POLITICAL LAW — PART ONE

CONSTITUTIONAL LAW

VICENTE V. MENDOZA*

I. THE COURT AND THE CONSTITUTION: JUDICIAL REVIEW IN OPERATION

The requirement of case or controversy. — In *Gonzales v. Commission on Elections*[1] the Court considered the constitutionality of the Tañada-Singson Act,[2] but failed to reach any decision with the consequence that, by operation of law,[3] the validity of the Act was deemed upheld. The inconclusiveness of the result, aggravated by the unsatisfactory abstractness of the record, deprives the case of precedential value and makes the opinions delivered little more than advisory opinions.

The Tañada-Singson Act amends the Revised Election Code by adding the following sections:

> SEC. 50-A. *Prohibition of too early nomination of candidates.* — It shall be unlawful for any political party, political committee or political group to nominate candidates for any elective public office voted for at large earlier than one hundred and fifty days immediately preceding an election, and for any other elective public office earlier than ninety days immediately preceding an election.
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> SEC. 50-B. *Limitation upon the period of Election Campaign or Partisan Political Activity.* — It is unlawful for any person whether or not a voter or candidate, or for any group or association of persons, whether or not a political party or political committee, to engage in an election campaign or partisan political activity except during the period of one hundred twenty days immediately preceding an election involving a public office voted for at large and ninety days immediately preceding an election for any other elective public office.
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> The term "Candidate" refers to any person aspiring for or seeking an elective public office regardless of whether or not said person has already filed his certificate of candidacy or has been nominated by any political party as its candidate.
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> The term "Election Campaign" or "Partisan Activity" refers to acts designed to have a candidate elected or not or promote the candidacy of a person or persons to a public office which shall include:
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> (a) Forming Organizations, Associations, Clubs, Committees or other groups of persons for the purpose of soliciting votes and/or undertaking any campaign or propaganda for or against a party or candidate;

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1 G.R. No. 27833, April 18, 1969.

2 Rep. Act No. 4880 (1967), *amending* the REV. ELECTION CODE.

3 Rep. Act No. 296 (Judiciary Act of 1948), sec. 9.

(b) Holding political conventions, causes, conferences, meetings, rallies, parades, or other similar assemblies, for the purpose of soliciting votes and/or undertaking any campaign or propaganda for or against a candidate or party;

(c) Making speeches, announcements or commentaries or holding interviews for or against the election of any party or candidate for public office;

(d) Publishing or distributing campaign literature or materials;

(e) Directly or indirectly soliciting votes and/or undertaking any campaign or propaganda for or against any candidate or party;

(f) Giving, soliciting, or receiving contributions for election campaign purposes, either directly or indirectly; *Provided,* That simple expressions of opinion and thoughts concerning the election shall not be considered as part of an election campaign; *Provided, further,* That nothing herein stated shall be understood to prevent any person from expressing his views on current political problems or issues, or from mentioning the names of the candidates for public office whom he supports.

The petitioners, one a candidate for vice mayor of Manila in the 1967 elections and the other his political leader, brought a suit for declaratory relief in the Supreme Court, claiming that the amendatory Act violated their right of expression and association.

There were a number of procedural grounds on which the Court safely could have based its decision, but instead it chose to reach constitutional grounds. In the first place the Supreme Court has no jurisdiction over actions for declaratory relief;[4] nevertheless, it assumed jurisdiction over this case, treating the action as one for prohibition. In the second place at the time the Court took a vote on the question, the elections had been held and, consequently, the issue had become moot, but just the same the Court voted 6 to 5 to decide the case on the merit. In its view the question raised in this suit had become a matter of public importance in view of another coming election.

The Court was unanimous in upholding the validity of section 50-A. In its judgment the limitation imposed on freedom of association was narrowly drawn to reach only certain conduct deemed by the legislature to be in need of regulation: the early nomination of candidates.

Section 50-B posed a more difficult problem for the Court. Five justices (the Chief Justice, Justices Reyes, Sanchez, Fernando and Teehankee) believed that paragraphs (a) and (f) were valid, while five others (Justices Dizon, Zaldivar, Castro, Capistrano and Barredo) thought otherwise.

With respect to paragraph (b) the voting was four to six, with Justice Fernando casting his vote against validity, along with Justices Dizon, Zaldivar, Castro, Capistrano and Barredo.

As regards paragraphs (c) (d) and (e) the Court was split three to seven, with the Chief Justice and Justices Reyes and Teehankee upholding

[4] *Id.*, sec. 17.

the validity of the law, and Justices Dizon, Zaldivar, Sanchez, Castro, Fernando, Capistrano, and Barredo voting to invalidate the paragraphs in question. Justice Castro, joined by Justices Dizon, Zaldivar and Capistrano, believed that the entire section 50-B was unconstitutionally overbroad. His position was that

> . . . [e]xcept within the "open season" of 120 and 90 days preceding the election, the statute prevents and punishes — by a heavy criminal sanction — speeches, writing, assemblies and associations intended to promote or oppose the candidacy of any person aspiring for an elective public office, or which may be deemed a direct or an indirect "campaign" or as "propaganda" against a political party. The prohibition reaches not only "a relative handful of persons;" it applies to *any person* "whether or not a voter or candidate" and *to any group of persons* "whether or not a political party or political committee." The effect of the law, therefore, is to impose a comprehensive and prolonged prohibition of speech of a particular content, except during the 120 or 90 days, respectively, immediately preceding an election.

While voting to dismiss the case for lack of a justiciable controversy, Mr. Justice Barredo said that if made to decide the case on the merits he would cast his vote with Mr. Justice Castro to declare section 50-B unconstitutional in its entirety.

In separate opinions, Justices Sanchez and Fernando voted to invalidate paragraphs (c), (d) and (e) on the same ground of overbreadth.

On the other hand the prevailing three justices (Chief Justice Concepcion and Justices Reyes and Teehankee), while voting to dismiss the action on procedural grounds, nevertheless expressed the view (according to the opinion written by Justice Fernando) that section 50-B was valid, being a "response not merely to a clear and present danger but to the actual existence of a grave and substantive evil of excessive partisanship, dishonesty and corruption as well as violence that of late has invariably marred election campaigns and partisan political activities in this country . . . . It is [their] opinion that it woud be premature, to say the least, for a judgment of nullity of any provision found in Republic Act No. 4880. The need for adjudication arises only if in the implementation of the Act, there is in fact an unconstitutional application of its provisions. Nor [do they feel] called upon, under this approach, to anticipate each and every problem that may arise. It is time enough to consider it when there is in fact an actual, concrete case that requires an exercise of judicial power."

Mr. Justice Makalintal voted to dismiss the action for lack of justiciable controversy and refrained from expressing any opinion on the validity of the Act.

The four separate opinions of Justices Castro, Fernando, Barredo and Sanchez are elaborately reasoned expositions on the law and it is indeed

to be regretted that because of the lack of necessary votes, either to affirm or invalidate the questioned legislation, and the lack of specific controversy these opinions do not have institutional strength that only the collegial process of decision making can impart.

The rationale of the requirement of case or controversy in constitutional adjudication has been put most cogently by one who speaks with authority: [5]

> . . . The Constitution provides that the authority of the Federal courts shall extend to "cases or controversies." This formula means that the jurisdiction of the Federal courts can be invoked only where a person claims that a conventional legal right has been infringed. Neither the President nor Congress may seek the opinion of the Supreme Court on the validity or interpretation of a law or a proposed law outside the framework of an ordinary lawsuit; and even within such a framework a litigant may be found not to possess a conventional legal interest that would justify a judicial decision. . . . Moreover, when the Court does accept a case for decision, the decision itself will be put on the most moderate ground that is conscientiously possible. If a law can be interpreted in a way to avoid a serious question of its constitutional validity, that construction will be adopted; or if the case can be disposed of on some less heroic plane, that course will be followed. . . .
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> These two aspects of the role of the Supreme Court — that it may pass judgment on some of the profoundest national issues and that it will do so only when absolutely necessary to the solution of a conventional lawsuit — mark the central paradox of the Court's function. And yet the two elements are not antithetical. Together they help to explain the ultimate paradox of the Court's power, the power of a small group of judges appointed for life to set aside the acts of the representatives of the people in a democracy. The rules of "case or controversy" can be seen as the necessary corollary of this vast power — necessary for its wise exercise and its popular acceptance. By declining to give advisory opinions, the Court refrains from intrusion into the law-making process. By requiring a concrete case with litigants adversely affected, the Court helps itself to avoid premature, abstract, ill-informed judgments. By placing a decision on a non-constitutional ground whenever possible, the Court gives the legislature an opportunity to amend the statute to obviate the constitutional question, a chance to exercise that spirit of self-scrutiny and self-correction which is the essence of a successful democratic system.[6]

Standards of Judicial Review. — In *Vera v. Arca*[7] the private respondents filed an action in the Court of First Instance, questioning the constitutionality of the Tax Census Act,[8] and secured a preliminary injunction restraining the petitioners (Commissioner of Internal Revenue, Secretary of Finance and Executive Secretary) from enforcing the Act pending decision on the merits. They contended that the Act, which requires the disclosure of information necessary in the enforcement of tax laws, constituted a denial of due process

[5] Freund, *The Supreme Court*, in FORUM LECTURES 51 (1963); *see also* Freund, *The Supreme Court: A Tale of Two Terms*, 26 OHIO ST. L.J. 225 (1965).
[6] *Id.*, at 51-52.
[7] G.R. No. 25721, May 26, 1969.
[8] Rep. Act No. 2070, 13 LAWS & RES. 42 (1958).

and a violation of their right against self-incrimination and unreasonable searches and seizures. The petitioners in turn brought an action for certiorari and prohibition in the Supreme Court to set aside the injunctive order of the respondent judge and to enjoin him from hearing the suit filed by the private respondents. They claimed that in enjoining enforcement of the Act the respondent judge gravely abused his discretion as he thereby disregarded the presumption of constitutionality that the Act enjoyed. The Supreme Court granted the petition and set aside the lower court's injunctive order, but it declined to enjoin the hearing on the validity of the Act.

