# MASS SATURATION DRIVES AND THE RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES: CONSTITUTIONAL POSSIBILITIES

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## I. INTRODUCTION

The mass saturation drives conducted by the law enforcement agencies of the government have been assailed by various human rights groups as unconstitutional, hence, illegal. The focal point of the attack has been its alleged violation of due process[1] and the guarantee against unreasonable searches and seizures.[2] It is argued that mass saturation drives, wherein a large group of *innocent* people are rounded up and *arbitrarily* arrested with neither a *valid search warrant* nor a valid *arrest warrant,* constitute an unreasonable intrusion into the constitutionally protected rights of the people. For them, the concept of mass saturation inherently involves these defects such that there could be no mass saturation drive which does not involve *arbitrary warrantless arrests of innocent people.* Confining the concept of mass saturation within such definition would understandably lead one to conclude that mass saturation drives are illegal. But to utilize such a definition in the determination of its legality would be to "load the dice", so to speak. For when our concept inherently involves an illegality, any purported attempt to ascertain its legality would be a useless exercise, having predetermined the result.

There has to be, at the outset, an objective definition of mass saturation — one which does not presuppose lack of basis for arrest and illegality of search or arrest warrants obtained. These matters do not form part of the concept of mass saturation but are to be determined in every case wherein mass saturation drives are conducted. They are variables which determine the legality or illegality in the manner of its execution and not of the concept itself. Thus, we have to distinguish the possible illegality of mass saturation operations, *per se,* from the illegality its execution may have involved.

This is not to say that our concept of mass saturation should not presuppose the existence of factual matters such as the absence of arrest or search warrants. The critics' conception of mass saturation is flawed not because they presuppose the absence of search warrants and arrest warrants, but because they presuppose that the operation was arbitrary, that the people

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1 CONST. art. III, sec. 1.

2 CONST. art. III, sec. 2.

arrested were innocent, and that search warrants and arrest warrants were not obtained although they were necessary under the circumstances. Such conception is flawed not because it presupposes certain facts, but because it presupposes certain *conclusions of law*. Hence, although we may presuppose the existence of objective facts, our conception of mass saturation should not assume certain facts, which, taken together, invariably point to a particular conclusion of law.

Bearing these in mind, our inquiry must be founded upon a legally neutral conceptual formulation presenting the most basic elements of "mass saturation drives." For the purpose of this paper, a "mass saturation drive" involves the following component steps: (1) the military/police authorities choose a community where criminal elements, specifically members of the Communist Party of the Philippines or the New People's Army are believed to be in hiding; (2) the members of such community are rounded up, interrogated and investigated; (3) upon their identification, those against whom no offense is to be charged are released while the rest are detained; (4) those to be detained, whether on the strength of confidential (intelligence) reports, previous surveillance, or identification from masked informers, are brought to the police station for further investigation, after which they are formally charged. From the previous mass saturation drives conducted by the law enforcement agencies, it is clear that the questioned operations do not necessarily involve warrantless arrests and searches. The requirements for the validity of seizures based on a warrant already being firmly established in our law and jurisprudence, this paper shall deal mainly with mass saturation drives conducted without complying with the warrant requirement. Searches and seizures are generally held to be unreasonable unless authorized by a validly issued search warrant or warrant of arrest, subject to exceptions, specified by the law and jurisprudence on the matter, where the factual circumstances justify the warrantless search or seizure. As a result, the constitutional issue involved becomes "pre-eminently the sort of question which can be decided in the *concrete factual context of the individual case.*"[3] This paper, then, shall consider the constitutional possibilities concerning mass saturation drives in different factual settings ranged against the jurisprudential framework established both by the United States Supreme Court and the Philippine Supreme Court in interpreting the constitutional prohibition against unreasonable searches and seizures.

## II. THE RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES

### A. *In General*

The Constitution protects individuals from unreasonable searches and seizures. Art. III, Sec. 2 provides:

[3] People v. CFI of Rizal, Br. IX, 101 SCRA 86, 107 (1980), (citations omitted).

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge 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."[4]

The language of the provision unequivocally affirms the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.[5] It connotes a reverence for personal liberty that restricts the government from detaining a citizen even briefly without appropriate cause, respect for the sanctity of the home that demands the highest standard before that threshold may be crossed, and regard for possession of property that prohibits the government from seizing it without authorization or emergency.[6] Its principal function, therefore, is the promotion of freedom by limiting governmental interference in the affairs of individuals, although it is frequently discussed in terms of privacy.[7] But unlike other constitutionally protected rights, the standards set by the search and seizure provision are couched in terms of reasonableness. Faced with the continuing tension between the requirements of effective law enforcement and the people's right to privacy, courts have difficulty in striking that proper balance which, without unduly hampering police operations, provides ample protection to personal security. In every case, the peculiar circumstances obtaining determine the precise boundaries of reasonableness.

### B. *The Changing Role of the Warrant Requirement*

The language of the search and seizure provision of the Constitution sets forth in conjunctive clauses the prohibition against unreasonable searches and seizures and the requisites for a valid warrant. Generally, an arrest is considered reasonable when supported by a warrant. It remains uncertain, however, what role the warrant clause is to play in determining reasonableness. One theory emphasizes the link between the reasonableness clause and the warrant clause such that all searches and seizures not supported by a warrant based on probable case and appropriately specified are unreasonable and so impermissible.[8] Another theory is that while the warrant clause serves to establish the standards for a valid warrant, the presence or absence of a warrant is not conclusive as to reasonableness. Under this theory the question of reasonableness is not to be judged by the mechanical test of

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[4] The Fourth Amendment of the United States Constitution similarly provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched and the persons or things to be seized."

[5] Payton v. New York, 445 U.S. 573 (1980).

[6] *Id.*

[7] Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need For a Rule*, 39 Has L.J. 283 (1988).

