*Case Comments:*

# GARCIA-PADILLA v. ENRILE: AN ASSAULT ON INDIVIDUAL LIBERTY

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## INTRODUCTION

In the span of a week in April, 1983, the Supreme Court rendered back-to-back decisions in two related *habeas corpus* petitions which offset the then settled power of judicial review. The decisions threw a pall of unexpected gloom on the future of civil and political rights under the Constitution, renewed old doubts on the continuing ability of the courts to effectively protect the exercise of fundamental freedoms, and cast the high tribunal in the unfamiliar role of villain in the volatile arena of Philippine politics.

The petitions that led to the now historic and precedent-setting verdicts in *Garcia-Padilla v. Enrile*[1] and *Morales v. Enrile*[2] stemmed from a series of routine arrests and detentions of several suspected members of the Communist Party of the Philippines by elements of the armed forces.

The petitioners in *Padilla* were initially placed under surveillance as "identified" members of the Communist Party of the Philippines, allegedly engaged in subversive activities and using the residence and clinic of Dra. Aurora Parong in Bayombong, Nueva Vizcaya, as their headquarters. A judicial search warrant, authoring the seizure of "subversive documents, firearms of assorted calibers, medicine and other subversive paraphernalia" was secured by the Constabulary and served on 6 July 1982 at 1:45 p.m. The petitioners were allegedly caught in *flagrante delicto* holding a conference and the possession of firearms, cash, medicines, and some documents described as subversive. They were placed under arrest and kept under detention for forty-two days, without the filing of formal charges or the benefit of any of their rights as accused. On the forty-third day, a petition for *habeas corpus* was filed on their behalf.

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1 G.R. No. L-61016, April 26, 1983, 121 SCRA 472 (1983).
2 G.R. No. L-61107, April 26, 1983, 121 SCRA 538 (1983).

*Legal background of the cases*

Many of the arguments relied upon by the Court in disposing the petitions and ruling in favor of the respondents centered around the validity of the various presidential issuances promulgated following the lifting of martial law. The document which served as the key to both decisions was Proclamation No. 2045,[3] signed on 17 January 1981, terminating the state of martial law throughout the Philippines.

The proclamation declared an end to the crisis government by expressly revoking the previous Proclamation No. 1081, which had served as the foundation of the martial law regime. In the many "Whereases" of the instrument, the President revealed that anarchy had been checked successfully,[4] the leftist-rightist rebellion had been substantially contained and its ranks reduced to disorganized bands alienated from the people,[5] and that there was already a greater awareness among the citizens of the contribution they expect to give for the peace, stability and security of the nation.[6] The decree noted that "both factions of a subversive organization[7] were dealt a heavy blow, one faction[8] surrendering en masse to the President before and after the proclamation of martial law, and the entire leadership of the other faction[9] being arrested and detained to face trial."[10] The Filipino people, the declaration concluded, have subdued threats to the stability of government, public order and security, and "are aware that the time has come to consolidate the gains attained by the nation under a state of martial law by assuming their normal political roles and shaping the national destiny within the framework of civil government and popular democracy."[11]

Nonetheless, the Proclamation qualified, the government and the people were aware "that public safety continues to require a degree of capability to deal adequately with elements who persist in endeavoring to overthrow the government by violent means and exploiting every opportunity to disrupt the peaceful and productive labors of the government"[12] and that hence, there was still a need to suspend the privilege of the writ of *habeas corpus* in certain areas and upon certain persons, even after martial law had been terminated.

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[3] 77 O.G. 441 (1981).
[4] Proc. No. 2045 (1981), par. 4.
[5] Proc. No. 2045 (1981), par. 5.
[6] Proc. No. 2045 (1981), par. 15.
[7] Apparently referring to the Communist Party of the Philippines. Cf. Rep. Act No. 1700 (1957), as amended by Pres. Decree No. 885 (1976) and Batas Pambansa Blg. 31 (1979).
[8] The defunct Partido Kumunista ng Pilipinas (PKP).
[9] The reorganized Communist Party of the Philippines, guided by Marxism-Leninism and Mao Ze-Dong's thoughts. The New People's Army (NPA) and the National Democratic Front (NDF) are the military and united front arms of this party.
[10] Proc. No. 2045 (1981), par. 32.
[11] Proc. No. 2045 (1981), par. 49.
[12] Proc. No. 2045 (1981), par. 51.

The privilege of the writ of *habeas corpus* remained suspended in the autonomous Regions 9 and 12 in Mindanao and, in all other places, with respect to persons presently detained and those to be detained thereafter for the crimes of "insurrection or rebellion, subversion, conspiracy or proposal to commit such crimes, and for other crimes and offenses committed by them in furtherance or on the occasion thereof, or incident thereto, or in connection therewith."[13]

The continued suspension of the privilege under the Proclamation, however, appears to be tainted with at least two defects touching on its validity and effectivity. The rule under the Constitution is that "the privilege of the writ of *habeas corpus* shall not be suspended *except* in cases of invasion, insurrection or rebellion, or imminent danger thereof, when the public safety requires it."[14] If we were to follow several previous rulings of the Supreme Court, the exercise by the President of this authority requires a factual determination that invasion, insurrection or rebellion, or imminent danger thereof, actually exists,[15] such that an absence of such determination vitiates the suspension as invalid for lack of any constitutional basis.

Paragraph fifty-two of the Proclamation, the heart of the suspension, lacks such a factual determination. The enactment in fact, declares the termination throughout the country of the state of martial law. The declaration of martial law is based on the same grounds as the suspension of the privilege of the writ so it follows logically that since the requisite conditions which have given rise to the imposition of martial law have been met, eradicated, or overcome as manifested in the preamble of the Proclamation, the necessity for the continued suspension of the privilege likewise has lost its constitutional support.

The assertion that public safety "continues to require a degree of capability to deal adequately with elements who persist in endeavoring to overthrow the government by violent means and exploiting every opportunity to disrupt the peaceful and productive labors of the government"[16] does not seem to satisfy the clear constitutional mandate that public safety *should require* the suspension of the privilege of the writ. Instances in history when the extraordinary recourse to the suspension had been made help illustrate this point.

The Philippine Commission in 1905 found by resolution that "there exists a state of insecurity and terrorism among the people which makes

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[13] Proc. No. 2045 (1981), par. 52.

[14] CONST., art IV, sec. 15 (emphasis supplied); art. VII, sec. 9.

[15] Barcelon v. Baker, 5 Phil. 87 (1905), Montenegro v. Castañeda and Balao, 91 Phil. 882 (1952), Lansang v. Garcia, 42 SCRA 448 (1971). Cf. Ex parte Milligan, 71 U.S. 281, 297 (1866), where the Supreme Court emphatically ruled that "the necessity must be actual and present."

[16] Proc. No. 2045 (1981), par. 51. The "capability" referred to is a general power needed by every civilian government in time of peace.

it impossible in the ordinary way to conduct preliminary investigations among justices of the peace and other judicial officers" and that the public safety required that the legislative body authorize the Governor General to suspend the writ in two provinces in the country.[17] In 1950, President Elpidio Quirino in his Proclamation No. 210 declared that "lawless elements ... have created a state of lawlessness and disorder affecting public safety and the security of the state," that acts of sedition, insurrection and rebellion "have seriously endangered and still continue to endanger the public safety," and concluded that "there is actual danger of rebellion fhich may extend throughout the country" and that "public safety requires that immediate and effective action be taken to ensure the peace and security of the population and maintain the authority of the government."[18]

The incumbent President's own Proclamation No. 889-A, which declared the suspension of the privilege in 1971, adverted not only to the existence of actual conspiracy and of the *intent* to rise in arms to overthrow the government but likewise asserted that lawless elements "are actually engaged in an armed insurrection and rebellion" to accomplish their purpose and that "public safety requires that immediate and effective action be taken in order to maintain peace and order, secure the safety of the people and preserve the authority of the State."[19] When the suspension was subsequently lifted in several provinces that same year, however, the President merely declared that "the condition of communist insurgency and subversion which posed a clear and present danger to public safety and to the security of the state ... has now *substantially eased* in certain areas so as to warrant the lifting thereof."[20] The conclusion is inevitable that mere "easing" of conditions, without an actual elimination of the danger to public safety, is sufficient to warrant the lifting of the suspension.

