[260] Garcia v. Chairman of Comm'n on Audit, *supra* note 256

[261] G.R. No. 103567, 250 SCRA 581, Dec. 4, 1995.

[262] *Id.* at 592.

[263] Lira Dalangin-Fernandez, *Arroyo grants pardon to Estrada*, PHIL. DAILY INQUIRER, Oct. 25, 2007 *available at*: http://newsinfo.inquirer.net/breakingnews/nation/view/20071025-96730/%28UPDATE_3%29_Arroyo_grants_pardon_to_Estrada..

Constitution by pardoning those convicted pursuant to this interpretation. This was most famously done by Thomas Jefferson, in opposition to the Alien and Sedition Act of 1801, and he wrote:

> [N]othing in the Constitution has given [the judiciary] a right to decide for the Executive, more than to the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence... But the executive, believing the law to be unconstitutional, were bound to remit the execution of it; because that power had been confined to them by the Constitution... [T]he opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch.[264]

G. VETO

The President's power to veto is treated with similar deference:

> (1) Every bill passed by the Congress shall, before it becomes a law, be presented to the President. If he approves the same he shall sign it; otherwise, he shall veto it and return the same with his objections to the House where it originated, which shall enter the objections at large in its Journal and proceed to reconsider it. If, after such reconsideration, two-thirds of all the Members of such House shall agree to pass the bill, it shall be sent, together with the objections, to the other House by which it shall likewise be reconsidered, and if approved by two-thirds of all the Members of that House, it shall become a law. In all such cases, the votes of each House shall be determined by yeas or nays, and the names of the Members voting for or against shall be entered in its Journal. The President shall communicate his veto of any bill to the House where it originated within thirty days after the date of receipt thereof, otherwise, it shall become a law as if he had signed it.
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> (2) The President shall have the power to veto any particular item or items in an appropriation, revenue, or tariff bill, but the

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[264] Edward White, *The Constitutional Journey of Marbury v. Madison*, 89 VA. L. REV. 1463, 1490 (2003).

> veto shall not affect the item or items to which he does not object.[265]

The dearth of jurisprudence and textual hooks governing vetos may similarly reflect the belief that it is purely discretionary. *Gonzales v. Macaraig*[266] upheld the broad use of the "item" veto to veto "provisions" in the General Appropriations Bill for 1989, despite a Senate resolution that opined this was unconstitutional, and noted that some provisions were inappropriate for an appropriations bill.[267]

However, as with the power to pardon, the power to veto is narrow and is principally directed at Congress. A veto may indirectly oppose the judiciary by targeting legislation pursuant to a decision the President wishes to oppose. For example, Andrew Jackson vetoed the charter of the Bank of the United States' renewal out of disagreement with *McCulloch v. Maryland*.[268] Noting a more recent American practice, a President may make a "signing statement" or articulate how he intends to enforce (or not enforce) a bill he signs into law instead of using his veto. Harvard Professor Laurence Tribe believes such decisions to sign and make a statement are "manifestly unreviewable."[269] More broadly, vetos may be part of the executive's constitutional interpretation.[270] As with other powers, finally, it is not impossible that a veto be declared grave abuse of discretion.

H. FISCAL POWERS

The President's fiscal powers merit two quick notes:

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[265] CONST. art. VI, § 27.

[266] G.R. No. 87836, 191 SCRA 450, Nov. 19, 1990.

[267] *Id.* at 464.

[268] 17 U.S. (4 Wheat.) 316 (1819).

[269] Laurence Tribe, *Tribe says 'signing statements' are the wrong target,* BOSTON GLOBE, ¶ 4, Aug. 9, 2006, *available at* http://www.law.harvard.edu/news/2006/08/09_tribe.html. *See* Laurence Tribe, *Larry Tribe on the ABA Signing Statements Report,* BALKINIZATION, Aug. 6, 2006, *at* http://balkin.blogspot.com/2006/08/larry-tribe-on-aba-signing-statements.html.

[270] Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law is*, 83 GEO. L.J. 217, 251 (1994); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 378-80 (1994); Michael Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735, 766-71 (1993); Geoffrey Miller, *The President's Power of Interpretation: Implications of a Unified Theory of Constitutional Law*, 56-AUT LAW & CONTEMP. PROBS. 35, 50-51 (1993); Gary Lawson & Christopher Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1286-88 (1996); Christopher May, *Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 992-93 (1994).