[8] Salken, *op. cit.*, note 9.

whether the police obtained a warrant, but by all the facts and circumstances of each case, hence, a balancing.[9] We need to reconcile, therefore, the reasonableness clause's general proscription against unreasonable searches and seizures with the warrant requirement.

The interrelation between the two clauses must be determined with regard to the purposes of the constitutional prohibition itself, how the citizens' privacy interests are to be upheld without unduly restricting the government's power to intrude in pursuing important government objectives. If the warrant requirement is to be made an absolute precondition for the legality of a search or seizure, the government's power to intrude would be severely restricted and may hamper government efforts to control criminality. On the other hand, if the reasonableness clause is construed as independent of the warrant clause, the scope of valid governmental intrusions broadens considerably, while encouraging the law enforcement officers to wholly forego the process of obtaining warrants. Reasonableness is a slippery concept that, without definitional restraints, can allow the range of acceptable governmental intrusions to expand and overwhelm the privacy interests at stake.[10]

*Warrant Requirement as the Dominant Clause*

Upon a purely textual approach, one may conclude that the warrant clause is a partial explication of the first clause, providing that the right of the people against unreasonable searches and seizures shall be inviolable. Consequently any search conducted without a warrant is, by that fact alone, unreasonable.[11] Instead of merely giving an example of an unreasonable search or seizure, the second clause actually defines an unreasonable search or seizure as that made without a warrant. Prior to 1969, the U.S. Supreme Court had indicated a strong preference for the warrant requirement, relegating the reasonableness clause to a secondary role,[12] that is, to cover cases where exigent circumstances render the procuring of a warrant unnecessary or impossible.[13] This preference, premised on a combined historical and textual argument, construes "unreasonable searches" in relation with the text of the

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9 *Id.*

10 Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry, supra; See generally Amsterdam, Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 393-94 (1974).

11 *See* Weinreb, *Generalities of the Fourth Amendment,* 42 U. CHI. L. REV. 47 (1974). *But see* Sundby, *op. cit.*, note 10, arguing: "A monolithic model would make the warrant clause the complete focus of fourth amendment analysis. A government search or seizure would always require probable cause, and only exigent circumstances would excuse the absence of a warrant . . . A monolithic reading of the amendment, however, *is difficult to justify textually because it makes the amendment's "unreasonable search or seizure" language at best descriptive and at worst redundant.*" (italics supplied)

12 *See* Agnello v. United States, 269 U.S. 20, 32 (1825) (more).

13 "Exigent circumstances" exist when it is necessary for police to arrest a suspect without delaying to obtain a warrant. Generally, it is the Supreme Court's category for events not falling into the other specific exceptions but nonetheless requiring immediate action. In these cases, a warrantless arrest or search is justified, given a compelling need for immediate action, and there being no time for the procurement of a warrant. *See, e.g.*, Warden v. Hayden, 387 U.S. 294 (1967).

fourth amendment and the historical purpose for its enactment. As explained by the Court in *Chimel v. California*:[14]

> One cannot wrench "unreasonable searches" from the text and context and historical content of the Fourth Amendment. It was the answer of the colonial Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed "unreasonable." Words must be read with the gloss of experience of those who framed them. x x x When the Fourth Amendment outlawed "unreasonable searches" and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity and gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity. Even a warrant cannot authorize it except when it is issued "upon probable cause x x x and particularly describing the place to be searched, and the persons or things to be seized."

The Court concluded that in the scheme of the amendment, the requirement that no "warrants shall issue, but upon probable cause," plays a crucial part.[15] Rejecting an independent role for the reasonableness clause, the Court explained its wariness of the open-endedness of the fourth amendment test based on reasonableness, such being purely subjective and allowing unrestrained analysis which may diminish or eliminate altogether, Fourth Amendment protection. Previously, in *United States v. Rabinowitz*,[16] the Court had utilized a reasonableness approach rather than an exceptions approach, holding that a warrant was not required for a search incident to an arrest:

> "The Constitution does not say that the right of the people to be secure in their persons should not be violated without a search warrant if it is practicable to procure one. The mandate of the Fourth amendment is that the people shal be secure against *unreasonable searches*. x x x The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn, depends upon the facts and circumstances — the total atmosphere of the case."

This approach, however, was rejected by the Court in *Chimel*,[17] affirming that the warrant is not a mere formality and that "(w)e cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative."

*Rise of the Reasonableness Clause*

The balancing of interests theory dominance in the area of Fourth Amendment analysis began in *Camara v. Municipal Court*,[18] which involved

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[14] 395 U.S. 752, 765 (1969).
[15] *Id.* at 761.
[16] 339 U.S. 56 (1950).
[17] *Id.*
[18] 387 U.S. 523 (1971).

administrative searches. Overruling *Frank v. Maryland*[19] decided eight years earlier, the Supreme Court held that administrative searches involve governmental intrusion within the scope of the fourth amendment's protection and requires the authorization of a warrant. In *Frank*, the Court, through Justice Frankfurter maintained the traditional view that if administrative searches were subject to full fourth amendment protections, the warrant requirement must be complied with.[20] Cognizant of the fact that requiring a warrant based on probable cause for housing inspections would defeat the inspections' objective of maintaining community health, the Court held that the privacy interest involved did not concern a criminal investigation, touching "upon the periphery" of the fourth amendment interests protected against invasion by the government.[21] As the Constitution's prohibition against official invasion arose almost entirely from the individual's fundamental right to be secure from evidentiary searches made in connection with criminal prosecutions, the fourth amendment's full protections did not extend to housing inspections.[22] Rather than applying this all-or-nothing approach, the *Camara* majority recognized that a balancing of interests approach can be applied to governmental intrusions — even those not involving exigent circumstances — and that this balance can be reflected in a modification of fourth amendment protection techniques rather than their abandonment.[23] Rejecting the premise that housing inspections were not criminal investigations, merely touching "upon the periphery" of the fourth amendment, the Court held that the inspection programs in fact went to the fourth amendment's central purpose of "safeguard[ing] the privacy and security of individuals against arbitrary invasions of government officials."[24] Having elected to assess the government inspection program within the traditional warrant and probable cause framework, the necessity of modifying the clause's requirements to permit housing inspections was evident.[25] While traditional probable cause required facts sufficient to justify a reasonably cautious person in believing that another had committed or was committing a crime, the *Camara* majority, rather than requiring individualized suspicion, determined probable cause on the basis of "reasonableness," considering both the governmental and individual interests involved. The Court explained:[26]

> "x x x In determining whether a particular inspection is reasonable — and thus determining whether there is probable cause to issue a warrant for that inspection — the need for the inspections must be weighed in terms of these reasonable goals of code enforcement."