It was furthermore erroneous to include persons accused of the crime of subversion and conspiracy or proposal to commit the same among those as to whom the privilege is suspended. The constitutional provisions limit the suspension to cases of invasion, insurrection or rebellion, or imminent danger thereof, such that, while the inclusion of the additional crimes may not work to invalidate entirely paragraph fifty-two of the Proclamation, still the inclusion thereof should be deemed mistakes or surplusages which cannot be given any force and effect.[21]

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[17] Barcelon v. Baker 5 Phil. at 90.

[18] Montenegro v. Castañeda & Balao, 91 Phil. at 884-85.

[19] Lansang v. Garcia, G.R. No. L-34004, December 11, 1971, 42 SCRA 449, 462.

[20] Proc. No. 889-B (1971), par. 2, 67 O.G. 8295 (1971) (emphasis supplied). When the suspension was further lifted in more provinces, the proclamations merely recited, "consistently with the requirements of public safety and national security, the suspension of the privilege of the writ of habeas corpus may further be lifted . . . " Proc. No. 889-C (1971) and Proc. No. 889-D (1971), 67 O.G. No. 47, 9186-A-9186-B (1971).

[21] Montenegro v. Castañeda & Balao, 91 Phil. at 885-86.

*Personal security under the law: LOI's 1125-A and 1211*

Four months after the termination of martial law, new and stricter measures were promulgated by the President to put muscle into the suspension of the privilege of the writ. Letter of Instructions No. 1125-A was issued to the Solicitor General, the Minister of National Defense, Minister of Justice, the Chief of Staff of the armed forces, and the Chiefs of the Philippine Constabulary, Criminal Investigation Service, National Intelligence and Security Administration, and National Bureau of Investigation, prescribing the observance of "regular procedures" under existing laws for the arrest and detention of rebellion and subversion suspects.[22]

The directive declared that Proclamation No. 2045 "has rendered unquestionable the authority of the President to cause the arrest and detention of persons engaged in, or charged with"[23] such crimes or offenses. The procedure outlined bore the heavy hand of executive process.

The law provided for a judge "or other investigating officer," as the fiscal, to issue a warrant of arrest upon a finding of probable cause and, after the arrest, to submit immediately a report to the President, specifying, among other information, a summary of the evidence gathered at the investigation, the extent of the involvement of the accused in the commission of the crime, and a finding "on whether the evidence of guilt is strong."[24] Thereafter, the President is empowered to issue a "commitment order" authorizing the continued detention of the arrestee "in the appropriate institution specified" under the order, until the final disposition of the case or unless sooner ordered released by the President or his duly authorized representative.[25] In all cases where the President does not issue a commitment order, the accused may be released on bail.[26]

Almost a year later, on 9 March 1982, the President issued a new Letter of Instructions, No. 1211, which superseded the earlier directive. It reiterated the same assertion that Proclamation No. 2045 had rendered the executive authority to cause the arrest and detention of rebellion and subversion suspects "unquestionable,"[27] adding that it was "necessary to clarify" the ealier procedure "to insure protection to individual liberties *without sacrificing the requirements of public order and the effectiveness of the campaign against those seeking the forcible overthrow of the Government and duly constituted authorities.*"[28] It was ominously clear that the executive had construed his authority under the Constitution to suspend the privilege of the writ as encompassing the unbounded and absolute power to cause the arrest and detention of any suspected individual.

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[22] L.O.I. No. 1125-A (1981), par. 3.
[23] L.O.I. No. 1125-A (1981), par. 2.
[24] L.O.I. No. 1125-A (1981), sec. 3.
[25] L.O.I. No. 1125-A (1981), sec. 4.
[26] L.O.I. No. 1125-A (1981), sec. 5.
[27] L.O.I. No. 1211 (1981), par. 2.
[28] L.O.I. No. 1211(1981), par. 4 (emphasis supplied).

The new directive allowed two exceptions to the "regular procedure" outlined under the earlier law. A military commander[29] or head of a law enforcement agency[30] may immediately arrest a person without securing a judicial warrant if, according to his determination, the suspected person would probably escape or commit further acts endangering public order and safety before a warrant could be obtained.[31] This authority seems to be undeniably discretionary and final, subject only to the usual administrative rule that there be substantial evidence to support the decision.

The second exception is the authority of the President to issue a "Presidential Commitment Order," abbreviated hereafter as PCO, covering persons believed to be participants in the commission of rebellion. It issues upon application of a military commander or head of a law enforcement agency through the Minister of National Defense, when "resort to judicial process is not possible or expedient without endangering public order and safety" or the release on bail of persons already under arrest by virtue of a judicial warrant "would endanger said public order and safety."[32] The PCO when issued authorizes the *arrest and detention* of suspected individuals "until ordered released by the President or his duly authorized representative."[33] In all cases where no PCO is issued by the President, the accused under detention may be released on bail.[34]

The result is to subject the personal security of every citizen and individual to executive discretion and control. While the Constitution ordains the rule of civilian authority "at all times superior over the military."[35] as one of the declared principles of republican government, the military commander is given the blanket authority to roam at will and selectively or randomly strike at the civilian populace to preventively detain persons suspected of endangering the security of the state. The executive, as well as all public officers and members of the armed forces, who are sworn to support and defend the Constitution,[36] are the same agents who lend havoc to its sacred provisions by transgressing the fundamental guarantee of the security of the individual.

"The right of the people to be secure in their persons," the Bill of Rights enjoins, "shall not be violated, and no search warrant or warrant

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[29] The Chief Officer in command of a military force or unit, presumably an officer with the rank of lieutenant or higher. 1 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 455 (1971).

[30] Apparently referring to the public officers to whom the directive was given, viz., the Ministers of National Defense and Justice, Solicitor General, Chief of Staff of the armed forces, the respective heads of the Philippine Constabulary, National Intelligence and Security Administration, Criminal Investigation Service, and National Bureau of Investigation. The phrase may be applied to include subordinate executive officers as well as station commanders of the Integrated National Police.

[31] L.O.I. No. 1211 (1981), sec. 2.

[32] L.O.I. No. 1211 (1981), sec. 3.

[33] L.O.I. No. 1211 (1981), sec. 4.

[34] L.O.I. No. 1211 (1981), sec. 5.

[35] CONST., art. II, sec. 8.

[36] CONST., art. VII, sec. 5; art. XV, sec. 4.

of arrest shall issue except upon probable cause to be determined by the judge, *or such other responsible officer as may be authorized by law,* after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized."[37] Under the Rules of Court, an arrest made without a warrant is lawful only when justified by reasonable necessity, e.g., when the officer has personal knowledge that the person to be arrested commits, will commit, or has committed an offense in his presence or there is reasonable ground to believe that the person has committed such an offense.[38] Under the directive, however, a military commander may take any person into custody without applying for a warrant upon a determination that the person would commit *further* acts endangering public order and safety, an entirely different ground.