Speaking through Mr. Justice Fernando, the Court said that the suspension of the effectivity of a statute, even if only temporarily, is a matter of utmost delicacy, requiring the exercise of caution. It found a "failure [by the respondent judge] to observe what Cooley referred to as 'due caution and circumspection' as well as 'the respect due to the action and judgment of the lawmakers.'"[9] Citing *Malate Hotel & Motel Operators Ass'n. v. City Mayor of Manila*[10] the Court said that the presumption of constitutionality, which inheres in a statute, must prevail in the absence of some factual foundation of record for overthrowing it and that

> except in cases where the specific freedoms of belief whether religious or secular, of expression, of assembly and of association are concerned, a domain where Congress is forbidden to trespass except under the clear and present danger doctrine, the need for introducing evidence to counteract the assumption that a statute is valid may be unavoidable. So it was in this case. The absence thereof sufficed to cast on the issuance of the preliminary injunction . . . the mark of a grave abuse of discretion.
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> This is not to say that in no case should a writ of preliminary injunction issue. There are times the exercise of such an authority is appropriate. Thus when there is an invasion of the preferred freedoms of belief, of expression as well as the cognate right to freedom of assembly and association, an affirmative response to a plea for preliminary injunction would indeed be called for. The primacy of the freedom of the mind is entitled to the highest respect. . . .

In his dissent in *Baking v. Director of Prisons*,[11] Mr. Justice Fernando put his views on personal freedom even more pointedly: "[T]he claims of freedom must be given the utmost sympathy and accorded priority."

The phrase "preferred position of freedom of speech" was first used in *Kovacs v. Cooper*,[12] although Mr. Justice Frankfurter, concurring in that

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[9] Of a piece with the Arca case is La Perla Cigar & Cigarette Fcty. v. Capapas, G.R. Nos. 27948 & 28001-11, July 31, 1969: "[I]f the President cannot suspend the operation of any law, it would be presumptuous in the extreme for one in the position of then Collector Ang-angco to consider himself possessed of such a prerogative.... Unless and until annulled by the courts, they must with fidelity be executed by the officials concerned."

[10] G.R. No. 24693, July 31, 1967, 65 O.G. 3648 (April, 1969); motion for reconsider den., October 23, 1967.

[11] G.R. Nos. 30364 & 30603, July 28, 1969.

[12] 336 U.S. 77, 69 S. Ct. 448, 93 L. Ed. 513, 10 A.L.R. 2d 608 (1949).

case, could trace its evolution to *Herndon v. Lowry*.[13] While Frankfurter deemed the phrase "mischievous because it radiates a constitutional doctrine without avowing it" and tends to substitute a mechanical formula for the ultimate weighing of values, he nevertheless admitted that there are "liberties which history has attested as indispensable conditions of an open society as against a closed society [which] come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."[14] Indeed, as Professor Paul A. Freund puts it with characteristic simplicity:

> . . . [W]hen freedom of the mind is imperiled by law, it is freedom that commands a momentum of respect; when property is imperiled, it is the lawmakers' judgment that commands respect. This dual standard may not precisely reverse the presumption of constitutionality in civil liberties cases, but obviously it does set up a hierarchy of values within the due process clause.[15]

Sovereign Immunity from Suit. — In several cases[16] decided in 1969 the Supreme Court reiterated its ruling in *Mobil Phil. Exploration v. Customs Arrastre Service*[17] that the Bureau of Customs cannot be sued in the operation of the arrastre service because the latter is merely incidental to the performance of its governmental function of assessing and collecting revenues and customs duties, fees, charges, and fines. The remedy of the individual is to file his claim with the Auditor General in accordance with the procedure in Act No. 3038[18] and Commonwealth Act No. 327[19] before he can bring a suit in court because the waiver of immunity, being in derogation of the state's sovereignty, must be strictly construed. In *Firemen's Fund Ins. Co. v. Maersk Line Far East Service*,[20] the Bureau of Customs was held liable for the value of shipments lost while in its custody. On appeal the Supreme Court reversed.[21]

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[13] 301 U.S. 242, 57 S. Ct. 732, 81 L. Ed. 1066 (1937).

[14] Frankfurter set his views on freedom of expression more fully in his book MR. JUSTICE HOLMES AND THE SUPREME COURT (Atheneum ed. 1965):

> . . . Since the history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths, the liberty of man to search for truth was of a different order than some economic dogma defined as a sacred right because the temporal nature of its origin had been forgotten. At 75.

[15] P. A. FREUND, THE SUPREME COURT OF THE UNITED STATES 33 (1961).

[16] Firemen's Fund Ins. Co. v. Maersk Line Far East Service, G.R. No. 27189, March 28, 1969; Insurance Co. of North America v. Osaka Shosen Kaisha, G.R. No. 22784, March 28, 1969; Rizal Surety & Ins. Co. v. Customs Arrastre Service, G.R. No. 25709, April 25, 1969; Insurance Co. of North America v. Republic, G.R. No. 27188, May 29, 1969.

[17] G.R. No. 23139, December 17, 1966.

[18] 18 PUB. LAWS 169 (1923).

[19] 2 PUB. LAWS 503 (1938).

[20] *Supra*, note 16.

[21] *Accord*, Caltex (Phil.) Inc. v. Customs Arrastre Service, G.R. No. 26994, November 28, 1969; Hanover Ins. Co. v. United States Lines Co., G.R. No. 26919, November 25, 1969, Phoenix Ass. Co. v. Republic, G.R. No. 26531, October 31, 1969; Providence Washington Ins. v. Republic, G.R. No. 26386, September 30, 1969; Rizal Surety & Ins. Co. v. Customs Arrastre Service, *supra*, note 16.

The philosophic justification for the doctrine of sovereign immunity was early given classic expression by Mr. Justice Holmes in *Kawananakoa v. Polybank*:[22] "[T]here can be no legal right as against the authority that makes the law on which the right depends." But the doctrine poses a dilemma when viewed against the rule of law and the idea of constitutional limitation on official power. In American constitutional law an accommodation has been worked out by distinguishing between suits to enforce rights against the state and those to restrain invasions of interests by individuals claiming to act under a legislative authority which could afford no protection because contrary to constitutional limitations. Thus, in *Ex parte Young*[23] it was held that an officer attempting to enforce an invalid enactment which threatens to interfere with the property rights of the plaintiff is doing an illegal act for which his representative character affords him no protection. The suit is brought to enjoin the individual wrong and is therefore not against the state.[24]

From another viewpoint the justification offered for the doctrine has likewise given rise to a problem of procedure: Is the state's immunity from suit a matter of jurisdiction or of lack of cause of action? In *Insurance Co. of North America v. Osaka Shosen Kaisha*,[25] a shipper sued the Bureau of Customs and the carrier for the loss of goods valued at ₱1,279.49. The Court of First Instance dismissed the action against the Bureau of Customs on the ground that the amount of the claim did not fall within its jurisdiction, even as it affirmed its maritime jurisdiction over the action against the carrier. The shipper appealed to the Supreme Court, citing section 5 of Rule 2 which permits causes of action to be joined and filed in the Court of First Instance provided one of them is within the cognizance of the Court of First Instance. The Court affirmed the order of the lower court. Expressing doubt on the power of the Supreme Court to provide by rule for the cognizance by courts of first instance of claims which under the Judiciary Act of 1948[26] fall within the jurisdiction of municipal and city courts, Mr. Justice Barredo chose to rest the decision of the Court on the ground of sovereign immunity.

> [W]hether . . . the matter of non-suability is jurisdictional, either over the subject-matter or of the person of the defendants, or . . . failure to state a cause of action, when the consent of the state is not alleged . . . as in this case . . . we are all agreed that whichever of these three views may be the most accurate one, said defense may be invoked by the courts *sua sponte* at any stage of the proceedings.

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[22] 205 U.S. 349, 353, 27 S. Ct. 625, 51 L. Ed. 834 (1907).
[23] 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714, 13 L.R.A. (N.S.) 932 (1908).
[24] Note, *Sovereign Immunity in Suits to Enjoin Enforcement of Unconstitutional Legislation*, 50 HARV. L. REV. 956 (1937).
[25] *Supra*, note 16.
[26] Rep. Act No. 296, sec. 88.

In footnote 5 of his opinion, Mr. Justice Barredo discussed at length the different views on the doctrine and, although disavowing any intention of advancing an opinion, preferring to wait for an opportunity to have "a full exchange of views with the rest of the members of the Court," he nevertheless left no doubt that in his view sovereign immunity raises a question of lack of cause of action. One is reminded of Chief Justice Stone's controversial footnote 4 in *United States v. Carolene Products Co.*,[27] in which he announced the view that "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, such as those of the first ten amendments." But as Mr. Justice Frankfurter later observed in referring to footnote 4, "A footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine, and the *Carolene* footnote did not purport to announce any new doctrine; incidentally, it did not have the concurrence of a majority of the Court."[28] In the case of Mr. Justice Barredo, however, let it be said that he made clear that the views he was expressing were his alone.

At any rate, in the later case of *Insurance Co. of North America v. Republic*,[29] the Court, speaking through Mr. Justice Dizon, held that lack of jurisdiction is at the core of the defense of sovereign immunity which may be raised at any stage of the proceedings. The government appealed from a judgment of the Court of First Instance holding it liable for loss in the operation of the arrastre service, but it failed to state in the record on appeal the date it received notice of the decision as required by the Rules of Court.[30] This is fatal and the Court has dismissed a number of appeals for failure to comply with this requirement, but in this case the Court denied the appellee's motion to dismiss the appeal on this ground and instead dismissed the appellee's claim on the ground of lack of jurisdiction. It said:

> . . . [C]ourts have no jurisdiction to render judgment against the Republic of the Philippines in any action of the nature of the one at bar.

Sovereignty Over American Military Bases in the Philippines. — In *Reagan v. Commissioner of Internal Revenue*[31] the Court upheld the power of the Philippine government to tax income derived from transactions between American citizens inside American bases in the Philippines. The petitioner, an American civilian employee, sold to a member of the U.S. Marine Corps a car, for which he was assessed ₱2,779 by the respondent. He paid the amount under protest and subsequently sought a refund. The Court of Tax Appeals denied recovery. On appeal the Supreme Court affirmed. In an opinion by Mr. Justice Fernando, the Court said the Philippines did not, by

[27] 304 U.S. 144, 152, 58 S. Ct. 778, 82 L. Ed. 1234 (1938).
[28] Kovacs v. Cooper, *supra*, note 12 at 89 (Frankfurter, J. concurring).
[29] *Supra*, note 16.
[30] Rule 50, sec. 1(a).
[31] G.R. No. 26379, December 27, 1969.

virtue of the Military Bases Agreement,[32] relinquish its sovereignty over territories occupied by American military installations.