The cost of the Court's adherence to the traditional warrant and probable cause framework, therefore, was the redefinition of the concept of probable

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19 359 U.S. 360 (1959).
20 *Id.* at 372.
21 *Id.* at 367.
22 *Id.* at 365.
23 Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Court Action Since Camara and See*, 61 CALIF. L.R. 1011, 1012.
24 Camara v. Municipal Court, *supra* at 528.
25 Sundby, *op. cit.*, note 10 at 392.
26 398 U.S. at 534-35.

cause. In order to preserve its function as a prerequisite to the issuance of a warrant, probable cause was recast as a flexible concept through which reasonableness, as an independent factor, was employed in fourth amendment analysis. Thus, while the traditional fourth amendment analysis considered a search or arrest as reasonable only when a warrant based on probable cause issued, after *Camara,* instead of probable cause defining reasonableness, it was reasonableness which became the basis of probable cause.[27]

The reversal of the roles of probable cause and reasonableness expanded the range of acceptable governmental behaviour beyond intrusions based on individualized suspicion to include activities in which government interest outweighed the individual's privacy interests. In *Terry v. Ohio,*[28] reasonableness as an independent factor gained a foothold in fourth amendment analysis in the area of criminal investigations. As in *Camara,* the *Terry* Court rejected the all-or-nothing approach invoked by the State, which argued that a stop and frisk was not a search and seiure under the fourth amendment.[29] The difficulty of the Court's position lay in how to extend the fourth amendment protection to stop and frisk situations, while addressing the legitimate need to conduct weapon frisks with less than probable cause and without a search warrant. Consequently, as in *Camara,* the Courts had to choose between adapting the traditional probable cause and warrant requirements to the situation, or adopting a new standard altogether. Unlike in *Camara,* however, the Court did not rely upon a flexible probable cause concept, but instead held that the warrant clause did not apply to the police conduct in issue. The very nature of the street encounter of necessity excused the warrant requirement.[30] The Court explained:

> "If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether "probable cause" existed to justify the search and seizure which took place. However, that is not the case x x x [W]e deal here with an entire rubric of police conduct — necessarily swift action predicated upon the on-the-spot observations of the officer on the beat — which historically has not been, and as a practical matter could not be, subjected to the warrant procedure."[31]

Instead of applying the probable cause and warrant requirement, the Court decided that the reasonableness clause's "general proscription against unreasonable searches and seizures" should control.[32] Thus, "reasonable belief" of danger, based on specific and articulable facts, suffices to justify intrusion, even where those facts are of considerably less specificity than would be required to constitute traditional probable cause.[33] Reasonableness

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[27] *See* Sundby, *op. cit.,* note 10 at 394.
[28] 392 U.S. 1 (1968).
[29] *Id.* at 16.
[30] *Id.* at 20.
[31] *Id.*
[32] *Id.*
[33] *Id. at* BF, *But see Greenberg, op. cit.,* note 26 at 1015 for a brief comparison of cases utilizing standards less than probable cause.

should be judged by balancing the government's interests against those of the individual. This approach by creating a new standard of reasonable suspicion instead of utilizing the flexible probable cause concept, made reasonableness an independent factor in fourth amendment analysis.

*Fourth Amendment Analysis after Camara and Terry*

Even after *Terry*, the rulings by the Supreme Court on search and seizure law was continually marked with inconsistencies, leaving generally unclear the limits to the application of the reasonableness clause. In *Adams v. Williams*,[34] the Court held that the *Terry* stop allows brief stops of "suspicious" individuals to determine the individuals' identity or to obtain more information. In *United States v. Place*,[35] the scope of *Terry* was broadened to include the seizure of personal possessions. As cases falling wthin the scope of the *Terry* stop are not subject to the probable cause requirement, and are consequently governed by the reasonableness clause, any expansion of the scope of *Terry* necessarily increases the role of the reasonableness clause.

*Dunaway v. New York*[36] was an attempt to limit the expansive use of *Terry*. *Dunaway* involved the detention of the defendant without being formally arrested, there being no probable cause. Rejecting the argument of the state that *Terry* had established a "multifactor balancing test of 'reasonable police conduct under the circumstances'" applicable to all seizures not qualifying as technical arrests,[37] the Court held that *Terry* must be construed as a narrow exception to the general rule that probable cause applies. Distinguishing the case from *Terry*, the Court explained that the *Terry* court applied the balancing test instead of the probable cause standard because the intrusion involved in "stop and frisk" cases "fell far short of the kind of intrusion associated with an arrest."[38]

The attempts to limit *Terry*, however, failed to reverse the trend towards the increasing dominance of the reasonableness balancing test. In *New Jersey v. T.L.O.*,[39] the Court for the first time applied the reasonableness balance test to a full-scale search.[40] The Court asserted that although both probable cause and the warrant requirement affect the reasonableness of the search, under some circumsances, neither would be mandatory.[41] The reasonableness balancing test was viewed by the Court as the rule rather than the exception[42] and not restricted to searches or seizures involving only minimal intrusion.