The power of the President to issue a PCO is arguably anchored on the cited constitutional provision allowing "such other responsible officer as may be authorized by law" to issue a search or arrest warrant.[39] Nonetheless, it is quite difficult to accept, though the presumption of regularity is at the first instance in favor of the President, that the executive *actually* examines each and every complainant under oath and issues a PCO only after finding probable cause.[40] The nature of the PCO as an expeditious executive process in lieu of the impliedly cumbersome regular judicial warrant already militates against compliance with the formal procedural safeguards under the Constitution. The danger to public order and safety has been made, under the directive, the overriding concern of law enforcers, rather than the personal safety and security of individuals protected in the Bill of Rights.

Furthermore, the law legitimizes preventive detention as an official policy. This regime subverts the constitutional caveat that "No person shall be held to answer for a criminal offense without due process of law,"[41] that is, by virtue of a valid law inflicting punishment for the commission of an offense *and* upon a judicial determination of guilt beyond reasonable doubt, after a hearing and trial where the accused is accorded all the rights and privileges of a defendant in a criminal prosecution.[42] The period of detention *for purposes of custodial investigation* allowed under the Re-

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37 CONST., art. IV, sec. 3 (emphasis supplied).

38 RULES OF COURT, Rule 113, sec. 6. The other ground is in the case of an escaped prisoner.

39 CONST., art. IV, sec. 3.

40 To date, the President has issued more than 200 PCO's for more than a thousand persons. The authority to issue warrants is not reasonably necessary for the performance of any of the enumerated powers under article VII of the Constitution, except, arguably, as the commander-in-chief when calling out the armed forces to prevent or supress lawless violence, invasion, insurrection or rebellion.

41 CONST., art. IV, sec. 17.

42 CONST., art. IV, secs. 14, 15, 16, 18, 19, 20, 21, 22 and 23. To some extent preventive detention has been embodied by amendment in the Revised Penal Code by Batas Pambansa Blg. 85 (1980), when the detention is by virtue of an arrest, search and seizure order (ASSO). See also Pres. Decree No. 1404 (1978).

vised Penal Code, is a maximum of eighteen hours for crimes punishable by afflictive or capital penalties,[43] because a deprivation of liberty for a period of twenty-four hours or more already constitutes a light penalty under the criminal law.[44]

"Arrest" is defined under the Rules of Court as "the taking of a person into custody *in order that he may be forthcoming for the commission of offense.*"[45] The underlying policy is to inflict deprivation of liberty as a punishment only upon the commission of a felonious act, not upon the harboring of a criminal intent. The instances when preventive detention is impliedly allowed under the law are in the case of custodial investigation, *supra,* and when an application for bail is denied because the person is charged with a capital offense and the evidence of guilt is strong. The last instance is when the privilege of the writ is suspended, but the effect of the suspension is generally "not to authorize the arrest of anyone" but simply to deny to *those arrested* the privilege of the writ to obtain their liberty.[46]

Under the directive, the period of detention by virtue of a PCO is indefinite, continuing until the President or his duly authorized representative orders the release of the person detained. The right to bail is impliedly denied—even if the person has not been formally charged for the violation of any penal law—because the order provides that a person may be released on bail only when the President does not issue a PCO,[47] contrary to the constitutional guarantee that every person shall be bailable by sufficient sureties *before conviction,* except those charged with capital offenses when the evidence of guilt is strong.[48]

### GARCIA-PADILLA V. ENRILE

*Garcia-Padilla v. Enrile* involved the legality of the arrest made by three teams of Constabulary soldiers led by one of the respondents, Lt. Col. Miguel Coronel, while executing a search warrant. The warrant was assailed by the petitioners as a general and roving warrant that did not specifically state the things to be seized. Likewise, the petitioners raised the legality of their continued detention beyond the reglementary period, the failure of the respondents to commence criminal prosecution against them, and a similar failure to give them a copy of the PCO authorizing their continued detention, purportedly signed by the President six days after their arrest. Lastly, the petitioners claimed that the respondents denied them of their right to be visited by counsel as well as relatives.

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[43] REV. PENAL CODE, art. 125, as amended by Pres. Decree No. 1404 (1978).
[44] REV. PENAL CODE, arts. 25 and 27.
[45] RULES OF COURT, Rule 113, sec. 1 (emphasis supplied).
[46] 39 Am. Jur. 2d 183.
[47] L.O.I. No. 1211 (1981), sec. 5.
[48] CONST., art. IV, sec. 18.

The prayer of the petitioners was for the issuance of a writ of habeas corpus and/or a writ of mandamus to compel the respondents to disclose the former's whereabouts. In addition, the petitioners applied for provisional liberty on bail pending the determination of the legal questions involved.

The Court issued a writ of habeas corpus and, on the return thereof, the Solicitor General contended that the petitioners were being detained by virtue of a PCO issued six days after the arrest and that proper charges had in fact been filed before the court and the provincial fiscal of Nueva Vizcaya. The government counsel further argued, by way of affirmative defense that the privilege of the writ remained suspended as to the petitioners and that for the duration of the emergency which necessitated the present suspension, the President had the power to order the confinement of persons such as the petitioners. As a final argument, the Solicitor General questioned the lack of authority on the part of Mrs. Padilla to represent the thirteen other detainees in the petition.

The Court noted the return to the writ during the hearing and resolved to require the submission of documents relative to the issuance of the PCO. The decision was rendered almost eight months after the case was deemed submitted for resolution.

The verdict was 12-1 for the dismissal of the petition. The decision, penned by Justice Pacifico de Castro, was concurred in by Justices Guerrero, Plana, Escolin, Vasquez, Relova and Gutierrez. Justice Teehankee filed the lone dissenting vote, while Chief Justice Fernando concurred in the result but dismissed from the overruling of *Lansang v. Garcia*. Justices Makasiar and Abad Santos concurred both as to the result and the overruling of *Lansang* with the latter reserving his right on the question of bail. Justices Concepcion and Herrera concurred on in the result.

*Main opinion*

The main opinion of Justice De Castro threshed out the basic issue of the legality of the detention of the petitioners in five brief paragraphs. After describing the circumstances of the arrest by citing the "records,"[49] the Court upheld the legality of the military's action, justifying the same as falling under Rule 113, section 6(a) on warrantless arrests that are considered lawful, even "under existing jurisprudence on the matter."[50]

According to the decision, the crimes enumerated under Proclamation No. 2045, and upon which the privilege of the writ remains suspended, are in the nature of continuing offenses which essentially involved "a massive conspiracy of nationwide magnitude."[51] The conditions prevailing

[49] Garcia-Padilla, 121 SCRA at 483, 488.

[50] *Id.*, at 488. Under the cited provision, an arrest without a warrant is lawful "[w]hen the person...arrested has committed, [was] actually committing, or [was] about to commit an offense [in the presence of a peace officer]."

[51] *Id.*, at 489.

in a rebellion are akin to a war, and arrests made during such incidents are "more an act of capturing [the rebels] in the course of an armed conflict, to quell the rebellion, than for the purpose of immediately prosecuting them in court for a statutory offense."[52]

Hence, there was really no need for prescribing the usual procedure of prosecuting offenses by applying to the courts for warrants since "[t]he arrest or capture is . . . impelled by the exigencies of the situation . . . . "If killing and other acts of violence against the rebels find justification in the exigencies of armed hostilities which is of the essence of waging a rebellion or insurrection," the ruling stressed, "merely seizing their persons and detaining them while any of these contingencies continues cannot be less justified."[53] The decision relied on *Aquino v. Ponce-Enrile,*[54] where the Court had earier sustained the power of the President to employ troops to kill persons who resist as well as to arrest those found standing in the way to peace.