> (1) The Congress may not increase the appropriations recommended by the President for the operation of the Government as specified in the budget.
>
> (5) No law shall be passed authorizing any transfer of appropriations; however, the President, the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the heads of Constitutional Commissions may, by law, be authorized to augment any item in the general appropriations law for their respective offices from savings in other items of their respective appropriations.[271]

First, the President's power to realign funds is mundane, uncontroversial and highly discretionary, particularly coupled with his power to control the executive and focus all his powers in an emergency. However, judicial review will likely be directed at the funds' use and not the realignment.

Second, the President could conceivably refuse to increase the judiciary's budget during his entire term as Congress is only bound not to reduce it.[272] This is, of course, an extremely indirect and abstract method of making his case, with unsure effectiveness.

I. IMPEACHMENT

Impeachment is a congressional prerogative but is included in this discussion as it is the gravest check against the Supreme Court. Conceivably, as President Aquino's critics allege, a president may influence his allies in Congress to initiate impeachment. Entire books have been written about impeachment given its gravity, but this discussion is solely concerned with impeachment's use by the political branches to challenge constitutional interpretation.

The prosecution in the ongoing Corona impeachment trial failed to make these challenges. As discussed in the end of the last section, the prosecution team soon dropped all allegations regarding decisions and focused on accusing Corona of amassing ill-gotten wealth. The prosecution later rested having barely discussed any of the allegations regarding Supreme Court decisions.[273] House prosecutors apparently felt it too

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[271] CONST. art. VI, § 25.

[272] CONST. art. VIII, § 3.

[273] Cathy Yamsuan & Cynthia Balana, *Prosecution rests case vs Corona*, PHIL. DAILY INQUIRER, Feb. 29, 2012, available at http://newsinfo.inquirer.net/153265/prosecution-rests-case-vs-corona.

difficult to argue judicial doctrine to ordinary voters.

Again, the Philippine perception of judicial supremacy diluted the charges against Corona in relation to constitutional interpretation at the outset. The powerful charge of a midnight appointment, being contrary to a decided case, was nuanced by alleging that it was betrayal of public trust to accept such a dubious appointment, following Fr. Bernas's initial opinion that "any person who accepted the post of Chief Justice from Ms Arroyo would open himself or herself to impeachment by the next Congress."[274] The questionable reasoning behind *De Castro v. Judicial and Bar Council* itself went unchallenged. The impeachment complaint alleged:

> Despite the obviously negative and confidence-shattering impact that a "midnight appointment" by an outgoing President would have on the people's faith in the Supreme Court and the judicial system, Respondent eagerly, shamelessly, and without even a hint of self-restraint and *delicadeza*, accepted his midnight appointment as Chief Justice by then-President Gloria Macapagal-Arroyo.[275]

The complaint assailed several other decisions, from *Biraogo* which used the human rights doctrine of equal protection to strike down a Presidential Truth Commission tasked with investigating anomalies in the preceding Arroyo regime to the Court's exoneration of Justice Mariano Castillo who was accused by several noted public international law authors and members of the UP College of Law faculty of plagiarizing the former's articles in a decision. Despite the doctrinal grounds to question such decisions, the complaint instead argued that Corona's votes were biased and cited an investigative report that claimed Corona voted in favor of Arroyo, who appointed him, in 78% of cases involving her.[276] The defense asserted in response to several allegations that (1) a Supreme Court decision had already settled the issue raised and (2) the assailed action was

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The prosecution discussed only articles 2, 3 and 7 of its complaint. Article 3 involved the recall of the Supreme Court decision favoring labor unions in *Flight Attendants and Stewards Association of the Philippines (FASAP) v. Philippine Airlines* allegedly after Philippine Airlines counsel Estelito Mendoza wrote a letter to the Court and involved no doctrinal issue. G.R. No. 178083, Jul. 23, 2008; In re Letters of Atty. Mendoza, A.M. No. 11-10-1 SC, Oct. 04, 2011. Article 7 accused Corona of highly partisan action in the issuance of a temporary restraining order that would have allowed former President Arroyo and her husband to leave the country and likewise involved no doctrinal issue. Minute Resolution dated Nov. 18, 2011 in Macapagal-Arroyo v. De Lima, G.R. No. 199034 and subsequent Court resolutions.

[274] Bordadora, *supra* note 13.

[275] In re Impeachment of Corona, Case No. 002-2011, Verified Complaint for Impeachment, at 14 (Dec. 12, 2011).