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34 407 U.S. 143 (1972).
35 103 S. Ct. 2637 (1983).
36 442 U.S. 200 (1979).
37 *Id.* at 213.
38 *Id.* at 214.
39 469 U.S. 325 (1985).
40 *Id.* at 337; *cited* in Sundby, *op. cit.*, note 10 at 413.
41 469 U.S. 325, 341-43.
42 *Id.* at 352.

## III. CONSTITUTIONAL POSSIBILITIES

In assessing the legality of mass saturation drives as permissible searches and seizure, several factual matters must be considered as against the requirements of the search and seizure provision of the Constitution, to wit:

(1) existence of a search warrant or an arrest warrant;
(2) the nature of the seizure; and
(3) existence of probable cause or reasonable suspicion.

### *A. Is the warrant requirement dispensable?*

The question regarding the role of the warrant requirement has been particularly difficult, as evidenced by the U.S. Supreme Court's continual struggle in attempting to develop a coherent analytical framework for the fourth amendment. Owing, perhaps, to the lack of opportunity to rule upon situations as diverse as the U.S. Supreme Court had faced, the Philippine Supreme Court has shown much more consistency in their approach to search and seizure cases. As a result Philippine jurisprudence on the matter has remained largely unchanging. A cursory examination Philippine case law would reveal a restrictive interpretation of the search and seizure provision of the constitution, tending to support the view that mass saturation drives, which are more often than not conducted without an arrest warrant or a search warrant, are *per se*, illegal. Yet in light of the recent developments in American case law, a closer examination of our search and seizure law would be desirable, at the least.

*Allowable warrantless seizures*

Searches and seizures not supported by a warrant are not necessarily unreasonable. Jurisprudence expressly recognizes several exceptions to the unreasonable searches and seizures prohibition. Thus, the Supreme Court has ruled in favor of the validity of searches made incidental to a valid arrest,[43] search of moving vehicles,[44] seizure of goods concealed to avoid duties,[45] seizure of evidence in plain view,[46] and when there is waiver of the

[43] Moreno v. Ago Chi, 12 Phil. 439, 442 (1909) where it was held: "An officer making an arrest may take from the person arrested any money or property found upon his person which was used in the commission of a crime or was the fruit of the crime or which might furnish the prisoner with the means of committing violence or escaping, or which may be used in evidence in the trial of the case..."

[44] People v. CFI, 101 SCRA 86 (1980), *citing* Carrol v. U.S., 267 U.S. 132. "Searches and seizures without warrant are valid if made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction; Papa v. Mago, 22 SCRA 857 (1968).

[45] Papa v. Mago, *supra.*

[46] *See* Roan v. Gonzales, 145 SCRA 687. The Supreme Court, while recognizing the plain view exception in *Harris v. U.S.*, 390 U.S. 234, rejected the State argument that seizure without a warrant of prohibited articles was valid, as the subject was illegal *per se.* Thus, a seizure can be made ony when preceded by a valid search. The Court explained: "It does not follow that because an offense is *malum prohibitum,* the subject thereof is necessarily illegal *per se.* Motive is immaterial in *mala prohibita,* but the subjects of this kind of offense may not be summarily seized simply because they are prohibited. A search warrant is still necessary."

right.[47] As regards warrantless arrests, the Revised Rules on Criminal Procedure[48] enumerates the instances when arrests without warrant are lawful,[49] to wit:

> (a) when, in his (the arresting officer's) presence, the person to be arrested has committed, is actually committing, or is attempting to commit an offense;
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> (b) when an offense has in fact just been committed, and he has personal knowledge of facts indicating that the person to be arrested has committed it; and
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> (c) when the person to be arrested is a prisoner who has escaped from a penal establishment or place where he is serving final judgment or temporarily confined while his case is pending, or has escaped while being transferred from one confinement to another.

By virtue of such enumeration of the instances where arrests without warrant may be lawfully made, the question of legality of any warrantless arrest is necessarily directed to the determination of whether it falls within the scope of the rule. The legality of mass saturation drives conducted without arrest warrants may possibly be defended on the basis of the first exception.

In the case of *Garcia-Padilla v. Enrile*,[50] the accused were arrested while having a meeting in the house of Dra. Parong. Prior thereto, they had been under surveillance as they were identified as members of the Communist Party of the Philippines. The Court held that the warrantless arrest was lawful under circumstances. The crimes of insurrection or rebellion, subversion or proposal to commit such crimes are all in the nature of continuing offenses, thus, setting them apart from common offenses.[51]

Mass saturation drives were conducted in order to suppress the increasing communist threat. These drives, therefore, are weapons against the crimes of rebellion. Where arrests of suspected rebels are made in the course of a mass saturation drive, the absence of a judicial warrant does not necessarily taint said arrests with invalidity. Precisely due to the nature of rebellion as a continuing offense, the arrest of a suspected member of the Communist Party of the Philippines or the New People's Army is arguably an arrest of a person actually committing an offense, and therefore valid despite the absence of a warrant. As explained by the Court:[52]

> "The arrest of persons involved in the rebellion whether as its fighting armed elements, or for committing non-violent acts but in furtherance of rebellion, is more an act of capturing them in the course of an armed conflict, to quell rebellion, than for the purpose of immediately prosecuting

[47] De Garcia v. Locsin, 65 Phil. 689, 694-5 (1938). But to constitute a waiver, "it must appear, first, that the right exists; secondly, that the person involved had knowledge, either actual or constructive of the existence of such right; lastly, that said person had an actual intention to relinquish the right.

[48] Effective January 1, 1985, as amended in 1988.

[49] Rule 113, Sec. 5.

[50] 121 SCRA 472, 489.

[51] *Id.*

[52] *Id.* Thus, in this case, membership in the CPP is itself the crime. The difficulty of this position lies in the determination of the overt act.

> them in the court for a statutory offense. The arrest, therefore, need not follow the usual procedure in the prosecution of offenses which requires the determination by a judge of the existence of probable cause before the issuance of a judicial warrant of arrest x x x. Obviously, the absence of a judicial warrant is not legal impediment to arresting or capturing persons committing overt acts but equally in pursuance of the rebellious movement."