> What should be underscored is that if the greater violation against life itself such as *killing, will not be the subject of judicial inquiry, as it cannot be raised as transgressing against the due process clause,* that protects life, liberty and property, lesser violations against liberty, such as arrest and detention, may not be insisted upon as reviewable by the courts.[55]

It is notable, furthermore, that Justice De Castro's opinion categorically pronounced the legality of the entire process without inquiring into the specific charges upon which the arrest was based, the extent and sufficiency as well as the validity of the surveillance conducted by the arresting officers, the question on the alleged nullity of the search warrant which was the apparent excuse for the raid, and — to the extent necessary to adequately dispose of the issues — the legality itself of the suspension of the privilege of the writ, which appears to be at the heart of the petition.

*Legality of the PCO*

The decision, abrupt as it was, should have stopped at this point. Nonetheless, the Court went beyond what is justiciably required and decided the question of the legality of the PCO, a point never raised in the pleadings and unessential to the entire proceeding. The more important issue of the validity of the suspension of the writ was only collaterally considered and quickly affirmed by a swift reliance on the "political question" doctrine. The reason given by the Court in tackling the suddenly "transcendentally important" issue of the PCO was to break the flow of petitions for habeas

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[52] *Ibid.*
[53] *Ibid.*
[54] 59 SCRA 183 (1974).
[55] Garcia-Padilla 121 at 490 (emphasis supplied).

corpus lately filed before it. What follows therefore, can be considered as largely *obiter dicta,* lacking the binding force of *stare decisis.*

Without citing Letter of Instruction No. 1211 but apparently relying upon the same, the Court upheld the PCO as a validating warrant whose legal effect is "to render the writ unavailing as a means of judicially inquiring into the legality of the detention" during the period of the suspension.[56] The Court thus laid the groundwork for the eventual abandonment, some paragraphs later, of the important *Lansang v. Garcia* doctrine.[57]

*Suspension of the Writ of Habeas Corpus Left Solely to Executive Discretion*

For the first time, the suspension of the privilege of the writ was declared a *military measure* which the President alone may take as commander-in-chief of the armed forces. The President should be kept free from interference by the coordinate political branches in the discharge of this responsibility, the Court admonished, since invasion, rebellion or insurrection entail "warlike conditions" inhibiting judicial inquiry. The occasion for its application on specific individuals should likewise be left ideally to the "exclusive and sound judgment" of the executive. Furthermore, "the need for a unified command in such contingencies is imperative—even axiomatic—as a basic military concept in the *art of warfare.*"[58]

The power of judicial review unanimously upheld by the *Lansang* Court was decried as "pure semanticism" since the judiciary was in fact ill-equipped to assume the task of checking, reversing or supplanting the decision of the President. The Executive, pursuant to the constitutional mandate, takes absolute command on such emergencies and in so doing becomes answerable only "to his conscience, the people and to God." The people can only trust and pray that the President on such occasions will not fail them.[59]

Here the Court argued that the *power* to suspend the privilege of the writ is intended as a limitation to the *right* of personal liberty, in the same vein that individual freedom yields to the exercise of the police power.[60] The reason was that in times of war or grave national peril, individual freedom becomes limited or restricted.

> Arbitrariness, as a ground for judicial inquiry of presidential acts and decisions, sounds good in theory but impractical and unrealistic, considering how well-nigh impossible it is for the Courts to contradict the finding of the President on the existence of the emergency. . . . For the

[56] *Ibid.*
[57] *Id.*, at 500ff.
[58] *Id.*, at 492 (emphasis supplied).
[59] *Id.*, at 500-501.
[60] *Id.*, at 501-502.

> Court to insist on reviewing Presidential action on the ground of arbitrariness may only result in a violent collision of two jealous powers with tragic consequences, *by all means to be avoided, in favor of adhering to the more desirable and long-tested doctrine of "political question"* in refenence to the power of judicial review.[61]

With that, the *Lansang* doctrine that the Courts may determine the existence of factual bases to check whether arbitrariness attended the action of the President, beyond the constitutional limits of his jurisdiction, was laid to rest. The dispositive portion of the decision disclaimed any attribute of judicial infallibility sufficient to allow it to review the exercise of an exclusive power vested on the President, and declared that the electoral mandate and his oath to do justice to every man are enough guarantees against commission by the President of an arbitrary act in the discharge of his duties.[62] "If freedom from judicial review is conceded in the exercise of [the power of appointment and pardon]," the Court reasoned, "it should incontestably be more so with his wartime power . . . to adopt any measure in dealing with situations calling for military action as in case of invasion, rebellion or insurrection."[63]

What then is the scope and extent of the exercise by the President of such a military power? May the President suspend the privilege of the writ upon any and all offenses so long as there exists an invasion, rebellion or insurrection, or imminent danger thereof, or should the suspension be limited only to such *crimes* as were enumerated in the Constitution? The decision impliedly favored the former position.

According to the Court, the circumstance that the Constitution used the words "invasion" and "imminent danger thereof," which are not statutory offenses, along with the terms "rebellion and insurrection," points to the intention to apply these terms in the sense of "a state or condition" prevailing in the nation.[64] The suspension is a necessary measure "to suppress or quell the rebellion or beat off an invasion." What happens is that, for the duration of the emergency, the *right* to personal liberty itself is restricted "in the greater interest of public safety and national security."[65] This view conforms with an early decision of the U.S. Supreme Court interpreting the provisions of the Habeas Corpus Act of 1863, a statute implementing a similar provision in the Federal Constitution, where the tribunal ruled that the purpose of the executive authority to suspend the privilege was, for so long as public safety demands, that he "should not be required to give the cause . . . of detention [of a suspected person] in return to a writ of habeas corpus."[66]

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[61] *Id.*, at 502-503 (emphasis supplied).
[62] *Id.*, at 504.
[63] *Id.*, at 491.
[64] *Id.*, at 492.
[65] *Ibid.*, at 492 (emphasis supplied).
[66] Ex parte Milligan, 4 Wall. 2, 116 (1866).

*Suspension and the right to bail*

It follows, therefore, as a matter of course, that a person arrested and detained during the period of the emergency may not petition for bail or demand any rights afforded the accused in an ordinary trial. The reliance in the opinion upon Chief Justice Fernando's reiteration in his separate opinion that the Constitution is the law "equally in war and in peace"[67] is somewhat futile, if not misplaced, because the decision asserted with equal force that the power to suspend the privilege of the writ "comes into being during the extreme emergencies . . . while individual freedom is obviously for full enjoyment in time of peace, but in time of war or grave peril to the nation, should be limited or restricted."[68]

> It, therefore, becomes self-evident that the duty of the judiciary to protect individual rights must yield to the power of the Executive to protect the State, for if the State perishes, the Constitution, with the Bill of Rights that guarantees the right to personal liberty, perishes with it.[69]

The right to bail, hence, remains unavailing for the petitioners pending the determination of their suit or thereafter. Preventive detention is a means of "self-defense for national survival," a necessary measure for the effectivity of the government's campaign to suppress rebellion.[70] The Court added that not even the right to be charged immediately in court can be claimed because, according to legal writers or publicists quoted in the Encyclopedia of Social Sciences, 1950 edition, volume eight, page 236, the suspension "has the sole effect of allowing the executive to *defer* the trials of persons charged with certain offenses during the period of emergency."[71]

Not only so, but as the decision amplified without invoking judicial notice, when a person engaged in rebellion is arrested or "captured," the latter does not cease to be committed to the cause of the rebellion and "remains in a state of continued participation in the criminal act or design." The Court apparently overlooked the presumption of innocence and went further: "His heart still beats with the same emotion for the success of the movement of which he continues to be an ardent adherent and ally. It is simple logic, . . . to hold that there should be no legal compulsion for a captured rebel to be charged in court . . . while he is, *realistically and legally,* still as much as part and parcel of the movement . . ."[72]

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[67] Padilla, at 501.
[68] *Id.*, at 502.
[69] *Ibid.*
[70] *Id.*, at 492.
[71] *Id.*, at 494 (emphasis supplied).
[72] *Id.*, at 494-95 (emphasis supplied).