[276] *Id.* at 15-21.

a collegial Supreme Court action of which Corona is only one member.[277]

"[S]imple questions deserve straight answers, not a defense by abstract legalism that claims that the questions may not even be asked."[278] Nevertheless, these defense positions appeared to have been accepted by the public who were conditioned to thinking of the impeachment trial as a judicial trial where evidence of individual guilt would weigh heaviest. Senator Antonio Trillanes IV was the only senator-judge to articulate a philosophy other than a proposed impartial adherence to evidence:

> If an impeachment trial were meant to be solely evidence-based, then why didn't our constitutional framers just give that power to the Supreme Court whose members are supposed to be experienced judges?
>
> The overarching policy issue in this ... episode is whether the conviction or acquittal of ... Corona would be good for our country. To resolve this, I intend to use political acceptability as the sole criterion to evaluate the projected outcomes of either (decision).
>
> My verdict should not be based solely on evidence as it now becomes a matter of public policy[279]

Trillanes's position appears to have been taken less seriously than armchair lawyering. Picking up the point that senators are elected officials and not necessarily lawyers by profession, I wrote on the need to ensure the electorate's thoughts on constitutional interpretation needed to be heard in the impeachment of a Justice:

> This impeachment ... is about once again placing our democratic institutions under intense scrutiny as a new generation of voters with no firsthand memory of Edsa emerges. An accounting of the judiciary ... must be an accounting of its very doctrines to ensure that these adhere to

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[277] In re Impeachment of Corona, Case No. 002-2011, Answer to Verified Complaint for Impeachment (Dec. 21, 2011). For a summary of the prosecution and defense positions, *see* Tan, *Impeachment trial scorecard*, *supra* note 169, at A16.

[278] Oscar Franklin Tan, *Commentary: Shoot the ball, not the ref*, PHIL. DAILY INQUIRER, Feb. 15, 2012, available at http://opinion.inquirer.net/23121/shoot-the-ball-not-the-ref.

[279] Speech delivered at University of the Philippines National College of Public Administration and Governance, Jan. 9, 2012, *quoted in* Cathy Yamsuan, *Corona verdict not solely evidence-based, says Trillanes*, PHIL. DAILY INQUIRER, *available at* http://newsinfo.inquirer.net/124755/corona-verdict-not-solely-evidence-based-says-trillanes.

> the principles the President, Congress and the "only boss" believe our nation stands for. As Stanford Dean Larry Kramer cautioned: "To nudge popular institutions out of the life of the Constitution is to impoverish both the Constitution and the republican system it is meant to establish."[280]

While popular constitutionalism in the abstract appeared to resonate during the Corona impeachment's early weeks, people appeared to have difficulty taking the next mental step to declaring a constitutional value judgment by popularly elected officials superior to a Court decision in an impeachment context.

Dean Pangalangan wrote:

> We need to respond to the fear of "lynch-mob populism," the fear that impeaching Chief Justice Renato Corona today will weaken the constitutional protection for our rights in the future. ...
>
> That fear is anchored on the principle of "judicial supremacy," the theory that the courts are "the surest expositors" of the Constitution, in contrast to common people who are caricatured as "creatures without reason, ever in thrall to irrational emotions."[281]

Further:

> "We have, therefore, reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself. .... We want a Supreme Court which will do justice under the Constitution and not over it."
>
> These words were uttered not by President Benigno Aquino III in 2011, but by US President Franklin Delano Roosevelt (FDR) in a fireside radio broadcast in 1937. The alarmists amongst us don't remember much, and that is why their logic is bizarre. The Supreme Court hurriedly issues a TRO that would let Arroyo evade Philippine justice, and they chant "Hallelujah, the rule of law has triumphed!" Congress

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[280] Tan, *The 'only boss' at battleground of principle*, *supra* note 5.

[281] Raul Pangalangan, *Anti-democratic constitutionalism*, PHIL. DAILY INQUIRER, Jan. 12, 2012, *available at* http://opinion.inquirer.net/21017/anti-democratic-constitutionalism.

> hurriedly uses its constitutional power to impeach, and they cry "bully" and "dictatorship." We forget our history.'[282]

Schlesinger implies that impeachment is hardly a purely judicial proceeding; "The Senate, in trying impeachment cases, was better equipped to be the judge of the law than of the facts."[283] Yale Professor Charles Black adds:

> [T]echnical rules of evidence were elaborated primarily to hold *juries* within narrow limits. They have no place in the impeachment process. ... Senators are in any case continually exposed to "hearsay" evidence.... If they cannot be trusted to weigh evidence, appropriately discounting for all the factors of unreliability that have led to our keeping some evidence away from juries, then they are not in any way up to the job, and "rules of evidence" will not help.[284]

In the Corona trial's opening days, it appeared that the Senate might assert primacy over the Supreme Court in impeachments. I argued that the Senate may present its own constitutional interpretation as part of its necessary task to define "betrayal of public trust" and "culpable violation of the Constitution" in order to judge the impeached against these standards:

> The Coronavela has dispelled the great myth that only the Supreme Court may interpret the Constitution. After Senate President Juan Ponce Enrile quoted the Constitution to assert that the Senate is the sole authority in impeachment cases and only the military can stop the trial, no temporary restraining order (TRO) issued from the Supreme Court. After Sen. Franklin Drilon instructed the Supreme Court's clerk of court to turn over Chief Justice Renato Corona's statements of assets, liabilities and net worth (SALN), required by the Constitution to be disclosed as provided by law, Court Administrator Midas Marquez immediately announced the SALN could be disclosed.
> ...
> ...
> With the flexing of the Senate's muscles ... [t]he key defense argument that the Senate cannot scrutinize constitutional questions is now untenable. ... The Senate threw a jab when it demanded the SALN; it may throw a knockout

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[282] Raul Pangalangan, *Save the Constitution from the Court...*', PHIL. DAILY INQUIRER, Dec. 15, 2011, *available at* http://opinion.inquirer.net/19229/%E2%80%98save-the-constitution-from-the-court%E2%80%A6%E2%80%99.

[283] SCHLESINGER, *supra* note 8, at 415.

[284] CHARLES BLACK, IMPEACHMENT: A HANDBOOK 18 (1974).

> punch when it asserts the power to define "betrayal of public trust" and "culpable violation of the Constitution."[285]

One notes the introduction of a former House Judiciary Committee Chair:

> We do not assume the responsibility ... of proving that the respondent is guilty of a crime.... We do assume the responsibility of bringing before you a case, proven facts, the reasonable and probable consequences of which are to cause people to doubt the integrity of the respondent presiding as a judge.[286]

This potential trajectory was soon derailed by two developments. First, as mentioned, the trial increasingly focused on assets Chief Justice Corona was allegedly hiding. Second, the Senate declined to press Senate President Juan Ponce Enrile's earlier strong assertions of jurisdiction when a bank in which Corona had US dollar accounts obtained a temporary restraining order against the Senate subpoena regarding these dollar accounts, based on bank secrecy laws governing dollar deposits.[287] Fr. Bernas asked questions he answered no to:

> [O]nly the Constitution is superior ... Does the fact that the Constitution [identifies] the Senate as the sole judge of all impeachment cases make it superior to the Supreme Court in everything relating to impeachment?[288]

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[285] Oscar Franklin Tan, *Drilon's jab may result in a knockout*, PHIL. DAILY INQUIRER, Jan. 25, 2012, *available at* http://opinion.inquirer.net/21781/drilon%E2%80%99s-jab-may-result-in-a-knockout. *See* Christine O. Avendaño, *Enrile: Only military can stop Corona impeachment trial*, PHIL. DAILY INQUIRER, Jan. 2, 2012, *available at* http://newsinfo.inquirer.net/121009/enrile-only-military-can-stop-corona-impeachment-trial; Cathy Yamsuan et al, *SC clerk of court turns over Corona SALNs*, PHIL. DAILY INQUIRER, Jan. 19, 2012, *available at* http://newsinfo.inquirer.net/130453/round-3-of-corona-trial-to-prosecution. A similar argument was made in Joel Butuyan, *Should we let it be?*, Malaya, Jan. 12, 2012, *available at* http://www.malaya.com.ph/01122012/edtorde.html.

[286] RAOUL BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 57 (1973).

[287] Phil. Savings Bank v. Senate Impeachment Court, G.R. No. 200238, Feb. 9, 2012; Michael Lim Ubac, *Senate votes 13-10 to obey TRO on Corona dollar accounts*, PHIL. DAILY INQUIRER, Feb. 14, 2012, *available at* http://newsinfo.inquirer.net/145105/senate-votes-13-10-to-obey-tro-on-corona-dollar-accounts.

[288] Jerome Aning & Norman Bordadora, *SC, Senate impeachment court equals, says Fr. Bernas*, PHIL. DAILY INQUIRER, Feb. 10, 2012, *available at* http://newsinfo.inquirer.net/142963/sc-senate-impeachment-court-equals-says-fr-bernas.