On this basis alone, it may be possible to defend the legality of mass saturation drives, at least with respect to the warrant requirement objection. We have to consider, however, that while *Garcia* has not been expressly overturned on this point, neither has it received any express support from later cases.

A further statement by the Court deserves comment. The warrantless arrest was justified by the Court as being "impelled by the exigencies of the situation that involves the very survival of society and its government and duly constituted authorities."[53] By considering the weighty governmental interest in justifying the arrests, the Court is implicitly applying a balancing of interests approach, central to which is the reasonableness clause. Since the adoption of the 1935 Constitution, search and seizure cases has consistently been decided utilizing the probable cause and warrant methodology.[54] Thus, the requirement of reasonableness is deemed satisfied only where a warrant is issued by a judge who must be convinced through an examination under oath or affirmation of the complainant and the witnesses he may produce that there is probable cause for its issuance.[55] Similarly, American case law before *Camara* and *Terry* demonstrated relative agreement as regards the role of probable cause and the warrant requirement. Yet, when the facts in *Camara* and *Terry* presented themselves before the Court, the need for greater flexibility in fourth amendment analysis so as not to un-

[53] *Id.* The Court continued: "If killing and other acts of violence against the rebels finds justification in the exigencies of armed hostilities, which is of the essence of waging a rebellion or insurrection, most assuredly so in case of invasion, merely seizing their persons and detaining them while any of these contingencies continues cannot be less justified. x x x What should be underscored is that if the greater violations 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."

[54] Most search and seizure cases involve questions as to the validity of search warrants to prove the reasonableness or unreasonableness of a search or seizure. People v. Sy Juco, 64 Phil. 667 (1937); Pasion Viuda de Garcia v. Locsin, 65 Phil. 689 (1938); Yee Sue Kuy v. Almeda, 70 Phil. 141 (1940); Alver v. Dizon, 76 Phil. 637 (1946); Moncado v. People's Court, 80 Phil. 1 (1948); Amarga v. Abbas, 98 Phil. 738 (1956); Stonehill v. Diokno, G.R. 1950, June 19, 1967; Burgos v. Chief of Staff, 133 SCRA 800 (1984); Corro v. Lising, 137 SCRA 341 (1985). In cases involving arrests without warrant, probable cause is considered the touchstone for validity. De Garcia v. Locsin, 65 Phil. 689 (1938); Lopez v. Commissioner of Customs, 68 SCRA 320 (1975); People v. CFI of Rizal, 101 SCRA 86 (1980).

[55] FERNANDO, THE BILL OF RIGHTS 176 (1st ed. 1970) *citing* Pasion Viuda de *Garcia v. Locsin*, 65 Phil. 689, 693 (1938); BERNAS, THE 1987 PHILIPPINE CONSTITUTION A REVIEW-PRIMER 46 (1st ed., 1987) explaining unreasonable searches and seizures: "The plain import of the language of the Constitution, which in one sentence prohibits unreasonable searches and seizures and at the same time prescribes the requisites for a valid warrant, is that searches and seizures are normally unreasonable unless authorized by a validly issued search warrant or warant of arrest x x x."

necessarily frustrate valid governmental interests became apparent. The reasonableness clause, which had traditionally been relegated to a secondary role, played an increasingly larger role ever since.

*Philippine Jurisprudence and the Reasonableness Clause*

Noting that the gradual evolvement of fourth amendment jurisprudence led to the acceptance of the expansive role of the reasonable clause, there is no discounting the possibility of Philippine jurisprudence developing towards the same direction. Philippine jurisprudence is undeniably largely influenced by American case law, due to the fact that our laws are mainly patterned from American law.

The trend towards expanding the role of the reasonableness clause began when the American Supreme Court faced two penumbral areas in search and seizure analysis, namely, stop and frisk situations and administrative inspections.[56] These areas so far have not been touched upon in Philippine jurisprudence. However, a comparison between the search and seizure provision contained in the Philippine Constitution and that in the United States Constitution would show not only that there is no obstacle to the adoption of the *Camara* and *Terry* doctrines, but also that the refinement embodied in the Philippine search and seizure provision, in fact, would seem to preclude us from going towards a different direction. The Fourth Amendment of the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated x x x." On the other hand, Article III, Sec. 2 of the Philippine Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures *of whatever nature and for any purpose* shall be inviolable x x x (italics supplied). The clause "of whatever nature and for any purpose" was introduced in the 1973 Constitution, and subsequently adopted by the 1987 Constitution. While the records of both the Constitutional Convention of 1971 and of the Constitutional Commission yield no explanations for the new language, the intent may be gleaned from the plain meaning of the clause, that is, the extension of search and seizure protection to all forms of seizures, whether constitutive of an arrest or not. It has been opined that the new phrase effectively extended the search and seizure clause to at least two penumbral areas.[57] One of these penumbral areas, which remains untouched by Philippine jurisprudence, concerns the issue of whether or not administrative inspections are subject to the constitutional proscription against unreasonable searches and seizures, which issue was the subject of *Camara*.[58] Clearly,

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[56] *Infra.*

[57] BERNAS, THE CONSTITUTION OF THE PHILIPPINES: A COMMENTARY (COPYRIGHT 1987) 100.

[58] The other penumbral area concerns constructive search contained in *subpoena duces tecum* or an order for the production of books and papers (Rule 27, Rules of Court).

effectuating the expansion of constitutional protection by virtue of the new clause with respect to administrative inspections would result in a virtual adoption of the *Camara* decision. For as the American Supreme Court observed, extending fourth amendment protection to administrative inspections would be incompatible with strict adherence to the traditional probable cause and warrant analysis. The very nature of said inspections makes impossible compliance with the requirement of individualized suspicion, precluding the issuance of a warrant. Thus extension of fourth amendment protection to administrative inspections would necessitate the redefinition of probable cause, from one requiring individualized suspicion to one based on "reasonableness." The only other option is to drop the warrant requirement and justify the search purely on the basis of reasonableness as a factor independent of the warrant clause. In both instances, the application of "reasonableness" as a dominant factor in search and seizure analysis is necessary to justify the expansion of constitutional protection to cover all searches and seizures "of whatever nature and for any purpose."