> If the right to bail may be demanded during the continuance of the rebellion, and those arrested, captured and detained in the course thereof will be released, they would, without the least doubt, rejoin their comrades in the field. . . .[73]

Moreover, the Court said, a fact well known to all is that when government troopers or individuals are captured by rebels, the captives are not set free on bail or accorded any trial, and the possibility of liquidation is oftentimes not remote. The suspension, the decision points out, helps put government forces "on equal fighting terms with the rebels, by authorizing the detention of their own rebel or dissident captives as the rebellion goes on." Thus the Court uncommonly took the precedent of engaging in open warfare on record, even if it had earlier shrunk from any responsibility of taking the executive task by checking the latter's action for arbitrariness. It would amount to ignoring reality "in the name of misplaced magnanimity and compassion, and for the sake of humanity," lastly, if the Court were to grant the petitioners' demand for rights under the very Constitution which they themselves trample over and "seek to destroy" by "waging war against the government".[74]

*Arbitrariness of the issuance of the PCO*

The tribunal refused to review the legality of the issuance of the PCO against the petitioners, who intimated that arbitrariness tainted its issuance because the evidence in the hands of the military was not enough to prove that they have committed rebellion. The reliance upon the *Lansang* doctrine to support this argument was dismissed by the Court, on the ground that the 1971 decision was not in point, being limited to the constitutionality of the suspension of the privilege of the writ by the President.[75]

Furthermore, the Court continued, a habeas corpus proceeding is not the proper action to contest the validity of any arrest and detention by reason of arbitrariness because, if the same were allowed, the effect would be to transfer the trial of a criminal case to the court hearing the habeas corpus petition. In the case of the Supreme Court, it was simply inconceivable, not being a trier of facts. "(A)rbitrariness, while so easy to allege, is hard to prove, in the face of the formidable obstacle built up by the presumption of regularity in the performance of official duty."[76]

The Court likewise inhibited itself from deciding the legality of the particular PCO issued against the petitioners on the alternative ground of inconformity with Letter of Instructions No. 1211. The argument of the petitioners that the PCO was ineffectual for failure to observe the procedures laid down in the directive was rejected on three grounds. First, the same

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[73] *Id.*, at 494.
[74] *Id.*, at 495-96.
[75] *Id.*, at 496.
[76] *Id.*, at 497.

directive expressly allows the issuance of a PCO even in instances when a resort to judicial process is possible, for instance, when expediency requires that public order or safety be not endangered. Secondly, the directive was intended by the President merely to provide guidelines for his subordinates in implementing the suspension under Proclamation No. 2045 and does *not,* in any manner, limit his authority to order the arrest and detention of persons covered by the suspension. The directive is *not* and does *not* form part of the law of the land since it was not issued under the President's extraordinary power under Section 6 of the 1976 Amendments to the Constitution.[77] Thirdly, and most important, even if a judge believes that no warrant should issue, *the President is not bound by such finding.* The purpose in accommodating the judicial process under the directive was merely "to aid him in exercising his power to restrain personal liberty," and not to curtail his power by allowing normal judicial processes to take its course, "under which the detainees or accused would then be entitled to demand their right of due process."[78] The issuance of the PCO was thus deemed the "exclusive prerogative" of the President which may not be declared void by the courts under the doctrine of "political question,"[79] as applied in *Barcelona v. Baker*[80] and *Montenegro v. Castañeda.*[81]

> The issuance of the PCO by the President necessarily constitutes a finding that the conditions he has prescribed in LOI 1211 for the issuance of [the] PCO have been met, and intends that the detention would be pursuant to the executive process incident to the government campaign against the rebels, subversives and dissidents waging a rebellion or insurrection.[82]

The petitioners' right to be released "even after the filing of charges against them in court," in the minds of the members of the Court, totally depends upon the President.[83]

*Separate dissenting and concurring opinions*

Justice Teehankee filed a restrained, fourteen-page dissent against the main opinion, particularly as to the holding that the *Lansang* doctrine should be adandoned, that the petitioners can not be released temporarily on bail for the duration of the suspension except on orders of the President, and against the Court's attitude in discouraging the filing of petitions for habeas corpus. The dissent noted, quite significantly, that martial law has been terminated, implying that certain premises cited in the Proclamation lifting the state of emergency contradict the majority's opinion

[77] *Id.,* at 499.
[78] *Id.,* at 500.
[79] *Id.,* at 504.
[80] 5 Phil. 87 (1905).
[81] 91 Phil. 882 (1952).
[82] Garcia-Padilla, 121 SCRA at 500.
[83] *Id.,* at 504.

that the continued suspension is "a time of war or grave peril to the nation."[84]

Justice Teehankee said that the determination of the issues in the petition does not call for "the all-encompassing ruling" in the main opinion that overturned the benchmark rule laid down in *Lansang,* because the suspension of the privilege of the writ has not been challenged by the petitioners.[85] The decision, the dissent criticized, was "an advance declaration that all [judicial] checks and barriers are down."[86] The same defect was pointed out by Chief Justice Fernando in a separate opinion. There was no need, according to him, of going to the extent of reexamining the *Lansang* ruling because it was sufficient for the Court's purposes to "accord deference to a presidential commitment order" and because, it was "unjustifiable for [the] Court to turn its back to a doctrine that has elicited praise and commendation from eminent scholars and jurists here and abroad."[87]

Justice Teehankee's dissent noted that the crucial issue at bar is whether or not the petitioners may be released temporarily on bail, which the main opinion decided adversely.[88] Having singled out the basic question in the petition, the dissent then deplored the return to the "retrogressive and colonial era" rulings in *Barcelon* and *Montenegro*[89] and defined the dimensions of the *Lansang* ruling in being both groundbreaking and, at the same time, limited. The latter decision "recognizes the greatest deference and respect that is due the President's determination for the necessity of suspending the priviliege" but at the same time limits the exercise of the power within the confines of the Constitution as determined by the test of arbitrariness.[90]

On the question of bail, Justice Teehankee was emphatic. He argued that Letter of Instructions No. 1211, "a mere internal instruction to certain agencies," should yield to the superior mandate of the Constitution guaranteeing the right to bail and vesting the courts with the jurisdiction and judicial power to grant bail "which may not be removed nor diminished nor abdicated."[91] To support his position, Justice Teehankee cited constitutional provisions, jurisprudence, well known facts, and even the President himself.

First, it is not true that releasing the petitioners on bail would defeat the purpose of the suspension, since the State, through its military and police forces, has the "overwhelming capability . . ' to keep suspects under

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[84] *Id.*, at 531 (Teehankee, J., dissenting).
[85] *Id.*, at 524.
[86] *Ibid.*
[87] *Id.*, at 505 (Fernando, C. J., concurring and dissenting).
[88] *Id.*, at 526 (Teehankee, J. dissenting).
[89] *Id.*, at 522.
[90] *Id.*, at 524.
[91] *Id.*, at 526.

surveillance" and the courts can impose reasonable conditions before granting bail, such as prohibiting movement in certain critical areas and requiring periodic reports to the authorities.[92] Furthermore, the President himself has also admitted in newspaper reports that a mayor who had been charged before the regional trial court of Cebu City is "therefore under the jurisdiction of the civil court and not only under the jurisdiction of the military under the PCO." He reportedly added that "the disposal of the body of the accused ... is now within the powers of the regional trial court of Cebu City and not within the power of the President."