President Aquino himself called to uphold the Senate's jurisdiction:

> [T]he English words 'sole' and 'exclusively' are clear ... in referring to the power of the House to impeach and referring to the Senate's right to try. So I don't get the legal theory that all of a sudden the Supreme Court can involve itself in the impeachment process when the Constitution that we all swore to defend says that one part of the impeachment belongs exclusively to the House and the other to the Senate.[289]

Harvard Professor Raoul Berger noted:

> From Story onward it has been thought that in the domain of impeachment the Senate has the last word; that even the issue whether the charged misconduct constitutes an impeachable offense is unreviewable, because the trial of impeachments is confided to the Senate alone. This view has the weighty approval of Professor Herbert Wechsler: "Who ... would content that the civil courts may properly review a judgment of impeachment when article I, section 3 declares that the 'sole power to try' is in the Senate? That any proper trial of an impeachment may present issues of the most important constitutional dimension ... is simply immaterial in this connection...."[290]

Black adds:

> "[J]udicial review" has no part to play in impeachment proceedings. For now, it should be briefly pointed out that, if I am right, then Congress ... rests under the very heavy responsibility of determining finally some of the weightiest of constitutional questions.... [W]e have to divest ourselves of the common misconception that constitutionality is discussable or determinable only in the courts.... We ought to understand, as most senators and congressmen understand, that Congress's responsibility to preserve the forms and precepts of the Constitution is greater, rather than less, when the judicial forum is unavailable, as it sometimes must be.[291]

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[289] *Id.*

[290] BERGER, *supra* note 286, at 104. Berger further notes that impeachment under the United States Constitution was originally under the Supreme Court but later transferred to the Senate as "no other tribunal than the Senate could be trusted." *Id.* at 113.

[291] BLACK, *supra* note 284, at 23-24.

> The crucial senatorial vote should be taken, and should be known to be taken, with full knowledge that there is no appeal. No senator should be encouraged to think he can shift to any court responsibility for an unpalatable or unpopular decision.[292]

Note, however, that Berger believes impeachment is subject to judicial review:

> The "sole power to try" affords no more exemption from that doctrine than does the sole power to legislate....[293]

> It was never intended that Congress should be the final judge of the boundaries of its own powers. ... Astonishment would have greeted a claim of illimitable power made with respect to any function of Congress. Astonishment would have greeted a claim that the structure so carefully reared upon the separation of powers could be shaken to bits whenever Congress chose to resort to an unlimited power of impeachment. (internal citations omitted)[294]

I wrote that conceding authority to a Court order and opening a crack in the Senate's supposed "sole" authority over impeachment would present future problems:

> Having proclaimed that only the military can stop the impeachment trial, Enrile cannot afford to cede any authority. The high court now gauges the Senate's resolve against its trial balloon TRO on the disclosure of Corona's dollar accounts. ...
>
> When the Supreme Court blocked Chief Justice Hilario Davide Jr.'s impeachment in 2003, it claimed it could interpret the rules governing impeachment even though it had no power to decide the verdict. Impeachment is a political process in part because there are few restrictions and even the very definitions of betrayal of public trust and culpable violation of the Constitution are left to senators' judgment. Imagine if the ongoing debate on the standard to convict crystallizes, whether into betrayal "beyond reasonable doubt," betrayal with "overwhelming preponderance of evidence," or betrayal with "substantial evidence." Might the Supreme Court rule that the Senate's verdict failed to meet its own standard and nullify it as "grave abuse of discretion"? Idle legal minds can craft infinite outlandish pretexts.

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[292] *Id.* at 62.

[293] BERGER, *supra* note 286, at 120.

[294] *Id.* at 116-17. "Impeachment was a carefully limited exception to the separation of powers, tolerable only if exercised strictly within bounds." *Id.* at 118.

> The defense insidiously claims that it has properly raised questions of law before the Supreme Court. This is like justifying a rule book change that forces a referee to count shots in only one side's basket. Questions of law are woven into the impeachment trial's fabric, and even if the Supreme Court does not outright halt the trial, a deceptively narrow order may leave the impeachment court with nothing to decide. Enrile need not suffer the travesty of having another court headed by the defendant himself shape his trial; every textbook tells the defense to raise its issues before the impeachment court when it has convened.[295]

With the Senate unwilling to resist a restraining order against its own subpoena, it appears highly unlikely as of this writing that it would explicitly present a constitutional interpretation at odds with a Supreme Court decision. The opposite of this result might have been the Senate discarding strict notions of evidence and individual culpability and making a policy-driven decision to remove Chief Justice Corona on the purely legal ground that he was a midnight appointee. *De Castro v. Judicial and Bar Council* would stand, albeit severely discredited, because the Senate verdict would be pursuant to the power to impeach and remove, not the power of judicial review. A policy-driven or symbolic removal as opposed to one pursuant to a finding of individual guilt is supported by history; Berger notes that impeachment was "essentially a political weapon"[296] used to make a king's advisers accountable.