Another area yet untouched by Philippine jurisprudence concerns stop and frisk situations. The question regarding the right of a police officer to make an on-the-street stop, interrogate and pat down for weapons is particularly troublesome, considering that the intrusion involve is much greater than a "petty indignity." The issue was first squarely presented to the United States Supreme Court in *Terry v. Ohio,*[59] which was not decided until after six months of deliberation following full argument and unusually elaborate briefing.[60] Preliminary to the determination of whether the stop and frisk violated the Fourth Amendment, the Court had to establish at what point the Fourth Amendment becomes relevant. It was argued that the police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a "search" or "seizure." The Court rejected the contention, holding that when a police officer accosts an individual and restrains his freedom to walk away, he has seized that person; and that a frisk is a "serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and is not to be undertaken lightly. Such a holding is also valid within the context of Philippine constitutional law, considering that our search and seizure provision is explicit in extending its protection to searches and seizures "of whatever nature and for any purpose." This being the case, however, he would have to contend with the more difficult question faced by the United States Supreme Court in *Terry,* which is whether the police conduct may be justified by the existence of probable clause, or negatively stated, whether the absence of probable cause invalidates the police conduct. It is evident that in these situations, complying with the warrant requirement would be impracticable.

Thus, as reasoned out in *Terry*:

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[59] *Infra.*

[60] *See* Pennsylvania v. Mimms, 434 U.S. 106, 115 (Justice Stevens, *dissenting*)

> "But we deal here with an entire rubric of police conduct — necessarily swift action predicated upon the on-the-spot observations of the officer on the beat — which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures."[61]

We would therefore be constrained to resolve the issue outside the traditional warrant and probable cause framework, opting instead as the *Terry* majority did, for an analysis based solely on reasonableness. That is the only available option considering the general interest in effective crime prevention and detection, which interest may be served only by upholding the questioned police conduct. While accepting reasonableness as the touchstone in the analysis of the legality of a search and seizure makes impossible strict adherence to the traditional warrant and probable cause framework, this seems to be an inevitable result of the expansion of the scope of the search and seizure provision to include those "of whatever nature and for any purpose" viewed against the weighty governmental interest in investigating or preventing a crime. And a logical consequence of such acceptance would be to diminish the role of the warrant clause in ascertaining the validity of particular searches and seizures, and the expansion of the range of permissible governmental intrusions. Warrantless searches and seizures are not to be considered *per se* unreasonable, but must be considered so upon failure to justify the necessity of the intrusion caused by the police action undertaken. The crucial inquiry then concerns not the existence of a warrant, but reasonableness as determined by a balancing of interests, of the police activity given the specific factual context.

### *B. Reasonableness of Warrantless Saturation Drives*

An assessment of the reasonableness of mass saturation drives must necessarily "first focus upon the government interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen, for there is no ready test for determining reasonableness other than by balancing the need to search or [seize] against the invasion which the search or [seizure] entails."[62] While it is not disputed that the governmental interest in quelling communist insurgency is substantial, yet the urgency attending the situation which prompted the law enforcement authorities to resort to mass saturation drives may be better appreciated with a short factual background.

In July 1987, 493 people died in insurgency-related incidents, an average of 16 a day that almost doubled the average for 1986.[63] Between February 1987 when the peace talks collapsed, and October 1987 when the first much-publicized mass saturation drive was conducted, more than

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[61] 392 U.S. 1, 20.
[62] Terry v. Ohio, 392 U.S. 1, 20 *quoting* Camara v. Municipal Court, *supra*.
[63] Phil. Daily Inquirer, Sept. 7, 1987, p. 9, col. 1.

100 policemen and military men were killed. On August 2, 1987, Local Government Secretary Jaime Ferrer and his driver-bodyguard were killed in an ambush. Ferrer's killing came on the heels of a warning from urban terrorists of the New People's Army that he could be assassinated if he did not stop organizing anti-communist groups in the country.[64] On Aug. 3, six constabulary soldiers were killed and 12 other troopers were wounded in clashes with New People's Army guerillas in Batangas.[65] The NPA killed two policemen in Cebu City and held hostage some 150 workers of a mining firm in Surigao del Norte last Aug. 4.[66] A town mayor, a police station commander, and six others were killed when 200 NPA guerillas raided the town hall in Bangui, Ilocos Norte on Aug. 5.[67] At least 20 policemen and civilians were killed in shooting incidents during the six-month period preceding August.[68] On Aug. 23, a businessman who acted as a bodyguard of a Congressman was shot dead by 4 suspected members of the NPA "sparrow" unit in Malabon. A police chief in Bicol was also killed in an ambush of NPA rebels.[69] On Aug. 27, about 200 heavily-armed NPA guerillas raided a cement factory in Batangas, killed a police sergeant, and fled with 4,125 sticks of dynamite and 1,725 blasting caps. During the month of September, the communist rebels destroyed no less than 6 bridges in Bicol in an apparent bid to cut off Bicol region from Metro Manila.[70] On Oct. 14, 1987, a powerful bomb exploded at the east front lobby of the Manila Garden Hotel in Makati, seriously injuring 4 persons.[71] A day later, various government and private establishments in Makati received bomb threats.[72] On Oct. 17, an army battalion commander and two other soldiers were killed in an ambush staged by NPA rebels in Ilocos Norte.[73] In Cotabato City, the acting mayor and seven companions were killed in another ambush. These events preceded the *saturation drive* conducted by the Western Police District on Oct. 17, where more than 700 suspected criminals were arrested. Police insiders said that the saturation drive was conducted "not only to arrest suspected criminals but also to neutralize the leftist and rightist rebels believed to be hiding in the city."[74]