In *Saura Import and Export Co. v. Meer*[33] the Court, through Mr. Justice Tuason, held that one who bought goods in a U.S. Army depot and then sold them to third persons is an importer because "while in army bases or installations within the Philippines those goods were in contemplation of law on foreign soil." The goods having been imported, their subsequent sale was, therefore, original sale, subject to tax under the National Internal Revenue Code.[34] In *Reagan* the Court repudiated this statement as a mere *obiter* and cited Mr. Justice Tuason's later statement in *People v. Acierto*[35] as expressing the correct rule: "By the [Military Bases] Agreement, it should be noted, the Philippine Government merely consents that the United States exercise jurisdiction in certain cases. The consent was given purely as a matter of comity, courtesy, or expediency. The Philippine Government has not abdicated its sovereignty over the bases as part of the Philippine territory or divested itself completely of juridiction over offenses committed therein."

The Expanding Scope of Governmental Functions. — The increasing role of the government in the promotion of the welfare of the people and the withering away of the *laissez faire* principle at least as to economic affairs were stressed by the Supreme Court in *Agricultural Credit and Cooperative Financing Administration v. Confederation of Unions in Government Corporations and Offices.*[36] The petitioner, renamed the Agricultural Credit Administration under the Agricultural Land Reform Code, is one of the agencies established to carry out the objectives of the law. Its principal function is to extend credit to small farmers and supervise the operations of farmers' cooperatives. In 1964 the Court of Industrial Relations certified the ACCFA Supervisors' Ass'n and the ACCFA Workers' Ass'n as the exclusive bargaining representatives of supervisory and rank and file employees. The CIR earlier found the petitioner guilty of unfair labor practice. On appeal the Supreme Court reversed. Through Mr. Justice Makalintal it held that the petitioner is an agency of the government performing governmental function and, therefore, the terms and conditions of employment therein cannot be the subject of bargaining. The Court abandoned the bright line it had previously drawn[37] between constituent (maintenance of peace and order, national defense, regulation of property, administration of justice, and the determination of the rights and duties of citizens) and ministrant (public works, education, charity, health and safety and regulation of trade and industry) functions:

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[32] March 26, 1947, 1-2 D.F.A.T.S. 144, 43 U.N.T.S. 271.
[33] 88 Phil. 199, 202 (1951).
[34] Secs. 185-186.
[35] 92 Phil. 534, 542 (1953).
[36] G.R. Nos. 21484 & 23605, November 29, 1969.
[37] Bacani v. National Coconut Corp., 100 Phil. 468 (1956).

> . . . The areas which used to be left to private initiative and which the government was called upon to enter optionally, and only "because it was better equipped to administer for the public welfare than is any private individual or group of individuals," continue to lose their well-defined boundaries and to be absorbed within the activities that the government must undertake in its sovereign capacity if it is to meet the increasing social challenges of the times . . . [T]his development was envisioned, indeed adopted, as a national policy, by the Constitution itself in its declaration of principle concerning the promotion of social justice. . . .
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> . . . There can be no dispute as to the fact that the land reform program contemplated in the said Code is beyond the capabilities of any private enterprise to translate into reality.

Mr. Justice Fernando concurred, stressing that "the *laissez faire* principle [which is at the core of the constituent-ministrant classification] never found full acceptance in this jurisdiction, even during the period of its full flowering in the United States," and that the 1935 Constitution "erased whatever doubts there might be on that score."

Whether the petitioner can be compelled to bargain with its employees for other purposes is a question which the Court did not reach in this case. The opinion of Justice Makalintal intimated though that unions of government employees have a right to be certified for purposes of bargaining with respect to complaints and grievances. It is doubtful, however, whether employees union need certification at all the purpose of seeking redress of grievances.

Effect of Invalidation of An Executive Act. — Municipality of Malabang v. Benito[88] was an action for prohibition to nullify Executive Order 386, which created the muncipality of Balabagan in Lanao del Sur, and to restrain the respondents from acting as municipal officials on the plea that the executive order in question was void. The petitioners relied on *Pelaez v. Auditor General*[89] which held that the President of the Philippines did not have, under section 68 of the Administrative Code, the power to create municipalities. The respondents opposed the action, arguing that the rule announced in *Pelaez* did not apply to the municipality of Balabagan because, unlike the municipalities involved in *Pelaez*, Balabagan was a *de facto* corporation, having been organized before section 68 was declared unconstitutional, its officers having been either elected or appointed and the municipality itself having been discharging its corporate functions. As such, it was contended, its existence could not be collaterally attacked in an action for prohibition. The Court granted the petition and overruled the respondents' opposition. Through Mr. Justice Castro it ruled that as there was no valid statute to give color of authority to its creation, the municipality of Balabagan could not be considered a *de facto* corporation. The Court added:

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[88] G.R. No. 28113, March 28, 1969. A motion for reconsideration is pending.
[89] G.R. No. 19870, March 18, 1967, 64 O.G. 4781 (May, 1968).

"This is not to say, however, that the acts done by the municipality of Balabagan in the exercise of its corporate powers are a nullity because the executive order 'is in legal contemplation, as inoperative as though it had never been passed.' For the existence of Executive Order No. 386 is 'an operative fact which cannot justly be ignored.' "[40]

In previous rulings the Court declined to give retroactive effect to decisions invalidating statutes[41] and reorganization plans drawn up by a joint legislative-executive agency.[42] Mr. Justice Fernando, concurring, considered significant the extension of the doctrine to executive acts. He said that "There would be an unjustified deviation from the doctrine of separation of powers if a consequence attached to the annulment of a statute is considered as not operative where an executive order is involved. The doctrine of co-equal or coordinate department would be meaningless if a discrimination of the above sort were considered permissible."

II. Individual Rights

A. *Freedom of Expression and Association*

Non-subversive Affidavits as Condition for the Registration of Labor Unions. — In *Philippine Ass'n of Free Labor Unions v. The Secretary of Labor*[43] the Court upheld the validity of section 23 of the Industrial Peace Act which requires, among other things, the filing of non-subversive affidavits by union officers within sixty days of their election as condition for the continued registration of labor unions[44] and provides for the cancellation of the registration of those failing to comply with the requirement.[45] The Act requires the officers to state under oath "that they are not members of the Communist Party and that they are not members of any organization which teaches the overthrow of the Government by force or by any illegal or unconstitutional method." Under the Act registration confers on labor unions a "legal personality" and gives them the "rights and privileges" to act as representative of employees; to be certified as such; to own property and to bring and defend actions with respect to its property.[46] The registrar of labor organizations poised action against the Social Security System Employees Ass'n for failure to submit the affidavits of its officers who were elected in 1961 and 1963, but instead of submitting individual affidavits the union filed a joint affidavit. Its registration certificate was therefore cancelled. The union moved for a reconsideration and asked for time to sub-

[40] The quotation is from Chicot County Drainage Dist. v. Baxter St. Bank, 308 U.S. 371, 374, 60 S. Ct. 317, 84 L. Ed. 329 (1940).
[41] *E.g.*, Manila Motor Co. v. Flores, 99 Phil. 738 (1956).
[42] Fernandez v. P. Cuerva & Co., G.R. No. 21114, November 28, 1967.
[43] G.R. No. 2228, February 27, 1969.
[44] Par. (b).
[45] Par. (d).
[46] Sec. 24.

mit the affidavits. Subsequently the registrar issued another order requiring the union to submit the affidavits of its officers who were elected in 1962 and in the meantime suspended action on the motion for reconsideration. Instead of complying the petitioners brought this action for certiorari and prohibition, contending that section 23(b) violated their right of association. The Supreme Court dismissed the petition. In an opinion by the Chief Justice, it held that registration is not a requirement for the exercise of the right of association but only "a condition *sine qua non* for the *acquisition of legal personality* . . . the possession of the 'rights and privileges granted by law to legitimate labor organizations.'"

> . . . The Constitution does not guarantee these rights and privileges, much less said personality, which are mere statutory creations, for the possession and exercise of which registration is required to protect both labor and the public against abuses, fraud, or impostors who pose as organizers, although not truly accredited agents of the union they purport to represent. . . . Furthermore, the obligation to submit financial statements, as a condition for the non-cancellation of a certificate of registration, is a reasonable regulation for the benefit of the members of the organization, considering that the same generally solicits funds or membership, as well as oftentimes collects, on behalf of its members, huge amounts of money due to them or to the organization.

The Court's holding in this case is reminiscent of Holmes' early statement "The petitioner may have constitutional right to speak politics, but he has no constitutional right to be a policeman."[47] The inference is that because the enjoyment of what has come to be referred to as government largess is in the nature of a privilege the retention of that privilege may be conditioned on the surrender of some constitutional right. But the right-privilege distinction is losing much of its significance in constitutional law.[48] As the United States Supreme Court said in invalidating the loyalty oath required by New York of its employees, "To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by proper authorities."[49]

The petitioners may have a constitutional right of association but they do not have a constitutional right to be certified as the collective bargaining agent, to be protected against the employer's union-busting activities, or to own property. The right of self-organization guaranteed in section 3 of the Act is available only to "legitimate organizations,"[50] and by that phrase is meant those which have registered with the Department of Labor. And yet it may

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[47] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517 (1892).

[48] *See, e.g.*, Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968); Reich, *The New Property*, 73 YALE L.J. 733 (1964); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

[49] Slochower v. Board of Higher Educ. of N.Y. City, 350 U.S. 551, 555, 76 S. Ct. 637, 100 L. Ed. 692 (1956); *accord*, Garrity v. New Jersey, 385 U.S. 493, 87 S. Ct. 616 (1967).

[50] Sec. 24.

not be asserted that because these rights are merely "statutory creations" their enjoyment can be conditioned upon the execution of affidavits renouncing membership in a political party, say the Liberal Party. Indeed, a union which is denied registration for failure to submit non-subversive affidavits may well find its existence threatened by the employer's unfair labor practice with no effective means of redress as it can have no access to the Court of Industrial Relations or the Department of Labor.

The issue posed by the requirements of non-subversive affidavits is much more complex. Behind it lies the competing interest of speech[51] and the public order. As the Court in *American Communication Ass'n v. Douds*[52] said in dealing with a similar requirement in section 9(h) of the Taft-Hartley Act,[53] the problem is the "delicate and difficult" one of

> . . . Weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by section 9(h) pose continuing threats to that public interest when in position of union leadership.[54]

On balance the Court found that the interests supporting the regulation outweighed those of speech whose resulting abridgment was merely "indirect, conditional [and] partial."