One might argue that some eminent American scholars have written against the resort to impeachment over differences in constitutional interpretation or political ideology. Schlesinger, for example, wrote:

> There was broad agreement, among scholars at least, on doctrine. Impeachment was a proceeding of political nature, by no means restricted to indictable crimes. On the other hand, it was plainly not to be applied to cases of honest disagreement over national policy or over constitutional interpretation, especially when a President refused to obey a law that he believed struck directly at the presidential prerogative. Impeachment was to be reserved, in Mason's phrase at the Constitutional Convention, for "great and dangerous offenses."[297]

Schlesinger wrote in the President's context, however, and Berger

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[295] Tan, *Shoot the ball, not the ref*, *supra* note 278.

[296] BERGER, *supra* note 286, at 59.

[297] SCHLESINGER, *supra* note 8, at 415.

wrote that the American Founding Fathers were "exclusively concerned with the President"[298] when the provisions of the United States Constitution on impeachment were drafted. One doubts the "honest disagreement" contemplated extends to a contravention of tradition and established jurisprudence as seen in *De Castro v. Judicial and Bar Council* and *Biraogo v. Philippine Truth Commission.* The argument that Congress cannot be left to exercise unlimited power fails when one instead hands unlimited power over the Constitution to the Supreme Court. Choosing between these two branches, I wrote analyzing the legitimacy of the canvass of presidential election results that there can only be one choice:

> Given human frailties, Congress thus plays a legitimizing role in the most essential of democratic exercises, and by its very nature, it is the only body capable of doing so.[299]

Parenthetically, the Court also rebuffed a prosecution request for certain of its records due to the separation of powers and interdepartmental comity.[300] The Senate did not pursue this matter.

J. THE PRESIDENCY AS A BULLY PULPIT

If even the weighty artillery of impeachment does not suffice to contest what the President fears are improvident exercises of the judicial power, the last of his residual powers is resort to the presidency as a bully pulpit, or what Professor Laurence Tribe describes as the ability to command national attention. This has been described:

> Justice Robert Jackson's astute observation in *Youngstown Sheet & Tube Co. v. Sawyer* on the unique nature of the presidency, has been widely quoted:
>
> Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In drama, magnitude, and finality, his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those

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[298] BERGER, *supra* note 286, at 100.

[299] Tan, *The 2004 Canvass*, *supra* note *, at 58.

[300] In re Production of Court Records, Resolution dated Feb. 14, 2012, *available at* http://sc.judiciary.gov.ph/jurisprudence/2012/february2012/notice.pdf.

> who are supposed to check and balance his power which often cancels their effectiveness.
>
> Correspondingly, the unique nature of the office affords the President the opportunity to profoundly influence the public discourse, not necessarily through the enactment or enforcement of laws, but specially by the mere expediency of taking a stand on the issues of the day. Indeed, the President is expected to exercise leadership not merely through the proposal and enactment of laws, but by making such vital stands. U.S. President Theodore Roosevelt popularized the notion of the presidency as a "bully pulpit", in line with his belief that the President was the steward of the people limited only by the specific restrictions and prohibitions appearing in the Constitution, or impleaded by Congress under its constitutional powers.[301]

The Presidency, in short, can become more than the sum of its powers if only because of the gravitas and influence of being the country's focal point. The only long term way for a President to resist a Court is to engage it on its own battlefield of reason and pit one institution's moral capital against another's. If "the Justices are inevitably teachers in a vital national seminar,"[302] the Presidency is a powerful platform from which to join and possibly dominate the debate.

President Aquino, based on media reports, has attempted to do so in relation to the Corona impeachment trial, at times arguing the very text of the Constitution. Although this language may not yet be mainstream in the Philippines, he would not be alone in broader experience. Abraham Lincoln, for example, voiced opposition to *Dred Scott v. Sandford*,[303] which ruled that slaves were not citizens of the United States, and argued that beyond the immediate parties to the case:

> We nevertheless do oppose [*Dred Scott*] ... as a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision.[304]

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[301] David v. Macapagal-Arroyo, G.R. No. 171396, 489 SCRA 160, 304, May 3, 2006 (Tinga, J., *dissenting*), *quoting* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Jackson, J., *concurring*).

[302] Eugene Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

[303] 60 U.S. (19 How.) 393 (1856).

[304] Edwin Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985 (1987).

Franklin Delano Roosevelt pushed the "New Deal" and a modern government economic role against an extreme version of *laissez-faire* then prevailing in judicial thinking. FDR directly debated decisions' reasoning in public, catching media fancy with witty criticism such as, "We have been relegated to the horse-and-buggy definition of interstate commerce."[305] More recently, at his 2010 State of the Union Address and in the presence of US Supreme Court Justices, President Barack Obama vocally criticized a decision on corporate spending in political campaigns that "reversed a century of law to open the floodgates for special interests – including foreign companies – to spend without limit in our elections."[306]

The President may readily deploy his entire array of powers from the bully pulpit. As mentioned, Thomas Jefferson used opposed the Alien and Sedition Act of 1801 by pardoning those found guilty under it and Andrew Jackson vetoed the charter of the Bank of the United States out of disagreement with an underlying Supreme Court doctrine.