On Oct. 27, three major bridges in Misamis Oriental were bombed by communist terrorists.[75] A rebel claimed that more bridges will be blasted, vital government and military installations bombed and Alsa Masa check-points destroyed when NPA escalates its all-out "strategic offensive" against

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[64] Manila Bulletin, Aug. 3, 1987, p. 1, col. 5.
[65] Manila Bulletin, Aug. 4, 1987, p. 1, col. 3.
[66] Manila Bulletin, Aug. 5, 1987, p. 1, col. 1.
[67] Manila Bulletin, Aug. 6, 1987, p. 1, col. 4.
[68] Manila Bulletin, Aug. 7, 1987, p. 1, col. 5.
[69] Manila Bulletin, Aug. 24, 1987, p. 1, col. 5.
[70] Phil. Daily Inquirer, Sept. 23, 1987, p. 1, col. 5.
[71] Manila Times, Oct. 15, 1987, p. 1, col. 1.
[72] Manila Times, Oct. 15, 1987, p. 1, col. 1.
[73] Manila Times, Oct. 17, 1987, p. 1, col. 6.
[74] Manila Times, Oct. 19, 1987, p. 1, col. 3.
[75] Manila Times, Oct. 27, 1987, p. 1, col. 3.

intensified military campaign.[76] On Oct. 30, NPA terror squads struck again, killing three lawmen and 2 civilians, bringing to 10 the fatalities of NPA "sparrow" attacks within a three-day period.[77] Manila policemen responded conducting a saturation drive in the state-run Polytechnic University of the Philippines, wherein 39 suspected communist urban terrorists were arrested. Immediately after the raid, human rights group condemned the raid, assailing it as a human rights violation.[78] On Nov. 4, military and police authorities detained 29 "tatooed" suspected members of the New People's army following the round-up of 1,500 men at Pasay City's Maricaban squatters' area.[79] But that was not sufficient as the rebels, upon resumption of their terroristic activities on Nov. 2 with the killing of a PC soldier in Mandaluyong, raid in an Angeles subdivision, attack of Abra municipal home, and the burning of its mayor's house, killing 13 military and police personnel within a week.[80]

It was within this factual context that the assailed saturation drives were conducted. Whether or not the pervading atmosphere of urgency was merely exacerbated by effective propaganda by detractors of the government, the alarming increase in terroristic activities of the "sparrow units" of the New People's Army had to be curbed by decisive police action. The mass saturation drive may have been employed because the elusive "sparrows" are known to sink into densely populated areas in order to avoid identification. Ordinary police procedures, coupled with a strict warrant requirement, are relatively cumbersome and ineffective. Nevertheless, without going into the legality of the procedure followed in the saturation drives, the compelling government interest in employing more intrusive police activities must be conceded. The state possesses the inalienable right of protection and self-preservation from the acts of lawless, disorderly persons who may have banded together for the purpose of opposing its civil or political authority.[81] As the Supreme Court explained:

> "That the government has a right to protect itself against subversion is a proposition too plain to require elaboration. Self-preservation is the 'ultimate value' of society. It surpasses and transcends every other value. If a society cannot protect its very structure from armed internal attack... no subordinate value can be protected."[82]

In matters involving the life of the state, the ordinary rights of individuals must yield to the necessities of the moment.[83] Considering the substantial public interest to be protected, the standards governing the determination of the validity of police action must be qualitatively different from those

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[76] Manila Times, Oct. 28, 1987, p. 1, col. 1.
[77] Manila Times, Oct. 30, 1987, p. 1, col. 3.
[78] The Phil. Star, Nov. 2, 1987, p. 1, col. 2.
[79] The Phil. Star, Nov. 9, 1987, p. 1, col. 2.
[80] The Phil. Star, Nov. 7, 1987, p. 1, col. 2.
[81] Moyer v. Peabody, 212 U.S. 78.
[82] People v. Ferrer, 48 SCRA 382 (1972).
[83] Moyer v. Peabody, *supra.*

in relation to searches and seizures for other offenses. It should be less rigorous, allowing greater flexibility in the exercise of governmental powers.

### *C. Probable Cause and Reasonable Suspicion*

As in the American Constitution, the prohibition under our Constitution is against *unreasonable seizures*. And as not all seizures may be considered "arrests", the scope of permissible seizures is considerably larger than allowed in Rule 113, Sec. 5 of the Rules on Criminal Procedure. Arrest is the taking of a person into custody in order that he may be bound *to answer for the commission of an offense.* The essence of probable cause is the possibility of inference of probable guilt. While probable cause is considered the touchstone in determining the validity of an arrest, reasonable suspicion would suffice for lesser seizures.[84] This distinction assumes relevance where there is difficulty in establishing the point at which the arrest took place.

Police authorities would undoubtedly seek to prove that the lining-up of residents within a densely populated community for questioning and identification does not constitute an arrest; by doing so, they are able to avoid the probable cause requirement, justifying the operation on the basis of the less stringent reasonable suspicion standard. As of yet, there has not been any established test by which a line is drawn between an arrest and less intrusive seizures. The Washington Supreme Court, in *State v. Williams,*[85] evaluated the seizure in question using three factors, namely: (1) the purpose of the stop, (2) the degree of physical intrusion, and (3) the duration of the stop. The Court held that since the scope and intensity of the questioned detention did not satisfy *Terry* requirements that the stop be temporary, lasting longer than necessary to dispel or confirm the officer's suspicion, and that the least intrusive means available be used.[86] The purpose of the investigative stop, as in *Terry* and *Adams v. Williams,* must be for determining the suspect's identity and reason for being in the area. Applying those rules to mass saturation operations, so as not to constitute an arrest, the purpose of rounding-up must not be, at that point, the detention of persons *to answer for the commission of an offense,* but should be purely investigatory. Necessarily, the degree of intrusion must be slight, lasting for only a very short period of time. Thus, unless circumstances indicate that the suspect might be dangerous, use of handcuffs, drawn handguns and physical force must be considered excessive. If the operation may be conducted within these limitations, assuming applicability of the reasonableness clause analysis in this jurisdiction, reasonable suspicion,

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[84] BERNAS, *op. cit.*, note 55 at 124.
[85] 102 Wn. 2d 733, 689 P. 2d 1065 (1984).
[86] *Id.* at 740, *cited* in Simpson, *Terry Stop or Arrest? The Washington Cour., Attempts a Distinction — State v. Williams,* 102 Wn. 2d 733, 689 P. 2d 1065 (1984).

instead of the more exacting probable cause, may provide sufficient basis for police action.