Finally, since 1951 in the leading case of *Nava v. Gatmaitan*,[93] although the decision failed one vote short of the majority of six affirmative votes required and which the main opinion ruled was "non-doctrinal for lack of necessary votes,"[94] judicial construction has been to the effect that the privilege of the writ and the right to bail are "separate and co-equal," the Constitution limiting the suspension to only one great right.[95] To argue otherwise, that the suspension includes the denial of the right to bail, would imply "the suspension of all [the petitioners'] other rights (even the right to be tried by a court)."[96] Notwithstanding numerous amendments to the new Constitution, Justice Teehankee points out, "(i)t is noteworthy and supportive of the prevailing stand since 1951 ... that there has been *no amendment*" of the constitutional provision guaranteeing the right to bail.[97]

Hence, the dissent concludes, the right to bail cannot be cancelled summarily by the issuance of a PCO. Moreover, the Court should not discourage the filing of petitions for habeas corpus because it "stands as the guarantor of the constitutional and human rights of all persons within its jurisdiction and must see to it that the rights are respected and enforced."[98] When the detention becomes punitive and not merely preventive in character, the petitioners, as a matter of right, are entitled to regain their freedom.[99]

Chief Justice Fernando filed a qualified concurrence, disagreeing with the majority on the ground that the right to bail should be accorded respect once a case is filed, and dissenting as to the overruling of *Lansang*. The Chief Justice noted that the function of judicial review is not only a power, but likewise a duty which the Court cannot lightly refuse.[100]

Briefly discussing the function of the courts, the separate opinion recalled the appellate jurisdiction of the judicial branch, in certain cases,

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92 *Id.*, at 527.
93 90 Phil. 172 (1951).
94 Garcia-Padilla, at 500 n. **.
95 *Id.*, at 528 (Teehankee, J., dissenting) (citing Ex parte Milligan 4 Wall. 2, 116 (1866)).
96 *Id.*, at 528.
97 *Ibid.*
98 *Id.*, at 531.
99 *Ibid.*
100 *Id.*, at 506 (Fernando, CJ., concurring and dissenting).

to inquire into the validity of executive as well as legislative action. Sometimes, judicial review may amount to an interference in the policy formulation, a matter better left to the political branches, but "where the question is one of liberty,"[101] the courts' jurisdiction may be properly invoked. To a certain extent here the Chief Justice's opinion departed from the majority ruling, which was silent on this regard.

But he saw no flaw in the majority view that the issuance of a PCO validates on constitutional grounds the prior arrest and detention of suspected persons, so long as the suspension remains in force, since "(t)he lifting of martial law *unfortunately* has not been followed by a restoration of peace and order in certain sections of the country."[102] Preventive detention has been recognized in *Lansang, Barcelon* and *Montenegro* where the privilege is suspended, creating thereby "an obstacle to judicial inquiry."[103] Even when the President has elected merely to call out the armed forces to supress lawless violence, invasion, insurrection or rebellion, he could still exercise preventive detention,[104] as held in *Moyer v. Peabody*.[105]

Nonetheless, the Chief Justice disagreed with the majority on the legality of the detention when it has continued for a length of time as to make the same punitive in character. The Court may inquire into the validity of the detention, he stressed, although he refused to offer any test which would determine when such a punitive stage has been reached, except "an appraisal of the environmental facts of each case."[106] He deemed this particularly difficult, in view of the indeterminate period of probable confinement[107] of the detainees, coupled with the procedural presumption of regularity of executive action and the consequent attribute of good faith assumed on the part of the President.[108]

The separate opinion, finally, vigorously dissented insofar as the availability of the right to bail is concerned once a case is filed in court. "If there be such a petition," it urged, "the court has jurisdiction to grant or deny bail in accordance with the constitutional provision." This is a reiteration of the author's position as counsel in *Hernandez v. Montesa*[109] and his sepa-

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101 *Id.*, at 507.

102 *Id.*, at 509 (emphasis supplied). It seems that the statement is inaccurate because the Proclamation itself declared the restoration of peace and order in the country, the need for the suspension being limited to giving the government legal leeway to counter dissident threats by allowing arrests and detention on mere suspicion.

103 *Id.*, at 505.

104 *Id.*, at 510.

105 212 U.S. 78 (1909).

106 *Id.*, at 511 (Fernando, C.J., concurring and dissenting).

107 In the case of those detained during martial law, for instance, the cause for preventive detention may not have elapsed at the time of this writing, a period spanning more than eleven years since 1972.

108 Garcia-Padilla, 121 SCRA at 511-512 (Fernando, C.J., concurring and dissenting).

109 90 Phil. 172 (1951).

rate opinions in *Lansang* and in *Buscayno v. Enrile.*[110] The Chief Justice cited instances of preventive detention recognized in the jurisdictions of Malaysia, India, the United States and England, capping his enumeration with the tame counsel that a plea for remedial action should be addressed by the petitioners to the President, "in the first instance." "Very likely," he assured, "there will be an affirmative response."[111]

As noted earlier, the separate opinion did not agree with the majority in abandoning *Lansang,* as there was no sufficient justification for the Court to retreat from "a position that assures judicial participation on a matter," referring to the suspension, "of momentous consequence." Moreover, the Chief Justice prudently assessed, "the benefit of judicial appraisal, *and thereafter approval,*" lessens the opposition against the act of the President.[112] A return to the doctrine of *Barcelon* and *Montenegro* would not be legally justified because the Court in those decisions, "was partly misled by an undue reliance ... on what it considered to be authoritative pronouncements" from Justice Story and Chief Justices Marshall and Taney of the U.S. Supreme Court.[113]

*Criticism of the main opinion*

The question that must be settled at the outset is whether the decision is doctrinal. It is clear that the abandonment of *Lansang v. Garcia,* unfortunately for constitutionalists and for the courts, is a binding precedent that must henceforth be reckoned with. The members of the Court voted 9-1 on this crucial point, one on leave and three abstaining, one vote more than that required under the Constitution[114] to reverse or modify a doctrine or principle laid down by the Court in a previous decision rendered *en banc.*

Whether the holdings on the other important issues are as binding is, however, a different story. Only *seven* members of the Court, the *ponente* included, voted to affirm the action of the President, ruling that the issuance of a PCO not only validates an arrest or detention but is likewise an act within the exclusive prerogative of the President, removed from judicial review by the "political question" doctrine. This aspect of the decision is non-doctrinal because the Constitution requires the concurrence of *at least eight* members to decide a case heard *en banc,*[115] although it may be proper to add that twelve members actually voted, one dissenting and one on leave, to dismiss the petition.

It may not be amiss, nonetheless, to put the case in proper perspective by noting its implications, nuances, and shortcomings, and to offer

110 102 SCRA 7 (1981).
111 Garcia-Padilla, 121 SCRA at 515 (Fernando, C.J., concurring and dissenting).
112 *Id.,* at 518; (emphasis supplied).
113 *Id.,* at 519.
114 CONST., art. X, sec. 2, par. 3.
115 CONST., art. X, sec. 2, par. 2.

some suggestions on the relevant constitutional issues, in view of the landmark importance of the opinion as originally promulgated. In hindsight, we are kept reminded by the travails of the Court along the path of judicial statemanship and its deplorable failure to exercise caution in treading upon such delicate grounds as the political and civil liberties enshrined in the Constitution.