The powerful pulpit aside, other stakeholders need to work to elevate the level of debate. In particular, the media and the academe are crucial to translating high level constitutional theory into everyday values.

CONCLUSION

Given its constitutional history, one imagines that the Philippines is a prime potential victim for what Judge Robert Bork calls "the 'American disease' – the seizure by judges of authority properly belonging to the people and their elected representatives."[307]

In 2006, at an informal session with Professor Mark Tushnet organized by my classmate Kasia Klaczynska, he asked each of us to share the most extreme exercise of judicial review in our home countries. I ventured that in 2001, there were large and prolonged demonstrations after then President Joseph Estrada's impeachment trial was aborted, which ended after the Justices of the Supreme Court walked into the center of the crowds at EDSA and swore in Vice-President Gloria Macapagal-Arroyo as President.[308] The exercise ended as none of my dumbstruck classmates could offer a comparably outlandish anecdote.

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[305] Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1019 (2000).

[306] Brian Montopoli, *Obama Hammers Supreme Court in Speech*, CBS NEWS, Jan. 27, 2010, *at* http://www.cbsnews.com/2100-504643_162-6148414.html.

[307] COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 1 (2003).

[308] Estrada v. Desierto, G.R. No. 146710, 356 SCRA 108, Mar. 2, 2001.

Immediately before this article was finalized I sat in Professor Frank Michelman's last lecture in comparative constitutional law on April 20, 2012. He mentioned that the insertion of language regarding economic policy into constitutions gave some courts in developing countries the textual basis to implement broad liberal economic policies by judicial fiat. He was quite surprised to hear that the Philippine Court acted in a similar manner with nationalist economic provisions but fortunately backed down when asked to rule on the Philippines' entry into the World Trade Organization.

Filipino lawyers have taken for granted the Supreme Court's relative power in our separation of powers. In addition to the "expanded certiorari" power explicitly given to it under the 1987 Constitution, the Court historically enjoyed the greatest public support and was perceived as democracy's last bastion. Our Presidency and Congress were severely damaged after the perceived partisan maneuvering during the Estrada impeachment trial and the alleged massive corruption that characterized President Arroyo's extended tenure; in contrast, Chief Justice Davide's calming influence during and in the aftermath of the Estrada trial, Justice Carpio's barricade of charter change[309] and Chief Justice Puno's extrajudicial crusade against extrajudicial killings[310] made judicial restraint an unthinkably unpopular philosophy both in legal academia and the mainstream media. The constitutional design has always presumed a "good" Supreme Court checking a "bad" President and less thought was given to a partisan Court straining the limits of its power.

This article has reviewed the recent experience in the ongoing Corona impeachment trial and how difficult it is for a popular President Aquino to challenge allegedly partisan decisions with dubious bases such as *De Castro v. Judicial and Bar Council,* which upheld the midnight appointment of a Chief Justice after the presidential elections but before the new president's term, and *Biraogo v. Philippine Truth Commission,* which used the human rights doctrine of equal protection to shield former President Arroyo from prosecution for corruption. Surveying judicial power in practice under the 1987 Constitution, one summarizes:

1) The power of judicial review was textually reinforced into the expanded certiorari power, and may strike down acts constituting grave abuse of discretion even if technically not

[309] Lambino v. Comm'n on Elections, G.R. No. 174153, 505 SCRA 160, Oct. 26, 2006.

[310] Secretary of Nat'l Defense v. Manalo, G.R. No. 180906, 568 SCRA 1, Oct. 7, 2008.

unconstitutional;

2) The political question doctrine, which marks the outer bound of a political branch's power relative to judicial review, is all but nonexistent;

3) An extremely textualist Philippine approach effectively expands the scope of judicial power;

4) Highly liberal standing rules effectively expand the scope of judicial power;

5) The 1987 Constitution's sheer length presents near infinite textual hooks to anchor an exercise of judicial power, and international law sources provide even more hooks;

6) The rulemaking power, introduced in 2007, expands judicial power even further, beyond the traditional case and controversy restraint of judicial review; and

7) An entrenched deference to judicial supremacy in the Philippines makes judicial power even broader in practice.