> . . . The "discouragements" of sec. 9(h) proceed, not against the combination of those affiliations or beliefs with occupancy of a position of great power over the economy of the country. Congress has concluded that substantial harm, in the form of direct, positive action, may be expected from that combination. In this legislation, Congress did not restrain the activities of the Communist Party as a political organization; nor did it attempt to stifle beliefs. . . . Section 9(h) touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint. And it leaves those few who are affected free to maintain their affiliations and beliefs subject only to possible loss of positions which Congress has concluded are being abused to the injury of the public by members of the described groups.[55]

The *Douds* decision was qualified by *United States v. Brown*[56] which struck down section 504 of the Labor-Management Reporting and Disclosure Act of 1959[57] as a bill of attainder. This section, which replaced section 9(h) of the Taft-Hartley Act, disqualifies members of the Commu-

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[51] The right of association is an aspect of freedom of expression. As stated in NAACP v. Alabama, 357 U.S. 449, 460, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958): "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."

[52] 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950).

[53] 61 Stat. 146 (1947).

[54] 339 U.S. at 400.

[55] *Id.* at 403-04.

[56] 381 U.S. 437, 85 S. Ct. 1707, 14 L. Ed. 2d 484 (1965).

[57] 73 Stat. 536 (1959), 29 U.S.C. sec. 504 (1964).

nist Party from being officers, representatives or employees of labor unions and punishes violations thereof with a fine or imprisonment. The Court did not reach the question whether section 504 violated freedom of speech and association. In its judgment section 504 is a bill of atttainder because "the designation of Communists as those persons likely to cause political strikes is not [merely] the substitution of a semantically equivalent phrase" but rests "upon an empirical investigation by Congress of the acts, characteristics, and propensities of Communist Party members." In object the Taft-Hartley Act and the LMRD are the same: to disqualify members of the Communist Party from becoming union officers. Insofar as *Brown* held this to be constitutionally impermissible the ruling in *Douds* must be deemed qualified. Otherwise, the treatment in *Douds* of the issue raised by the requirement of non-Communist affidavits as one of accommodating the interest in the free flow of interstate commerce and the right of speech and association has much to commend itself.

Whether section 23(b)(2) is likewise open to challenge as a bill of attainder is an aspect that was not litigated in *PAFLU*. But the litigation of the future may well turn on the constitutionality of another statute, the Anti-Subversion Act,[58] which declares the Communist Party of the Philippines to be "an organized conspiracy to overthrow the Government of the Republic of the Philippines for the purpose of establishing in the Philippines a totalitarian regime and place the Government under the control and domination of an alien power"[59] and punishes anyone who "knowingly, wilfully and by overt act affiliates himself with, becomes or remains a member of the Communist Party of the Philippines."[60]

Anti-Subversion Act. — In *People v. Lava*[61] the Court made statements which, in any future adjudication involving the Anti-Subversion Act, may prove to be intractable. These are five cases jointly tried and decided in the Court of First Instance. In G.R. No. 4975 the appellant Nicanor Razon, Sr. was convicted as an accomplice in the crime of rebellion with murder, arson and robbery on a finding that he was a member of the Communist Party of the Philippines and that he had been secretary and later treasurer of a local committee. On appeal the Supreme Court, through Mr. Justice Zaldivar, reversed his conviction. It reiterated its ruling in previous cases that there is no complex crime of rebellion with murder, arson and robbery.[62] Neither could the appellant be convicted of rebellion or of conspiracy to commit rebellion, because mere membership in the CPP implies no more than advocacy of abstract principles.

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[58] Rep. Act No. 1700, 12 LAWS & RES. 102 (1957).
[59] *Id.*, sec. 2.
[60] *Id.*, sec. 4.
[61] G.R. Nos. 4974-78, May 16, 1969.
[62] *E.g.*, People v. Hernandez, 99 Phil. 515 (1956).

Whether he could be convicted under the Anti-Subversion Act on the basis of such membership was a question which the Court did not have to decide as the Act was enacted after the charge had been filed. But in holding the Act inapplicable the Court strongly implied that had the charge been filed after its enactment membership alone in the CPP would have sufficed for conviction. This is evident from its quotation of the following statement from *People v. Hernandez.*[63]

> On the other hand, Rep. Act 1700, known as the Anti-Subversion Act, which penalizes membership in any organization or association committed to subvert the Government, cannot be applied to the appellants because said Act was approved on June 20, 1957 and was not in force at the time of the commission of the acts charged against appellants (committed in 1945-50); the Anti-Subversion Act punishes participation or membership in an organization committed to overthrow the duly constituted Government, a crime distinct from that of actual rebellion with which appellants are charged.

This impression is reinforced by the Court's earlier finding that the purpose of the CPP is to "overthrow the Philippine Government by armed struggle and to establish in the Philippines a communist form of government similar to that of Soviet Russia and Red China."

While the finding as to the purpose of the CPP may well foreclose the question whether the legislative declaration in the Anti-Subversion Act that the CPP is an organized conspiracy for the overthrow of the government constitutes a bill of attainder, still it is doubtful whether mere membership in the CPP, as the Court strongly implied, can sustain a conviction under the Act. To be sure, the Act speaks of "knowingly, wilfully and by overt act" affiliating or maintaining membership in the CPP. Membership alone, as the Court itself noted with respect to the crime of rebellion, "merely implies advocacy of abstract theory or principle without any action being induced thereby."

Indeed, in *Scales v. United States,*[64] and *Noto v. United States,*[65] the American Supreme Court construed the provision of the Smith Act,[66] prohibiting knowing membership in a subversive organization, to refer only to active membership with "specific intent" to further the unlawful objectives of the organization. And in *Lava* the Philippine Supreme Court itself drew a distinction between membership in the CPP and membership in the HMB. While it held the first to be no more than

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[63] G.R. Nos. 6025-26, May 30, 1964.
[64] 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed 2d 782 (1961). Significantly, this case was cited approvingly by the Philippine Supreme Court in People v. Hernandez, G.R. Nos. 6025-26, May 30, 1964.
[65] 367 U.S. 290, 81 S. Ct. 1517, 6 L. Ed. 2d 836 (1961).
[66] 18 U.S.C. sec. 2385 (1964).

advocacy of abstract ideas, it found the second to be advocacy of action.[67] The distinction may not be tenable in view of the Court's own finding regarding the purpose of the CPP and its relation to the HMB, which according to the Court is the military arm, but, so far as the distinction is based on the idea of active membership, it suggests an approach that has promise for the satisfactory accommodation of the rival claims of public order and individual freedom.

Baking v. Director of Prisons[68] is related case. Having been under detention for more than eighteen years, the petitioners, some of whom were parties in the *Lava* case, filed petitions for habeas corpus in the Supreme Court, claiming the right to a speedy trial. Shortly after they had filed their petition the Court rendered its decision in the *Lava* case, sentencing each of the petitioners to ten years of imprisonment. The petitioners argued that having served eighteen years and seven months in prison, they were entitled to a credit of nine years and three months, representing one half of their preventive imprisonment[69] and that in addition they were entitled to good conduct allowance,[70] with the result of that they had served more than the total number of years of imprisonment to which they had been sentenced.

The Court, by a vote of 7 to 1, with three abstentions, denied the petition. Speaking for the majority, Mr. Justice Sanchez said that article 97 of the Penal Code, which gives allowance for good conduct, applies only to prisoners serving final sentences and not to those under detention pending decision of their case.

Mr. Justice Fernando dissented. He said that the loss of freedom was no less real simply because it was in the nature of preventive imprisonment and not final sentence. "[T]o continue the incarceration of these petitioners who all this while for a period longer than the penalties imposed on them have been deprived of their freedom is to commit an affront against the rudimentary requirement of fairness and of justice, which the due process clause is intended to secure," he added.

Liability of Picketers for Illegal Detention. — In *People v. Barba*[71] the Court upheld the dismissal of a criminal charge for illegal detention against picketers who blocked the gates of a company and thereby prevented people inside from getting out. The accused picketed the premises of the Red V Coconut Products in Lucena during a strike and prevented the exit of the complainants who were kept inside the company premises for more than one

[67] It was for this reason that one of the appellants in G.R. No. 4975, Marcos Medina, was found guilty of conspiracy to commit rebellion on the basis of membership in the HMB.

[68] G.R. Nos. 30364 & 30603, July 30, 1969.

[69] REV. PEN. CODE, art. 29.

[70] *Id.*, art. 97.

[71] G.R. Nos. 27615-16, September 30, 1969.

day. They were accused of slight illegal detention,[72] but the Court of First Instance dismissed the case against them. On appeal the Supreme Court affirmed the dismissal of the charge. Through Mr. Justice Fernando, the Court held that "the detention or deprivation of liberty [of the complainants] under the circumstances while certainly not to be justified, was not done with criminal intent."

The picketers' conduct may not constitute slight illegal detention, but it certainly was unlawful. In blocking the gates of the company and thereby preventing egress and ingress they certainly were not engaged in peaceful picketing, let alone in the exercise of the constitutional right of expression.[73] Their conduct might have amounted to grave coercion,[74] but this question was not considered in *Barba* as the Court confined itself to the narrow question whether on the facts stated in its opinion the accused committed the crime of slight illegal detention. There is authority for the view, however, that the nature of the crime is not determined by the denomination in the information but by the facts alleged therein[75] and quite possibly the accused in this case might have been held for trial for grave coercion.

B. The Protection Against Self-Incrimination

Compelling Testimony in Administrative Investigations. — In *Pascual v. Board of Medical Examiners*[76] the Court held the right against self-incrimination to be within the protection of the Due Process Clause. The petitioner, as respondent in an immorality charge before the Board of Medical Examiners, was required by it to take the witness stand. He claimed the protection against self-incrimination, but the board did not heed his plea. He therefore brought an action in the Court of First Instance which enjoined the board from compelling him to testify. The board in turn appealed to the Supreme Court. In affirming the lower court's judgment, the Supreme Court relied on its ruling in *Cabal v. Kapunan*[77] that the protection against self-incrimination may be invoked in administrative proceedings in which the result may be the imposition of a penalty (in this case the loss of the privilege to practice medicine) and that the guarantee comprehends not only the right to refuse to answer a question that is incriminating but to remain silent as well without any adverse inference. Indeed, in *Chavez v. Court of Appeals*[78] the reversal of the conviction of the accused was rested solely on denial of his right to remain silent.

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[72] REV. PEN. CODE, art. 268.

[73] *See, e.g.*, Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836, 132 A.L.R. 1200 (1941).

[74] REV. PEN. CODE, art. 286.