*Validity of the Search and Seizure Warrant*

The basic issue that confronts the Court is the legality of the arrest and subsequent detention of the petitioners. The determination of this question rests upon the validity of the search and seizure made immediately prior to, and which served as the basis for, the arrest. The petitioners allege that the warrant was a general and roving authority granted to the military officers to seize all sorts of evidence on a "fishing expedition," contrary to the constitutional requirement that there be particularity in the description of the things to be seized.[116]

There is no doubt that Judge Sofronio Sayo's warrant for the seizure of "subversive documents, firearms of assorted calibers, medicine and other subversive paraphernalia" is in the nature of a general search warrant which is outlawed by the Constitution "because they place the sanctity of the domicile and the privacy of communication and correspondence at the mercy of the whims, caprice or passion of peace officers."[117] Aside from particularity of description, a search warrant, to be valid, must also be issued upon probable cause, the probable cause to be determined by the judge himself and not by the applicant or any person, and in determining probable cause, the judge must examine under oath or affirmation the complainant and such witnesses as the latter may produce.[118] These requirements have been construed to be of a mandatory character,[119] in addition to the procedural requirement under the Rules of Court that a warrant should be issued only in connection with one specific offense.[120]

Executing officers do not have roving commissions to search where they please and to seize what they please—they are bound by the command of the search warrant and may not exercise any discretion.[121] Strict adherence to the descriptive requirement of the personal property to be taken is important as it tends to prevent the seizure of one article where the warrant contemplates another.[122]

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116 CONST., art. IV, sec. 3.

117 Stonehill v. Diokno, G.R. No. L-19550, June 19, 1967, 20 SCRA 383 (1967).

118 Lim v. Ponce de Leon, G.R. No. L-22554, August 29, 1975, 66 SCRA 299 (1975)..

119 Castro v. Pabalan, G.R. No. L-28642, April 30, 1976, 70 SCRA 477 (1976).

120 RULES OF COURT, Rule 126, sec. 3; Oca v. Maiquez, G.R. No .L-20749, July 30, 1965, 14 SCRA 735 (1965), Bache and Co., Inc. v. Ruiz, G.R. No. L-32409, February 27, 1971, 37 SCRA 823 (1971), and Asian Surety and Insurance Co., Inc. v. Herrera, G.R. No. L-25232, December 20, 1973, 54 SCRA 312 (1973).

121 Stanford v. Texas, 379 U.S. 476 (1965).

122 Marron v. U.S. 275 U.S. 192 (1927).

Hence, under the "exclusionary rule," any evidence obtained by virtue of an illegal general warrant is "inadmissible for *any purpose* in any proceeding,"[123] because thereby the search and seizure is rendered unreasonable and unlawful.[124] It is a general rule that if a valid search reveals the commission of an offense, an officer may arrest the offender.[125] But if the search is invalid, an arrest made pursuant thereto upon incriminatory evidence gathered as a result thereof is also invalid, a rule of thumb which has come to be known as the "fruit of the poisonous tree doctrine."[126] Just as a poisonous tree will yield poisonous fruit, a tainted search also taints the illegally procured evidence.[127]

*Validity of Warrantless Arrest*

Attention may be called, however, to the fact noted by the Court that the petitioners had been under surveillance prior to the arrest "as they were then identified as members of the Communist Party of the Philippines engaging in subversive activities," a point apparently seized upon by the Court to evade the issue of the validity of the search warrant and to shift the question to the legality of the arrest made without a warrant. It remains for us to extricate the exact reasoning of the Court on this aspect, because the opinion was unusually brief and abrupt, contrary to the constitutional rule that "Every decision of a court of record shall *clearly and distinctly* state the facts and the law on which it is based."[128]

The arrest of a person without a warrant is lawful under certain circumstances, when there exists *probable cause* to believe that a crime has been committed and the person to be arrested is probably guilty thereof. There must be a reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves—not a mere general suspicion or belief which do not amount to proof—to warrant a police officer, taking into consideration his expertise and qualification, to believe that the arrestee is guilty of the offense charged.

To establish this belief, jurisprudence does not require that the arresting officer be possessed of facts within his personal knowledge, but allows that the arrest be predicated in good faith upon mere hearsay, so long as the prior reliability of the source or informant is established. In this regard, warrantless arrest is not justified if it proceeded from an unverified "tip" given by an undisclosed source. But an arrest made on the basis of a radio description of the suspect or an "all points bulletin" is valid, so long as there is reciprocal knowledge among the officers who work

123 CONST., art. IV, sec. 4, par. 2.
124 Mapp v. Ohio, 367 U.S. 643 (1961).
125 5 Am. Jur. 2d 699. Cf. 1 VARON, SEARCHES, SEIZURES & IMMUNITIES 74 (1974).
126 Wong Sun v. U.S., 371 U.S. 471 (1963).
127 1 VARON, *supra* note 125, at 12.
128 CONST., art. X, sec. 9 (emphasis supplied).

together and the person who initiated the communication has first hand information.[129]

This brings us to the sufficiency of the surveillance made upon the petitioners, who "were then identified as members of the Communist Party of the Philippines." Technically, surveillance is a form of investigation involving the "*covert* observation of places, persons and vehicles for the purpose of obtaining information concerning the identities or activities of subjects."[130] As such, it does not afford the suspect a right to dispute the findings of the surveillant or to cross-examine him on his conclusions, a disparity which an application for a judicial warrant corrects with the aid of a magistrate who determines probable cause. Thus, the additional requirement that the arrest be *promptly made* at the time the offense or some part of it is being committed, or within a reasonable time thereafter. Otherwise, the arrest can be effected subsequently only by procuring a warrant and proceeding in accordance with its terms.[131]

The main opinion likewise noted that the petitioners were apprehended during a raid. A raid is described as "a surprise invasion of a building or area" for the purpose of affecting an arrest, to obtain evidence of illegal activity by surprising in *flagrante delicto,* or to recover stolen property. It is an attack on a small scale of a limited territory, resembling a minor military operation.[132] As such, the raid must be *legal,* "having its basis in lawful process and conducted in a legal manner." This means that, ordinarily, the raiding party should possess prior judicial authority in the form of a search warrant or a warrant of arrest[133] and probable cause justifying the necessity for the raid must be established.

Hence, whether or not the arrest was made without a warrant on the basis of evidence procured by surveillance, or by virtue of a search warrant executed during a raid, the Court acted hastily and unjustifiably in adjudicating the question on the legality of the arrest without sufficient elaboration on the matter. The nature, extent, and sufficiency of the surveillance should have at least been inquired into to lay down definitive rules and limitations on executive action.

*Suspension of the Writ of Habeas Corpus*

Nonetheless, what has so far been discussed finds application only in those cases where ordinary court processes are allowed to follow the arrest of persons, as a matter of right, to determine their personal liability under the criminal law. In cases where, as viewed by the majority opinion

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129 1 VARON, *supra* note 125, at 114-28.

130 O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 199 (1976). Cf. ACLU v. Westmoreland, 323 F. 2d 1153 (1971), where foot surveillance was upheld as non-violative of the constitutional rights of individuals.

131 5 Am. Jur. 2d 725.

132 1 VARON, *supra* note 125, at 890.

133 *Ibid.*

and as supported by Chief Justice Fernando, the arrest is effected for purposes of preventive detention while the privilege is suspended, it is fruitless to argue that usual rules likewise govern.

It may not be true at all that the suspension is a *military measure* vested in the President as commander-in-chief of the armed forces, since the same Constitution that grants the power declares it as a state principle that civilian authority is "at all times" superior over the military.[134] Moreover, to describe the conditions prevailing during the suspension as "warlike" overlooks the express constitutional limitation that the sole power to declare the existence of "a state of war" is vested upon the legislature.[135] What seems to be clear is that the suspension is more in the nature of a *civil remedy* intended to broaden executive powers in times of crisis, to enable the President to meet or quell public emergencies without an open resort to arms. A call to the armed forces or a declaration of martial law are more appropriately in the nature of "war powers" of the President.