Against the judicial power, one surveys presidential power:

1) The President enjoys no special preference relative to judicial review in the exercise of his general executive power;

2) The President has numerous implied powers;

3) The President exercises broad power to control executive instrumentalities and a government body not legislative or judicial or part of an independent constitutional body is deemed executive;

4) As Commander-in-Chief, the President faces substantial post-martial law restrictions should he declare martial law or a suspension of the writ of habeas corpus, but enjoys substantial deference using his "most benign" power of "calling out" the armed forces;

5) The President enjoys substantial deference in foreign affairs, including entry into executive agreements that do not require Senate ratification;

6) The President enjoys latitude in focusing his powers in an emergency and declaring a "state of national emergency" but true emergency powers require congressional authorization;

7) The President enjoys substantial deference in making appointments;

8) The President enjoys substantial deference in granting pardons;

9) The President enjoys substantial deference in exercising a veto;

10) The President may attempt to influence Congress to initiate and try a Justice in impeachment but this has not been an effective venue for challenging judicial doctrine in Philippine experience; and

11) The President enjoys a powerful, implied bully pulpit by being the nation's focal point from which he may attempt to influence the country.

The ready conclusion is that the constitutional design favors aggressive judicial review as a general rule and recognizes narrow areas of deference to presidential power as an exception. The only long term way for a popular president to resist a possibly partisan Court in this framework is to use his bully pulpit to challenge the Court's very reasoning following the likes of Lincoln and Roosevelt. Disinterested stakeholders such as the media and academe are crucial to elevating the level of debate necessary to make such a challenge possible, beyond the present default to judicial supremacy in the Philippines. People must realize that they cannot fear another martial law regime only to ignore the more subtle impunity embodied in *De Castro v. Judicial and Bar Council* and *Biraogo v. Philippine Truth Commission*.

One consolation for an embattled President is that the judiciary's true strength lies in its moral strength, holding neither purse nor sword, and its more extreme powers such as the rulemaking power appear to be difficult to exercise absent the kind of clear popular support Chief Justice Puno did. For all the scholarly literature on the Court's greater "mystic function," a President cannot forget that he is equally capable of mustering moral strength and firing the national imagination. As Schlesinger wrote:

> The effective means of controlling the Presidency lay less in law than in politics. For the American President ruled by influence; and the withdrawal of consent, by Congress, by the press, by public opinion, could bring any President down. The great Presidents understood this.[311]

One must always recall judicial review's place in democracy as a countermajoritarian enigma and its presumption that citizens remain active participants. An abdication of this collective role to the judiciary means "the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility."[312] As Judge Learned Hand put it, "it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not."[313]

As recent experience has shown, the level of discourse sorely needs to be elevated in impeachment contexts, and the process must transcend armchair lawyering into an opportunity for elected officials to represent their constituents in affirming or rejecting constitutional interpretation. As I proposed:

> The cruelest fiction is that impeachment cannot ask a justice to account for how human rights have been rewritten. This is a fiction maintained by a legal elite trained to discount the electorate as a whimsical mob and aggrandize law as a secular religion where "equal protection" is reduced to an incantation. To apply the designated check and balance of impeachment on the Supreme Court to challenge its doctrine has never meant to appeal a case by referendum. It simply means that, beyond who won and who lost, the sovereign people have the ultimate duty to rebuke the human rights doctrine they disbelieve. It simply means the Constitution's ultimate interpretation lies not with the lawyer who wrote it but with the ordinary citizen who lives it, not with legal technicalities blown out of proportion but with resonance in daily life.
>
> It simply means that the sovereign people, through their elected representatives, have every right in our democracy to remind unelected justices that the Constitution is too important

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[311] SCHLESINGER, *supra* note 8, at 410.

[312] JAMES BRADLEY THAYER, JOHN MARSHALL 106-07 (1901).

[313] LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

> to be left to them alone and that they have the ultimate right to take it back if they are unable to teach their children that Arroyo is a human rights victim.[314]

Schlesinger ended his classic discourse:

> A constitutional Presidency, as the great Presidents had shown, could be a very strong Presidency indeed. But what kept a strong President constitutional, in addition to checks and balances incorporated within his own breast, was the vigilance of the nation. Neither impeachment nor repentance would make much difference if the people themselves had come to an unconscious acceptance of the imperial Presidency. ... As Madison said long ago, the country could not trust to "parchment barriers" to halt the encroaching spirit of power. In the end, the Constitution would live only if it embodied the spirit of the American people. (internal citations omitted)[315]

One argues that in the post-1987 context of an already institutionalized wariness of an imperial Presidency, the same reasoning should equally apply to an imperial Judiciary and "the most dangerous branch."[316]

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[314] Tan, *Gloria M. Arroyo as human rights victim*, *supra* note 17.

[315] SCHLESINGER, *supra* note 8, at 418.

[316] *E.g.,* Agabin, *supra* note 1, at 210.