[75] *E.g.*, United States v. Lim San, 17 Phil. 273 (1910); People v. Olivera, 67 Phil. 427 (1939).

[76] G.R. No. 25018, May 26 1969.

[77] G.R. No. 19052, December 29, 1962, 62 O.G. 2423 (April, 1966).

[78] G.R. No. 29169, August 29, 1968.

Writing for the Court, Mr. Justice Fernando said:

> . . . The constitutional guarantee, along with other rights granted an accused, stands for a belief that while crime should not go unpunished and that the truth must be revealed, such desirable objectives should not be accomplished according to means or methods offensive to the high sense of respect accorded the human personality.

He likewise noted a current of judicial opinion in the United States[79] identifying the right against self-incrimination with the right to privacy, which in turn is derived from the idea of due process.

There is in the passage quoted an echo of Frankfurter's statement in *Rochin v. California*:[80]

> . . . Due process of law, as a historic and generative principle, precludes defining, and therefore confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice."

For a long time the United States Supreme Court held to a conception of due process that did not include the right against self-incrimination, with the result that this right could not be invoked in state criminal prosecutions.[81] It was not until 1964 when the American Court, because of changing conception of justice, overruled its 56-year old doctrine and held that "the Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement — the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in *Twining*, for such silence."[82] And over the years there has been a steady growth in the number of specific provisions of the Bill of Rights which have been held applicable to the several states through the Due Process Clause: the First Amendment rights of speech, press, religion, assembly and petition;[83] the Fourth Amend-

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[79] *E.g.*, Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

[80] 342 U.S. 165, 173, 72 S. Ct. 205, 96 L. Ed. 183, 25 A.L.R. 2d 1396 (1952).

[81] *See* Twining v. New Jersey, 211 U.S. 78, 29 S. Ct. 14, 53 L. Ed. 97 (1908); Palko v. Connecticut, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937); Adamson v. California, 332 U.S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903, 171 A.L.R. 1223 (1947).

[82] Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); *accord*, Murphy v. Waterfront Comm'n, 378 U.S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678 (1964).

[83] *E.g.*, Gitlow v. New York, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925) (speech and press); Lovell v. City of Griffin, 303 U.S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938) (speech and press); Sullivan v. New York Times Co., 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (speech and press); Staub v. City of Baxley, 355 U.S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302 (1958) (speech); Grosjean v. American Press Co., 297 U.S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (1936) (press); Cantwell v. Connecticut, 210 U.S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, 128 A.L.R. 1352 (1940) (assembly); Shelton v. Tucker, 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960) (association); NAACP v. Button, 371 U.S. 415, 83 L. Ed. 328, 9 L. Ed. 2d 405 (1963) (association and speech).

[84] *E.g.*, Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 1081, 84 A.L.R. 2d 933 (1961).

ment right of privacy;[84] and the Sixth Amendment right to counsel.[85] And so, in the context of American federalism, whether a particular constitutional right is so fundamental as to be "implicit in the concept of ordered liberty"[86] is a matter of obvious relevance and, indeed, of importance. In truth, the core of the controversy over the "theory of incorporation"[87] lies in just this determination. Whether the issue is of any relevance in the Philippines is a matter that may not arise at all, absent a provision like the Fourteenth Amendment within the framework of a working federalism.

C. Due Process: Substantive and Procedural

Notice and Hearing. — In *Florendo v. Florendo*,[88] the Court held that parties are bound by the notice of the date of hearing of their case given to their counsel. The appellants were defendants in an ejectment suit. The municipal court served notice by registered mail on their counsel but as the latter was out of town the notice was returned to the court unclaimed.[89] Judgment by default was rendered, ordering the ejectment of the appellants. On appeal the Court affirmed. Through Mr. Justice Fernando it ruled that it was the appellants' duty "to make inquiries of their counsel as to when the suit was to be heard," and that in not doing so they had only themselves to blame. The lower court had done "everything that was required of it under the law."

In *Verastique v. Court of Appeals*,[90] the Court reiterated the rule that a party is accorded due process if, although in the beginning denied notice of hearing, is subsequently heard on a motion for reconsideration.[91] The petitioner, as party in a cadastral proceeding, received a copy of the respondent's motion for the issuance of a writ of possession the day after the Court of First Instance had heard and granted it. They asked the court to reconsider its order and failing in this regard filed a suit for certiorari and mandamus in the Court of Appeals. The Court of Appeals affirmed. So did Supreme Court. Through Mr. Justice Fernando it was held that "what the law pro-

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[85] *E.g.*, Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 72, 9 L. Ed. 2d 799, 93 A.L.R. 733 (1963).

[86] Palko v. Connecticut, *supra*, note 81 at 325.

[87] Compare Black, J., dissenting in Adamson v. California, 332 U.S. 46 (1947): "My study of the historical events that culminated in the Fourteenth Amendment and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the states."

[88] G.R. No. 24982, March 28, 1969.

[89] Rule 13, section 8 provides that "Service by registered mail is complete upon actual receipt by the addressee; but if he fails to claim his mail from the post office within five (5) days from the date of first notice of the postmaster, service shall take effect at the expiration of such time."

[90] G.R. No. 23973, April 29, 1969.

[91] *E.g.*, Batangas-Laguna Tayabas Bus Co. v. Cadiao, 28725, March 12, 1968.

hibits is not the absence of *previous* notice, but the absolute absence thereof and lack of opportunity to be heard."

Notice of Filing of Commissioner's Report. — In *Apurillo v. Garciano*[92] the Court found no denial of due process to a party litigant despite the failure of the lower court to give him notice of the filing of the commissioner's report and to set the report for hearing as required by the Rules of Court. The petitioner, as bondsman in a criminal case, asked the court to relieve him of his obligation on the ground that the signature appearing on the bail bond was not his but a forgery. The clerk of court investigated the matter and submitted a report finding the petitioner's signature genuine, whereupon the court denied the petitioner's moton. The petitioner brought this suit for prohibition in the Supreme Court. The Court, through Mr. Justice Zaldivar, dismissed the suit. It found the referral of the claim to the clerk to be in accordance with Rule 33. Nor was there any irregularity in failing to notify the petitioner of the filing of the report and to hear the petitioner thereon. The Court relied on *Manila Trading & Supply Co. v. Philippine Labor Union*,[93] which held that

> When the Court of Industrial Relations refers a case to a commissioner for investigation, report and recommendation, and at such investigation the parties are duly represented by counsel, heard or at least given an opportunity to be heard, the requirement of due process has been satisfied, even if the Court failed to set the report for hearing, and a decision on the basis of such report, with the other evidence of the case is a decision which meets the requirement of a fair and open hearing.[94]

The Court's reliance on *Manila Trading* calls for two observations. In the first place, Commonwealth Act No. 103,[95] the organic act of the CIR, has no provision similar to Rule 33 which requires that parties be notified[96] of the filing of the commissioner's report and be heard on it.[97] The requirement of notice and hearing is part of a scheme of orderly procedure and its disregard must be considered a "grave irregularity" that offends the Due Process Clause.[98]

In the second place, the requirement of notice and hearing is a necessary extension of what the Court in another case[99] called a "cardinal primary right,"

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92 G.R. No. 23683, July 30, 1969.

93 71 Phil. 578 (1940); *accord*, Bay View Hotel Employees' Union v. Bay View Hotel, 107 Phil. 489 (1960).

94 *Id.* at 580.

95 1 PUB. LAWS. 406 (1936).

96 Rule 33, sec. 10.

97 *Id.* sec. 11.

98 *Cf.* Marcos v. Cruz, 68 Phil. 96, 104 (1939): "[P]reliminary investigation *in* criminal cases is not a creation of the Constitution . . . [B]ut in view of the aforequoted laws which sanction the preliminary investigation and prescribe the procedure for its holding, the right thereto is undeniable and the omission thereof is a grave irregularity which nullifies the proceeding because it violates the due process of law provision guaranteed by section 1(1), Article III, of the Constitution."

99 Ang Tibay v. CIR, 69 Phil. 635, 642 (1940).

namely, the right to have the tribunal consider the evidence presented by the parties.[100] Indeed, it has been held that he who decides must hear.[101] And where the court does not itself hear the matter because it has commissioned its clerk to receive the evidence, a party's right to be heard not only extends to the commissioner's proceedings but also includes the right to be heard on the commissioner's report, because for all purposes the commissioner is just another witness giving his evidence to the judge behind the back of the petitioner who has no way of knowing what has been reported to the judge.[102] As the United States Supreme Court said:

> . . . The "hearing" is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "hearing" is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered the evidence or argument, it is manifest that the hearing has not been given.[103]

When Notice is Not Required. — In *Cuenco v. Laya*[104] the Court brushed aside a party's claim to due process despite its finding that he had been denied a hearing, because of the Court's other finding that the party had no meritorious defense and, consequently, that an order granting him a hearing would serve no useful purpose. The petitioner Antonio V. Cuenco and the respondent Eduardo Gullas were candidates for the third congressional district of Cebu in the elections held on November 11, 1969. The election return from one of the districts failed to mention the name of the respondent and to show the number of votes cast for him. In anticipation of the respondent's moves, the petitioner requested the executive judge of the Court of First Instance to notify him of any action which the respondent might file in respect of the return. The board of inspectors of the precinct concerned subsequently filed a petition for correction of the return under section 154 of the Revised Election Code. The petition was, after an *ex parte* hearing, granted. And so the petitioner brought a suit for certiorari and prohibition, claiming among other things, the denial of his right to a hearing. The Supreme Court, by a vote of 6 to 3, dismissed the action.

Writing for the Court, Mr. Justice Castro said that while the correction of a return is a summary proceeding which may be held *ex parte*, "due process, the community's sense of fairness, would seem to indicate the need of hearing the petitioner Cuenco" considering his prior request to the court and the fact that "the respondent judge might have accommodated the petitioner's

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[100] *Id.* at 642.
[101] Morgan v. United States, 298 U.S. 468, 58 S. Ct. 773, 82 L. Ed. 1129 (1936).
[102] *Cf.* Mazza v. Cavicchia, 15 N.J. 499, 105 A.2d 545 (1954).
[103] *Supra*, note 101 at 480.
[104] G.R. No. 31252, December 22, 1969.

request . . . the latter's residence [being] only a stone's throw from the court." Nevertheless he felt that a hearing would be a useless formality as the grounds for correction were amply demonstrated.