The privilege of the writ of habeas corpus is enshrined in the Bill of Rights to prevent persons from being arrested and held unlawfully and to insure that persons arrested should not be held indefinitely, but should be brought to trial within a reasonable period of time. When the privilege is *suspended,* these protections are breached, making it possible to arrest on mere suspicion persons "against whom evidence to secure conviction [is] lacking and to hold them throughout the period during which they might be dangerous without the embarrasing necessity to bring them to trial."[136] The suspension allows civil and military authorities "to hold persons in jail indefinitely without placing a charge against them or bringing them to trial.[137] Judicial authorities have construed the primary purpose of the suspension as "to enable the executive as a precautionary measure to detain without interference persons suspected of having designs harmful to public safety."[138]

> In the emergency of times, an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit, in the exercise of proper discretion, to make arrests, should not be required to produce the person arrested in answer to a writ of habeas corpus.[139]

*History*

American experience in 1861 at the outbreak of hostilities during the Civil War provides some interesting lessons in history. President Abraham

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134 CONST., art. II, sec. 8.
135 CONST., art. VIII, sec. 14, par. 2.
136 SWISHER, AMERICAN CONSTITUTIONAL DEVELOPMENT 277 (1954).
137 Mahoney, *Civil Rights Versus Military Necessity,* in CIVIL-MILITARY RELATIONS 55 (Cochran ed. 1974).
138 *Ex parte* Zimmerman, 132,F. 2d 442 (1942), *cert. denied,* 319 U.S. 744 (1943).
139 *Ex parte* Milligan, 71 U.S. 281, 297 (1866).

Lincoln suspended the privilege of the writ and directed the State Department to enforce its operation. Hundreds of arrests were made through an elaborate secret service as well as through federal marshals and military authorities.

> Prisoners were not told why they were arrested, and often the authorities acted without sufficient investigation or evidence to provide a reasonable basis for definite charges. With the privilege suspended, prisoners were held without legal action until the emergency which had led to their arrest had passed. Judges often sought to secure the release of such prisoners, but provost marshals and other military officers were usually under orders to disregard judicial mandates and to resist the execution of writs.[140]

Public officials in certain states were not spared from arrest and many of the prisoners were shipped to distant places of confinement. When the lower house of Congress asked the President to explain the grounds, reasons and evidence upon which certain persons were taken, he denied the request, replying curtly that "it is judged to be incompatible with the public interest at this time to furnish the information called for in the resolution."[141] One reason Lincoln cited for suspending the writ as a measure to subdue the rebellion in the South was the apparent incompetence of the judicial machinery, which "seemed as if it had been designed, not to sustain the government, but to embarrass and betray it,"[142] in handling the emergency.

It appears, in sum, that the power of the executive to meet the emergency by ordering the arrest and detention of persons is broad and unqualified, unless restricted by the judiciary through the Supreme Court, or by the legislature, through the enactment of a regulatory statute.

Since the Court, through the majority opinion, has ruled that the President is not limited by a Letter of Instructions which it declared to be merely an order of the executive to his subordinates and not necessarily law, nor is he bound by a judicial finding of an inferior court that there exists no probable cause to hold a person in detention, the occasion is ripe for the legislature to enact a statute regulating the exercise of this power. Executive discretion is limited by the fundamental law solely to the act of suspension itself, but the conduct of the arrest and detention may be so regulated by law as to uphold the rights of the person arrested, including the right to bail. There is enough elbow room remaining for constitutionalists and advocates of civil liberty to move about in their trying struggle for individual freedom.

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140 KELLY & HARRISSON, THE AMERICAN CONSTITUTION 438-39 (1963).
141 SWISHER, *supra* note 136, at 282.
142 *Id.*, at 283.

*The Presidential Commitment Order*

The PCO is, in fact, a superfluous instrument legally devoid of any purpose other than a questionable historical value. In the meantime that the legislative body and the Highest Tribunal have declined to take the initiative in curbing Executive excesses in times of emergency, a mere allegation on a return to a writ of habeas corpus that the privilege is suspended as to the petitioner would be enough to stop further judicial inquiry on the matter. This is the plain meaning of the often-misleading statement by Justice Davis in *Ex parte Milligan* that "the suspension of the privilege of the writ of habeas corpus does not suspend the writ itself. The writ issues as a matter of course; *and on the return made to it the court decides whether the party applying is denied the right of proceeding any further with it.*"[143]

But it was not correct for the Court to refuse cognizance of its power to review and inquire into the validity of the arrest and detention of the petitioners, and even examine the validity of the suspension itself, so long as the issues are properly raised in a petition for habeas corpus. In the case at hand, Justice Teehankee's and Chief Justice Fernando's opinions that the question of the legality of the suspension was not in issue, and hence need not be adjudicated, are not entirely true, if the Court were to grant complete relief to the parties. It can not be denied, for instance, that the arrest and detention were made during the period of suspension and in pursuance of the authority granted under Proclamation No. 2045 and the subsequent Letters of Instructions.

The Rules of Court is clear that the writ of habeas corpus extends to *all* cases of illegal confinement or detention.[144] If the petition raises the issue of the constitutionality of the Proclamation and the other executive enactments, the Court would be hard put to avail of the "political question" doctrine as a shield to evade its duty under the Constitution to assume jurisdiction over cases involving the "constitutionality . . . of any . . . executive order."[145] Deprivation of liberty without due process of law then assumes primacy as a basic issue before the Court, a plea it must resolve if only to remain true to its trust as a court of last resort and the final guarantor of fundamental rights.

The other issues decided by the Court have been sufficiently discussed in the dissent and in some parts of the comment. The proclivity of the main opinion to portray the scenario during the suspension as a combat situation has been adequately met with legal objections, foremost among them being the civil nature of the suspension as a constitutional measure.

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[143] *Ex parte Milligan*, 71 U.S. at 299 (emphasis supplied).
[144] RULES OF COURT, Rule 102, sec. 1.
[145] CONST., art. X, sec. 5, par. 2(a).

The question of bail was sufficiently met by the dissent and separate concurring and dissenting opinions.

In closing, there is some value in looking forward to what possibly augurs for us as a people were we to suffer passively the harshness of repeated and indiscriminate surveillance, one of the actions impliedly sanctioned by the majority opinion. Knowledge of political surveillance, according to a former U.S. Army officer, can have a "chilling effect" upon the willingness of persons "to participate in politics or otherwise exercise their constitutional freedoms of expression and association, and their right to petition the government for redress of grievances. The chilling effect is easiest to demonstrate where police deliberately conduct harassing surveillance in order to deter political expression and association."[146]

Worse, the refusal of the Court to assert its restraining power encourages an atmosphere of lawless dictatorship. The Lincoln era, if not our own epoch, leaves some lessons:

> "The very fact of judicial noninvolvement suggests the degree to which the courts were unable to afford customary protections. Petitioners applied to the President and to military leaders rather than to the courts. So great indeed was the scope of executive power, and so limited the power of the courts, that by the end of the war much of the deferance ordinarily accorded to the judiciary was accorded elsewhere—not, it is true, to executive and military subordinates but to the looming figure of the President, Abraham Lincoln."[147]

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[146] Pyle, *The Coming Police State?* in CIVIL RIGHTS AND LIBERTIES IN THE 1970s, 185, 202 (Pious, ed. 1973).

[147] 5 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 901-902 (1974).