It is settled that compulsory participation in identification tests do not necessarily violate the privilege against self-incrimination.[87] The mode by which it is undertaken, however, may constitute an unreasonable seizure within the meaning of the constitutional prohibition. In *Davis v. Mississippi*,[88] the defendant and several other Negro youths were taken to police headquarters, questioned and fingerprinted, in relation with the rape of an 86-year-old white woman by an assailant described as a Negro youth. The detention, unaccompanied by a warrant and not being based upon probable cause, was considered by the Court as an unreasonable seizure. The Court, however, stated that detentions for fingerprinting may constitute a much less serious intrusion upon personal security than other types of searches and seizures, and under narrowly defined circumstances might be found to comply with the fourth amendment upon a showing of less than probable cause. Thus, compulsory identification procedures, *per se,* are not violative of the constitutional prohibition against unreasonable searches and seizures. It would have to be admitted that the procedure followed in some mass saturation drives, wherein the suspects are lined-up are asked at gunpoint to remove articles of clothing to reveal identifying marks on their bodies, would be a serious intrusion which is impermissible absent probable cause.

In *Immigration and Naturalization Service, et al. v. Delgado*,[89] the Supreme Court upheld the validity of a factory survey conducted by the INS, whereby INS agents entered employer's worksites to determine whether any illegal aliens may be present as employees. According to the Court, "the Fourth Amendment does not proscribe all contact between the police and citizens, but is designed 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals'."[90] In this case, the INS agents' conduct consisted simply in questioning employees and arresting those they had probable cause to believe were unlawfully present in the factory.[91] The questioning was nothing more than a brief encounter which did not result in a reasonable fear that they were not free to continue working or to move about the factory.[92] With this case as the basis, it is theoretically possible to conduct a saturation drive involving constitutionally permissible questioning procedures preceding a formal arrest. By following a less intrusive procedure than that followed in previous saturation drives, the law enforcement authorities may rely on the less stringent reasonable suspicion requirement.

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[87] *E.g.*, a person may be compelled to produce a sample of his handwriting to be used as evidence in a prosecution against him. *See* Beltran v. Samson, 50 Phil. 570 (1929).

[88] 394 U.S. 721 (1969).

[89] 466 U.S. 210 (1984).

[90] *Id.* at 215.

[91] *Id.* at 218.

[92] *Id.* at 219-220.

## IV. CONCLUSION

Mass saturation drives are assailed as being illegal restrictions upon the liberty of innocent individuals, being made without warrant and without probable cause. While apparently valid, these criticisms stem from an erroneous understanding of the concept of mass saturation. The concept of mass saturation does not inherently involve the arrest of innocent people without warrant and without probable cause. To say otherwise would be to predetermine the result to any determination as to its legality, making the finding of illegality a matter of juristic inevitability. Our starting point, therefore, must be a legally neutral concept.

Mass saturation drives, *per se,* are not violative of the due process clause of the Constitution, nor of the constitutional guarantee against unreasonable searches and seizures. Still, delineating the perimeter for the valid conduct of such operation is undeniably difficult, bearing in mind the range of possible interpretations of the unreasonable searches and seizures provision of the Constitution. The United States Supreme Court itself seems unable to define the exact scope of the prohibition. As is evident from the discussion, an analysis based on the reasonableness clause accommodates more intrusive exercises of governmental power. Validity of a search and seizure would not be made to depend upon a mechanical test of whether or not there exists a warrant to support the governmental action. The development of American jurisprudence has witnessed reasonableness closing in from all sides — as a means of determining probable cause in *Camara,* and as an independent factor in justifying governmental action in *Terry*. Should the Philippine Supreme Court follow such trend, much more room shall be available to upholding the validity of mass saturation drives. Arrests made in the course of a mass saturation drive are based on the state's right to protect itself, the exercise of which necessarily requires individual rights to yield. This is not to say that the right against unreasonable searches and seizures would be totally disregarded to give way to the exercise by the state of its right to self-protection. The right of the individual remains but what constitutes "unreasonable" within the meaning of the constitutional prohibition depends upon the exigencies of the situation. Where, as in the present case, the threat to the existence of the state is so grave, the balance in the competing interests of the state and its citizens must be tilted towards the former, allowing it greater flexibility in the exercise of its powers.

Reasonableness analysis, utilizing the balancing of interests approach, has not gained acceptance in Philippine case law equal to that in American case law. The restrictive interpretation of the prohibition against unreasonable searches and seizures, however, is not due to differences in the language of the search and seizure provision in the Philippine Constitution and the United States Constitution. The language of the Philippine search and seizure provision does not in any way preclude the adoption of the reason-

ableness analysis. The interpretation of the prohibition depends largely upon the temper of the Court and of the times. True, the Constitution "is a law for rulers and people, equally in war and in peace, and covers with the shield of its production all classes of men, at all times and under all circumstances."[93] Yet, there may be situations where the demands of individual liberties should not be so stringent as to hamper the attainment of pressing legitimate state interests, situations which call for standards of reasonableness which are qualitatively different from those applied during untroubled times and for lesser offenses.

[93] *Ex parte* Milligan, 4 Wall 2, *quoted* in *Alih v. Castro*, 151 SCRA 279.