> . . . It is noteworthy that the petitioner Cuenco does not deny that the respondent Gullas was a candidate; the omission from the election return of mention of the latter's name and of the votes that he garnered, was therefore a patent mistake. Nor does the petitioner categorically deny that the respondent Gullas obtained 67 votes; all he candidly says is that he does not really know how many votes Gullas got. Nor does he asseverate that Gullas obtained much less than 67, as would materially affect the result of the election. Consequently, we are not prepared to say that the petitioner Cuenco was denied due process by the court *a quo* when no notice was given to him of the petition for correction.

Justices Dizon, Fernando and Zaldivar dissented, while Justice Barredo wrote a separate concurring opinion. Justice Dizon, joined by Justice Fernando, stated that the petitioner's right to a hearing did not depend on his ability to traverse the action as he was not expected "to prove his opponent's case, or supply what the members of the Board of Inspectors say they *forgot* to write on the return . . ."

On the other hand, Mr. Justice Barredo, concurring in the majority opinion, said:

> . . . Herein may be found, precisely, what to my mind is the difference in their elements between procedural and substantive due process. In the first, there is denial of due process when notice and hearing expressly required by law are not accorded, irrespective of the merits of the party's claim. In the latter, hearing is not indispensable when there is no showing that the results would be possibly or probably favorable, if the party were to be heard. . . . Petitioner himself admits, and rightly, that he is not entitled to notice as a matter of statutory and jurisprudential right. He bases his claim to due process only on his having expressly requested the court for a chance to be heard through his letter, Annex G-3, and as a matter of fairness. Such being the case, it was imperative for him to inform the court of what right he stood to lose and the basis of his claim to such right. This, petitioner did not do.

Is the requirement of notice and hearing a requirement of procedural due process only when it is provided for by statute, but when it is not it is a requirement of substantive due process which a party may invoke only if he can show an injury to a right which seeks to vindicate?

The requirement of notice and hearing has always been understood to be a requirement of procedural due process.[105] As such it does not need statutory recognition. There are of course instances in which by settled usage, notice and hearing are not required, as in the issuance *ex parte* of injunctions, the summary distraint of property and the summary abatement

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[105] *See* Macabingkil v. Yatco, G.R. No. 23174, September 18, 1967; Twining v. New Jersey, *supra*, note 81.

of nuisances. Obviously, a proceeding under section 154 of the Election Code is of this nature. Nevertheless, as the majority in *Cuenco* noted, the duty of fairness may require a court, even in the instances mentioned, to give notice and hearing to a party where it is possible for the court to do so, consistent with the summary character of the proceeding. This is the significance of the majority opinion in *Cuenco*, although the Court's ruling that a party claiming the denial of such a right must be able to show on appeal an injury to a right as a result of the denial of due process in the trial court may be difficult to maintain. As Justice Dizon said in dissent, the burden of proof is on the plaintiff and until he discharges the burden the defendant is not called upon to present his evidence.

Once the right to notice is conceded it does not seem to be required that the party invoking it must first show that he has a meritorious defense. Nor does the right cease to be part of procedural due process simply because it is not provided for by statute. The distinction between procedural and substantive due process is difficult to make; nevertheless the following characterization will help convey its essence:

> Judges continually seek for a verbal formula, a definition of due process, which will help in making a just choice between conflicting claims in society. This search is never very successful. The variety and complexity of inconsistent human aspirations make a resolving formula, which may serve in one conflict of interest, almost certainly unserviceable in various others. . . .
>
> Such conflicting aspirations occur both in matters of procedure and in matters of substance; the difference between these two is sometimes difficult to perceive. Procedure could be described as the system arranged by government to ensure to the governed a reasonable opportunity to protest before the power of organized society is applied to the protester. Substantive decisions and rules are harder to characterize. Examples of the substantive are easy: a speed limit on a street; a statute forbidding "obscene" publications; a judgment fixing the compensation to be paid on eminent domain. Each of these involves choice between inconsistent desires of different people. . . . Perhaps one can most usefully characterize substance as that which is not procedural.[106]

Jurisdiction over Person. — In *Victorias Milling Co. v. Workmen's Compensation Commission*[107] the Court reiterated its previous ruling in *Filipino Pipe & Foundry Corp. v. Workmen's Compensation Commission*[108] that if an employer fails to controvert its employee's claim for compensation under the Workmen's Compensation Act[109] it is deemed to have admitted the claim and is not entitled to hearing. The petitioner was notified of the claim filed

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[106] 2 P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, CONSTITUTIONAL LAW 1320-21 (3d ed. 1967).

[107] G.R. No. 25665, May 22, 1969; *accord*, Northwest Airlines v. Mateu, G.R. No. 25274, July 29, 1969.

[108] G.R. No. 20381, December 24, 1963, 62 O.G. 9037 (Nov., 1966).

[109] Act No. 3428, sec. 45, 23 PUB. LAWS 415 (1927).

against it but it did not controvert the claim, whereupon the respondent commission heard the claim *ex parte* and rendered judgment by default against the petitioner. The petitioner filed an action for certiorari in the Supreme Court, contending that he was denied his day in court and that at any rate since no summons were served on him the WCC did not acquire jurisdiction over its person. The Court affirmed the award. Through Mr. Justice Fernando it ruled that as the claim was admitted by reason of the petitioner's failure to controvert, "the hearing officer could make the award without the necessity of a formal hearing, treating the claim as uncontested and thus dispensing with the reception of evidence."

In contrast, in civil cases, while defendant's failure to file an answer is a ground for declaring him in default, it does not relieve the plaintiff of the duty to prove his claim.[110] But this difference hardly explains why when the claim is deemed admitted by the employer's failure to controvert a binding award may be made against him despite the fact that no jurisdiction over his person has been acquired either through the exertion of some coercive legal process or through his voluntary submission.

This is the point brought out in *Algabre v. Court of Appeals*[111] in which the Supreme Court upheld the power of the Court of Agrarian Relations, under section 12 of Republic Act No. 1267,[112] to approve compromises even where there are no cases actually filed in it, on the basis of the voluntary submission of the parties to its authority. The petitioner, as tenants, and the private respondent, as landholder, entered into separate compromise agreements whereby the former, in consideration of the condonation of their obligations as well as the payment of sums of money, relinquished possession of their landholdings to the latter. These agreements were submitted to the Court of Agrarian Relations which rendered judgment approving them. However, several months later the petitioners asked the CAR to set aside their agreements, claiming that they had been coerced into signing them. The CAR denied their motion on the ground that the judgments approving the compromises had become final, but subsequently it reversed itself and set aside the judgments, the court being of the opinion that it did not have jurisdiction in the first place to render them as there were no cases filed by the parties. On appeal the Court of Appeals reversed. On certiorari the Supreme Court affirmed the judgment of the Court of Appeals.

Speaking through Mr. Justice Barredo, the Court ruled that by asking the CAR to approve their agreements, the parties likewise submitted themselves to its jurisdiction. This jurisdiction which, as originally provided in section 7 of Republic Act No. 1267, extended to "all questions, matters, contro-

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110 Rule 18, sec. 1.
111 G.R. Nos. 24458-64, July 31, 1969.
112 10 LAWS & RES. 49 (1955), *as amended* by Rep. Act No. 1409, 10 LAWS & RES. 419 (1955).

versies or disputes involving all those relations established by law which determine the varying rights of persons in the cultivation and use of agricultural land where one of the parties work the land," had been consistently interpreted to include the power to approve compromises even if no cases were pending. But as the jurisdiction of the CAR has since been provided in the Agricultural Land Reform Code which changed CARs from quasi-judicial tribunals into tribunals that are more like regular courts, the Supreme Court chose to rest its decision on article 2037 of the Civil Code. This article provides that "a compromise has upon the parties the effect and authority of *res judicata*." In other words what might possibly constitute a bar to the petitioners' action is not the judgment approving the compromise but the compromise agreement itself. There is wisdom, I believe, in the choice of this ground of decision as it avoids the difficulty posed by a court rendering a judgment approving a compromise when there is no case filed in it. After all jurisdiction can come into play only when it is invoked in an actual controversy.

The Jurisdiction of Civil and Military Courts. — In *Arula v. Espino*[113] the petitioner filed charges of frustrated murder against army officers for gunshot wounds he suffered while training on Corregidor Island. The complaint was filed on March 23, 1968 with the city fiscal of Cavite City who on March 29 issued subpoenas to the army officers and set the preliminary investigation for April 3. On the latter date army lawyers appeared on behalf of the officers and asked for postponement of the investigation to April 16, which request the fiscal granted. Meanwhile the respondent Espino ordered an investigation of the shooting incident and on March 27 issued orders placing the officers under technical arrest effective March 22, one day before the filing by the petitioner of the charge in the fiscal's office. On April 6 he appointed a general court-martial which on April 16 (the day the preliminary investigation was to be held) began the proceedings. On April 19 the army lawyers asked the fiscal to dismiss the case on the ground that the civil courts had lost jurisdiction. The petitioner thereupon filed an action for certiorari and prohibition in the Supreme Court to restrain the general court-martial from hearing the matter. The Court, by a vote of 7 to 2, dismissed the petition. Through Mr. Justice Castro, it ruled that jurisdiction to try criminal cases is vested in a court only when the charge is filed with it and when jurisdiction of the person is acquired by it through the arrest of the party charged or by his voluntary submission to the court's jurisdiction. The filing of the charge in the fiscal's office was not the equivalent of the filing of a case in court and even if it is the general court-martial acquired jurisdiction over the case to the exclusion of the civil courts "because it first acquired custody or jurisdiction of the persons of the accused."

[113] G.R. No. 28949, June 23, 1969.

Justices Dizon and Sanchez dissented in separate opinions. Mr. Justice Dizon said that as the fiscal had already "taken positive steps and actually exercised jurisdiction over the case," the constitution of the general court-martial was a "premeditated undue army interference with the exercise of civilian authority; a step against the rule of law, in general, and destructive of the orderly administration of justice by the constituted civilian agencies in this country."

On the other hand, Mr. Justice Sanchez argued that by appearing before the fiscal investigating the case and by asking for postponement, the respondents could not later deny that judicial proceedings had begun. By their conduct "the military . . . submitted to the civil authority the prosecution of the case against the accused." "[W]e should discourage," he said, "a race for jurisdiction between the civil authority and the army in the enforcement of the penal laws of this country in those cases where jurisdiction is concurrent."

Concurring in the majority opinion, Mr. Justice Fernando said that while generally the military should be subordinate to the civil authorities, nevertheless "where as here the army is seeking to enforce its disciplinary power over its personnel, we should not interpose any obstacle to the exercise of such undeniable authority in accordance with our constitutional scheme." In his opinion, the petitioner did not have standing to question the jurisdiction of the general court-martial.

Substantiality of Evidence as a Requirement of Due Process. — In *Ang Tibay v. CIR*[114] the Court declared it to be part of due process requirement in administrative proceedings that the decision of the agency be supported by substantial evidence. While administrative agencies are not bound by the technical rules of evidence, "this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force."[115] In *Sanchez v. CIR*[116] the hearing examiner of the CIR submitted a report containing a computation of the backwages of 33 of the 43 employees found by the CIR to have been illegally dismissed by the petitioner. The report did not include the other ten because their names did not appear in the payroll, but the CIR subsequently ordered the examiner to compute the wages of seven (The claims of the three were dismissed) on the basis of their testimony, at the rate of "6 days a week . . . from May 21, 1958 up to November 2, 1963." The examiner submitted a report in which the amount of ₱52,705.83 was found due the seven employees. The petitioner brought this suit for certiorari contending that in ordering the computation of backwages on the

[114] 69 Phil. 635 (1940).
[115] *Id.* at 643.
[116] G.R. No. 26932, March 28, 1969.

basis of six working days in a week the CIR disregarded its earlier finding in the case of the 33 employees that the petitioner was not in continuous operation during the period in question. The result was that, whereas 33 employees were credited only 803.47 hours work for which ₱49,774.11 was paid, seven employees were given credit for 1,653 hours for which the amount of ₱52,705.83 was recommended to be paid. The Court reversed the decision and remanded the case. Through Mr. Justice Fernando it found the order to be arbitrary, resulting from a "manifest failure to observe the requirement that evidence be substantial."

It does not of course follow that due process is denied a party in every case where a decision is found to be without the support of substantial evidence. The decision of a tribunal may be based on some evidence, which may be less than substantial.[117] The rule of substantial evidence is to be understood as the necessary corollary to the rule that administrative agencies, unlike regular courts, are not bound to follow strict procedures in the conduct of cases.

D. Freedom of Contract

Leasehold Contracts. — In *Teodoro v. Macaraeg*[118] the Court held that the liberty of contract does not protect individuals against reasonable regulation by the state. The petitioner and the respondent entered into a contract whereby the former leased to the latter a piece of riceland with an area of four and one-half hectares. The lease was for one "agricultural year 1960-61." The rent was fixed at nine cavans of palay (unhusked rice) per hectare. The Court of Agrarian Relations found the petitioner guilty of dispossession and accordingly ordered him to reinstate the respondent in the land. On certiorari to the Supreme Court the petitioner argued that his contract with the respondent was not a leasehold contract under the Agricultural Tenancy Act[119] but an ordinary lease under the Civil Code, with the result that the respondent could claim no security of tenure after the expiration of the term of the contract. The Court affirmed the judgment of the agrarian court. It found the agreement of the parties to be within the statutory definition of a leasehold tenancy.[120] From this it was an easy step to hold that, despite the expiration of the term of the contract, the res-

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[117] *See, e.g.*, Gonzales v. Victory Labor Union, G.R. 23256, October 31, 1969.
[118] G.R. No. 20700, February 27, 1969.
[119] Rep. Act No. 1199, 9 LAWS & RES. 429 (1954).
[120] *Id.*, sec. 4.

Leasehold tenancy exists when a person who, either personally or with the the aid of labor available from members of his immediate farm household, undertakes to cultivate a piece of agricultural land susceptible of cultivation by a single person together with members of his immediate farm household, belonging to or legally possessed by, another in consideration of a price certain or ascertainable to be paid by the person cultivating the land either in percentage of the production or in a fixed amount in money, or in both.

pondent was entitled to remain in the land. The Act expressly secures his tenure:

> *Ejectment of Tenant.* — Notwithstanding any agreement or provision of law as to the period of future surrender of the land, in all cases where land devoted to any agricultural purpose is held under any system of tenancy, the tenant shall not be dispossessed of his holdings by the landholder except for any of the causes hereinafter enumerated and only after the same has been proved before, and the dispossession is authorized by, the court.[121]

Mr. Justice Castro, speaking for the Court, said:

> . . . We agree with Teodoro that as a landholder he has full liberty to enter into a civil lease contract covering his property. . . . [H]owever, once a landowner enters into a contract of lease whereby his land is to be devoted to agricultural production and said landholding is susceptible of personal cultivation by the lessee, solely or with the help of labor coming from his immediate farm household, then such contract is of the very essence of a leasehold agreement, and perforce comes under the direct coverage of the tenancy laws. Otherwise, it would be easy to subvert, under the guise of the liberty to contract, the intendment of the law of protecting the underprivileged and ordinarily credulous farmer from the unscrupulous schemes and pernicious practices of the landed gentry.

Actually, the argument based on the liberty of contract merited no more than a passing reference to the Civil Code[122] to dispose of. For absent a claim that the Agricultural Tenancy Act was unreasonable under the test of due process the Court had more than ample support in the presumption of constitutionality that inheres in every statute. As Professor Paul A. Freund said, "legislation, whether it restrains freedom to hire or freedom to speak, is itself an effort at compromise between the claims of the social order and individual freedom, and when the legislative compromise in either case is brought to the judicial test the court stands one step removed from the conflict and its resolution through law."[123] The legislature, it is to be remembered, is, in theory at least, as much the guardian of constitutional rights as are the courts.

E. Protection Against Unreasonable Searches and Seizures

Administrative Warrants of Arrest. — In *Neria v. Vivo*[124] the Court reiterated its earlier ruling that immigration authorities cannot order the arrest of aliens for the purpose of determining whether grounds for their deportation exist, because the determination of probable cause is a judicial function. The petitioners were allowed to enter the Philippines as citizens by the board of special inquiry, but upon review, the Board of Immigration Commis-

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[121] *Id.*, sec. 49. Causes for the severance of the tenancy relation are provided for in section 9.

[122] Article 1306 provides that "The contracting parties may establish such stipulations, clauses, terms and conditions as they may deem convenient, provided they are not contrary to law, morals, good customs, public order or public policy."

[123] P. A. FREUND, *supra*, note 15 at 75; *see also* Hand, *Chief Justice Stone's Conception of the Judicial Function*, 46 COLUM. L. REV. 696 (1946).

[124] G.R. Nos. 26611-12, September 30, 1969.

sioners found that they had not satisfactorily established their claim to Philippine citizenship. Accordingly, the Commissioner of Immigration issued a warrant of arrest for the apprehension and eventual deportation of the petitioners. On petition of the petitioners, the Court of First Instance set aside the board's decision as well as the warrant of arrest and on appeal the Supreme Court affirmed. Through Mr. Justice Castro it held, quoting the decision in *Qua Chee Gan v. Deportation Board:*[125]

> . . . Under the express terms of our Constitution it is, therefore, even doubtful whether the arrest of an individual may be ordered by any authority other than the judge if the purpose is merely to determine the existence of a probable cause, leading to an administrative investigation. The Constitution does not distinguish between warrants in a criminal case and administrative warrants in administrative proceedings. And if one suspected of having committed a crime is entitled to a determination of the probable cause against him, by a judge, why should one suspected of a violation of an administrative nature deserve less guarantee? Of course it is different if the order of arrest is issued to carry out a final finding of a violation, either by an executive or legislative officer or agency duly authorized for the purpose, as then the warrant is not that mentioned in the Constitution which is issuable only on probable cause. Such, for example, would be a warrant of arrest to carry out a final order of deportation, or to effect compliance of an order of contempt.

The Court suggested that instead of a warrant of arrest aliens be required merely to post cautionary bonds.

F. Protection Against Being Placed in Double Jeopardy

Double Jeopardy. — In *People v. Montemayor*[126] the Court refused to disturb the 65-year old ruling in *Kepner v. United States*[127] that an appeal by the government from a judgment of acquittal in a criminal case would place the accused in double jeopardy. The fiscal appealed from a judgment acquitting the accused, claiming the commission of an "enormous injustice." But the Solicitor General disagreed. In dismissing the appeal, the Court through Mr. Justice Fernando, invoked the weight of precedents from *Bringas*[128] to *Pomeroy*.[129]

III. The Powers of Government

A. The Separation of Powers

Judicial Recount of Ballots. — In *Binging Ho v. Municipal Board of Canvassers*[130] the Supreme Court sustained the constitutionality of section 163, in relation to section 168, of the Election Code against the charge that it

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125 G.R. No. 20280, September 30, 1963, 62 O.G. 7708 (Oct., 1966); *accord,* Vivo v. Montesa, G.R. No. 24576, July 29, 1968.
126 G.R. No. 29599, January 30, 1969.
127 195 U.S. 100, 24 S. Ct. 797, 49 L. Ed. 114 (1904).
128 People v. Bringas, 70 Phil. 528 (1940).
129 People v. Pomeroy, 97 Phil. 927 (1955).
130 G.R. No. 29051, July 28, 1969.

vests in courts of first instance nonjudicial powers. The parties in this case were candidates for the mayoralty of Bongao, Sulu in the elections held in November 1967. At the instance of the petitioner the Court of First Instance ordered a recount of the ballots in one of the precincts in view of a discrepancy in the words and figures of the number of votes credited to the respondent. The result of the recount was adverse to the respondent. And so he appealed, questioning the validity of sections 163 and 168 of the Code, which give the courts of first instance the power to order a recount of the votes in case of discrepancy. He argued that the power to order a recount is not judicial in nature.

Upholding the validity of the provisions of the Election Code, the Court, through Mr. Justice J. B. L. Reyes, said that the recount is only incidental to the exercise of the judicial power to ascertain the facts, pass upon their sufficiency, and apply the law to the controversy. It added:

> . . . Appellant also seems to have overlooked one basic feature of our tripartite system of government: the existence of what Justice Holmes so appropriately termed penumbra of governmental powers, of authorities "shading gradually from one extreme to the other," and the absence of a mathematically precise distinctive line between the actions of the recognized branches of government. . . . Thus, it has been said that in determining the constitutionality of the exercise of power by a department, the question to be asked is not whether the power is essentially legislative, executive or judicial, but whether it has been specifically vested in it by the Constitution, or properly incidental to the performance of the function of that department. And where the power is not peculiarly or distinctly legislative, executive or judicial, it is within the authority of the legislature to determine where its exercise would belong.

Indeed, the Constitution does not draw bright lines between judicial and executive and between executive and legislative functions. The boundary lines are for the most part marked by gray areas, those creative ambiguities in the law which enable it to answer to new concerns. It is less important that the functions of government should be neatly divided than that they be divided at all. After all the purpose of the separation of powers doctrine is to prevent the concentration of powers in one man or group of men and thereby forestall the danger of absolutism.[181]

B. The Presidency

Ad Interim Appointments. — In *Ponce v. Vaño*[182] the Court upheld the validity of *ad interim* appointment made before the defeat of President Carlos

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[181] As Justice Brandeis said:

> . . . The doctrine of separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary powers. The purpose was not to avoid friction, but by the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. Myers v. United States, 272 U.S. 52, 293, 44 S. Ct. 272, 68 L. Ed. 577 (1926) (dissent).

P. Garcia but transmitted to Congress at the same time as the controversial "midnight appointments." The petitioner was justice of the peace of Cordova, Cebu. He was designated acting judge of the municipal court of Lapulapu City and, on November 6, 1961, was extended an *ad interim* appointment to the position by President Garcia, although he did not assume office as such until January 16, 1962, on account of pending cases in his court in Cordova. On December 29, 1961 his appointment was sent to Congress and on April 27 it was approved. However, on February 28 payment of his salary was ordered withheld by the Deputy Auditor General on the strength of an opinion of the Secretary of Justice that Executive Order No. 2, dated December 21, 1961, of incoming President Diosdado Macapagal withdrew all appointments made by President Garcia after the proclamation of the results of the presidential elections in November 1961. He therefore filed an action for mandamus in the Court of First Instance which upheld the petitioner. On appeal the Supreme Court affirmed. Through Mr. Justice Teehankee it pointed out that the previous case of *Aytona v. Castillo*[133] did not really uphold Administrative Order No. 2 but that the Court there merely declined, on grounds of separation of powers, to invalidate the Presidential order, having in view the "doubtful character of the appointments themselves." Indeed, *Aytona* is premised on the Court's finding that the appointments were made under circumstances indicating lack of deliberation and care in making them. In contrast, in *Vaño* the appointment was made before the election. What gave it the appearance of the odious "midnight appointment" was the fact that it was transmitted to Congress only on December 29, 1961.

Vaño is noteworthy because at the time that the *ad interim* appointment was sent to Congress the petitioner had not qualified for the position to which he had been appointed. It will be recalled that one of the scandalous circumstances noted by the *Aytona* Court was the fact that most of the appointees whose appointments were transmitted to Congress, had not even qualified. As the Court said, "only those who have accepted the appointment and qualified are submitted for confirmation."[134] The reason for this is that the making of an *ad interim* appointment is justifiable only in the interest of preventing an interruption in the public service, so much so that in one case,[135] where the appointee was not notified of his appointment until after six months after it was made and so was not able to qualify immediately the Court considered this circumstance as proof that there was no

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[132] G.R. No. 20723, July 30, 1969.

[133] G.R. No. 19313, January 20, 1962, 58 O.G. 5835 (Sept., 1962).

[134] *Id.* at 5837. See also the concurring opinion of Mr. Justice Bautista Angelo in which he said that "an *ad interim* appointment is not complete until the appointee takes the oath of office and actually takes possession of the position or enters upon the discharge of its duties." *Id.* at 5844.

[135] Rodriguez v. Quirino, G.R. No. 19800, October 28, 1963, 62 O.G. 8415 (Nov. 1960).

urgent need for filling the position and that, therefore, there was no justification for the making of *ad interim* appointment.

This point was not considered in *Vaño* where the petitioner did not qualify for the position until two months after he was appointed and one month after his appointment was sent to Congress, although perhaps there was no immediate need for him to do so considering that he had been discharging the functions of the office anyway by virtue of a designation, while holding on to his former position. Still, this fact merely underscores the lack of urgency in filling the position by *ad interim* appointment. Under the Constitution the making of an appointment is a joint act of the President and Congress. An *ad interim* appointment, by which the President acts alone, is an exception, and as such must be made only when necessary in the public interest.

C. The Congress

Titles of Bills. — In *City of Baguio v. Marcos*[186] the Court found new use for the constitutional requirement that the title of a bill fairly reflect the subject thereof.[187] Republic Act 931 is entitled "Act to Authorize the Filing in the Proper Court, Under Certain Conditions, of Certain Claims of Title to Parcels of Land that Have Been Declared Public Land, by Virtue of Judicial Decisions Rendered Within The Forty Years Next Preceding the Approval of this Act." Section 1, however, speaks of the reopening of cadastral proceedings "in case such parcels of land, on account of . . . failure to file such claims, have been, or are about to be declared land of the public domain, by virtue of judicial proceeding instituted within the forty years next preceding this Act." The private respondent filed on July 25, 1961 a petition to reopen cadastral proceedings begun on April 12, 1912 and terminated on November 13, 1922. The petitioners opposed the action. The Court of First Instance denied their opposition. They went to the Court of Appeals, questioning the jurisdiction of the lower court, but their petition was dismissed. They brought suit for certiorari in the Supreme Court. The petitioners argued that pursuant to section 1 the forty-year period within which a petition to reopen a cadastral proceeding must be counted from the date of institution of the proceedings and that as the proceedings in this case began in 1922 and the respondent's action was not filed until 1961 more than forty years had passed.

The Court, through Mr. Justice Sanchez, referred to the title of the bill and held that the phrase "by virtue of judicial proceedings instituted" in section 1 should really be understood to mean "by virtue of judicial decisions rendered" as indicated in the title. As the petition to reopen was filed in 1961 and the decision sought to be reconsidered was rendered in 1922 the

[186] G.R. No. 26100, February 28, 1969.
[187] CONST. art. VI, sec. 21(1).

private respondent's action was filed on time. "R.A. 931 is not under siege on constitutional grounds," the Court said. And since the title is supposed to express the subject of the statute, any doubt caused by "lingual imperfections" in the text may be cleared up by a reference to the title. There is here an element of question begging. The title is at variance with the text. Just how the title can be taken as the correct expression of the text when the text itself is sought to be enlightened is something that cannot simply be assumed.

Conclusiveness of Enrolled Bills. — In Morales v. Subido[138] the Court reiterated the rule[139] by now settled that an enrolled bill is conclusive on the courts. The petitioner was earlier declared ineligible for the post of chief of police of Manila[140] in view of section 10 of the Police Act of 1966 which provides that the chief of a city police department must be at least a "high school graduate who has served as officer in the Armed Forces for at least eight years with the rank of captain and/or higher." The petitioner, a high school graduate, had served in the Manila Police Department but not in the Armed Forces. He filed a motion for reconsideration, contending that as approved by both houses of Congress House Bill 6951, which became the Police Act of 1966, gave credit to service in the police department by providing that the appointee to the post must be at least a "high school graduate who has served the police department of a city or has served as officer in the Armed Forces for at least eight years from the rank of captain and/or higher." For this purpose he submitted photostat copies of what appeared to be the page proofs of a bill and intimated that the deletion of the phrase "has served the police department of a city or" was made not at any stage of the legislative proceedings but only in the course of the engrossment of the bill, more specifically in its proofreading; that, consequently, the change was made not by Congress but only by an employee. The Court denied the motion. Through Mr. Justice Castro it held:

> The petitioner wholly misconceives the function of the judiciary under our system of government. . . . [T]he enrolled Act in the office of the legislative secretary of the President of the Philippines shows that section 10 is exactly as it is in the statute as officially published in slip form by the Bureau of Printing. We cannot go behind the enrolled Act to discover what *really* happened. The respect due to the other branches of the Government demands that we act upon the faith and credit of what the officers of the said branches attest to as the official acts of their respective departments. Otherwise we would be cast in the unenviable and unwanted role of a sleuth trying to determine what *actually* did happen in the labyrinth of lawmaking, with consequent impairment of the integrity of the legislative process. The investigation which the petitioner would

[138] G.R. No. 29658, Feb. 27, 1969.
[139] *See* Casco Philippine Chemical Co. v. Gimenez, G.R. No. 17931, February 28, 1963, 62 O.G. 2990 (May, 1966) *citing* other cases.
[140] G.R. No. 29658, November 29, 1968.

> like this Court to make can be better done in Congress. After all, House cleaning — the immediate and imperative need for which seems to be suggested by the petitioner — can best be effected by the occupants thereof. Expressed elsewise, this is a matter worthy of the attention not of an Oliver Wendell Holmes but of a Sherlock Holmes.

The Court added:

> . . . [T]here are certain matters which the Constitution (Art. VI, secs. 10(4), 20(1), and 21(1).) expressly requires must be entered on the journal of each house. To what extent the validity of a legislative act may be affected by a failure to have such matters entered on the journal, is a question which we do not now decide, (*Cf. e.g.*, Wilkes County Comm'rs v. Coler, 180 U.S. 506 (1900)). All we hold is that with respect to matters not expressly required to be entered on the journal, the enrolled bill prevails in the event of any discrepancy.

D. The Civil Service

Confidential Employees. — In *Gray v. Vera*[141] the Court reiterated the rule[142] that primarily confidential employees enjoy constitutional protection against dismissals without cause. The petitioner was appointed secretary of the board of directors of the Philippine Homesite and Housing Corp. In 1959 he was dismissed for "loss of confidence," for having sent a telegram to then President Carlos P. Garcia denouncing anomalies in the PHHC board of directors and suggesting its revamp. He brought an action for quo warranto but it was dismissed by the lower court. On appeal the Supreme Court reversed the decision of the lower court and ordered the reinstatement of the petitioner with back salaries. Speaking through Mr. Justice Capistrano, the Court said that "a position declared to be primarily confidential comes within the purview of Section 4, Article XII of the Constitution with respect to removal of the permanent incumbent thereof." It cited *Cariño v. ACCFA*[143] in which it was held that the Constitution merely excepts those occupying policy-determining, primarily confidential, and highly technical positions from the requirement that their appointment shall be made on the basis of merit and fitness to be determined by competitive examination but not from the mantle of protection thrown by section 4 on all officers and employees of the civil service against removal or suspension "except for cause as provided by law." The sending of the telegram suggesting a revamp of the board of directors of the PHHC was, according to the Court, "an act of civic duty." What the PHHC should have done was to require the petitioner to explain and prove his charges.

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141 G.R. No. 23966, May 22, 1969.
142 *E.g.*, Ingles v. Mutuc, G.R. No. 20390, November 29, 1968.
143 G.R. No. 19808, September 29, 1966, 64 O.G. 3771 (April, 1968).